ACCESS TO LEGAL EDUCATION

Peter Hogg*

This article was presented as a lecture on "Capital Law School Day" organised by the Institute of Advanced Legal Studies to mark the occasion of the centenary of the Faculty of Law, Victoria University of Wellington in 1999.

I ACCESS IN 1957

I was born in Lower Hutt in 1939. Although I did not know it at the time, 1939 was a very good year in which to be born, because not as many babies were born in that year — or in the years immediately before and after — as were born after the second world war. The baby boom — a phenomenon shared by New Zealand, Australia, Canada and the United States — started in 1946, after the soldiers returned from the Second World War. It has been claimed that demographics explains two-thirds of everything, and they certainly had a profound effect on legal education.

The babies that were born in 1939 were qualified to enter university in 1957. In 1957, all you did to enter Victoria University College (Victoria was still a college of the University of New Zealand) was to arrive on the first day of classes with your university entrance qualification and enrol in the faculty of your choice. Everybody who arrived was accepted. Indeed, it used to be fashionable for distinguished lawyers to claim that they made their career choice on the basis that on the first day of term they had a tennis game arranged and the Law queue was the shortest one! On top of that, there were no tuition fees; university was completely free. Now that is access!

A corollary of this open, last-minute admission policy, was that the administration of the university did not know how many students had enrolled in each of the programmes until the end of the first day of classes. That was as true of Law as it was of the other faculties. I remember Mr E K Braybrooke, who taught Roman Law (since replaced by Legal System — a

* Professor and Dean, Osgoode Hall Law School, York University, Toronto.

subject I taught at Victoria in 1964 and 1965), which was the only law subject that one did in first year in the Faculty of Law (three Arts subjects were taken), expressing surprise that more than 100 people had enrolled in Roman Law in 1957. That probably meant that a few more babies were born in 1939 than had been born in the earlier years of the 1930s, but it might have reflected a higher retention rate in high school or a shift in popularity from Arts or Science to Law. So far as I can gather, universities did not engage in any form of enrolment planning and certainly did not make use of demographics to plan their faculty and space requirements.

Once admitted, a student could take as long as he or she wished to finish the degree. All that was required was that you pass four elective Arts courses and fifteen compulsory Law courses. If you failed a course, or even several courses, you could simply take them again until you did pass them. The standard time for completion of the LLB was five years, but a few people did it in four, and many people took six or seven or more years, often waiting on only one course. There was one successful practitioner in Wellington who could never get the hang of Conflict of Laws. He was able to be admitted as a solicitor without that subject, and he continued for many years to try and pass it. I do not know whether he ever got his LLB, but if he did it was many years after all his peers had graduated.

In 1957, part-time study was the normal practice for law students. Usually, the first year or two were done full-time, and the rest of the degree was completed while holding a full-time job as a clerk in a law firm. In order to make this possible, law lectures were given early in the morning and in the late afternoon and evening. For the babies born in 1939, jobs were not an issue. During the period of full-time study there were plenty of non-law summer jobs to be had, and there was no problem in getting a position as a law clerk, and no difficulty in finding employment as a lawyer after the call to the bar. In fact you had to be employed for three years before you could practise on your own or in partnership, and I understand that this is still the rule, but the ready availability of jobs meant that this was not a significant barrier to entry to the profession.

A student engaged in part-time study is of course earning an income while studying. Couple this with the absence of tuition fees, so that only books and living expenses needed to be covered, and you are looking at a system from which nobody was excluded on economic grounds.

Nostalgia for the 1950s is a sentiment that should be resisted. We now understand that a lot of unhappiness and inequality lurked beneath the placid surface of society in the 1950s. But, obviously, there is much to admire in the picture I have painted of an open, free university and employment readily available to students and to those who completed their degrees.

Now fast forward to 1999, and let me use Canada as my primary reference point to illustrate the global trends that have transformed legal education and that will carry us into the next century.

II ADMISSION TO LAW SCHOOL

Open admissions could not survive the achievement of university age of the baby boom generation, despite the building of new universities. Moreover the "participation rate" increased at the same time as the numbers of university-age students increased. For one thing, increasing numbers of young people rightly perceived that a university education was a necessary preparation for a satisfying career, and employers in all fields increasingly required a degree. Some special factors increased the demand for law places. One was the entry of women into the professions. Female applicants to law school went from a small minority to a majority without any decrease in the number of male applicants. Another was the protest movements of the 1960s, which taught the central role of law in constructing society and rebuilding society; law became a focus and a desirable preparation for political idealism and activity. At the same time, American television shows glamorised the role of lawyers. *LA Law* was the first really popular one. It caused a huge increase in applications to North American law schools. It was syndicated all over the world and spawned many copycat shows, and lawyer shows like *Law and Order* and *Ally McBeal* remain very popular today.

At the Osgoode Hall Law School, we admit 280 students per year, for a total enrolment in the three-year programme of 850 or so LLB students. This is the largest in common law Canada (Laval and Montreal are slightly higher). We had over 2,000 applications for the 280 first-year places for 1998-1999. These numbers are actually down from the peak of the baby boom years, but they are expected to rise sharply again as the baby boom echo — the children of the baby boomers — starts to enter university in about 2005. But, obviously, to accept one student for every eight who apply is enormously competitive, requiring the successful applicant to present very high undergraduate grades and Law School Aptitude Test (LSAT) scores. At Victoria, you have allowed your numbers to rise very sharply from the 1950s, but if you continue to allow as many as 450 students to progress into second year classes — as I gather is the situation for 1999-2000 — you may be able to revert to the old policy of taking all qualified applicants.

The higher one raises the bar to admission the greater are the equity concerns about the admissions process. The students presenting the scores that will admit them to law school will be disproportionately the children of privileged families who have been to the best schools and universities and who have benefited from the support of university-educated parents. One can

be certain that people of working-class or immigrant backgrounds, aboriginal people and visible minorities, will not do as well in a competition based on grades and other test scores. The solution? To create preferential admission categories, under which some percentage of law school places is reserved for older students, Aboriginal students, visible minority students and others who can show that special circumstances have affected their ability to achieve an academic record that would qualify them for regular admission.

What is the criteria for these discretionary admissions? Theoretically, it is likelihood of success if admitted to law school. In practice, this is a very difficult matter for an admissions committee to judge. After all, we are dealing with people whose academic records are by definition inferior to those of the regular admittees. Moreover, in the law school, the high quality of the work of the regular admittees has an effect on the standards that are seen as achievable in law school courses. The result is that those students who do get into academic difficulty are made up disproportionately of those who entered the law school under a special admissions category. The short-term solution? Special tutorial help and counselling for those who present poor grades in the earliest law school tests.

The long-term solution to equity in admissions can, if you are an optimist, be drawn from the situation of women. Once a small minority in the law schools' classes, they now comprise more than 50 per cent of the student body at Osgoode and Victoria. This important development has occurred simply because qualified women have started applying to law school in numbers that yield these admissions through the regular admissions policy. As other equality-seeking groups increase their representation in the mainstream of the educational system, the need for preferential admissions will gradually diminish. As the achievement of greater equality in our society brings more and more people onto a level playing field, the regular admissions process will yield more and more equitable results. We will probably never be able to completely abandon preferential admissions, but that should be the ideal to which we strive in the next century.

III TUITION FEES

I have already mentioned that university in New Zealand was free in the 1950s. That ended in the 1980s when fees were imposed. Now in New Zealand and Canada government support for universities (and other public enterprises) is trending downwards, and universities have to turn to student tuition fees and private funding to make up the difference. I used to believe that university should be free, as it was in the 1950s, but I am now persuaded that it is sound public policy to charge tuition. University education is very expensive, and it is appropriate to seek a contribution from those who benefit from it. While the nation as a whole

benefits from an educated population, it is also the case that the most direct benefit of a university degree accrues to the student in the form of greatly increased earning capacity. Surely, it is appropriate for the student whose future income will be enhanced to contribute to the cost.

In thinking about tuition, it must be recognised that universities do not have much choice about levels of tuition fees. They are normally regulated by government and, if unregulated, are closely driven by the level of government funding which defines the need for additional funding. It is to be hoped that government funding does not continue to shrink indefinitely. A strong university system is a key part of any economic strategy. As well, a substantial part — perhaps as much as half — of the human and physical resources of universities is devoted to research which cannot defensibly be charged to students in the form of tuition. So the public contribution through taxation to the costs of running the universities must remain substantial.

Given that tuition fees have risen and will probably continue to rise, as the result of forces over which universities have little control, the most important concern must be access. The increased earning power that is acquired with a university degree does not provide immediate cash to pay for tuition, not to mention books, room and board. Moreover, the poorer the student is, the more reluctant he or she will be to assume a large load of debt to cover the cost of acquiring a degree. Without extensive financial assistance, students from low-income families are likely to be deterred from entering university. The challenge is to construct and finance systems of financial assistance that will preserve access for poorer students.

At Osgoode, tuition is going to be about $5,500 in 1999-2000 (a bit more than double the current Victoria level), and will probably rise sharply the following year. Moreover, because law is a graduate programme in Canada (as in the United States) our students have already had to finance an undergraduate degree. All Canadian provinces have student assistance plans, which consist of a mixture of loan and bursary to students who meet a regulated level of need. In Ontario, that plan is now predominantly loan, so that students accumulate a good deal of debt as they advance through university with provincial aid.

At Osgoode, we are using three strategies to top up the government aid plans. One is a holdback of tuition. We are holding back 35 per cent of any tuition increase to provide financial aid to students. This means that tuition increases need to go beyond the actual needs of academic programmes, because only 65 per cent is available for academic programmes, but it means that each increase generates a large pool of available financial aid. The second is private fundraising to create an endowment that will provide scholarships in which financial need is a component or pure bursaries awarded solely on the basis of need. This type of

fundraising has proved attractive to law firms and other private donors, who tend to share the concerns about access, and who often like to have their name attached to scholarships or bursaries. The third is loan arrangements with a bank under which loans are made to students at favourable rates; interest can be paid by the Law School while they are in the Law School, and perhaps for a period following graduation. I hope that the cumulative effect of these measures will lead to an admissions process that is open to all qualified applicants.

IV CONCLUSION

Is it possible to draw any conclusions that will help Victoria to plan its affairs for the new millennium? One might be to resist the movement towards making the law degree a graduate degree. In North America that requirement has made the study of law a long and expensive process that cannot easily be defended. The combination of law with some non-law subjects and an attractive double-degree structure are the way to continue, it seems to me. Another drawback of law as a system of graduate study is that law students come with a considerable commitment to a career in the legal profession. In Canada, not all students end up in the legal profession, and we counsel them that this is not necessarily a realistic expectation, but nevertheless we cannot expand enrolment to numbers that would vastly exceed the prospect of law-related occupations. In New Zealand, a student can study undergraduate law without any firm intention of practising law.

A second suggestion — offered much more tentatively — might be to continue the tradition of expanding places as the pool of applicants expands. This has not been our practice at Osgoode or anywhere else in Canada, where law students are more vocationally oriented, and where there simply would not be places for them in the legal profession. And at Osgoode we have a building that is designed for the present size of the Law School so that any major expansion would be extremely expensive. It is probably impossible to go all the way back to perfectly open admissions, because the size of your beautiful new building and the size of your Faculty must obviously impose restraints, and the last thing you would want is to degrade the quality of the Victoria degree. But the idea that most of the people who are qualified to study law and want to do so should be able to do so accords with deep-rooted egalitarian New Zealand values that I find very attractive.