Tuition Fee Increases and the History of Racial Exclusion in Canadian Legal Education

Charles C. Smith

Charles C. Smith is the Equity Advisor to the Canadian Bar Association, Lecturer, Cultural Pluralism in the Arts, at the University of Toronto Scarborough and facilitator of the National Secretariat on Hate and Racism Canada. He has recently authored several papers for the Canadian Bar Association.

ABSTRACT

This paper explores how increasing tuition fees create barriers for Aboriginal and subordinate racialized group members seeking to pursue legal education in Canada. The history of racial discrimination in legal education in Canada is briefly reviewed to illustrate the roots of these barriers.

In April 2003, two Ontario law schools approved significant increases to their tuition fees, marking a rise from approximately $2,451 in 1995 to $16,000 for the 2003-04 at the University of Toronto and from $3,228 in 1997 to approximately $8,961 in 2003 at Queen's University. Further, the University of Toronto intends to increase tuition fees until they total $22,000 and Queen's University has projected to increase its fees to $12,856 by 2005. Concerns regarding the impact of tuition fees on individuals from historically subordinate communities have been addressed by a number of organizations. For example:

- Statistics Canada data indicates that 38.7% of youth aged 18-21 years from wealthy families attended university compared to 18.8% of youth from poorer families.
- In the Canadian Centre for Policy Alternatives' *Missing Pieces IV* it is suggested that higher tuition fees result in lower participation and that "Researchers at the University of Guelph found that 40% fewer students from low-income families were attending University after tuition fees rose."
- The Canadian Association of University Teachers suggests that, if current trends continue, access to post-secondary education will be increasingly divided along income lines.
- Recent census data indicates that Aboriginal peoples and individuals from subordinate racialized groups tend to fall below the Low-Income Cut Off (LICO) more so than others. The result of this is lowered earnings, leaving them less able to support the educational advancement of their children.

Racial Discrimination in Legal Education: A Brief History

Concerns on the education of subordinate groups have been emerging over a considerable period of time. Discrimination in education is mirrored and reinforced by discrimination in society, e.g. through statutes, social policy, institutional practices or individual and community actions. This has been a continuous part of Canadian history and is critical to any understanding of access to law school. For example, shortly after the end of slavery in 1833 the Nova Scotia *Education Act* of 1836 allowed for the establishment of separate schools for 'Blacks or People of Colour'. In 1842 and 1843, New Brunswick established two statutes explicitly recognizing the existence of Black schools as a means of segregating Black and white students.

In 1850, the Upper Canada Common Schools Act was adopted to provide separate schools for the Black community. In 1870, the Halifax City Council passed a by-law excluding students of African descent from common schools. In 1886, the Province of Ontario amended the *Common Schools Act* and "clarified that schools for 'coloured people' were to be set up only after an application had been made by at least five Black families in the community."

Relations between Canadian government and Aboriginal peoples entered a new phase following the *Indian Act* which entrenched in Canadian law the government's intent to assimilate Aboriginal peoples, making it necessary to eliminate their cultures and customs. In 1894, the Government of Canada amended the *Indian Act,* adding Sections 137, 138 and 139 which not only made attendance at school compulsory but, additionally, spelled out consequences for both parents and children who failed to comply.

Following the completion of the trans-Canada railway, anti-immigrant sentiment, particularly directed toward people of Chinese origin, was pervasive in Canada. In particular, in 1914 the Vancouver City Council adopted a resolution

requiring the removal of Chinese students from public schools because "association of the two races must result in a condition detrimental to the future welfare of our children who have nothing to gain, either mentally or morally, by daily association with Orientals."

In Ontario, separate schools for Blacks continued until 1891 in Chatham, 1893 in Sandwich, 1907 in Harrow, 1917 in Amherstburg, and 1965 in North Colchester and Essex counties. In 1940, Black children were barred from attending the only public school in Halifax County and, "until 1959 school buses would stop only in white sections of Hammonds Plains. In 1960, there would still be seven formal Black school districts and three additional exclusively Black schools in Nova Scotia." The repeal of the Ontario and Nova Scotia statutes authorizing racial segregation in education did not occur until the mid-1960s

In terms of legal education, in *Common Law Legal Education in Canada's Age of Light, Soap and Water* W. Wesley Pue summarizes the ethnocentric and racist values that contributed to the establishment of common law legal education in Canada. Pue describes efforts by the Manitoba Law Society to stop the development of proprietary schools which "(j)udging by U.S.A experience … would also almost certainly have opened the door to legal careers for much larger numbers of young men (and women?) of working class or minority ethnic background. This prospect would not have been viewed with equanimity by Manitoba's Anglo élite, who were embedded in a culture which was fiercely pro-British and hierarchical, nativist, even xenophobic". He also notes "… the most vigorous proponents of what might be called a 'cultural' agenda in legal education were prominent, energetic, busy, successful practicing lawyers. All were either born into the Anglo élite or thoroughly integrated into it. All were active in matters in law society governance or in the activities of bar associations."

Mirroring Pue's comments, in *The Law Society of Upper Canada and Ontario's Lawyers: 1797-1997,* Christopher Moore notes that "[t]he vast majority of nineteenth century Ontario lawyers were English, Scots, or Irish in origin and Protestant in religion, and they tended to take in students of their own class and kind …". It was not until 1855 that Robert Sutherland was called to the Bar in Ontario, becoming the first Black Canadian lawyer. This was followed by Delos Rogest Davis in 1885 whose call to the Bar required a special act of the Ontario Legislature to which the Law Society of Upper Canada protested. While information on other Blacks called to the practice of law is difficult to ascertain, it appears certain that the effects of discrimination in education combined with racism in society generally limited the number of Blacks who entered into law school and, further, those who did faced barriers in undertaking legal education, particularly in attracting articling positions.

Chinese, Japanese, South Asian and Aboriginal peoples were prohibited from becoming members of the Law Society of British Columbia until 1947, and 1948 for people of Japanese descent. Further, until it was amended in 1951, the *Indian Act* required Aboriginal peoples to relinquish their status if they were to pursue higher education. This prevented many Aboriginal peoples from entering university and considering legal education.

The Era of Change

After the 1948 United Nations Declaration of Human Rights, human rights statutes became more established in Canada within both federal and provincial governments. As part of this process of change, a series of statutes and policies were then enacted to promote recognition of diverse groups and a more inclusive polity.

In 1994, following a period of intense lobbying by educators and community activists, the Ontario Ministry of Education established the Anti-Racism and Ethnocultural Equity Unit to provide advice and guidance to school boards to enable them to develop similar policies and programs (later repealed).

Following an attempt to further entrench the assimilation of Aboriginal peoples through the 1969 *White Paper on Indian Affairs,* in 1973 the Federal government officially endorsed the National Indian Brotherhood's (predecessor to the Assembly of First Nations) *Indian Control of Indian Education.* This policy document called for Native control over education and that "Band councils should be given total or partial authority for education on reserves, depending on local circumstances, and always with provisions for eventual complete autonomy, analogous to that of a provincial board *vis-a-vis* a provincial Department of Education."

Throughout the 1980s, most school boards in Ontario and in urban centres across Canada established multicultural and race relations policies and programs. In 1988, the Ontario Government established a *Race and Ethnocultural Relations Policy* and mandated that all school boards adopt such a policy and program. In 1994, following a period of intense lobbying by educators and community activists, the Ontario Ministry of Education established the Anti-Racism and Ethnocultural Equity Unit to provide advice and guidance to school boards to enable them to develop similar policies and programs (later repealed). Colleges, universities and law schools were moving in the same direction and examples of such approaches are evident in law schools at York, University of Toronto, Queen's, Ottawa, Windsor, and Western Ontario.

Despite these changes, there has been little research on the content or effects of these policies. More needs to be known about how racism affects education and the impact of antiracism policies and programs. Further, evidence of discrimination and disadvantage persist. Across Canada, particularly in Toronto, the country's most densely populated as well as racially and culturally diverse urban centre, the

failure of mainstream educational institutions to respond effectively to non-dominant groups has been repeatedly discussed and analyzed.

As if capturing evidence of this resistance, in *Rethinking 'African-Centred' Schools* George Dei writes, "I need not reiterate here the reasons behind the push for such [Afrocentric] schools. In fact, one only has to read the countless research reports, academic studies and anecdotal accounts on the education of African youths in Euro-American/Canadian contexts to understand the frustrations that had led to the cry for African-centred schools."

Dei further reveals that "(i)n a 1991 high school survey by one board of education in Toronto, it was revealed that African-Canadian youth were not achieving as well as other students in terms of credit accumulation. It was shown that 36% of all Black students were 'at risk' of dropping out because of failure to accumulate sufficient credits to graduate within six years. This compared with 26% for whites and 18% for Asians … This survey also confirmed '… that 45% of Black high school students were enrolled in Basic and General level, as compared to 28% of the entire student body…' {and} the board of education's study of high school students enrolled in 1987 showed that by 1991, 42% of Black students (compared to the overall student population of 33%) dropped out of school" (1996: 33-34).

In *Post-Colonial MikMaq Languages Development Strategies,* the plight of Aboriginal peoples is summarized by Marie Batiste:

> Education has not been benign or beneficial for Indians. Rather through ill-conceived federal government policies and plans, Aboriginal youth were subjected to a combination of unquestionably powerful but profoundly debilitating forces of assimilation and colonization. Through various systems of boarding schools and educational institutions, the Aboriginal world view and the people who held them were ignored, while the nurturing and health of the nation were disrupted. Although educated by Catholic and Protestant clerics in almost all the schools, Aboriginal children were subjected to persistent violence, powerlessness, exploitation and cultural imperialism only to become marginalized in both their own communities and in urban areas. The outcome was the gradual loss to their aboriginal world views, languages, cultures and the creation of widespread social and psychological upheaval in Aboriginal communities.

This matter is compounded when considering the social significance of attaining a legal education. On the importance of subordinate groups entering into the study of law, equity and diversity issues are well articulated in the University of Windsor study on law school admissions criteria. In introducing the report *The Impact of Law School Admission Criteria: Evaluating the Broad-Based Admission Policy at the University of Windsor Faculty of Law,* the authors write:

> By necessity, the nature, quality, and effectiveness of the legal system are greatly dependent on the types of individuals who receive a formal legal education. As lawyers, judges, educators, administrators, and legislators, legally trained persons control or materially affect the majority of decision-making and law-enforcement processes in society. Law school graduates continue to develop careers in many non-traditional occupations requiring legal expertise; this broadens the profession's sphere of influence. Thus, the legal system, intended for the benefit of all members of society, reflects in some measure the cultural, social, and economic views of the legally trained. To the extent that the legally trained influence the organs of government, access to formal legal education can also be viewed as an important determinant of the political, social, and economic reality. Yet, legal education has traditionally been accessible only to majority groups in Canada. Therefore, minority perspectives concerning our societal choices may have had only limited influence.

There have been numerous concerns raised about the LSAT, what it measures, its relevance and effectiveness in determining success in legal education. The Canadian Bar Association's report Racial Equality in the Canadian Legal Profession cites several arguments and statistical data on this matter.

Regrettably, barriers to legal education for these very groups continue to exist. Despite the models discussed earlier regarding law schools implementation of program initiatives promoting equity and diversity, it is apparent that there are several areas requiring attention in legal education. There have been numerous concerns raised about the LSAT, what it measures, its relevance and effectiveness in determining success in legal education. The Canadian Bar Association's report *Racial Equality in the Canadian Legal Profession* cites several arguments and statistical data on this matter.

University of Toronto Faculty of Law

One area where the potential impact of increasing tuition fees has been explored is by the University of Toronto. As the basis for increasing its law school tuition fees to $22,000, the University initiated a study to demonstrate that there would be little, if any, negative impact. This study was completed by the University's Provost and released to its Board of Governors. The points noted immediately above are critical to examining the U. of T. Provost's study on accessibility. However, the Provost's study ignores the well-known history of disparate outcomes in legal practice,

including articling, for specific groups. This masks deeply entrenched societal and systemic inequalities and evades a critical point on the likely deleterious impact increasing tuition fees will have.

The Provost's report makes it difficult to assess whether or not the offering of financial aid will ensure accessibility and whether or not potential students are willing to invest in an educational career at such a high cost when their career opportunities may be limited. While the report contains some data on the financial needs of 'Blacks' and Aboriginals, the study itself identifies that the numbers for these groups are quite small and, as such, any statistical inference is unreliable. The fact that the number for each group is actually very small and statistically unreliable should mean something about current accessibility.

In terms of students from families with low incomes, the report indicates that the numbers are small in the low-income areas with 17.3% of students compared to 33% of students with family incomes above $90,000 and 33.5% of students who have not reported their family income. Given that individuals from this latter group do not seek financial assistance, it is likely safe to assume that these individuals are financially well-off. As such, this indicates that over 66% of students in the Faculty of Law come from families with incomes above $90,000 per year as compared to 17% with incomes less than $60,000 per year. This data supports the concerns expressed earlier, specifically that 38.7% of youth aged 18-21 from wealthy families attend university compared to 18.8% of youth from poorer families and, further, that if such trends in increasing tuition fees continue, post-secondary education will be increasingly divided along class lines. Given the intersections between race and family incomes, these divisions will likely be along the lines of race as well.

While the Provost's study cites the importance of providing financial aid to ensure that educational opportunities in the Faculty of Law are accessible, there is no data in the report which identifies the level of financial aid that will be needed to support students who cannot afford the increased tuition; nor is there any comment on the proposed targets for how these funds will be attracted and secured.

Conclusion

The issue of accessibility is now being studied by law schools across Ontario with a report to be released soon. As with the University of Toronto, this cannot be discussed in a vacuum. There are societal pressures and realities, which, along with increased tuition fees, may have the cumulative effect of impeding diversity within legal education and within the legal profession.

Recent studies of the legal profession in Canada indicate that it is predominantly white and male with only 5% of individuals from subordinate racialized groups and 0.8% of Aboriginal peoples. There is also evidence in the public domain on the barriers individuals from these groups face in attracting lucrative articling and associate positions as well as becoming partners and receiving comparable remuneration after lengthy years in practice.[1] In some cases, a significant number of students have complained about the inaccessibility of lucrative positions in large law firms while others have questioned the rate of call back based on Aboriginal and racial characteristics. These concerns are also supported in a recent article by Michael St. Patrick Baxter *Black Bay Street Lawyers and Other Oxymora* which provides evidence on the barriers faced by African Canadian lawyers in securing opportunities in large firms. Further, there is evidence of significant earning differentials between white lawyers and those from subordinate racialized groups. For example:

- White lawyers between the ages of 25-29 earn approximately $6,000 per year more than lawyers from subordinate racialized groups ($28,000 v. $33,900). This gap increases to approximately $33,000 for lawyers between the ages of 35-39 ($58,000 v. $91,200) and to $40,000 for lawyers between the ages of 40-49 ($70,000 v. $110,000); and
- Wage differentials between white lawyers and those from subordinate racialized communities are quite dramatic in the peak earning years of 50-54 with whites earning $70,000 more.

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Given that the number of individuals from Aboriginal and subordinate racialized groups studying law is very low and, at the same time, they face barriers to articling and limited employment opportunities, finances for these individuals to pay down increasingly high student debts appears to be an insurmountable obstacle. These current factors rest upon a history of racial discrimination that was both overt, active and continued over a long period of time. The fact that increasing tuition fees may erect barriers to Aboriginal peoples and individuals from subordinate racialized groups from entering the study of law simply resurrects the old outcomes – a legal profession that is overwhelmingly white.

Endnote

[1] See Concerns Regarding Discrimination in Attracting Articling Positions, August 2000, and Articling Student Feedback Report 2001.