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Canadian Lawyer Mobility and Law Society Conflict of Interest

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Abstract

This Article discusses inter-jurisdictional mobility of lawyers in Canada, comparing Canadian practice to European Community ("Community" or "EC") reforms and U.S. practice. Ironically, the Community eschews using the label "federal" because the process of European unification is ongoing, yet the new regime for the transfer of lawyers between EC Member States is freer and less fettered than the transfer regimes in Canada. In the United States, the mobility of lawyers is dependent upon reciprocal agreements between state bar associations whereby qualification in one state bar permits direct entry to practice in other states. Hence, this Article compares the rules affecting lawyer mobility in the ten Canadian provinces and two territories, the European Community, and the United States, specifically New York State, a jurisdiction receptive to foreign law degrees.

CANADIAN LAWYER MOBILITY AND LAW SOCIETY CONFLICT OF INTEREST*

*Alexander J. Black***

Un Canadien errant, bani de son foyer
Parcourant en pleurant, des pays étrangers
Un jour triste et pensif, assis au bord des flots
En courant fugitif, il s'adressa ses mots
Si tu vois mon pays, mon pays malheureux
Va dire à mes amis, que je me souviens d'eux.[1]

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* A shorter version of this Article will appear as *Inter-jurisdictional Mobility of Lawyers in Canada*, 73 CAN. B. REV. 610 (1994). Copies of all letters and unpublished decisions cited in this Article are on file with, and available from, the Author.

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1. This traditional folksong was written by rebel exiles following the abortive, pre-confederation, rebellion in Upper and Lower Canada. It roughly translates: "A wandering Canadian, banished from his home/ Travelling tearfully in a foreign country/ One day, sad and moody, sitting on the side of the river/ Running as a fugitive, he said these words to himself/ If you see my country, my unhappy country/ Tell my friends that I remember them."

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INTRODUCTION

Law societies are self-regulating bodies intended to promote the public interest. But law societies are also bureaucracies created by lawyers to act as lobbyists for their membership. This interest group behavior has created rules preventing Canadian lawyers with less than three years active practice from freely moving from one province to another in order to earn a living.[2] Likewise, this conflict of interest restricts the ability of lawyers who are qualified in the province of Alberta to transfer to another province when their first law degree was obtained outside Canada.[3] In 1992, the three-year rule was successfully challenged in Québec because it offended the mobility rights guaranteed by the Canadian Constitution.[4] Roughly half of Canada has flexible transfer rules while the other half does not. Two different standards are currently in force concerning foreign law degrees. This bifurcation has unfairly frustrated inter-provincial mobility in Canada.

Inter-jurisdictional mobility of lawyers involves the debate about legal education that is part of the modern process of adjustment of disparate middle-class elements to the forces of industrialization and urbanization. There is a well-documented

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2. The term "active practice" is not clear. For instance, an active member of the Law Society of Alberta can undertake not to handle trust monies and live and/or work outside Alberta. Furthermore, since 1994, corporate counsel from outside Alberta will no longer have to take a transfer examination, provided they are qualified to practice in another Canadian jurisdiction. Lawyers admitted in other Canadian provinces can practice in Alberta as corporate counsel under a limited membership in the Law Society of Alberta without paying for professional liability insurance.

3. Canadian law societies tend to favor of a "first" law degree, such as an LL.B. or J.D., as opposed to a graduate law degree like the LL.M. or J.S.D., to which they ironically attach little weight.

4. British North America Act, 1867, 30 & 31 Victoria c. 3, *substantially amended by* Canada Act, 1982, ch. 11 (U.K.), R.S.C. 1985 (Can.), app. II, no. 44, *containing* Constitution Act, 1982, annex B, sched. B [hereinafter CAN. CONST.].

"struggle between a powerful and entrenched professional body" and university-based legal educators. Inter-jurisdictional mobility may be regarded as a new variation of this conflict.[5] The issue also concerns provincial regulation of property and civil rights and federal regulation of inter-provincial trade and commerce. These economic concerns are discussed in relation to the Canada-United States Free-Trade Agreement ("FTA")[6] and the North American Free Trade Agreement ("NAFTA"),[7] international treaties which are inducing change within Canada. Nevertheless, significant barriers to inter-provincial trade exist, including non tariff barriers to the mobility of professionals and skilled laborers, despite recent attempts to conclude a so-called inter-provincial free trade agreement.

This Article discusses inter-jurisdictional mobility of lawyers in Canada, comparing Canadian practice to European Community ("Community" or "EC") reforms and U.S. practice. Ironically, the Community eschews using the label "federal" because the process of European unification is ongoing, yet the new regime for the transfer of lawyers between EC Member States is freer and less fettered than the transfer regimes in Canada. In the United States, the mobility of lawyers is dependent upon reciprocal agreements between state bar associations whereby qualification in one state bar permits direct entry to practice in other states. Hence, this Article compares the rules affecting lawyer mobility in the ten Canadian provinces and two territories, the European Community, and the United States, specifically New York State, a jurisdiction receptive to foreign law degrees.

5. C. IAN KYER & JEROME E. BICKENBACH, THE FIERCEST DEBATE: CECIL A. WRIGHT, THE BENCHERS, AND LEGAL EDUCATION IN ONTARIO, 1923-1957 viii (1987).

6. Canada-United States: Free-Trade Agreement, Dec. 22, 1987 & Jan. 2, 1988, U.S.-Can., *reprinted in* 27 I.L.M. 281 (1988) (entered into force Jan. 1, 1989) [hereinafter Free Trade Agreement]. The FTA was ratified by the United States in the United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (codified at 19 U.S.C. § 2112 (1988)). The FTA was codified in Canada by the Canada-United States Free Trade Agreement Implementation Act, R.S.C., ch. 65 (1988).

7. North American Free Trade Agreement, Dec. 17 1992, *reprinted in* 32 I.L.M. 296 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA]; *see Description of the Proposed North American Free Trade Agreement; Prepared by the Governments of Canada, The United Mexican States and the United States of America*, Aug. 12, 1992, *available in* WESTLAW, NAFTA Database, PR Trade File.

I. *CANADIAN LAWYER MOBILITY*

Lawyer mobility involves individual movement and national affiliations of law firms. Although the landmark linkage between the Calgary firm, Black & Company, with the Toronto firm, McCarthy & McCarthy, was concluded in 1981, few inter-provincial linkages took place until the 1989 Canadian Supreme Court decision in *Black v. Law Society of Alberta.*[8]

> In large part, the reason for this delay resides in the role played by interprovincial barriers in suppressing the creation of national law firms. . . . These barriers take the form of various provincial law society restrictions on the capacity of lawyers called in one province to practice in another. . . . While the putative benefits of national law firms may have existed for some time, firms were unable to exploit these benefits because of the restrictions imposed by provincial law societies on the creation of such linkages.[9]

Canadian law societies have traditionally prevented transfers from other provinces by discrimination based upon practice experience. For instance, the Barreau du Québec, the law society of Québec, formerly required that lawyers had to have practiced law for three years in the province of previous residence before they could sit for an examination on matters of provincial jurisdiction.

A. *Lawyer Mobility:* Richards v. Barreau du Québec

In *Richards v. Barreau du Québec,*[10] the petitioner was an Ontario lawyer who had less than three years of active practice. The Barreau du Québec refused to let him write the transfer examination.[11] In 1991, the petitioner successfully sued the Barreau du Québec for a declaration that the three-year practice rule was

8. [1989] 1 S.C.R. 591 (Can.).

9. Ronald J. Daniels, *Growing Pains: The Why and How of Law Firm Expansion,* 43 U. TORONTO L.J. 147, 194 (1993); *see* B. Filipow, Jr., *Getting National Mobility in Motion,* 6-7 CAN. LAW. 45 (1982). Similar restrictions have, in the past, impeded the movement of law firms within the United States. *See, e.g.,* P.C. Beck, *Why Large Firms Have Not Incorporated,* 12 LAW OFF. ECON. MGMT. 516 (1971-72).

10. [1992] R.J.Q. 2847 (Can).

11. The Barreau du Québec's denial was pursuant to Section 50, clause b, of the Act Respecting the Barreau du Québec, R.S.Q. (1977), which effectively precluded admission to the Québec bar of a member of the bar from another province or territory who had not practiced the profession of advocate in Canada for at least three consecutive years. *Id.*

invalid and obtained a writ of mandamus compelling the Barreau du Québec to allow him to sit for the much less onerous transfer examinations required of candidates who had three years active practice.[12] This effectively abolished the three-year rule. Richards successfully invoked the protection of the Canadian Charter of Rights and Freedoms (the "Charter"),[13] which states that all Canadian citizens have the right to move and take up residence and pursue a livelihood in any province.[14]

The mobility principle established by the Charter means that a member in good standing of the bar in one province should have the right to pursue a livelihood as a lawyer in another province. This right, however, is qualified by Section One of the Charter, which allows all "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[15] In *Regina v. Oakes*,[16] the Supreme Court of Canada defined the objective sought and the means employed as the criteria for limiting Charter rights. The Court held that the burden is on the party imposing the restriction to prove proportionality.[17] The means chosen must pass a "proportionality test," which balances the interests of society with those of individuals and groups.[18] The proportionality test requires that: (1) the means must be rationally connected to the objective and not be arbitrary, unfair, or based on irrational considerations; (2) even if rationally connected to the objective, the means should impair as little as possible the right or freedom in question; (3) there must be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance."[19]

The Supreme Court of Canada applied this reasoning in

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12. *Id.*

13. CAN. CONST. pt. I. "The Charter, like the United States Constitution, provides textual protection for individual rights, and thus entrenches individual rights in the Canadian constitutional system." Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1194 (1984); *see supra* note 4 (referencing legislative components of Canadian Constitution).

14. CAN. CONST. pt. I, § 6(2).

15. *Id.* § 1.

16. [1986] 1 S.C.R. 103 (Can.).

17. *Id.* at 138-39.

18. *Id.*

19. *Id.*

Black v. Law Society of Alberta,[20] where a Calgary-based law firm wanted to join forces with the then Toronto-based law firm of McCarthy Tétrault. The Law Society of Alberta refused to allow inter-provincial associations by law firms. Ultimately, the Supreme Court of Canada struck down this restrictive practice. Justice La Forest, writing for the majority, held that:

> The right to pursue this livelihood of choice must remain a viable right and cannot be rendered practically ineffective and essentially illusory by the provinces. . . . It is important for the courts to look at the substance of provisions, which on their face do not appear to affect the pursuit of the gaining of a livelihood and ensure that these provisions are not for practical purposes rendered impotent.[21]

In *Richards*, the objective of ensuring the professional competence of all those practicing law was found to be sufficiently important to warrant restricting a Charter right. The means chosen by the Barreau du Québec, however, failed the proportionality test on a number of counts. First, there was no rational connection between the three-year requirement and the objective pursued by the Barreau du Québec.[22] A comparison of admission requirements in Canada showed that the three-year practice requirement was not followed by all provinces. Most provinces required either a six to twelve month work term, a period of articling,[23] or that the applicant take the courses of the bar in that province. Furthermore, Canadian law societies do not uniformly agree on whether the three or more years of expe-

20. [1989] 1 S.C.R. 591 (Can.). Seven months before the Court's decision in *Black*, the Supreme Court of British Columbia struck down provincial legislation which prohibited inter-provincial law firm partnerships in which not all of the partners of the merging firms were members of the Law Society of British Columbia. Martin v. Attorney Gen. of BC, 53 D.L.R.4th 198 (1988) (Can.).

21. *Black*, [1989] 1 S.C.R. at 618-19 (citations omitted).

22. Rationality "is simply a matter of being open and curious, and of relying on persuasion rather than force." Richard Rorty, *Is Natural Science a Natural Kind?*, *in* CONSTRUCTION AND CONSTRAINT: THE SHAPING OF SCIENTIFIC RATIONALITY 49, 71 (1988).

23. Articling is the term used to describe what is essentially a form of professional apprenticeship. Unlike graduates of American law schools, who are entitled to sit for state bar exams immediately upon graduation, and then practice once they pass, graduates of Canadian law schools must follow a different, perhaps more 'vocational' route. The term articling reflects the ancient English concept of 'articled clerk,' which was the only way of becoming a solicitor. Graduates of Canadian law schools are required to work (article) in a law office, under the supervision of a qualified lawyer (principal) for at least one year, during which time the graduate must also take bar courses and sit the bar exam.

rience gives a lawyer more theoretical knowledge of the provincial legislation, because the period of practice required for transfer varies from province to province.[24] Inter-jurisdictional mobility is therefore part of the murky debate concerning the balance of 'theoretical knowledge' and 'practical experience' in law school curricula and law society admission requirements.

The Barreau du Québec gave the petitioner the onerous alternative of attending law school, passing law society exams, or articling in Québec. Counsel for the petitioner, Julius Grey of Grey Casgrain, argued this was a false alternative. Justice Jasmin, of the Québec Superior Court, concurred by stating that

> *[t]his is not a real alternative since, for candidates from other provinces, it amounts to starting from scratch.* . . . There is no doubt in the Court's mind that this is an unrealistic alternative, one that is out of proportion to the objective to be achieved and one that, for all practical purposes, is as drastic as, if not more drastic than, the requirement that a candidate have three or more years' experience.[25]

Justice Jasmin rhetorically asked whether three years of active practice ensured "better protection of the public and a better assessment of the candidate's competence."[26] The three-year period of practicing was compared to a compulsory period of articling, creating a distinction between persons trained in Québec and those trained in other Canadian provinces, and therefore, discordant with the Charter of Rights.

The *Richards* Court held that the three-year requirement serves to ensure a degree of reciprocity and imposes a "quota system of sorts" on the transfer of lawyers from other provinces.[27] Justice Jasmin found that reciprocity and quotas may not justify a limitation on a Charter right.[28] The *Richards* case was not appealed. The government and Bar of Québec accepted the result. Thus, *Richards* is a first instance Québec decision that is of persuasive influence elsewhere in Canada.

24. *Richards*, [1992] R.J.Q. at 2852.
25. *Id.* at 2853-54 (emphasis added).
26. *Id.* at 2853.
27. *Id.* at 2854.
28. *Id.* at 2854-55.

B. *Implications of the* Richards *Decision*

Under the Charter, Canadian judges have a wider law-making role in comparison to the pre-Charter, Parliamentary sovereignty doctrine.[29] These judges are now able, in appropriate cases, to invalidate otherwise valid Acts of Parliament or Legislative Assemblies, which offend constitutionally-enshrined rights.[30] Nonetheless, implementing the new Canadian Constitution has proven difficult.

> The Constitution Act of 1982, signed by every Canadian province except Québec, which protested date-rape, did manage to abolish the embarrassing power of the Parliament of Westminster to legislate for Canada. However its Charter of Rights and Freedoms guaranteed us no more, come to think of it, than we have always taken for granted: the right to "freedom of thought, belief, opinion and expression, including freedom of the press and other media communication."[31]

While Québec has struggled to preserve its rightful and distinct character, the Canadian Constitution was not a particularly competent instrument for challenging draconian language laws, which were a product of intense political conflict. An analogy is shown by the U.S. Supreme Court, prior to *Brown v. Board of Education*,[32] when the Court held that the U.S. Constitution endorsed the provision of "equal but separate accommodations for

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29. England, which has what is popularly referred to as the 'mother of all Parliaments,' has developed, since the time of the Magna Carta, the democratic political convention that the will of elected representatives in Parliament is superior to that of the King.

30. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (seminal U.S. authority asserting federal court power to refuse to give effect to congressional legislation inconsistent with U.S. Supreme Court's interpretation of U.S. Constitution). "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. The dicta of Justice Marshall was subsequently approved by the Supreme Court of Canada. Law Soc'y of Upper Can. v. Shapinker, [1984] 1 S.C.R. 357, 367-68 (Can.).

31. MORDECAI RICHLER, OH CANADA! OH QUÉBEC! REQUIEM FOR A DIVIDED COUNTRY 11 (1992) (quoting Canada Act, 1982, ch. 11 (U.K.), R.S.C. 1985 (Can.), app. II, no. 44, § 2(b)). As part of the Canadian Constitution repatriation compromise, the so-called "notwithstanding clause," Section 33 was inserted into the Canadian Charter of Rights and Freedoms to allow the legislature of a province to declare that its legislation operates notwithstanding provisions in Sections 2, and 7 through 15, of the Charter. *Id.* Despite the federal enshrinement of English and French as the two official languages, Québec utilized, until recently, the notwithstanding clause to prolong its *visage linguistique*, the promotion of French as its single official language. *Id.*

32. 347 U.S. 483 (1954).

the white and colored races" in *Plessey v. Ferguson*.[33]

Within this intense political context, it is remarkable that Québec leads Canada in a rational rule for interjurisdictional mobility of lawyers. The *Richards* decision means that any duly qualified lawyer from another province who wants to practice law in Québec must pass an examination on matters of provincial competence. Following the *Richards* decision, lawyers from other Canadian provinces may now make a straightforward application for certification of training equivalence from the Barreau du Québec. Candidates must then pass two three-hour examinations in the Civil Code and Code of Civil Procedure, in addition to a French language examination.

Members of professional corporations in Québec must have an appropriate knowledge of the official provincial language.[34] Lawyers from other Canadian provinces have to prove their ability in the French language, usually by passing the *examen de français*. This exam measures an applicant's understanding of written and spoken French through multiple choice questions, an interview evaluating specialized vocabulary, delivery, syntax, and pronunciation, and a short summary written after the applicant listens to a recorded message. Altogether it includes five questions based on pictures and thirty-five questions based on dialogue. The passing mark is sixty percent for each of the three sections. An applicant may retake failed sections of the exam as many times as desired, limited only by a ninety-day waiting period.

C. *Joint Committee on Accreditation and Lawyer Mobility*

Some Canadians study outside Canada for their first law degree, often because they did not gain entry to a Canadian law school. Fewer than half of Canada's twelve jurisdictions employ restrictive practices aimed against members of a Canadian bar whose law degree is not from an accredited Canadian law school. Foreign law degrees were minimally dealt with by the Inter-Jurisdictional Practice Protocol (the "Protocol"), passed by the Federation of Law Societies of Canada in February, 1994.[35] For every

33. 163 U.S. 537, 540 (1896).

34. Charter of the French Language § 35.

35. Federation of Law Societies of Canada, Inter-Jurisdictional Practice Protocol, Feb. 18, 1994 [hereinafter Protocol]. The Protocol was adopted by ten of the thirteen

Canadian province and territory, except Alberta, the credentials of these law graduates, who have not been called to the bar in another jurisdiction, have to be evaluated by the Joint Committee on Accreditation (the "JCA").[36] Affiliated with the Federation of Law Societies of Canada and the Committee of Canadian Law Deans, the JCA operates as an agent to the Canadian Law Societies, servicing their needs.

The JCA usually requires LL.B. graduates of British universities to attend two years of study at a Canadian law school, including specified courses. Requiring two years of study at a Canadian law school, however, means that applicants may apply for advanced-standing and receive a Canadian LL.B., thus obviating the need for a JCA certificate. Furthermore, some Canadian law schools do not require that foreign advanced-standing applicants take all the courses otherwise required by the JCA. Therefore, it is possible to get a second LL.B. and avoid some of the course requirements set by the JCA.

The reasons and policy behind the distinction between foreign first law degrees and Canadian first law degrees, or indeed graduate law degrees, are not clear. In a 1990 report, entitled the Inter-Jurisdictional Practice of Law (the "*Edwards Report*"), the Inter-Jurisdictional Practice Committee of the Federation of Law Societies of Canada acknowledged the mobility conundrum of Canadian lawyers with a foreign first law degree:

> The situation in Alberta is unique, because of provincial legislation which governs the situation. It has created problems in the past, in circumstances where a foreign applicant qualified

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governing Canadian Law Societies. The Protocol originated as a report, which was concluded in December, 1990. *See The Inter-Jurisdictional Practice of Law, A Report of the Inter-Jurisdictional Practice Committee of the Federation of Law Societies of Canada* (1990) [hereinafter *Edwards Report*]. The *Edwards Report* was named after Jack Edwards, Q.C., the Chairman of the Practice Committee of the Federation of Law Societies of Canada.

The Law Society of Upper Canada has stated that the Protocol will not have any effect upon foreign-trained Alberta lawyers nor alter the requirements set by each province for transfer from another Canadian jurisdiction. Article 11 of the Protocol requires the use of "best efforts" to implement the Protocol, which is intended to facilitate the temporary and permanent mobility of lawyers in Canada, the provision of legal services by inter-jurisdictional law firms, and the practice of foreign legal consultants. Appendix 2 deals with permanent mobility of lawyers within Canada. Article 2(a) of appendix 2 provides that transferring lawyers must "complete successfully this Society's examinations on jurisdiction-specific substantive law, practice and procedure."

36. Alberta is the only province that does not use the JCA, a choice induced by the legislature rather than the Law Society of Alberta.

> for call and admission in Alberta under that province's requirements, and then sought to transfer to British Columbia. [British Columbia] rejected the application because the person had not complied with the Joint Committee on Accreditation's requirements. Our Committee is concerned that the two different standards which are in force now may give rise to claims that inter-provincial mobility is being frustrated. We are gratified that there is now closer liaison between the provincial board in Alberta and the Joint Committee on Accreditation and we hope that this will enhance consistency between the two systems.[37]

This gloss, however, does not reveal the restrictive practices employed by the Law Society of Upper Canada ("LSUC") and the Law Society of British Columbia.

While unfair discrimination is odious, discrimination based upon education remains the most elastic way to restrict entry to the legal profession. Many lawyers cannot see further than the ethos of their own jurisdiction and its attendant legal sub-culture. Generally speaking, legal formalism is a philosophy, maintaining that law exists independently from the world of fact. Instead of a comparative, rational, and functional analysis, some Canadian law societies use legal formalism to perpetuate myths[38] that legal systems in other jurisdictions are inherently different.[39]

In fact, by formalism and sophistry, the LSUC[40] and Law So-

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37. *Edwards Report*, *supra* note 35, at 6. By way of analogy, "closer liaison" is needed between regulatory agencies that affect the same regulated interest. *See* Alexander J. Black, *Economic and Environmental Regulatory Relations: U.S.-Canada Free-Trade in Energy*, 8 CONN. J. INT'L L. 583 (1993). "Decisional consistency and rationality on a common grid is therefore desirable among regulatory regimes in all jurisdictions." *Id.* at 583.

38. Walter Lippmann, *Public Opinion*, *in* JEFFREY SIMPSON, FAULTLINES: STRUGGLING FOR A CANADIAN VISION 214 (1993).

> The distinguishing mark of a myth is that truth and error, fact and fable, report and fantasy, are all on the same plane of credibility, the myth is, then, not necessarily false. It may happen to be wholly true. If it has affected human conduct for a long time, it is almost certain to contain much that is profoundly and importantly true. What a myth never contains is the critical power to separate its truths from its errors.

Id.

39. These myths are perpetuated by a lack of familiarity with other legal systems. *See* Alexander J. Black, *Separated by a Common Law: American and Scottish Legal Education*, 4 IND. INT'L & COMP. L. REV. 15 (1993); *see also* Richard Stith, *Can Practice Do Without Theory?: Differing Answers in Western Legal Education*, 4 IND. INT'L & COMP. L. REV. 1 (1993).

40. *See* Letter from Kenneth Jarvis, Secretary, LSUC (Oct. 21, 1986).

ciety of British Columbia[41] have stated, in letters to an applicant, that evaluation of foreign legal credentials is the responsibility of the Joint Committee on Accreditation, adding that "[t]his is not a question of mobility, Charter or any other 'rights', but one of academic qualification."[42]

After the 1989 Canadian Supreme Court decision in *Black v. Law Society of Alberta*,[43] which led to the *Richards v. Barreau du Québec*[44] decision, and the relaxation of the three year rule in British Columbia, the LSUC began a yet-to-be completed evaluation of their transfer regime. Presently, it is anomalous that an Alberta lawyer with a foreign first degree is permitted to argue a case with national implications in Alberta courts that eventually could reach the Supreme Court of Canada, or alternatively practice in any of the Federal courts of Canada, yet be fettered from reasonable admission requirements to Ontario or British Columbia. However, some provinces that use the JCA evaluation of equivalencies waive these requirements for duly qualified members of Canadian bars, raising further questions about the function of the JCA.

Interpretation is elastic, covering many functions. By itself, discretion is "not 'principled,' although it may be bounded by principles."[45] U.S. Supreme Court Justice Oliver Wendel Holmes suggested that when the rules fail to fit, judges and other law-givers are interstitial legislators, free to modify incon-

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> You are not in a position to enter the bar Admission course in Ontario because you have neither an approved Canadian LL.B degree nor the certificate of the Joint Committee on Foreign Accreditation. You are not in a position to transfer in Ontario from practice in Alberta because you have not completed three years of active practice there.

Id. However, the JCA did not give notice that it would take such an obdurate stand. For instance, the doctrine of informed notice is a contractual analogy requiring an offeror to point out onerous or unexpected terms to an offeree. *See* Jacques v. Lloyd D. George & Partners Ltd., [1968] 1 W.L.R. 625, 630 (C.A.) (U.K.).

41. *See* Letter from G.G. Everitt, Assistant Deputy Secretary, Law Society of British Columbia (Nov. 18, 1987). "The Benchers have set standards for entry into the profession in this province, and an applicant cannot in effect set his own standards; nor can this law Society be bound or constrained in any way by the procedures and decisions of the law Society of Alberta." *Id.* This letter was written before *Black v. Law Society of Alberta* was decided and begs the question, why did the Law Society of British Columbia ultimately change its transfer rules following the *Richards* decision?

42. *Id.*

43. [1989] 1 S.C.R. 591 (Can.).

44. [1992] R.J.Q. 2847 (Can.).

45. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 21 (1990).

venient rules to cover the case at hand whenever there is a gap in the substantive rules.[46] But, rather than being a guide to decision-making, the JCA's elasticity of interpretation "often is a fig leaf covering judicial discretion."[47]

Furthermore, the evaluation of professional qualifications involves quasi-judicial functions.[48] The *Edwards Report* acknowledged that "identifying which aspects of statute law, common law and procedural law are 'jurisdiction-specific' is a challenging exercise."[49] Yet, the JCA does not provide reasoned decisions. It operates formalistically, presenting a handful of purportedly immutable guidelines in order to protect the self-defined 'integrity' of the Canadian legal system.[50] In Canada, however, the reality is that the experience of the main actors in the legal system is accentuated by the fast pace of the "global village" and pluralism.[51]

Some ethnic communities recognize that "foreign-trained lawyers face too many hurdles in gaining admission to the provincial bars."[52] For instance, Cornelia Soberano, one of the few lawyers of Filipino descent practicing in Toronto, says, "what we

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46. *Id.* at 20.

47. *Id.* at 30. For a description of this positivist view, see H. L. A. HART, THE CONCEPT OF LAW (1972).

48. The "duty to decide" function will "affect rights or impose obligations." Security Export Co. v. Hetherington, [1923] S.C.R. 539, 549-51 (Can.).

49. *Edwards Report*, *supra* note 35, at 7.

50. JOINT COMMITTEE ON ACCREDITATION, EVALUATION OF LEGAL CREDENTIALS FOR ACCREDITATION GENERAL INFORMATION (Dec. 1993) [hereinafter EVALUATION GUIDELINES]. The Evaluation Guidelines state that

> [t]he JCA does not usually evaluate applicants who have already been admitted as members of a law society in a common law province of Canada, but it does evaluate applicants from Quebec and Alberta who have less than three years practice experience within the five years immediately preceding an application to transfer.

Id. at 2. The Evaluation Guidelines, concerning applicants from the United States, further state that "the Committee takes into account relevant graduate legal education and experience in law teaching at a university law school level." *Id.* at 6. But the guidelines, which purport to express the principles of evaluation, do not take into account teaching at university law schools outside Canada or the United States.

51. Black, *supra* note 39, at 16; *see* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964). The Canadian communications guru of the 1960's coined this term after perceiving that quantitative, qualitative, and frequency increases in the dissemination of information would radically alter societies.

52. Michael Crawford, *Canada, A Shortage of Lawyers? Ethnic Communities Seek Relaxed Bar Admission*, FIN. POST, Mar. 10, 1992, at 15.

want is an objective qualifying exam."[53] Vern Krishna, the Executive Secretary of the Joint Committee, which entertains about 200 applications per year, has stated that "[o]ur focus is only on whether the person is qualified to go and render services to the public."[54] The purported focus of the JCA, however, arguably hides its real agenda, which is to frustrate entry into the legal profession. There are more than 100 Filipino-trained lawyers in Toronto alone and only two of them have been accredited.[55] Soberano has commented that these ethnic communities "are not asking for any special favors or to lower the standards. They [are] saying let us have access on our merit."[56]

Earlier, the LSUC announced a campaign to encourage more minorities to become lawyers.[57] Nevertheless, the Executive Secretary of the JCA, Vern Krishna, said that it would be wrong to advocate a quota system and "support a blanket affirmative action program in a profession that is concerned with professional standards and protection of the public."[58] Arguably, the JCA fetters natural justice by the requirement for new evaluation fees, the variable time limit for completing its examinations depending on minority status, and its past refusal to consider new qualifications for Alberta bar members.

Nevertheless, the Protocol adopted a guiding principle that "Canadian lawyers have constitutional rights relating to the interprovincial practice of law."[59] It qualified this principle saying that each jurisdiction retains the authority and responsibility to ensure that: (a) a member of its society who practices in another jurisdiction; or (b) a member of another Canadian governing body who practices in its jurisdiction, does so competently, ethically, and with financial responsibility.[60] While this guiding principle and the set of norms concerning evaluation of credentials by Canadian law societies may look good on paper, they are not coherently enforced.

The Protocol acknowledged that the Federal Government

53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *See Canada, "Lawyers Trying to Strike a Racial Balance"*, FIN. POST, Aug. 8, 1991, at 10.
58. *Id.*
59. Protocol, *supra* note 35, at 1.
60. *Id.*

was concerned "about mobility restrictions imposed by governing bodies on the movement of lawyers among provinces and territories."[61] The Protocol discussed the question of mobility for Canadian lawyers with less than three years active practice and concluded by recommending:

> Transfer after call, but before one complete year of practice of the law of the home jurisdiction - applicants should complete 6 months articles in the host jurisdiction, minus 1 month of articles for every 2 months of post-call practice of the law of the home jurisdiction; complete the host jurisdiction's professional legal training program; complete the host jurisdiction's transfer examination.[62]

Thus, for any qualified Canadian lawyer, most Canadian jurisdictions tend to follow this requirement or have lesser requirements. While other jurisdictions are moving towards this standard, extinction of the old three year rule has paradoxically tightened up the rules for transfer applicants who do not have a first law degree from a Canadian law school.

D. *The Ontario Transfer Examination*

Ontario has stringent rules concerning inter-jurisdictional transfer yet it has relatively lenient internal rules for Ontario lawyers who, having been out of practice, wish to requalify. An applicant from outside Ontario may take the transfer examination if he has a Canadian law degree and three years of active practice. The Ontario transfer examinations take place three times a year, in January, May, and September, and consist of Civil Litigation, Family Law, Business Law, Real Estate, Estates, and Professional Responsibility sections.[63] All six sections have a written portion, marked on a pass or fail basis and are taken over a four-day period. Bar admission materials are available for US$642. Passing all the written sections obviates the need for the comprehensive oral examination. Instead of taking the transfer examinations, candidates may opt to sit for Phase II of the Bar Admission Course, a three-month course given in London, Toronto, and Ottawa, starting in September of each year.

61. *Id.* at 2.
62. *Id.* at 9.
63. Law Society Act, R.S.O., ch. L-8 (1990); THE LAW SOCIETY OF UPPER CANADA, ONTARIO, rule 50 (Mar. 1993).

Ontario has three categories of members: members in active practice in respect of Ontario law, who pay one hundred percent of the annual fee, which in 1993 was US$1211.24; members not practicing in Ontario, including professors of law, who pay fifty percent of the annual fee; and members who are unemployed, who pay twenty five percent of the annual fee. On March 25, 1994, the governing body of the LSUC approved the Requalification Policy, which took effect on July 1, 1994, and established rules concerning requalification of Ontario lawyers who, regardless of their fee paying status, do not make substantial use of their legal skills in their current work.[64] Members are required to file a qualification status each year and must submit an application to the sub-committee of the Professional Standards Committee if they do not fit within the "qualified" category for a period of five years or more. Each member's case will be considered on an individual basis. Members engaged in the following types of work will be deemed to be in the "qualified" category: private practice in Ontario or another jurisdiction; in-house counsel; clinic lawyer; M.P. or M.P.P.; government lawyer; policy analysis or legislative drafting; member of an administrative tribunal; arbitrator; mediator; conciliator; legal teaching and/or legal writing; and legal research staff.[65]

This new policy, however, does not enter into force until July 1999, and the current LSUC Policy on Reinstatement only deals with members who have been suspended. If a member has been suspended for less than five years, they may be reinstated by paying all outstanding amounts due to arrears of annual fees, errors, omissions, and levy and late-filing fees. If suspended for five years or more, these amounts must be paid, and the member must pass the requalification examination, which is the same as the examination for transfer from other Provinces.

E. *Lawyer Mobility in the Maritimes*

In 1993, *Richards v. Barreau du Québec*[66] was distinguished from *O'Neill v. Law Society of New Brunswick*,[67] another first in-

64. THE LAW SOCIETY OF UPPER CANADA, REQUALIFICATION POLICY (Mar. 25, 1994) [hereinafter REQUALIFICATION POLICY].

65. *Id.* at ¶ 1.

66. [1992] R.J.Q. 2847 (Can.).

67. Trial Division, Court of Queen's Bench of New Brunswick (Oct. 25, 1993) (unreported).

stance decision. Although New Brunswick has a three year practice rule, the main reason that the *O'Neill* Court distinguished *Richards* is that New Brunswick imposes a six month period of articles plus two short examinations on all candidates who have less than three years active practice within the preceding five years.[68] Furthermore, New Brunswick does not discriminate against members of a Canadian Bar whose first law degree is from outside Canada. The Law Society of New Brunswick regularly exercises its discretion to waive either its bar admission course or the transfer examination. An applicant who opts for the examination may be admitted after only six months as a student member. Mr. O'Neill was an Ontario lawyer with less than three years active practice who challenged the requirement of six months articles. The court dismissed Mr. O'Neill's application and awarded the Law Society of New Brunswick costs of US$750, finding that "[t]he New Brunswick Act and Regulations are more accommodating of lawyers from other Canadian jurisdictions."[69] Perhaps one of the reasons for this outcome was that between the time of the commencement of the application and the time of the court's decision, the applicant was admitted to the New Brunswick Bar, mooting the issues in so far as they concerned Mr. O'Neill. The court stated that it decided the case because the issues were of "sufficient importance that the [c]ourt should address them."[70]

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68. *See* Letter from Michel Carrier, Secretary, Law Society of New Brunswick (May 7, 1990).

> [I]f a member of the Law Society of Alberta, who has not practiced for three (3) of the last five (5) years, wishes to become a member of our Society, that person would have to complete at least six (6) months of articling, successfully complete the Bar Examinations which consist of an oral examination of our Rules of Court and a written examination on the Statutes of New Brunswick. That person would not have to complete the [eight week] Bar Admission Course. The fact that this person has received his first law degree outside of Canada would not be a factor, as the person would be applying as a transfer from the Alberta Bar and not as a foreign applicant. We would then presume that this person would have met all the requirements of the Alberta Bar and would therefore be considered as a member of the Law Society of Alberta.

Id.

69. O'Neill v. Law Society of New Brunswick, Trial Division, Court of Queen's Bench of New Brunswick 6 (Oct. 25, 1993) (unreported).

70. *Id.* at 1. The New Brunswick Law Society Act of 1986 states that "the term 'practice of law' bears its usual meaning and for greater clarity includes a person employed in his capacity as a barrister or solicitor by a government department or agency, or municipality or corporation." New Brunswick Law Society Act of 1986 § 13(3). Can-

Nova Scotia follows Ontario's practice and requires a JCA certificate. It formerly required completion of six months articles and passing examinations in Statutes and Civil Procedure and likely did not require completion of the Bar Admission course if the applicant had completed one in another province within the five years preceding his application for transfer. However, Nova Scotia recently changed its rules, probably due to a trend towards standardization stemming from the impetus of the *Edwards Report*.[71]

Changes are anticipated during the next year to the Regulations of the Law Society of Prince Edward Island. Regulation 16(1) currently provides for transfer if an applicant has been engaged full time in the actual practice of law in a Province or Territory, other than Quebec, for a period of five out of the last seven years and passes an examination on Prince Edward Island, Statutes, Procedures, and Practice. Regulation 17(1) requires individuals with a British Commonwealth, American or Canadian civil law degree to obtain a JCA certificate, complete six months articles if the applicant has practiced for at least three of the preceding five years, or, otherwise articling for twelve months, in addition to passing the Bar Admission Course.[72]

didates are required to "have successfully completed at least two years of studies at a university in a program approved by the Council of Studies leading to a degree in Common law." *Id.* § 22(3)(a). Lawyers from other Canadian provinces, who have practiced less than three of the five years preceding application, are allowed to be admitted following six months of articling. *Id.* § 28(2). To qualify for admission under the provisions of Regulation 28(2), an applicant is required to be in good standing in the last jurisdiction in which they practiced prior to their application. *Id.* § 28(3). A candidate is required to pass the Bar Admission Course and the Bar Exam. *Id.* § 29(1). The Council is permitted to waive the requirement for completion of the Bar Admission Course. *Id.* § 29(2). Finally, members of the faculty of Law of the University of New Brunswick and the Université de Moncton, who have held these positions for at least three consecutive years, may be admitted. *Id.* § 30(1).

71. *See* Letter from Victoria Rees, Director of Administration, Nova Scotia Barristers Society (May 3, 1990) (citing Nova Scotia, Barrister and Solicitors Act, R.S.N.S., ch. 30, § 1 (1990)). An applicant who is a member of a Canadian Bar, who has less than three years active practice in the five years preceding application, shall serve articles specified by the Committee and pass the Bar Admission Course or components thereof specified by the Committee. Barrister and Solicitors Act, R.S.N.S., ch. 30, § 19 (1990). Members of the faculty of law of Dalhousie University in their second year who will continue for a third year and who hold a graduate degree in common law or who are members of another Canadian Bar will be admitted without having to meet these requirements. *Id.* § 22.

72. *See* Letter from Beverly Mills Stetson, Secretary-Treasurer, Law Society of Prince Edward Island (May 13, 1994).

Newfoundland is one of the few provinces to define the term "legal practitioner."[73] Like the practice in some American states, Newfoundland provides for reciprocal recognition of lawyers from other Canadian provinces which likewise recognize Newfoundland lawyers.[74] Perhaps because of its history, Newfoundland expressly recognizes British law degrees for the purpose of enrollment as a student-at-law, which the education committee deems to be equivalent of a Canadian degree, for British lawyers who have actively practiced for three years, whereupon not more than one year's articles is required.[75] This allows the Law Society of Newfoundland Education Committee to recognize degrees of candidates without practice experience, which it considers to be the equivalent of a degree at a Canadian law school,[76] or likewise, recognize foreign degrees of applicants from other provinces who have less than three years active practice.[77]

F. *Lawyer Mobility in the Northwest Territories, Yukon, Saskatchewan, Manitoba, Alberta, and British Columbia*

The two Canadian territories have quite reasonable transfer rules which may partly be due to their geographical isolation from the mass of Canada's population. Any member of a Canadian bar, regardless of the origin of their first law degree, may be admitted to practice in the Northwest Territories[78] by passing an open book exam, which can be completed by correspondence,[79] on that jurisdiction's Rules of Court and Laws. This is also true

73. RULES OF THE LAW SOCIETY OF NEWFOUNDLAND, rule 1.02(e) (adopted Dec. 20, 1990) (pursuant to The Law Society Act, S. Nfld., ch. L-9 (1990)). " 'Legal practitioner' means a member, a person enrolled under Section 42 of the Act and a member of the Bar of another Province or Territory in Canada." *Id.*

74. RULES OF THE LAW SOCIETY OF NEWFOUNDLAND, rule 6.21. The Law Society of Newfoundland allows "Courtesy Enrollment" for limited practice, at the discretion of the Education Committee, providing that the home law society of the applicant provides reciprocal courtesy to Newfoundland lawyers. *Id.*

75. The Law Society Act, S. Nfld., ch. L-9, § 38(3) (1990).

76. *Id.* Sections 38(1) and 39(1) empower the Education Committee to prescribe extra examinations for law graduates from outside Canada. *Id.* §§ 38(1), 39(1).

77. *Id.* § 38(2).

78. *See* RULES OF THE LAW SOCIETY OF THE NORTHWEST TERRITORIES, rule 39. Rule 39 provides for admission of any active member of any Canadian Law Society, subject to passing a rules of court examination. *See* Letter from P.L. Homenick, Deputy Secretary-Treasurer, Law Society of the Northwest Territories (Aug. 24, 1989).

79. Formal admission requires that the applicant take an oath before a Justice of the Supreme Court of the Northwest Territories.

for the Yukon, which admits any active members in good standing with a Canadian bar, without articles, provided that the candidate pass a three-hour, open-book Statutes examination, consisting of 'true or false' and 'yes or no' type questions.[80]

In Manitoba, transfer applicants with less than three years active practice must re-article eleven and one half months in conjunction with taking a Bar Admission Course. Manitoba, which is currently reviewing the implications of the *Richards* decision, has an alternative provision for admission to practice for applicants of "exceptional merit."[81] Saskatchewan requires Canadian lawyers who have less than three years experience to article for six months and write that province's Statutes Examination.[82]

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80. Letter from Jan Graham, Executive Secretary, The Law Society of the Yukon (Sept. 14, 1990). Section One of the Yukon Legal Profession Act states that " 'active member' means a member of the society in good standing who is entitled to practice law in the Yukon under this Act." Yukon Legal Profession Act, S.Y.T., ch. 100, § 1 (1988). Section 20(1) establishes membership qualifications by stating that:

> The following persons are qualified to apply for admission to the society and enroll as members:
>
> (a) any person who
>
> (i) has been duly called to the bar of a province or has been admitted to practise as an attorney, advocate, barrister or solicitor in a province for a period of at least 12 consecutive months immediately preceding the date of application or such other period as may be prescribed by the rules,
>
> (ii) is a member in good standing of the law society of the province in which he or she last practiced as an attorney, advocate, barrister or solicitor . . . .

Id. § 20(1).

81. RULES OF THE LAW SOCIETY OF MANITOBA, rule 100. Rule 100 provides for the discretionary admission, "on recommendation of the Committee," for candidates who possess "qualifications of exceptional merit and distinction." *Id.*

82. RULES OF THE LAW SOCIETY OF SASKATCHEWAN, rule 190(3). Under Rule 190(3), inactive members have all the rights and duties of membership in the Society except that they are not permitted to practice law. *Id.* Rule 150(e)(i) states that admission as a student-at-law requires completion of "at least two years towards the requirements for a Bachelors degree from a common law faculty of law in a Canadian university approved by the benchers" or, a JCA certificate. *Id.* rule 150(e)(i). Rule 153 provides for a 12 month articling term. *Id.* rule 153. Rule 170 allows other Canadian lawyers with at least three years active practice in the last five years to qualify without articles by passing an examination on statute law, court procedure, and practice, while applicants with less than three years active practice are required to article for three months and pass an examination on statute law, court procedure, and practice. *Id.* rule 170. Rule 170(5), however, amended on December 9, 1993, requires applicants without an approved Canadian LL.B. to obtain the JCA certificate "before applying for admission as a lawyer." *Id.* rule 170(5).

In Alberta, the review of bar applicants is under the control of the Coordinating Council. It evaluates non-Alberta degrees and prescribes the content of any examinations at university standards in subjects pertaining to substantive law in force in Alberta.[83] Provision is made for the admission of Canadian lawyers of three years standing, who have "been actively engaged in the practice of law for a period or periods totalling at least three years in the five-year period immediately preceding their application for enrollment."[84] Applicants with less than three years active practice may receive reduced articles, but must complete the bar admission program. Alberta expressly recognizes admission of lawyers of three years standing from the United Kingdom, Ireland, New Zealand, and Australia, subject to Coordinating Council discretion to prescribe extra exams.

In British Columbia, the former requirement that applicants practice for a minimum of three years in their host jurisdiction prior to an application for transfer was abolished on September 10, 1993. The new rules state that if the applicant practiced or was called in his or her host jurisdiction within the three-year period immediately preceding the date of their application, the applicant is not required to write the transfer examinations. However, if an applicant has not practiced in over three years but under seven years, the applicant is required to write the transfer examinations. If the applicant has not practiced in over seven years, then the Credentials Committee determines the conditions of admission. For example, the Credentials Committee may require re-articling for a period of nine months, completion of the ten-week Professional Legal Training course, or restrictions on practice once admitted.[85]

In British Columbia, members of other Canadian law societies, who do not have a degree from a Canadian university, must obtain a Certificate of Qualification from the JCA before writing the transfer examinations.[86] The *Edwards Report*, however, rec-

83. Legal Profession Act, R.S.A., ch. L-9.1, § 39(1) (1990).

84. *Id.* § 40.

85. *See* Letter from Katarina Hodak, Office of the Secretary, Law Society of British Columbia (Dec. 9, 1993).

86. RULES OF THE LAW SOCIETY OF BRITISH COLUMBIA, rule 370(6) (pursuant to the Legal Profession Act, S.B.C., ch. 25 (1987)). These rules state that an applicant affected by a decision of the secretary may make a written request that the matter be referred to the Credentials Committee. *Id.* rule 302(2). Furthermore, an applicant must either

ommended that "each governing body review its own ethical rules, to ensure that they comply with the Charter's mobility rights."[87] Despite the fact that the British Columbia reforms stem from the remarkable *Richards* case, they are flawed. Although British Columbia has abolished the three year rule, it still requires that Canadian lawyers with a foreign first law degree obtain the certificate of the JCA, thereby perpetuating the tautological distinction between practice and academic qualifications.

Transfer rules in the twelve Canadian Jurisdictions can be divided into categories. Four jurisdictions are liberal. Quebec, the North West Territories, Yukon, and New Brunswick have direct or very liberal transfer rules. Three jurisdictions are semi-liberal. Newfoundland seems to allow some discretion, expressly favoring British law degrees, by permitting re-articling and Bar Admission courses. Manitoba also allows some discretion, requiring an eleven-and-one-half month course, the possibility of reduced articles, and a provision for exceptional merit. Alberta is receptive to foreign first law degrees and presently requires Bar Admission and/or articles for those with less than three years practice. Alberta is in the process of revising its rules. Finally, four jurisdictions are tough. Nova Scotia, Prince Edward Island, and Saskatchewan are difficult, similar to Ontario. One province is a hybrid, partly liberal and partly tough. British Columbia has liberal rules for the admission of holders of Canadian law degrees, but still uses the JCA for applicants with foreign first law degrees. Therefore, it is harder for applicants with foreign first law degrees, as the three year active practice rule door is closed.

G. *Academic Call for Law Teachers: Bar Exam Bypass*

Academic lawyers, employed in either their second consecutive year as a dean of a law school in Ontario or as a full-time faculty member, who have entered their third consecutive year in that position, are eligible for a direct call to the Ontario Bar at the Law Society's discretion.[88] Presumably, the rationale is that university law teachers, being good enough to teach law, should

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prove successful completion of "the requirements for a degree from a common law faculty of law in a Canadian University" or hold a JCA certificate. *Id.* rule 311(1)(c).

87. *Edwards Report*, *supra* note 35, at 22.

88. Law Society Act, R.S.O., ch. L-8, § 708(5) (1990).

be good enough to practice law without facing the hurdles of articling and bar examinations.

Nova Scotia permits an "academic call" for full time members of the faculty at Dalhousie Law School with full, associate, or assistant professorial rank, for two years preceding the application date. While this type of admission by-passes articling and examination requirements, limits may be imposed on the type of practice the applicant is permitted to carry out. The Nova Scotia Barristers' Society requires that the applicant have their contract renewed to continue full time for at least one more year. This applicant must have a graduate law degree from a common law university or be a member of another Canadian bar.[89] British Columbia permits full time lecturers at the University of British Columbia and the University of Victoria, or any full-time lecturer on the faculty of a common law Canadian university for at least five of the preceding eight years, provided they have been found to have an adequate knowledge of the common law.[90] Alberta also provides for direct calls.[91] Similarly, in New York, a full-time member of the law faculty, of a law school accredited by the American Bar Association, at the associate professor rank, may be admitted without examination.[92]

Thus, in many Canadian jurisdictions, it is possible for academics trained outside of Canada to be admitted to practice, while Alberta lawyers with a foreign first law degree are required to top-up their legal education before being allowed to take the provincial transfer test.

II. *EUROPEAN COMMUNITY LAWYER MOBILITY*

A. *Recognition of Higher Education Diplomas in the Community*

Transfer is now allowed, with minimal restrictions, in the European Community ("Community " or "EC"), a jurisdiction

89. Letter from Victoria Rees, Director of Administration, Nova Scotia Barristers' Society (May 3, 1990).

90. RULES OF THE LAW SOCIETY OF BRITISH COLUMBIA, rule 311(1)(c)(iii) (pursuant to the Legal Profession Act, S.B.C., ch. 25 (1987)).

91. The Legal Profession Act, R.S.A., ch. L-9, § 42 (1990). Section 42 provides for the admission of full-time members of the Faculty of Law of the University in Alberta who have been continuously employed for at least two years, after the successful completion of any examinations required by Education Committee. *Id.*

92. N.Y. CT. APP. RULES FOR THE ADMISSION OF ATTORNEYS AND COUNSELORS AT LAW § 520.9(d)(ii) (revised Nov. 1993) [hereinafter N.Y. CT. APP. RULES].

that is slowly evolving towards, but for political reasons eschews the term, "federalism." Completion of the Single European Market in 1992 is a wide-ranging process that has affected vocational prospects.[93] As in Canada, mobility rights are constitutionally guaranteed in the European Community. The Treaty Establishing the European Community[94] promotes four so-called fundamental freedoms which are the freedom of movement of goods,[95] persons,[96] services,[97] and capital.[98] Although these four objectives are primarily economic, derogation and exception clauses apply to all four freedoms in order to protect the character, traditions, and heritage of the EC Member States. In 1977, the Lawyers' Service Directive was adopted, which facilitated the ability of lawyers to provide services in other EC Member States.[99]

Inter-jurisdictional mobility of lawyers is governed by the transfer test stated in the EC Diploma Directive on Mutual Recognition of Higher Education Diplomas (the "Diploma Directive").[100] This provides a general system for the recognition of

93. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741, *amending* Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty].

94. Treaty Establishing the European Community, Feb. 7, 1992, [1992] C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/01 (1992), [1992] 1 C.M.L.R. 719, *reprinted in* 31 I.L.M. 247 (1992) [hereinafter TEU]. The TEU, *supra*, amended the EEC Treaty, *supra* note 93.

95. EC Treaty, *supra* note 94, arts. 30, 31, 36. Articles 30 and 31 concern the elimination of barriers, charges and measures incompatible with the free movement of goods. Article 36 concerns exceptions to the free movement of goods. Examples of impediments to the free movement of goods include: restrictions by the United Kingdom on the importing of potatoes, Commission v. United Kingdom, Case 231/78, [1979] E.C.R 1447, [1979] 2 C.M.L.R. 427; restrictions by France on the importing of poultry, Commission v. France, Case 40/82, [1982] E.C.R. 2793, [1982] 3 C.M.L.R. 497; and restrictions by France on imports of lamb from the United Kingdom, Commission v. France, Case 232/78, [1979] E.C.R. 2729, [1980] 1 C.M.L.R. 418.

96. EC Treaty, *supra* note 94, art. 48.

97. *Id.* arts. 59, 60; *see* Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556, 566 (1991-1992) ("The right of professionals to practice occasionally in other states is founded on the right of freedom to provide services, while the right of professionals to practice while residing in another state is founded on the right of establishment.").

98. *Id.* art. 67.

99. Council Directive No. 77/249, O.J. L 78/17 (1977). For an in-depth discussion of the movement "toward an integrated market for the practice of law" in the EC, see Goebel, *supra* note 97, at 556.

100. O.J. L 19/16 (1989) [hereinafter Diploma Directive]. For a discussion of the Diploma Directive, see Goebel, *supra* note 97, at 595-601; Bernhard Schloh, *Freedom of*

higher education diplomas. The Diploma Directive required EC Member States to change their internal legislation, in accordance with the Diploma Directive, by the beginning of 1991. Part of the reason behind the change was to prevent discrimination.[101] Lawyers from other Member States are allowed to pass a simple 'top-up' aptitude test in order to requalify. Requalification is a popular expression, which contemplates the process whereby a professional meets the professional licensing requirements in another jurisdiction.

Scotland, England, Wales, Northern Ireland, and Germany all have systems in operation. France, however, has been dilatory, taking

> the 'Alice in Wonderland' approach to implementation. Although the new French law purports to deal with the directive, the details of the test are to be contained in implementing regulations, which, curiously, have never seen the light of day. More curious still, in the meantime, time was found to repeal the pre-existing rules for Community lawyers (with eight years' experience), leaving EEC lawyers trying to exercise their rights under the directive in a *vide juridique*.[102]

Thus, the Diploma Directive "sought . . . to allow qualified lawyers (however defined) in one member state to use that qualification to gain access to another member state by passing an aptitude test or completing an adaptation period. Most states have opted for the incoming applicant to pass a test."[103]

The Diploma Directive is a legal measure that promotes professional mobility within the EC while recognizing the proportionality principle.

> Proportionality is ancillary to the principle of subsidiarity because it embodies the goal of minimum interference. The means employed must be proportional to the desired end. As the Community has developed, it has gravitated more and more towards less intrusive action. For example, in relation to free movement of services the Commission's initial ap-

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Movement of Lawyers Within the European Economic Community, 9 ST. LOUIS U. PUB. L. REV. 83 (1990).

101. *See* H. SMIT & P. HERZOG, 3 THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY 556 (1976). "Discrimination always involves uneven treatment of subjects or objects in essentially similar situations by a single person or body." *Id.*

102. Iain W. Jacobs, *No Mutual Recognition in France*, 37 J.L. SOC'Y SCOT. 475 (1992).

103. *Cross-Border Raids?*, 36 J.L. SOC'Y SCOT. 327 (1991).

> proach was that of a sector-by-sector examination, looking at each profession in turn and harmonizing professional qualifications. This was painstakingly slow in relation to the majority of professions and a new approach was adopted in the form of the [Diploma Directive]. The emphasis is now less on harmonization and more on mutual recognition and minimum standards.[104]

For instance, Articles 30 through 36 forbid tariffs, quotas, and other restrictions on intra-Community trade. The exceptions to the principle of free movement of goods in Article 36 are strictly interpreted. The test is essentially that measures taken should not be disproportionate to their objective. In other words, the proportionality principle prohibits measures, if the objective could be reached by means less restrictive to trade.[105] This must be balanced with the principle of subsidiarity, which requires that Member States implement measures best suited for their particular circumstances in order to achieve broadly-defined aims of the Community.

B. *Implementation of the Diploma Directive in the United Kingdom*

The aptitude test was adopted in England and entered into force on April 17, 1991.[106] In May 1988, discussion commenced between the four Law Societies of England and Ireland. From the beginning, it was clear that there were two potential difficulties. First, the Republic of Ireland is a separate Member State within the EC, and second, the laws and legal system of Scotland do not derive from precisely the same source as those of the rest of the UK and Ireland.[107] The first problem was deemed not to be of particular relevance for the English Law Society as there have been no recent applications, nor are there likely to be many future applications from solicitors from Ireland.[108]

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104. Lynn E. Ramsey, *Subsidiarity - Did the Edinburgh Summit Explain Maastricht's 'S' Word?*, 38 J.L. SOC'Y SCOT. 316, 317 (1993); *see* Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11/70, [1970] E.C.R. 1125, [1972] C.M.L.R. 255; *see also* Commission v. Denmark (Disposable Beer Cans), Case 302/86, [1988] E.C.R. 4607, [1989] 1 C.M.L.R. 619.

105. *See* Commission v. Italy, Case 7/61, [1961] E.C.R. 317, [1962] C.M.L.R. 39; Commission v. Italy, Case 7/68, [1968] E.C.R. 423, [1968] C.M.L.R. 1; *see also* LEIGH HANCHER, EC ELECTRICITY LAW 32 (1992).

106. *Cross-Border Raids?*, *supra* note 103, at 327.

107. *Id.*

108. *Id.*

The test for Scottish lawyers seeking admission in England is a "three-hour paper called Property, including basic concepts of land law and trusts, conveyancing, and wills, probate and the administration of estates (together with the relevant tax law relating to these areas)."[109] After passing the test, the applicant is admitted provided that they are still in good standing with the Law Society of Scotland.[110] It should be noted, however, that all newly admitted solicitors in England and Wales are required to first gain a certain number of continuing education points through attendance at continuing legal education courses before they may practice.[111] In addition, such applicants may not practice as a sole principal in private practice for at least three years.[112] The Law Society of Scotland eventually decided that a transferring intra-UK solicitor should be asked to pass two two-hour papers, one on the law of property, including conveyancing and trusts and succession, and the other on Scots criminal law, including civil and criminal evidence and procedure.[113]

Prior to 1991, lawyers transferring to England from other EC Member States or the Commonwealth had to meet a three-year requirement of active practice. Recently, the Law Society of England and Wales altered its rules for lawyers in accord with the Diploma Directive.[114] The Law Society of England and Wales promulgated regulations, whereby "Certain Overseas Solicitors" are allowed to enroll.[115] Since 1994, the list includes all Canadian and American jurisdictions, as well as other countries. The test for Canadian lawyers transferring to England is now a two-hour paper in Professional Conduct and Accounts. The examination fees are approximately £140 each and the total cost of the process, assuming one test is required, including administration, examinations, and enrollment fees is approximately £600. American lawyers must write three exams: Professional Conduct and Accounts, Property, and Litigation. Lawyers from Québec,

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*; *see* Diploma Directive, *supra* note 100, at 9; Alexander Freiherr von Furstenberg & Axel Grannemann, *Acquisition of German Professional Titles - 'Rechtsanwalt' and 'Wirtschaftsprufer,'* 38 J.L. SOC'Y SCOT. 196 (1993).

114. Diploma Directive, *supra* note 100.

115. The Qualified Lawyers Transfer Regulations 1990 § 11 (promulgated pursuant to Solicitors Act (1974) (U.K.)).

in addition to these three, must write an examination on the principles of Common Law. Commencing in November 1994, the test centers will be located in Toronto, Hong Kong, and London.

Presently in Scotland, Canadian lawyers who want to transfer are regulated by the quaint sounding, but onerous, "Colonial Solicitors Act of 1990," which requires approximately two years of courses and "training" or apprenticeship. However, when the Law Society of Scotland recognized the Diploma Directive,[116] it too undertook to admit duly qualified lawyers from other Member States, after an applicant passed two, two-hour examinations, one in Scots Property and one in Criminal Law. However, Scottish practice has lagged because a Canadian lawyer can qualify as an English solicitor by passing a two-hour exam, then take another two, two-hour exams to qualify in Scotland, thus, obviating the requirement of over two years of courses and serf-like training. The Law Society of Scotland said that "there is some merit in reconsidering our position" concerning the unfettered admission of qualified lawyers from the Commonwealth.[117] It subsequently decided, however, not to implement any change.

III. *INTERSTATE LAWYER MOBILITY IN THE UNITED STATES*

A. *Legal Education and Bar Admission in the United States*

The United States does not use an articling process as is the norm in Canada. Americans typically cram and then write the Bar Exam after completion of their Juris Doctor ("J.D.") degree from law school. In the 1960's, the American Bar Association ("ABA") changed the designation of the LL.B. degree to J.D., largely in an effort to elicit more prestige for lawyers. The nonbinding guidelines for American bar examiners are periodically published by the ABA[118] Reliance on a national accrediting body relieves each state of the burden of assessing the merits of

116. Diploma Directive, *supra* note 100.

117. Letter from Kenneth Pritchard, Secretary, Law Society of Scotland (Jan. 28, 1994); *see* Letter from Lindsay Paterson, Deputy Secretary, Law Society of Scotland (Apr. 11, 1994).

118. AMERICAN BAR ASSOCIATION, SECTION ON LEGAL EDUCATION & ADMISSION TO THE BAR AND THE NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 1992-1993 (1992).

an applicant's educational qualifications.[119] However, "[t]he structural discussions of the 1970's proceeded amid increasing public and political confusion about the role of accreditation. The process irritated radicals for being elitist and market economists for being anticompetitive."[120] Because over thirty American states require the Multistate Professional Responsibility Examination (the "MPRE") for bar admission, a course in "Professional Responsibility" is offered by most law schools in the United States.[121]

Bar examiners claim that there is a correlation between bar examination results and law school performance.[122] But opponents of state bar exams say that state bar exams do not test how well law schools train students, nor enhance the profession's prestige, yet they restrict entry of new competitors.[123] Bar examiners admit that bar exams are not a reliable predictor of a candidate's ability to practice law.[124] The legal profession, and not the public, is the chief beneficiary of the bar admission process. State bar examinations constitute an unnecessary obstacle that prevents applicants from being judged by ability, as they would be if allowed to enter freely into the competitive market.[125] "Indeed, 'the bar examination does not purport to test all of the essential characteristics of the complete lawyer.' "[126]

Despite the conundrum concerning the reliability and validity of bar requirements, all states have some sort of legislatively prescribed group, which is responsible for setting bar admission requirements. Following *Schware v. Board of Bar Examiners*,[127] however, any state qualification for bar admission must "have a

119. James P. White, *Legal Education in an Era of Change: Law School Autonomy*, 1987 DUKE L.J. 292, 295.

120. ROBERT B. STEVENS, LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 243 (1983).

121. William T. Braithwaite, *Hearts and Minds: Can Professionalism Be Taught?*, 76 A.B.A. J. 70 (1990).

122. Richardson v. McFadden, 540 F.2d 744, 748-49 (4th Cir. 1976), *modified on other grounds*, 563 F.2d 1130 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

123. *See* E. Gordon Gee & Donald W. Jackson, *Bridging The Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 727-31, 735-45.

124. W. Sherman Rogers, *Title VII Preemption of State Bar Examinations: Applicability of Title VII to State Occupational Licensing Tests*, 32 HOW. L.J. 563, 565 (1989).

125. *Id.* at 590-91.

126. *Id.* at 565-66 n.9 (quoting Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 B. EXAMINER 15, 34 (1977)).

127. 353 U.S. 232 (1957).

rational connection with the applicant's fitness or capacity to practice law."[128] Although the ABA opposes the practice, Wisconsin[129] and Montana[130] have a "Diploma privilege," constituting automatic admission to the state bar after an applicant meets the requirements of a state law school and the "character requirements" similar to all jurisdictions.[131] Maine, New York, and Wyoming permit a combination of law school and law office study to substitute for law school graduation.[132] However,

> [a]dmission to practice law on a state-by-state basis can restrict . . . the supply of legal services. The ABA Model Code of Professional Responsibility encourages lawyers to remove unnecessary restrictions on interstate practice . . . . Lawyers continue to press for the enforcement of statutes forbidding the unauthorized practice of law . . . from violating the heretofore exclusive domain of the profession. We should be skeptical of the claim that such exclusion is always necessary to protect the public from incompetent lay people trespassing on legal territory. Such behavior is anticompetitive, and not all of it can be justified by competency concerns.[133]

Discrimination based on educational requirements is easy to get away with. Self-regulating law societies, as mentioned, have an inherent conflict of interest, the public interest versus the membership interest. Together, these exigencies provide the means to limit entry into the law profession.

An essay that speculated upon professional responsibility of lawyers, written in the fictional future of law practice in the United States in the year 2049, included an

> independent federal disciplinary agency [and] federalized li-

128. *Id.* at 239.

129. WIS. SUP. CT. RULES §§ 40.02(2), 40.03 (West 1993). Students at fully ABA approved Wisconsin law schools are automatically admitted to the Wisconsin bar upon graduation. *Id.*

130. Huffman v. Montana Supreme Court, 372 F. Supp. 1175 (D.Mont.), *aff'd*, 419 U.S. 955 (1974).

131. White, *supra* note 119. Numerous "character" cases have discussed the wide range of human behavior. *See, e.g.*, Cord v. Gibb, 254 S.E.2d 71 (1979) (holding that joint ownership of house by female applicant with male, both unmarried, not bar to good moral character).

132. *See* Jennifer G. Brown, *Rethinking "The Practice of Law"*, 41 EMORY L.J. 451 (1992) [hereinafter Brown]; *see also* AMERICAN BAR ASSOCIATION, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM (1992).

133. Brown, *supra* note 132, at 454-55.

> censing for lawyers in 2010. The political alliance that produced federal licensing reflected fragmentation of the modern bar. 'Federalist' bar groups stressed the need for lawyer mobility in serving national clients, the uniformity of modern American law, and the seemingly arbitrary discrepancy in state bar exam pass rates. . . . The losers in the debate over national licensing, the 'antifederalists', were the state supreme courts and bar associations and the now defunct ABA General Practice Section, the home of the 'little lawyer'.[134]

States cannot limit bar admission to local residents, because this violates the interstate privileges and immunities clause of the U.S. Constitution,[135] which was "intended to create a national economic union."[136] However, the growth of the global economy and the advent of the information age will stress the self-regulation of lawyers.

Federal antitrust law favors competitive markets, believing that competition furthers the public interest by advancing economic efficiency or the public good. Yet it conflicts with anti-competitive state regulations like rent control or conservation measures that restrict output or fix prices, in the belief that these measures correct market failures. Under the antitrust state action doctrine, restraints of trade are immunized from antitrust scrutiny by an adequate showing of sovereign "state action," not by determining whether the state acted wisely or in an anti-competitive fashion. This doctrine has sparked uncertainty. Professor Elhauge argues that instead of getting bogged down in doctrine, the decision-making process should be viewed in order to distinguish state from private action. Under the decision-making process view, "financially interested actors cannot be trusted to decide which restrictions on competition advance the public interest, disinterested, politically accountable actors can."[137] However, "there is no principled way for the courts to reconcile truly conflicting interests."[138] Courts must choose on an ad-hoc,

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134. Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM L. REV. 125, 125-27 (1991).

135. U.S. CONST. art. IV, § 2, ¶ 1.

136. Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 280 (1985) (citing Hicklin v. Orbeck, 437 U.S. 518, 531 (1978)).

137. Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 668 (1991).

138. *Id.* at 670.

case-by case basis or systematically in favor of one of the interests.[139] Unfortunately, bar associations are not politically accountable themselves but are only indirectly accountable through the state attorney general's office.

In *Hoover v. Ronwin*[140] a candidate failed his state bar exam and sued the state-appointed grading committee, composed of practicing attorneys, contending that the committee "had set the grading scale . . . with reference to the number of new attorneys they thought desirable, rather than with reference to some 'suitable' level of competence."[141] In a 4-to-3 opinion, the U.S. Supreme Court did not find a violation of the Sherman Act[142] and concluded that the supervising state entity, the State Supreme Court, was the challenged restraint, as opposed to the supervising party, the committee, which, *ipso facto*, was immune under the doctrine of state immunity.[143]

The basis for *Hoover v. Ronwin* was that: (1) thirty days prior to examinations, the committee had to file the grading formula with the State Supreme Court; (2) the challenge to the grading formula was considered and rejected by the State Supreme Court; and (3) the State Supreme Court had the final say in admitting bar applicants.[144] However, this is not the situation in Ontario, where the outcome in *Hoover* would be different if American antitrust principles applied. The Law Society of Upper Canada is financially interested and not accountable politically.

Validity and reliability are two other aspects of bar admis-

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139. *Id.*

140. 466 U.S. 558 (1984).

141. *Id.* at 565.

142. 15 U.S.C. §§ 1-7 (1988); *see* Joel Randall Tew, *The Role of Attempt to Monopolize in Antitrust Regulation: An Economic and Social Justification for a New Approach*, 31 VAND. L. REV. 309 (1978). The common thread is to secure competition. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940) (prevention of restraints to free competition in business and commercial transactions); United States v. Reading Co., 253 U.S. 26, 59 (1920) (securing competition and precluding practices that tend to defeat it); United States v. Union Pacific R.R., 226 U.S. 61, 82 (1912) (preserving free action of competition); United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 337 (1897) (law of free and unrestricted competition is controlling element in business world). For a judicial discussion of the political and social aspects of antitrust, see United States v. Columbia Steel Co., 334 U.S. at 535-36 (Douglas, J., dissenting); *see also* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (seminal treatment of economic issues of antitrust and contemporary monopolization).

143. *See* Parker v. Brown, 317 U.S. 341, 350-52 (1943).

144. Elhauge, *supra* note 137, at 694.

sion standards. Indeed, validity and reliability are salient concerns in psychometrics, the art of predicting future performance from present behavior, often through the means of a paper-and-pencil test administered by educational psychologists. For instance, the Law School Aptitude Test ("LSAT") was born in 1948 and is used throughout the United States and English-speaking Canada. The U.S. Supreme Court criticized the LSAT in *DeFunis v. Odegaard*.[145] Justice Douglas, dissenting on the issue of mootness, wrote that:

> the test purports to predict how successful the applicant will be in his first year of law school, and consists of a few hours' worth of multiple choice questions. But the answers the student can give to a multiple-choice question are limited by the creativity and intelligence of the test-maker; the student with a better or more original understanding of the problem than the test maker may realize that none of the alternative answers are any good but there is no way for him to demonstrate his understanding. 'It is obvious from the nature of the tests that they do not give the candidate a significant opportunity to express himself. If he is subtle in his choice of answers it will go against him; yet there is no other way for him to show any individuality. If he is strong-minded, nonconformist, unusual, original or creative - as so many of the truly important people are - he must stifle his impulses and conform as best he can to the norms that the multiple-choice testers set up in their unimaginative, scientific way. The more profoundly gifted the candidate is, the more his resentment will rise against the mental strait jacket into which the testers would force his mind.'[146]

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145. 416 U.S. 312 (1974). The plaintiff was a non-minority applicant who was denied admission to the University of Washington Law School while minority applicants with lower evaluation ratings were admitted. He sued on the grounds that the school's policy invidiously discriminated against him on account of his race, in violation of the Fourteenth Amendment. The trial court granted the relief requested. The plaintiff was admitted to the law school. The Supreme Court of Washington reversed and on application for Certiorari vacated the former judgment. By that time the plaintiff was in the last quarter of the final year of law school and the law school was letting him complete the term regardless of the decision. Since the case was not brought as a class action, the controversy was moot. This case marked the first time a U.S. court sustained contentions concerning racial bias in the bar examiner's procedures.

146. *Id.* at 328 (quoting B. HOFFMAN, THE TYRANNY OF TESTING 91-92 (1962)). Justice Douglas went on to say that "no one knows how many of those who were not admitted because of their test scores would in fact have done well were they given the chance." *Id.*

In a society undergoing change, there is no clear evidence that the traditional combination of the Law School Admissions Test ("LSAT") and grade point average ("GPA") provide a particularly "good evaluat[ion] of the intrinsic or enriched ability of an individual" to perform as a lawyer.[147]

B. *New York State Rules on Lawyer Mobility*

Admission to the New York state bar is user-friendly. Applicants who have studied outside the United States can take the New York State bar examination by proving that they have the required legal education.[148] The former requirement that a bar applicant be a citizen of the United States is no longer constitutional.[149]

> The applicant shall show fulfillment of the educational requirements for admission to the practice of law in a country other than the United States by successful completion of a period of law study at least substantially equivalent in duration to that required under subdivisions (d) and (e) of section 520.3 of this Part, in a law school or schools each of which, throughout the period of the applicant's study therein, was recognized by the competent accrediting agency of the government of such other country, or of a political subdivision thereof, as qualified and approved; and (1) that such other country is one whose jurisprudence is based upon the principles of the English Common Law, and the program and course law of study successfully completed by the applicant were the substantial equivalent of the legal education pro-

147. *Id.* at 330 (quoting Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who are Not Admissible by Traditional Criteria*, 2 U. TOL. L. REV. 321, 333 (1970)).

148. N.Y. CT. APP. RULES, *supra* note 92, § 520.5a.

149. In re Application of Griffiths, 413 U.S. 717 (1973). The requirement of citizenship is not necessary to practice law in England. Solicitors Act c. 26, § 1 (U.K.) (1974). The Supreme Court of Canada held that the former requirement of Canadian citizenship for admission to the practice of law violated § 15(1) of the Canadian Charter of Rights and Freedoms. Andrews v. The Law Society of British Columbia, 56 D.L.R. 4th 1 (1989) (Can.). "History reveals that Canada did not for many years resist the temptation of enacting legislation the animating rationale of which was to limit the number of persons entering into certain employment." *Id.* at 39; William Black & L. Smith, *Sections 15 and 1 - Canadian Citizenship and the Right to Practice Law: Andrews v. The Law Society of British Columbia*, 68 CAN. B. REV. 591-615 (1989). Indeed, "[t]he Law Society of British Columbia took the most conservative and restrictive position about the scope of the Charter equality rights." *Id.* at 591.

vided by an approved law school in the United States.[150]

Thus, for example, British, Canadian, or Australian LL.B. graduates with a foreign 'first' law degree are allowed to write the New York bar examination without having to complete extra courses.[151] However, the New York state bar examination, like other American bar exams, invariably requires cramming in a four to six week bar exam preparation course offered by various private enterprises. Another avenue is the admission of foreign lawyers without examination.

In the United States, the ability of lawyers qualified in one state to become qualified in another depends on whether both states have reciprocal arrangements. New York has a five-year practice rule, whereby the Appellate Division, "in its discretion" may admit a person who "has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia; and is currently admitted to the bar in such other jurisdiction," which would allow the applicant to practice in New York state without examination, if that particular jurisdiction likewise admits New York state attorneys.[152] While many states grant reciprocity for experienced out-of-state lawyers, twenty-eight states do not recognize reciprocity.[153] Because New York lawyers are required to take the New Jersey bar examination, New York retaliated by enacting a law denying admission to attorneys whose host states do not grant admission to New York attorneys.

This provision disjunctively and alternatively contemplates the admission of foreign lawyers. An applicant who:

has been admitted to practice as an attorney and counselor-

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150. N.Y. CT. OF APP. RULES, *supra* note 92, § 520.5(b).

151. *See* Letter from Nancy Oppe Carpenter, Deputy Executive Secretary, New York State Board of Law Examiners (Mar. 8, 1994).

152. N.Y. CT. APP. RULES, *supra* note 92, § 520.9a(1).

153. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 545 (1992). For instance, qualified lawyers admitted to practice in other states may be admitted to the Virginia bar "on motion," without taking the bar examination, which Virginia otherwise requires. Virginia requires that an applicant must have been licensed for 5 years, and (a) is a proper person to practice law; (b) has made such progress in the practice of law that it would be unreasonable to require him to take an examination. SUP. CT. VA. RULES, rule 1A:1. A requirement of residency in Virginia was held to violate the Privileges and Immunities Clause of the U.S. Constitution, Article IV, Clause 2, by the U.S. Supreme Court. Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988).

> at-law or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of English Common Law; and (2)(i) . . . has actually practiced therein, for at least five of the seven years immediately preceding the application:
>
> (a) in its highest law court or highest court of original jurisdiction in the state or territory of the United States, in the District of Columbia or in the common law country where admitted; or
>
> (b) in Federal military or civilian legal service in a position which requires admission to the bar for the appointment thereto or the performance of duties thereof; or
>
> (c) in legal service as counsel or assistant counsel to a corporation in the state or territory of the United States where admitted, or in the District of Columbia if admitted therein or in the common law country where admitted; or
>
> (d) in a combination or cumulation of service among the above categories of practice or legal service even if the government service, civilian or military, was not in a jurisdiction in which the applicant was admitted to practice, where the Court of Appeals has determined that such five years of combined or cumulative service is the equivalent of the practice required in clause (a) of this subparagraph; . . . and
>
> (3) has the legal education which would have been required under section 520.3 of this Part, or its predecessor section or sections, to qualify applicant to take the New York State bar examination at the time of applicant's admission to practice in such other state, territory, district or common law country, or at the time of application for admission under this section.[154]

Lawyers from outside the United States, who are neither resident nor employed full-time in New York must submit, to the Appellate Division for the Third Department, proof[155] that they are over twenty-six years of age.[156] They must also file:

> (1) a certificate from the clerk of the highest court of the state, district or foreign country in which the applicant has been admitted to practice as an attorney and counselor-at-law

154. N.Y. CT. APP. RULES, *supra* note 92, § 520.9(a)(1).

155. *Id.* § 520.9(c). Proof and fees must be submitted to the New York State Board of Law Examiners. *Id.*

156. *Id.* § 520.9(a)(4).

> or the equivalent, certifying to applicant's admission to practice and the date thereof; . . . (3) a *Certificate from the New York State Board of Bar Examiners* certifying that the applicant has [the legal education required by § 520.9(a)(3), a section which incorporates by reference § 520.3, that would have allowed the applicant to take the New York State bar examination at the time of the applicant's admission to practice in such other common law country]; and (4) a report of the *National Conference of Bar Examiners* together with such other satisfactory evidence of character and qualifications as may be required.[157]

Provision is also made for the admission of lawyers *pro hac vice*, which allows admission for an out of jurisdiction lawyer in a particular trial, but only for litigation-related work.[158] New York also admits foreign lawyers as "legal consultants" to give legal advice on the law of the jurisdiction in which they are admitted.[159] The Appellate Division has discretion to impose conditions on admission or such other tests of character and fitness as it may deem proper.[160] Provision is also made for the Appellate Division to exercise its discretion and waive its rules "where strict compliance will cause undue hardship to the applicant."[161]

CONCLUSION

Law Societies are in an inherent conflict of interest because of their obligation to their membership. While competition is said to create wealth, true competition often results in negative interest group behavior.[162] Accordingly, lawyers frequently extol the virtues of competition, yet their actions speak of protectionism. The profession's standards of practice capture fields of

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157. *Id.* § 520.9(b) (emphasis added).

158. N.Y. CT. APP. RULES, *supra* note 92, § 520.9(e).

159. *Id.* § 521.1; *see* Judiciary Law § 53(6) (McKinneys 1994); GILLERS, *supra* note 153, at 551.

160. N.Y. CT. APP. RULES, *supra* note 92, § 520.9(d).

161. *Id.* § 520.12.

162. *See* STIGLER & COHEN, CAN REGULATORY AGENCIES PROTECT CONSUMERS? 9 (1971).

> Competition, like other therapeutic forms of hardship, is by wide and age-long consent, highly beneficial to society when imposed upon other people. Every industry that can afford a spokesman has emphasized both its devotion to the general principle and the over-riding need for reducing competition within its own markets because this the one area in which competition works poorly.

Id.

knowledge from the public, allowing practitioners to perpetuate the idea that only professionals are competent in a particular area, which forces the public to put faith in their purported knowledge. Law societies that discourage mobility by lawyers from other provinces are motivated by considerations of money rather than quality. Indeed, localized bar admission procedures cause disadvantage to multi-provincial, multistate, or multinational companies.

In Ontario, the Law Society of Upper Canada's practice is not in conformity with global developments, partly because the LSUC represents over half of Canada's lawyers. The practice of the LSUC wrongfully discriminates against two classes of Alberta lawyers - and the 'quota' reason for such discrimination is to keep down the number of lawyers in Ontario.

This is an anti-competitive practice that runs against the spirit of the FTA.[163] Article 1403 of the FTA provides that: (1) "certification of nationals providing covered services should relate principally to competence or the ability to provide such covered services.[164] (2) Each Party shall ensure that such measures shall not have the effect of discriminatorily impairing or restraining the access of nationals of the other Party to such licensing or certification."[165] Indeed, the *Edwards Report*[166] acknowledges that the FTA guarantees expedited entry into Canada to American attorneys, giving them rights to give advice in Canada about American law, "subject to appropriate regulation by Canadian governing bodies."[167] Furthermore, the implications of NAFTA have induced the Canadian Federation of Law Societies to agree to the idea of meetings with their counterparts in the United States and Mexico. The very idea of such meetings suggest that the exigencies of freer movement within the regional trading bloc will affect the internal mobility rights of lawyers.

Restrictive practices adversely affect the "vitality of the Nation as a single entity."[168] The role of lawyers in the national

163. Free Trade Agreement, *supra* note 6.

164. *Id.* art. 1403(1), 27 I.L.M. at 361.

165. *Id.* art. 1403(2), 27 I.L.M. at 362.

166. *See Edwards Report*, *supra* note 35.

167. *Id.* at 3.

168. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978). The Baldwin Court held that a state could charge a non-resident more for an elk-hunting license than a resident, because elk-hunting is not a means of livelihood but rather is a "recreation" which was not "fundamental" to the promotion of interstate harmony. *Id.* at 388.

economy and the opportunity to practice law is a "fundamental right." The legal profession has a non-commercial role when out-of-state, or in Canada, out-of-province, lawyers represent persons who raise unpopular federal claims. U.S. states cannot prohibit non-residents from gaining admission to their bar.[169] At issue is the "profession or business" dichotomy.[170]

Appropriate regulation of lawyers concerns professional failure, including malpractice or neglect of client matters. Preventive measures exist, although the relationship between a particular rule and the reduction of risk of professional failure is not always clear. For instance, a requirement that bar candidates have graduated from an accredited law school has an enormous financial and temporal cost. Epistemologically, it is difficult to know whether the requirement produces a higher quality of work compared to the quality of work that would result without it. Furthermore, law society admission rules influence the supply and demand for lawyers, hence these rules have economic consequences,[171] such as attempting to inhibit "client flight" when national or regional law firms are proposed.

In *Richards v. Barreau du Québec*,[172] the three-year active practice rule was held to be a "quota system of sorts."[173] Quotas are anti-competitive. Indeed, world trade quotas and other protectionist measures adopted by industrialized nations prevented the free flow of international trade and were thought by world

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169. *See* Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985). Two other U.S. Supreme Court cases overturned limitations on practice by out-of-state lawyers: Frazier v. Heebe, 482 U.S. 641 (1987) (concerning limits imposed by federal courts); Thorstenn v. Barnard, 842 F.2d 1393 (3d Cir. 1988) (holding that residency requirments violate Privileges and Immunities clause of the United States Constitution).

170. Supreme Court of New Hampshire v. Piper, 470 U.S. at 279. Justice Rehnquist, dissenting on the issue of residency requirements, stated:

> Today the Court holds that New Hampshire cannot decide that a New Hampshire lawyer should live in New Hampshire. This may not be surprising to those who view law as just another form of business frequently practiced across state lines by interchangeable actors. . . . [H]owever, . . . the practice of law is . . . fundamentally different from those other occupations that are practiced across state lines without significant deviation from State to State. . . . Law is one occupation that does not readily translate across state lines. Certain aspects of legal practice are distinctly and intentionally non-national.

Id. at 289-92.

171. GILLERS, *supra* note 153, at 535-36.

172. [1992] R.J.Q. 2847.

173. *Id.* at 2854.

leaders to be partially responsible for World War II.[174] Following the recent GATT deal,[175] protected industries will replace quotas (representing a supply-management system) and other "import restrictions" with tariffs that will gradually be reduced over the years. Even though law societies are involved in the provision of services and not the sale of goods, they are a sector protected by self-regulation. Instead of using what appears to be a quota system, law societies should consider imposing a tariff system and charging differential rates for transferring lawyers.

As with its international trade, Canada has historically constructed barriers to the movement of people and goods across provincial boundaries.[176] These barriers may violate federal control over interprovincial trade and commerce.[177]

> The provinces have a plethora of rules and regulations regarding occupations. Certified general accountants, for example, can perform a full range of accounting duties in Western Canada, but they are not permitted to audit public companies in Ontario, Québec, Nova Scotia, [Prince Edward

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174. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 31 (1989).

175. *See* General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT]. The Preamble stated the goals and objectives of GATT: "[R]aising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods." *Id.* GATT established the framework for the modern international economy by reducing quotas and tariffs on certain internationally-traded goods. The Uruguay Round was concluded by 117 nations in Geneva on December 16, 1993, and will take effect on July 1, 1995. GATT will cut tariffs, reduce subsidies, widen market access, and apply the GATT regime to service industries such as financing, banking, insurance, telecommunications, transport, consultancy, accountancy, films, and television. When implemented, quotas will be replaced by tariffs, which must decline by at least 15% over six years. *See Ministerial Declaration of Punta Del Este*, GATT Doc. Min. Dec. No. 86-1572, Sept. 20, 1986 [hereinafter *Uruguay Round*].

176. "Restrictions regarding professions and trades were not limited to the legal profession; they extended to pharmacists, optometrists, bankers, and others. . . . [T]he nation has gained maturity in this area and legislation aimed at creating 'closed door types of labour legislation' respecting aliens has tended to disappear." Andrews v. The Law Society of British Columbia, 56 D.L.R.4th 1, 39 (1989) (Can.) (quoting Ivan L. Head, *The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in Canada*, 2 CAN. Y.B. OF INT'L LAW 107, 128 (1964)).

177. A province could not attempt to regulate trade that is properly a matter of interprovincial concern. Laskin, C.J.C. stated, "[i]t is true that a Province cannot limit the export of goods from the province, and any provincial marketing legislation must yield to this." Ref re Agricultural Prod. Marketing Act, [1978] 2 S.C.R. 1198 (Can.).

Island] and Newfoundland.[178]

Until recently, Québec prevented Ontario and New Brunswick construction workers from working in the province.[179] Certified accountants in New Brunswick cannot practice in Prince Edward Island because the licensing requirements differ. Canada must liberalize the free movement of services if Canada is to keep up with trade liberalization between Canada and other countries. The FTA and the NAFTA have accelerated the mood for change.[180]

In 1994, the federal and provincial governments concluded the Agreement on Internal Trade,[181] to be ratified by July 1995. It aims to establish uniform standards and regulations, including the professional services sector. The accord has seven chapters, covering procurement, investment, labor mobility, consumer-related measures and standards, agriculture and food, alcoholic beverages, natural resource processing, energy, communications, transportation, and environmental protection. Labor mobility barriers come in the form of provincial occupational standards and residency requirements for professional or semi-professional occupations.

The Agreement on Internal Trade, however, recognizes the need for exceptions and transition periods[182] to the general principles of equal treatment of persons, goods, services, and investments,[183] as well as the reconciliation of relevant standards.[184] Each party agrees to mutually recognize the occupational qualifications required of workers in other parties' jurisdictions and to reconcile differences in occupational standards.[185] Licensing and certification shall relate principally to competence.[186] A party, however, may opt out of these obligations, if its purpose is to achieve a "legitimate objective,"[187] which

178. Donald Campbell, *Trade Barriers Tumbling: Negotiators Tackle Task of Drafting Pact to Stimulate Free Trade Between Provinces*, CALGARY HERALD, Feb. 18, 1994, at D7.

179. *Id.*

180. *Id.*

181. Internal Trade Secretariat, Agreement on Internal Trade (Can.) (Jul. 18, 1994).

182. *Id.* art. 4(b).

183. *Id.* art. 3(b).

184. *Id.* art. 3(c).

185. *Id.* art. 707.

186. *Id.* art. 706.

187. *Id.* art. 709(1)(a). Section (b) of this agreement "does not operate to impair

includes objectives related to "consumer protection."[188] Any such "Allowable Inconsistent Measures" must be reported to and reviewed by the Forum of Labour Market Ministers.[189] Although the parties agree to assess regulated occupations,[190] the Agreement on Internal Trade is not a panacea for lawyer mobility.

For instance, Kressman is the most popular imported wine in Ontario. However, Ontario will not buy the French wine from Québec, where it is bottled under license by T.G. Bright and Co., pursuant to a rule that requires all bottled wines in Canada to contain at least 25% domestic grapes. Likewise, Ontario-made beer cannot be sold in Manitoba or Québec. Furthermore, British Columbia restricts raw log exports to Alberta. The inter-provincial trade barriers in the beer and wine industry are the most noticeable and seemingly intractable issues facing the implementation of the Agreement on Internal Trade, which was signed on July 18, 1994.

Labor mobility barriers are presently in the form of provincial occupational standards and residency requirements for professional or semi-professional occupations. Ontario negotiators wanted to treat all companies from foreign provinces as they would treat their own, but this is subject to exceptions. Poorer provinces are concerned with how the agreement may limit their policy flexibility and are looking for broad "economic development" exemptions. Presently, Ontario has special warehousing requirements and handling fees for New Brunswick-based Moosehead beer, and some fear that opening the doors to companies from other provinces will mean dropping barriers to foreign firms.[191]

Lawyer mobility is part of the gate-keeping conflict between an entrenched professional body and university-based legal education. Indeed, critics like Judge Edwards attack the seemingly useless training in law schools, which emphasizes abstract theory and interdisciplinary legal scholarship at the expense of practi-

unduly the access of workers of another Party who meet that legitimate objective; (c) the measure is not more mobility-restrictive than necessary to achieve that legitimate objective, and; (d) the measure does not create a disguised obstacle to mobility." *Id.*

188. *Id.* art. 712(1)(e).

189. *Id.* art. 709.

190. *Id.* annex 707(1)(a).

191. Shawn McCarthy, *Breaking Down Barriers*, TORONTO STAR, May 2, 1994, at E1-2.

cal doctrinal-policy scholarship and pedagogy.[192] He states that "[t]oo many law professors are ivory tower dilettantes," and that law schools should produce scholarship that is useful to lawyers and produces ethical practitioners.[193] Lawyers have an ethical obligation to serve their client fairly and creatively, as illustrated by the rules against overbilling and conflicts of interest. Competitive markets, however, are not much fun for sellers. The effect of competition is to transform producer surplus into consumer surplus. While competition serves clients, there is a complicated tradeoff between a second type of ethical obligation owed to people and that owed to institutions, who are not the lawyer's client.[194]

Thus, the implications of *Richards* are remarkable from a Canadian unity viewpoint, even if realpolitik suggests that the proportion of lawyer transfers to Québec will not be as great comparatively, as transfers among the English-speaking provinces. Judicial activism[195] is needed in order to break restrictive practices by law societies. Yet, a court's scope is arguably less where litigation concerns a law society.

Law societies are powerful opponents who are like gatekeepers, comprised of members of the organized Bar. In Canada, the Federation of Canadian Law Societies, the Committee of Canadian Law Deans, the Canadian Bar Association, and provincial law societies have a say in accreditating the Canadian law schools. In the United States, the law school approval agencies are the American Bar Association and the American Association of Law Schools. The judiciary is really the ultimate bar-admitting authority, which has to supervise the bar licensing authorities, the law societies in Canada, and the bar examining boards in the United States.

A more rational rule would be one that follows the Québec practice of allowing any qualified Canadian lawyer to transfer merely by taking a transfer test. Instead, Ontario's current inter-

192. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

193. *Id.* at 36.

194. Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1922 (1993).

195. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." *Id.*

jurisdictional transfer regime and the prejudice against "foreign" lawyers from Alberta reflects the tendency for lawyers to rely on formalism and precedent.

> The preoccupation with precedent as authority may be one of the causes of American judges' insensitivity to the ways in which foreign legal systems deal with problems similar to ours, since foreign decisions have no authority in an American court except in the rare case where a question of foreign law is presented. Too many of our judicial opinions contain unexamined assumptions, conventional and perhaps shallow pieties, and confident assertions bottomed on prejudice and folklore.[196]

Restrictive practices by self-governing law societies involves legal legerdemain, lending credence to George Bernard Shaw's aphorism that all professions are conspiracies against the laity. In Ontario, the evaluation process is inconsistent due to inconsistent policy. Since the energy available for social regulation at any time and place is limited, control by law takes on an aspect of engineering.[197] In Ontario, this engineering is outdated.

European practice has changed remarkably since implementation of the Diploma Directive.[198] The Community consists of about 350 million people in twelve diverse countries, over twelve language groups, and two major legal systems, based on both common and civil law. Ironically, there is greater mobility

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196. POSNER, *supra* note 45, at 97.

> Here is a typical example of judicial certitude: No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Id.; Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). The only support offered for these emphatic and non-obvious propositions are a quotation from a speech of Daniel Webster and a quotation from an English judicial opinion. The style suggests a dogmatic rather than an inquiring mind. It is characteristic of judicial style.

197. *See* K. N. Llewellyn, *The Effects Of Legal Institutions Upon Economics*, 15 AM. ECON. R. 666 (1925).

> [L]aw operates under the principle of scarcity. The energy available for social regulation at any time and place is limited. . . . Because of this fact, control by law takes on the aspect of engineering. We require . . . to invent such machinery as, with least waste, least cost and least unwanted by-products, will give most nearly the desired result.

Id.

198. *Diploma Directive*, *supra* note 100.

accorded to EC lawyers than there is accorded to Canadian lawyers, despite the fact that Canada's system of government is unabashedly federal. In Scotland, the relevant legislation dealing with the transfer of Canadian lawyers is called the 'Colonial' Solicitors Act 1890, yet the LSUC treats certain Alberta lawyers like colonials. Conversely, the Community is nominally an economic union, eschewing the political word "federal" as the unification process continues incrementally. Over half of the jurisdictions in Canada provide rational and reasonable rules for transfer. Others, Ontario in particular, remain pejoratively provincial.