The State We’re In: Legal Education in Canada’s New Political Economy

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THE STATE WE'RE IN:
LEGAL EDUCATION IN CANADA'S NEW POLITICAL ECONOMY

by
Harry W. Arthurs*

1. INTRODUCTION: LEGAL EDUCATION ABOUT, IN, OF, FOR AND AGAINST THE STATE

I will begin by proposing five simple and non-controversial propositions concerning the relationship of the state to legal education:

1. Most lawyers—and other people—understand law as the distinctive normative system generated and administered by the state. Legal education is therefore about the state.

2. Legal education is not autonomous, any more than law is autonomous. Both are shaped by the surrounding society, culture and polity. In that sense, legal education is in the state.

3. Legal education has as one of its main purposes the formation of legal practitioners who will be awarded a license to participate in the professional monopoly which the state has created. Moreover, the state licenses and finances universities, subsidizes students and defines the goals and strategies—even the technical modalities—of higher education. In all these important respects, legal education is of the state: it belongs to the state.

4. Law—many would argue—expresses and advances the hegemonic power of the state. Since legal education ultimately helps to reinforce state authority and state policy, and incidentally trains future state functionaries, it may therefore be considered as education in the service of the state, for the state.

5. However, legal education is not only for the state. Like all true education, legal education is inherently subversive: conventional wisdom is not privileged and customary ways of doing things are not immune from criticism. Indeed, many legal scholars and practitioners are committed to the notion that law’s mission is not to strengthen the state, but to restrain it, to reform it, even to transform it. In this special sense, legal education is against the state and, incidentally, against the law and against the legal profession as well.

So: legal education is about, in, of, for and against the state. It follows that

* University Professor of Law and Political Science and President Emeritus, York University, Toronto. I am most grateful to the editors of the Windsor Yearbook of Access to Justice for their invitation to deliver the Annual Access to Justice Lecture. This has enabled me to bring together and then carry forward a number of streams of my previous writings on legal education and scholarship and on the effects of globalization and neo-liberalism on Canada’s political economy. Since the present piece was prepared as a public lecture, I have not provided extensive footnotes; in lieu I have mostly referred to earlier work which is more conventionally footnoted.

(2001), 20 Windsor Yearbook of Access to Justice 35
changes in the state and changes in political economy exert a significant—perhaps definitive—influence on law, legal institutions and the legal profession and, therefore, on legal education.

II. GLOBALIZATION AND NEO-LIBERALISM

Over the past twenty years or so, two related developments have transformed the political economy—and thus the legal systems—of most states, including Canada. These developments—globalization and neo-liberalism—have, in different ways, diminished state power and authority and increased the importance and legitimacy of market forces.

Neo-liberalism—plain and simple—holds that state regulation of markets produces inefficiencies, discourages enterprise and innovation, diminishes personal and collective wealth and introduces serious distortions into public policy. Mainstream neo-liberals accept that states must continue to perform certain core functions, albeit more efficiently than they do now. They have in mind such essential responsibilities as protecting property rights, suppressing fraud, disciplining obstreperous labour unions, providing infrastructure for business and resolving business disputes. Other neo-liberals—the fundamentalists—believe that markets, not states, can and should distribute all public goods including health services, public security, clean air and water, culture, education and law. Neo-liberal politicians—including Prime Minister Thatcher, President Reagan and Premier Harris—tend to shift from fundamentalism to the mainstream once elected to office.

Globalization next. Like neo-liberalism, globalization comes in a variety of flavours. From, say, 1945 to 1970 or 1975, most western democracies embraced a version of globalization which permitted them to develop some version of social democracy and to promote a more secure, equitable and richer life for their citizens. But from, say, the mid-1970s to the present, the neo-liberal version of the global economy has displaced the social democratic version. Its proponents have argued that so long as economies remain domestic in scale, so long as local producers are insulated from world competition, so long as workers and consumers are sheltered from the full force of market discipline by interventionist government policies, markets cannot work their magic. Thus, our present version of globalization is organized around the principle that key factors such as capital, expertise and information must be allowed to flow across national borders, free from state regulation. As a consequence, state activism—redistributive taxation, social welfare, aggressive anti-trust enforcement, environmental regulation—has come to be regarded as inappropriate, if not downright dangerous, because it is likely to result in adverse reactions from the market, in disinvestment, devaluation of the currency and other consequences dire enough to deter governments of almost all political stripes. In this sense, neo-liberal globalization has become a self-fulfilling prophecy, a “conditioning framework” which has broken most govern-

ments of their bad social democratic habits and atavistic interventionist tendencies.

This intertwining of globalization and neo-liberalism is sometimes referred to as the Washington Consensus not only because it is closely associated with the philosophy which has dominated American governments since at least 1980, but because it is actively promoted by two powerful international agencies located in Washington—the World Bank and the International Monetary Fund ("IMF"). I am going to argue that the Washington Consensus has had important implications for law as an institution of social control and a vehicle for social justice; it has restructured law as a profession which occupies the strategic intersection of politics, economics and social regulation in many countries; and it is in the process of transforming law as an intellectual discipline and a field of study. But before I make that argument, I want to qualify my description of the Washington Consensus in three respects.

First, the neo-liberal version of globalization did not just occur as a natural phenomenon, nor was it hatched by a few wicked capitalists conspiring in the shadow of the White House. Rather, it developed from some sophisticated academic theories and practical policy prescriptions which, over time, came to be accepted by many "right thinking people"—some of whom used to think otherwise; it was sold to—and bought by—electorates which had given up on the activist state; and it was implemented by more-or-less democratic governments. In other words, the Washington Consensus is something we did to ourselves. Second, we did it to ourselves rather differently in different countries. Germany is different from Brazil is different from Korea; Canada because of its geopolitical situation is different from all of the above, and uniquely susceptible to American influences; and within Canada, Ontario's experience has not been quite the same as that of Alberta or Québec. Third, the Washington Consensus is a work-in-progress. Some of its principal custodians, including the leadership of the World Bank, have come to feel that if global capitalism does not soon acquire a human face, if it does not soon deliver a decent life to the people whose destinies it shapes, it will be repudiated or at very least destabilized. Consequently, in recent years, we have seen some attempts to renovate the Washington Consensus, to allow space for socially- and environmentally-sensitive policies, and to ensure that free markets complement, rather than detract from, democratic politics and the rule of law. Perhaps these attempts are genuine and will lead to a new synthesis; perhaps they will produce a kinder and gentler Conseven-

2 A recent study by the Centre for Economic and Policy Research, The Emperor Has No Growth, suggests that compared to the previous twenty years, neo-liberal globalization during 1980-2000 has been associated with slow growth and declining prosperity, not only for the poorest but also for the middling and rich countries. For the first two groups of countries, progress in improving life expectancy, infant survival and school enrolments has also slowed. While not claiming to have conclusively demonstrated that neo-liberal globalization caused slow growth, the study maintains that the burden of proof has shifted to those who advocate neo-liberal policies. J. Steele, “G8 nations owe the world an apology for globalization” Guardian Weekly (August 23-29, 2001) 23.
sus; perhaps they are only attempts to disguise the true nature of global neol-
oliberalism, without changing its essentials. Time will tell.

Now to return to my main argument: the Canadian state is being trans-
formed by the Washington Consensus, by globalization and neo-liberalism,
with consequences, ultimately, for law and legal education. How, exactly,
is this transformation proceeding?

III. DISABLING, DELEGITIMATING AND DISPLACING THE
LEGAL SYSTEM OF THE ACTIVIST STATE

For 200 years we have increasingly embraced the idea that the state’s
primary obligation is to enhance the well-being and fulfill the aspirations
of its citizens. Consequently, we have got used to thinking of law as an
instrument for the advancement of emancipatory and ameliorative state
policies. If we want to correct the imbalance of power in the workplace,
reduce road accidents, protect consumers, enhance opportunities for mem-
bers of visible minorities or suppress the sale of tobacco, we pass laws.
And we expect those laws to produce results. If they do not, we expect
them to be revised, enforced more vigorously or replaced by new and better
laws. True, there is a large and growing literature which shows that laws
are not always effective, that they sometimes produce perverse outcomes
or to turn out to be fundamentally misconceived. Nonetheless, we had
come to accept this progressive and instrumental model of law as paradigm-
ic, as grounding and giving legitimacy to the laws which we enact, prac-
tice and teach.

However, this is not a model of law that sits comfortably alongside the
world-view of neo-liberalism, nor is it one that can easily be made opera-
tional in the kind of state which neo-liberalism seeks to construct. Conse-
quently, high on the agenda of neo-liberalism is a series of constitutional
initiatives designed to limit the use of law as a strategy of social reform. I
will mention three: the effort by neo-liberal governments in provinces such
as Alberta and Ontario to transfer power from the central govern-
ment—which alone can address issues of globalization and regulate national mar-
tets—to the provinces, which lack the capacity and the desire to do either
of those things; the neo-liberal attempt to shift power from the legislature,
the executive and the courts—the potential agents of state activism—to
“the people” whose exploitable fear of change can be mobilized through
referenda, polls and recall elections; and the introduction of formidable
legal constraints on the state’s capacity to tax and its discretion to spend to
achieve social equity.

3 H. Arthurs & R. Kreklewich, “Law, Legal Institutions, and the Legal Profession in the
New Economy” (1996) 34 Osgoode Hall L. J. 1
4 This phenomenon was addressed in the very first volume of this journal. See D. Nelken,
5 H. Arthurs, “Constitutionalizing Neo-conservatism and Regional Economic Integration:
TINA x 2” in T.J. Courchene (ed.) Room to Manoeuvre? Globalization and Policy Conver-
gence (Kingston: McGill-Queen’s University Press, 1999) at 17.
Of course, it is not enough to simply constitutionalize limits on the state and its legal system. On the one hand, it is necessary to convince people that they are better off with a passive legal system than an active one. Consequently, neo-liberals have become quite adept in undermining our belief in the importance of law. For example, the substantive provisions of Ontario’s water quality, workplace safety, labour standards and environmental protection laws have remained pretty much unchanged; but inspection and enforcement have been reduced, eliminated or privatized to the point where these laws have become largely ineffective. As we come to understand that there is not much point in seeking remedies from understaffed or dysfunctional government agencies, we begin to lose faith in the model of legal activism itself. Or to take another example, possibly a contentious one, laws used to have rather anodyne titles like the Income Tax Act or the Elections Act: you knew what they were about—more or less—and you accepted that they were part of the permanent fabric of state governance. However, Ontario’s neo-liberals have adopted a new, didactic approach to legislation. The charmingly entitled “Fewer Politicians Act” effectively attenuates the relationship between citizens and their elected representatives. The “Taxpayers’ Protection Act” makes new taxes virtually impossible without a province-wide referendum. And the “Balanced Budgets for Brighter Futures Act” launched Ontario’s withdrawal from existing federal-provincial tax arrangements. The neo-liberal state uses law, then, to teach us to expect little from government, to despise politicians, to resist taxation and to view the Canadian state as an obstacle to progress.

On the other hand, it is not enough to destroy the reality and the image of an active state legal system. Someone has to do the necessary jobs that state law once did. Fortunately for neo-liberals, a private market in the production and distribution of law has developed to fill the gap. Take legislation: regulatory standards—once enshrined in statutes—are now found in corporate codes or in unilateral promises of good behaviour by the trucking industry or the financial services industry. Take public administration: policing, inspection and enforcement—once quintessential state functions—are now provided by security guards, standards agencies, private laboratories, industry ombudsmen and the “big five” auditing firms. And even adjudication—for most lawyers the highest and most indispensable

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6 I write these lines during the closing stages of Royal Commission inquiry into the tragedy at Walkerton, a small Ontario town, where degradation of the local water supply led to the death of seven inhabitants, and the illness of several thousand more. An important question which the Commission will have to answer is the extent to which the provincial government’s neo-liberal policies - privatization of provincial water testing laboratories, reduced provincial inspection of local water systems - were responsible for the tragedy.

7 Statutes of Ontario 1996, c. 28. Companion statutes forced the amalgamation of a number of Toronto-area municipalities, consolidated local school boards into large regional boards, deprived them of the right to levy taxes, reduced their power to manage schools and reduced payment of board members to a pittance. See City of Toronto Act, S.O.,1997, c. 2, Education Quality Improvement Act, S.O., 1997, c. 31 and Fewer School Boards Act, S.O., 1997, c. 3.

8 Taxpayer Protection Act, S.O. 1999 c. 7.

function of the state legal system—is now the business of a burgeoning industry of private providers of mediation and arbitration services. It is no accident that “government”—the exercise of state functions—is being replaced in political, legal and popular discourse by the more generic “governance.”

To sum up, under neo-liberalism, the state legal system—understood as the instrument of social justice and the source of individual and collective rights—is in the process of being disabled, delegitimated and displaced.

IV. THE RE-INVENTION OF THE STATE LEGAL SYSTEM IN THE NEW POLITICAL ECONOMY

To say this, however, is not to say that the state legal system is in danger of being abolished any time soon. Indeed, in many ways, its continued existence is necessary for the success of globalization and for neo-liberalism, which is its dominant ideology. State law, in fact, is being deployed to facilitate globalization and neo-liberalism.

As part of the price of admission to the global economy, states must commit themselves to changing their domestic law to remove so-called “non-tariff barriers” to free trade. Treaties which we willingly signed—such as the North American Free Trade Agreement (“NAFTA”), the World Trade Organization (“WTO”) and specific conventions on intellectual property or technical standards—required extensive amendments to our laws. Moreover, we have committed ourselves not to enact any new laws which might encumber trade. Most notoriously, Chapter 11 of NAFTA treats state regulation as a form of expropriation or “taking,” and entitles adversely affected companies to claim compensation against foreign governments (though not against their own). Several U.S. companies have made successful Chapter 11 claims against Canada and, more importantly, Chapter 11 has apparently deterred Canadian governments from embarking on important regulatory projects for fear of severe financial repercussions. In short, a central principle of the unwritten neo-liberal constitution of the global economy seems to be that national governments should give priority to the promotion of trade and investment over virtually all other considerations. True, this principle is hotly contested in the international sphere, but it seems to be gaining traction in Canada’s domestic law.

Furthermore, governments must not only abstain from measures which impede trade. They must take positive steps to make it easier to do business across national boundaries. Harmonization of law is one such step which,

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12 At least one author believes that Ontario’s NDP government was deterred from establishing a public auto insurance monopoly because of Chapter 11. See P. Monahan, Storming the Pink Palace: The NDP in Power (Toronto: Lester Publishing, 1995).
in Canada’s case, means aligning its law with that of its dominant trading partner, the United States. Obviously, not every line of our statute books is being rewritten: there is no need for that. But in intellectual property law, corporate and securities law, tax law and other key areas, Canada has been systematically revising its legal system in order to make foreign—especially American—investors feel at home. And, I might mention, the courts have begun to do likewise. As the Supreme Court of Canada suggested in a recent judgment:

> Accommodating the flow of wealth, skills and peoples across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.\(^{14}\)

Note: we are not simply changing our law because we are obliged to under international treaties and conventions. We are “accommodating”—to use the Supreme Court’s word—a whole new transnational legal order which has grown up in and around the global economy. This legal order—sometimes referred to as the *lex mercatoria*—was crafted largely by global law firms and consulting firms, by transnational industry associations, by international arbitrators and by major companies which themselves promulgate the terms of their relational contracts with vast networks of customers, suppliers, distributors, agents and subsidiaries.\(^{15}\) Consequently, it primarily reflects the interests of the principal players in the global economy, not the interests of local communities, consumers, businesses or workers. Nonetheless, states like Canada are generally willing to acquiesce passively in the new global legal order, to explicitly amend their national laws to “accommodate” it and, occasionally, to actively enforce it despite the fact that the global regime may contravene or undermine national law or policy.\(^{16}\) To put into perspective this powerful impulse to bring Canadian law into conformity with the law of the global economy, compare and contrast the extent to which our globally-conscious judges and neo-liberal governments have been galvanized into action by the conventions of the International Labour Organization (“ILO”), the UN Covenants on Social and Economic Rights or the Kyoto Protocol on reducing air-borne pollutants.

Legal changes to facilitate business transactions—global and domestic—extend beyond private and commercial law to crucial areas of public law.\(^{17}\) In the area of administrative law, for example, the buzz-words are

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\(^{16}\) For example, several decisions by the US Supreme Court allowed enforcement of international arbitration rulings even though these may have had the effect of subverting US anti-trust law. See *e.g.* *The Bremen v. Zapata Off-Shore Co.*, 407 US 1 (1972), *Mitsubishi Motors v. Soler*, 473 US 1 (1985).

"regulatory reform," "clearing away red tape" and "governing smarter"—all items on the agenda of the World Bank, all features of the movement towards "good global governance." A fair translation is that the main aim of public law reform should be for governments to create a positive legal environment for business, especially international business. However, this presents all elected governments with a difficult problem: how to overtly focus public law reform on facilitating market transactions without being seen to abandon the other important values they espouse, the laws they enact, the institutions they administer and the many needs and interests of citizens and voters?

Because the mere invocation of their faith in markets by definition will not resolve this problem, neo-liberal governments must turn to other strategies. One such is to portray themselves as a neutral referee between competing interests, as the custodian of a balance between legitimate but opposing forces. In order to validate their "neutral" credentials, these governments typically undertake two rhetorical strategies. First, they depict women's groups, environmentalists, labour unions, municipal politicians and even their own technical experts as "special interests" seeking illicit preeminence over a responsible business community and "ordinary citizens." Hence the Harris government's abolition of thirty or so government agencies and policy units—notably the Employment Equity Commission, the Women's Directorate and the Anti-Racism Directorate—which it deemed to have excessive influence. And second, they seek to equate human and social interests with business interests. Hence B.C.'s newly-elected Labour Minister explaining his postponement "for further study" of a ban on workplace smoking enacted by the previous NDP government:

I think the health and welfare of employees is extremely important, but I also think that the health and welfare of small business people is extremely important.

Needless to say the Minister was not being even-handed as between two groups of ordinary citizens—workers and business people—whose lungs are, after all, equally susceptible to second-hand smoke. Rather, he was "balancing" the economic health and welfare of businesses, large and small, against the physical health and welfare of employees.

These strategies, and others, are designed to discredit the old social democratic and progressive ideals of public law as an active force for good, to free public law from the embrace of "special interests" which cling to the old ideal, and to promote a new ideal which will inscribe neo-liberal values in the deep structures of Canadian public law and public administration.

18 The government also abolished the Law Reform Commission which, presumably, had a different law reform agenda than the one which is most favoured by neo-liberals. Statement of the Hon. David Johnson, Chair of the Management Board, Ontario Legislative Assembly Debates (Hansard) 36th Parliament, 1st session at 3145-47 (29 May 1996).
V. GLOBALIZATION OF THE MIND: CHANGING THE WAY WE THINK ABOUT LAW AND PUBLIC POLICY

What I have described so far represents a significant—some would say revolutionary—shift in Canada’s political economy and in its expression in law and legal institutions. I want now to examine some possible explanations of how this has come about and why it has been accomplished with relative ease.

A number of explanations are plausible. One might argue that political pendulums swing, that the arc of post-war social democracy and legal activism simply reached its extreme limit in the 1960s and 1970s, and that in a natural and healthy way, things have been tending in the opposite direction ever since. On this theory, at some point—perhaps soon—the pendulum will begin to swing the other way. Alternatively, one might say that social democracy and legal activism did not just exhaust themselves; they failed to deliver on their promises and, in fact, created more problems than they resolved—public enterprise, social housing, town planning, regional equalization, the welfare system and the public school system being cases in point. Or in another version of the same story, well-intentioned social justice agencies—Human Rights Commissions, for example—confused their priorities, mis-spent their resources and ultimately collapsed under their own weight. Or in yet one more version, as several studies have suggested, rights-based litigation strategies to advance equality and social justice have sometimes produced famous legal “victories” but seldom translated those victories into a fundamental changes in society or the economy.20

In the end, what matters most is not whether these diagnoses of the failure of the progressive or social democratic project were true or false, or even whether they were the product of disinformation, misinformation or sheer ideological perversity; what matters most is that a significant number of important constituencies came to believe that activist strategies which used law to achieve social change ultimately cost too much and achieved too little. These constituencies included not only influential elites, of whom more in a moment, but also much of the rank and file of the labour movement in provinces such as Ontario and British Columbia and even members of progressive social movements, who remained persuaded of the rightness of their own particular cause, but not of the good faith, good sense or good strategy of their sometime allies in government and civil society.

At very least, then, with some local variations in degree and timing, Canada has experienced a disjuncture in progressive political and legal thought, policies and strategies. And globalization has arrived at precisely the right moment to allow neo-liberalism to fill the void. In effect, globalization captured the hearts and minds of our cosmopolitan, knowledge-based elites—the influential politicians, business executives, community leaders, civil servants, consultants, lawyers, journalists and academics

whose shared values and assumptions are so influential in shaping how we think about public policy and how we translate it into law. There are a number of strands in this process, which I call "globalization of the mind." 21 

The first strand is historical: Canada has always been a net importer of legal institutions and ideas, at both ends of the political spectrum. The sources of many of our current neo-liberal ideas are the United Kingdom and especially the United States, but it is worth underlining our debt to these countries, as well as the countries of Western Europe and Australasia, for such imported progressive notions as public education, public health care, publicly-owned railways and power systems, collective bargaining, anti-discrimination legislation and the Charter of Rights and Freedoms, not to mention transformative approaches to law such as legal realism, feminist legal theory, critical theory, deconstructionism and legal pluralism. 22 Our elites, therefore, have always been open to foreign influences.

The second strand is more circumstantial and contemporary: Canada has increasingly become a net importer of capital, technology and business culture—especially from the United States. In fact, in many sectors, our branch-plant economy is effectively run from corporate head offices in New York, Chicago and Detroit. Until fairly recently, a degree of managerial autonomy was accorded Canadian subsidiaries—such as Chrysler Canada or GE Canada—which allowed them to pursue fairly distinctive local practices in their relations with local consumers, workers and suppliers. But the integration of global financial markets, global production chains and global management structures has shifted a great deal of decision-making authority from the Canadian subsidiaries back to their corporate head offices in the U.S. And in addition to tighter control by U.S. transnationals of their Canadian subsidiaries, many Canadian companies have either moved to the U.S. or been bought out by larger U.S. firms. This "hollowing out" of corporate Canada has led to closer integration of the two economies and to pressures to create an integrated North American business culture and public policy environment. As I will shortly recount, this in turn has led to the restructuring of the market for all of the services provided by our elites, including law. 23 Thus, economic as well as intellectual forces make Canada particularly susceptible to "globalization of the mind."

Third, as I mentioned earlier, the Washington Consensus is in the process of renovating its image, and perhaps its reality as well, by stressing that constitutionalism, the "rule of law" and "good governance" are necessary, if not sufficient, conditions for the success of capitalism. 24 Neo-liber-

22 I have provided some examples in H. Arthurs, "Poor Canadian Legal Education: So Near to Wall Street, So Far from God" (2001) Osgoode Hall L.J. 381 at 389 ff.
als offer a coherent, if not compelling, explanation of the linkage between
global capitalism and democracy. Dynamic economies fuelled by global-
ization—they argue—will generate better jobs and living standards and a
more highly-educated and assertive citizenry; IMF conditional loans will
force recipient governments to end corruption, mismanagement and profli-
gate spending; technical assistance programs in education, public adminis-
tration and business, provided under the aegis of the World Bank, will
break the stranglehold on power of powerful local business elites and
repressive local cultures; the Internet and CNN will expose corrupt and
tyrannical governments to censure by democratic states and to financial
sanctions by high-minded corporate investors. The current version of glo-
balization, they contend, will ultimately provide the material resources,
political will and legal modalities to ensure—for ourselves and for less
privileged nations—respect for human rights, accountable democracies,
viable social services and a strong civil society.

All to the good, if true. But note: this same “rule of law discourse” has
historically been used to undermine interventionist governments and to
advance the fundamental neo-liberal premise of the Washington Consen-
sus, to ensure that states are weak and passive, that they lack the capacity
or desire to interfere with markets. So should we believe or doubt?
Should we take this new discourse at face value, or treat it sceptically, in
light of its neo-liberal provenance and pedigree? Many members of Can-
da’s elites have chosen to believe rather than to doubt, thereby declaring
their moral or ideological affinity, as well as their economic and intellectu-
tual indebtedness, to their counterparts in other countries and to the domi-
nant ideas of globalization.

VI. CHANGES IN LEGAL PRACTICE IN CANADA’S NEW
POLITICAL ECONOMY

As might be expected, all of these changes in law and legal institutions,
driven by globalization and neo-liberalism and by changes in Canada’s
political economy, have produced important changes in legal practice. I
will mention some examples—again acknowledging local diversity—
largely to enable me then to argue that the same changes ultimately explain
what is happening to legal education and scholarship.

The most obvious and dramatic change has been the consolidation and
internationalization of large Canadian law firms. Essentially, a small
number of law firms has always represented important domestic and for-
30eign businesses. Most of these firms were concentrated in the same three or
four metropolitan centres which housed corporate head offices—Montreal,
Toronto, Calgary and Vancouver, with a few more in government centres

25 B. Santos, “Law and Democracy: (Mis)trusting the Global Reform of Courts” in J. Jenson
and B. Santos, supra, note 23; W. Scheuerman, “Globalization and the Fate of Law” in D.
202, and “Poor Canadian Legal Education ...” supra note 22.
such as Halifax, Quebec, Ottawa, Winnipeg and Edmonton. Over the past ten or twenty years, however, there has been a pronounced tendency for these firms to affiliate and then to amalgamate on a national basis so that they could provide relatively seamless service to corporate clients across the country, achieve a size sufficient to sustain a full range of practise specialties and promote themselves abroad to foreign corporations investing or doing business in Canada. But this strategy had its limits. In fact, as globalization has proceeded apace, as corporate Canada has been “hollowed out,” as more Canadian firms have moved abroad or been sold to foreign owners, and as corporate head offices have repatriated corporate functions from their Canadian subsidiaries, there are fewer and fewer large corporate clients to go around. For example, the globalization of financial markets has greatly diminished the importance of Canadian stock exchanges and financial institutions and, therefore, the prospects of the elite law firms whose members held corporate directorships in listed companies and provided legal services associated with public share offerings.

And it is not only globalization that has created a problem for these elite law firms. In certain respects, neo-liberalism has as well. De-regulation has diminished the need for them to maintain large environmental law or labour law departments; the privatization of adjudication has undercut the earnings potential of litigation departments; reduction in tax rates—especially corporate tax rates—has diminished incentives for clients to pay for elaborate tax planning strategies.

True, during any transitional period there will be more work for some lawyers and law firms—more mergers and acquisitions work when foreign firms are buying up Canadian companies, more contract work when public enterprises and agencies are being privatized, more trade law as the WTO and NAFTA offer new opportunities to challenge initiatives by Canadian governments and, perhaps, more Charter litigation as the new culture of constitutionalism absorbs disputes which used to be dealt with in the domain of politics. But, on balance, this transitional period has exposed Canadian law firms to significant new pressures. The advent of the global economy has devalued their comparative advantage—knowledge of Canadian law, politics and financial markets. It has exposed them to competition from foreign law firms conveniently located in New York, London and other global cities where—not by coincidence—the head offices of most global corporations are also located. And perhaps most importantly, it has introduced important new players into the corporate legal services market—the multi-disciplinary consulting firms which already hold a significant segment of that market in Europe and have begun to establish themselves in Canada.

Faced with increased competition in a shrinking Canadian market, yet driven by internal imperatives to continue to grow, Canadian law firms have tried to establish themselves abroad. Alas, the success of this strategy depends upon their being able to ride the coat-tails of their Canadian corporate clients—fewer and fewer of whom are significant players in the global economy. The most attractive option for elite Canadian law firms is therefore to reinvent themselves so that they are either not elite, not law firms or
not Canadian. And they are doing all three: some former labour and litigation departments of large law firms have been reincarnated as much smaller free-standing niche practices; some firms have established what are, in effect, multi-disciplinary practices; and some have formed partnerships or alliances with U.S. firms in the hope of being able to reinvent themselves as Washington or Wall Street firms.

Moreover, the effects of changes in our political economy are by no means confined to elite firms. Globalization is also looming over general practice—the heartland of the legal profession. The law firm equivalents of H and R Block, the tax preparers, have emerged in the United States offering standard legal services—incorporation of companies, real estate transactions, wills, divorces and routine collection cases—to middle class clients at cut-rate prices. Because they operate through local franchises, make extensive use of computer technology, trained paraprofessionals and saturation advertising and have storefront offices in convenient locations, they are able to generate high volumes—literally hundreds of thousands of files per year—at low unit costs, which, in turn, allows them to charge low fees. It would be relatively easy for these firms to use their know-how, excess computer capacity and well-advertised reputations to move into the Canadian market and to make life very uncomfortable indeed for lawyers in small firms on this side of the border, just as they have done in the U.S.

The restructuring of the Canadian economy by globalization and neoliberalism has affected the prospects of general practitioners in other ways as well. People in towns whose major employer shuts down, workers whose wages have remained static for a decade, former employees of much-reduced Canadian head offices are less able to afford summer cottages, less likely to leave significant estates, less concerned about the property dimensions of their marital disputes and less inclined to seek legal redress against their employer: their need for legal services diminishes accordingly. But every cloud has a silver lining. The new economy has translated many former workers into self-employed contractors or consultants; they may need legal advice in starting up their “businesses”; the boom-and-bust cycle of e-commerce has created a neat little market for IP and bankruptcy lawyers; and various rights which used to be enforced free of charge by government departments now must be enforced by lawyers acting for aggrieved citizens.

Finally, neo-liberalism has not just restructured the economy; it has restructured the legal apparatus of the state. Neoliberal cutbacks in government spending and in government activism have reduced the government’s need for lawyers; social movements and intervener groups no longer supported by governments can no longer afford legal counsel; changes in legal aid eligibility have reduced the financial prospects of lawyers in fields such as immigration and refugee law; and the end of rent control and tenant security have cut the ground out from under the lawyers who sat on or appeared before housing tribunals.

27 "Poor Canadian Legal Education ... ". supra note 22.
Thus, changes in political economy have destabilized the careers of many Canadian lawyers: their clientele has disappeared; they encounter new forms of competition; their specialty has ceased to be economically viable or their government job has vanished; their localized reputations and connections are of limited value in a continental or global context.

This destabilisation has implications for the very notion of legal professionalism, for the formal and informal governance structures of the legal profession, for the regulatory strategies of Law Societies, for rising and declining lawyer constituencies, for the organization and compensation strategies of law firms, for the creation of and access to new forms of professional knowledge. These challenges to the profession—rooted in changes in Canada’s political economy—exacerbate the difficulties of governing a profession which has long been experiencing the centrifugal effects of specialization and stratification, of changing demographics and geographic distribution and of something approaching an intellectual revolution.\textsuperscript{28} Law Societies cannot make and enforce ethical codes, offer education programs or run insurance schemes which have salience for widely differing groups of members who constitute, in effect, multiple sub-professions. Nor can these sub-professions govern themselves. Law firms used to shape professional careers and instill professional values through mentorship, the promise of upward mobility, a performance-based reward system and, especially, through an informal, largely hierarchical firm culture. Now they are too large, too far-flung, too diverse and too unstable to do any of these things well. And many individual lawyers, especially those in solo practice or small firms, are in such a precarious position that their very self-image as “professionals” is at risk. The result is that the profession is becoming in many ways ungovernable—except of course by the very market forces which are making it so.

It is difficult, then, to say what it means to be a lawyer in Canada today. And if we cannot say who or what lawyers are, what they do, how they must act, and what they must know, it is very difficult to imagine how we ought to educate them.

\textbf{VII. IMPLICATIONS FOR LEGAL EDUCATION}

Which brings me—at last!—to legal education. Oddly perhaps, in light of my advertised title, I arrive here a bit reluctantly. This is because I am not going to be able to draw a straight line which connects the dots which I have scattered through my analysis. Legal education does not exhibit all the consequential effects of globalization and neo-liberalism which I have tried to describe. Not yet, at least. There are reasons for this, which I had better outline before I go any further.

First, there are the effects of simple time lag. Universities and their law faculties are institutions in which fundamental values and well-established

\textsuperscript{28} H. Arthurs, “A Lot of Knowledge is a Dangerous Thing: Will the Legal Profession Survive the Knowledge Explosion?” (1995) 18 Dalhousie L.J. 295.
ways of seeing the world and dealing with it are slow to change, perhaps in the present circumstances happily so. Second, universities and their law faculties are, by their nature, incurably oppositional. Some of the most severe and incisive critics of globalization and neo-liberalism have been professors and students, including many in law schools. Third, as it happens, over the past twenty years or so, Canadian law schools have become more like other university faculties in terms of the political perspectives, intellectual credentials and career trajectories of their professors and the academic sophistication of their students. Because this “academic normalization” of law faculties has weakened the profession’s influence over how law schools define and pursue their goals, it has also to an extent delayed, if not deflected, the effect on law schools of the current professional crisis. And finally, for much the same reason—its increasingly close ties with the rest of the university—law as an intellectual discipline has been going through a renaissance over the past twenty or thirty years. This has energized many faculty members and created a sense of collective purpose in the professoriate which has helped to sustain momentum through times of trouble.

So much for disclaimers. How have changes in “the state we’re in”—and especially the provinces we’re in—affected Canadian law schools?29

Some effects of the new political economy have come to bear directly on law schools. Specifically, they have experienced the effect of government cutbacks on funding for higher education. Because the formula which governs the distribution of government funds was devised before law came into its own as a university discipline, law has been run on the cheap for a very long time. This situation was exacerbated as universities generally began to experience severe cut-backs, especially through most of the 1990s. The results were totally predictable: a virtual embargo on faculty hiring, deteriorating faculty-student ratios, facilities, libraries and services and inadequate student aid. And one other result was, with hindsight, also totally predictable: the need for law schools to seek alternative sources of funding.

These alternative sources were, inevitably, those mandated by the neo-liberal policies of our provincial government: increased student fees and increased support from the legal profession.30 Both present obvious risks: that the “usual suspects”—the poor, blacks and indigenous peoples—will be deterred from pursuing law degrees; that students will be forced to


30 In Ontario, these policies included: an overall per capita, inflation-adjusted reduction in university grants; the deregulation of student fees in law and other professional degree programs; the requirement that a designated portion of increased fee revenue should be used for student financial aid; the “freezing” of fees for students receiving the highest level of OSAP financial aid; and the provision of matching funds to encourage donations to student financial aid programs established at each university. So far, other provinces—notably Québec and British Columbia—have not adopted similar policies on student fees in law schools.
neglect their studies to work part-time; that graduates burdened by debt will be unable to practice in low-paying legal aid, community and cause-advocacy settings; that law firms and other donors will exercise their pipers' privileges to call the tune in law school curriculums, appointments and research. These are all very real risks; they account for the extreme reluctance with which most deans and faculties have adopted this new approach. However, I believe that most law schools have so far succeeded in preserving accessibility, academic integrity and intellectual autonomy while at the same time putting their new resources to good use. But I acknowledge that some observers contend that the new, neo-liberal dispensation in our universities has already justified everyone's worst fears.31

Certainly, new dangers lie ahead. Governments mesmerized by the magic of competitive markets are increasingly providing new funding based on performance indicators, ostensibly to ensure that tax-payers and fees-paying students get "value for money" from universities. The problem is that neo-liberal or market-related performance indicators are not likely to reflect the intellectual priorities or political propensities of many law professors and students. Consequently, law schools which accept applicants with unconventional credentials, teach students critical theory or produce future anti-establishment practitioners are unlikely to be rated "highly" or financed generously. But note the irony: by decreasing their dependence on public funds in the first place, governments may have inadvertently buffered law schools somewhat from the effects of government-decreed performance standards.

In parallel to the new funding arrangements for law faculties, governments have been developing new strategies for legal research. On the one hand, they have radically reduced their direct investment in policy studies and law reform research. This has deprived legal scholars not only of funds but of influence, no doubt as intended. On the other hand, they have increased grants for academic research with the predictable proviso that the additional funds be directed to fields which the government deems important. Law has not been a beneficiary of this new, targeted support for research. For doctrinal scholars who may not want or need funding, not much harm has been done; but for the growing number of interdisciplinary legal scholars, who do need funding, these policies are frustrating. Moreover, because some government research priorities involve law—e-commerce, efficiency, health, international trade, money laundering, productivity—there is a risk that some scholars will go where the money is rather than where their intellectual curiosity or social conscience might take

them. Once again, however, as a recent study seems to show, the legal research community has not so far succumbed to temptation. 32

To this point, I have been talking about neo-liberal policies which are directly aimed at higher education. Now I will return to the broader changes in Canada's political economy which I traced out earlier in my paper. In many ways, their effects on the legal academy are more insidious, fundamental and potentially long-lasting.

In the first place, I would argue, we have come to understand the substantive content of law quite differently under globalization and neo-liberalism. If many legal functions are no longer performed by the state, if the locus of law making has shifted from national to transnational forums and from the public to the private sphere, how long can we continue to teach almost exclusively the parochial law of the Canadian state? 33 Do we not have to make more room for teaching public and private international law, for the intellectual property law and business law of the United States, for the law of corporate codes and private prisons? Of course, this is a high risk enterprise. Few Canadian law professors know much about these fields; there is no guarantee that students will practice this sort of law, even if it does ultimately control our lives; and indeed, there may not be anything much to teach or study: many scholars question the very existence of a lex mercatoria. But most importantly, such a shift in the curriculum wrenches law out of its familiar context, out of "the state we're in," and allows it to float free as a set of disembodied concepts detached from the politics and economics and culture of any particular jurisdiction. That detachment from context has always been a problem for comparativists; 34 it is a problem still for those who claim to perceive the near-universal acceptance or adaptation of American legal values and institutions; 35 it is a problem for me. 36

Second, we have to reassess the social and political potential of law itself. Most Canadian law professors spent their formative years absorbing and then disseminating the notion that law could and should function as a silver bullet which would right wrongs, change attitudes, empower citizens

34 See e.g. O. Kahn-Freund, Selected Writings/Otto-Freund (London: Stevens, 1978).
36 "The World ... ." supra note 33.
and deter abuses of power. But in Canada’s new political economy, we have had to crank down our expectations of law, if not change them entirely. On the one hand, law is no longer about making the world a better place; it is about making the world safe for markets. On the other, judicial activism—legal activism more generally—is under attack by populists and neo-liberals; and even its foremost practitioners seem to be on the defensive. How long, then, will future Canadian law students—who have grown up with a different set of cultural assumptions about law—sit still while their professors drone on about dramatic law reforms which will never come, about social revolutions which will never occur?

Third, we have to contend with the effects of an emerging continental, if not global, market for legal services and legal knowledge—a market which American law schools are eager to exploit. If Canadian law graduates want to practice business law on Wall Street or in Singapore or Frankfurt—and some do—what point is there in their knowing the idiosyncrasies of Canadian Charter law or trust law or criminal law? Indeed, why study law in Canada at all? Similar questions arise for Canadian legal scholars. If they want to be recruited to teach in American or English universities—and some have—would they not be better to seek careers there initially, or at least to make their reputations by publishing in non-Canadian journals on non-Canadian subjects? One can easily imagine that these new career possibilities for professors and students may launch a new dynamic in Canadian law schools.

Finally, I think we are witnessing a change in the behaviour of the primary institutional and individual actors in legal education—law schools, their committees and councils, their deans and professors and students. Here is where neo-liberalism and globalization may ultimately play themselves out.

Canadian law schools have long been competitive in a healthy sense. They wanted to be the best they could be, and of course they wanted to persuade themselves and others that they had succeeded. But not much turned on being—or being thought to be—the best. Now a great deal does. Success begets more resources in the form of higher government grants and larger donations and greater latitude to charge students higher fees; more resources in turn beget the possibility of innovation in curriculum, teaching and research, improve the odds of hiring and retaining interesting and able faculty members; and all of these beget the prospect of more success and more resources and so on ad infinitum. So law schools have to invest a great deal in success and the appearance of success. This they do especially by offering distinctive new pedagogies, courses or curricula, by establish-

39 Arturs, “Poor Canadian Legal Education ...” supra note 22.
ing special research centres or partnerships with foreign institutions or by preparing people for specific practice roles in, say, global law firms or at the local bar. And they try to enhance their own reputations with new buildings, with admissions brochures and fundraising propaganda, with celebratory occasions such as special anniversaries and even with public lectures. Ideally, these innovations and image-building exercises will have intrinsic merit, will succeed in their own terms and will produce the desired result of more resources and the blessings that flow therefrom. But we all know that some may be bogus, driven by a desire to placate governments or attract donors, rather than by academic values.

To understand which tendency is likely to prevail over the long term, we have to consider the new dynamic of governance at work in Canadian law faculties, a dynamic which clearly emanates from the new competitive market-place for legal education. Now that students pay a significantly higher part of the cost of their education, they are becoming empowered “consumers” with enhanced power to “vote with their feet,” to send market signals to law school administrators and faculty councils about what profile to maintain in the competition for students, what kind of curriculum and support services to provide, what kind of faculty to hire in order to ensure student satisfaction and alumni support. And by coincidence, as if in anticipation of the new rule-of-law rhetoric of global capitalism, students (and faculty members, for that matter) have also begun to see themselves as individual bearers of rights, rather than as members of a scholarly community or collegium. In all these ways, legal education is not only being reshaped by neo-liberal forces pressing on it from the outside; it is being re-programmed by a neo-liberal dynamic of governance which has been set in motion from within.

VIII. CONCLUSION: REMINISCING ABOUT THE FUTURE OF CANADIAN LEGAL EDUCATION

If the social and political functions of law change, if the substantive content of law changes, if the models of lawyering used to instruct and inspire students change, if the lives of students and professors change, if the values and processes of institutional decision-making change, so too will the discourse and deep structures of legal pedagogy and scholarship—the hypotheticals used in class, the problems and essays assigned in exams, the ideological and intellectual content of informal common room discussions, and the political tone and subject matter of academic books and articles. That globalization and neo-liberalism are transforming Canadian legal education comes as no surprise. After all, we are in, of, about and for the state. But remember: we are also—in part—against the state and against the dominant models of law and lawyering which the state endorses at any given moment. Therein lies our strength and—possibly—our salvation. Canadian law schools have confronted power before, have challenged the state and its legal system before and its universities too; and they have often prevailed. In the 1930s Frank Scott, a McGill law teacher, helped found the League for Social Reconstruction and the CCF—precursors of
the NDP; in the 1940s Bora Laskin, a professor at Osgoode, spoke out for civil liberties and the rights of workers; in the 1950s Cecil Wright, Dean of Law at Toronto challenged the Law Society’s control of legal education and John Willis exposed the intellectual vacuity of judicial conceptualism and conservatism. In the 1960s a few dozen young law professors across the country made a revolution in legal research and pedagogy and ushered in new strategies for providing access to legal services; in the 1970s and 1980s a larger and more diverse body of activist law students and faculty members built on that revolution to establish a tradition of progressive advocacy and engaged scholarship; and in the 1990s a new generation of law professors, graduate students and independent scholars has moved us forward again by dazzling displays of doctrinal, critical and interdisciplinary scholarship, far exceeding previous generations—including their revolutionary forbears.

So: the energy, the intelligence, the social commitment, ultimately the optimism of Canadian law schools has often emerged during moments of creative tension between the legal system of “the state we’re in” and an alternative vision of a more just state and legal system. We are in one of those moments now, in this era of globalization and neo-liberalism. Law schools may not be able to change the world, to transform the law or even to save the soul of the profession. But perhaps, just possibly, they can change themselves.

What a moment. What a challenge.