

2017

## A Flex-Time JD in Canada: New Approaches to the Accessibility of Legal Education

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### Source Publication:

Canadian Bar Review 95:1

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# A FLEX TIME JD: NEW APPROACHES TO THE ACCESSIBILITY OF LEGAL EDUCATION

Darcel Bullen<sup>1</sup> and Lorne Sossin<sup>2</sup>

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*This article examines accessibility and inclusion in legal education. Responding to the Canadian Bar Association's call for accessible and innovative legal education in the Futures Report, this study explores the possibilities (and limits) of a Flex Time Juris Doctor ("JD") program and how such a program might foster further diverse and inclusive learning community for law students. The article situates the debate around more flexible forms of legal education in historical context, highlighting the role part-time legal studies has played in facilitating the entry of outsider groups into the legal profession. While there is not a mid-sized city in the US without part-time law school programs, intentionally designed to accommodate flexible legal education, Canada's law schools remain premised on full time JD studies. A Flex Time JD responds to a variety of the challenges now facing Canadian legal education, from financial accessibility at a time of significantly rising tuition and law student debt, to the integration of technology enhanced pedagogy. Drawing on the research gathered in Osgoode Hall Law School's Accessible JD Working Group over the last two years, including surveys of prospective law students, the article canvasses the potential features of a Flex Time legal education program, and barriers to its implementation. The authors conclude that if a Flex Time JD model has the capacity to meet the diversity, family status, ability and financial needs of present and future lawyers, then it has the potential to enhance both the accessibility and quality of legal education.*

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*Le présent article examine les problèmes d'accessibilité et d'inclusion dans le cadre de la formation en droit. En réponse à l'appel lancé par l'Association du Barreau canadien dans le rapport Avenirs en droit réclamant des programmes de formation juridique accessibles et innovateurs, cette étude analyse les avantages (ainsi que les limites) d'un programme Juris Doctor (JD) assorti d'un horaire souple (Flex Time Juris Doctor) et la manière dont un tel programme pourrait davantage favoriser la diversité et le caractère inclusif du milieu d'études. Les auteurs articulent le débat autour de modèles de formation*

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<sup>2</sup> Dean and Professor, Osgoode Hall Law School at York University. We are grateful to Nicole Salama and the members of the Osgoode Hall Law School Accessible JD Working Group, and those who attended and commented on the ideas in this paper at the Canadian Bar Association "Transforming Legal Education in Canada: A Workshop to Inspire Change" on March 4, 2016. We also benefited from suggestions and comments from David Sandomierski.

*juridique plus flexibles sous un angle historique et comparatif, en soulignant le rôle facilitateur des études en droit à temps partiel pour les groupes autrement exclus de la profession juridique. Aux États-Unis, toutes les villes de taille moyenne sont dotées d'une faculté de droit offrant des programmes à temps partiel dans le but d'accommoder un modèle d'études souples. À l'inverse, les facultés de droit canadiennes offrent uniquement des programmes JD à temps plein. Pourtant, un programme JD assorti d'un horaire souple saurait répondre à tout un éventail de défis auxquels sont actuellement confrontés les programmes d'études en droit au Canada, notamment l'accessibilité limitée des études sur le plan financier résultant de l'importante hausse des frais de scolarité et la dette étudiante qui l'accompagne, ainsi que l'intégration d'une pédagogie à fort contenu technologique. Pour faire l'examen des caractéristiques possibles d'un programme de formation juridique assorti d'un horaire souple et des obstacles quant à sa mise en œuvre, les auteurs s'appuient sur les travaux de recherche menés au cours des deux dernières années par le groupe de travail sur l'accessibilité des programmes JD (Accessible JD Working Group) de la Faculté de droit d'Osgoode Hall, notamment des sondages effectués auprès de futurs étudiants. Les auteurs tirent la conclusion suivante : si le modèle du programme JD assorti d'un horaire souple est en mesure de répondre, tant aujourd'hui que pour l'avenir, aux besoins des avocats d'aujourd'hui et de demain sur les plans de la diversité, de la situation familiale, des compétences et des finances, c'est qu'il est susceptible d'améliorer l'accessibilité et la qualité de la formation en droit.*

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## Introduction

The focus of this study is accessibility and inclusion in legal education. Bringing together conversations about expanding financial and structural access to legal education, we seek to broaden the institutional responses to the Canadian Bar Association's ("CBA") call for accessible and innovative legal education in the *Futures Report* by making the case for a Flex Time Juris Doctor ("JD") program.<sup>3</sup> This paper explores how more flexible models of JD programs can foster further diverse and inclusive learning community for law students.

The introduction of the study situates the discussion about access to legal education in a historical context by outlining the existing financial accessibility and inclusion models. In Canada, the range of flexible legal studies is generally limited to a part-time or extended-time program of study that is only available as a retroactive accommodation to students experiencing barriers to full-time study who may be mature, low-income, sole support caregivers, or from other underrepresented groups.<sup>4</sup> While there is not a mid-sized city in the US without part-time law school programs, intentionally designed flexible legal education remains non-existent in Canada with exception to graduate level legal education where professional, part-time LLM programs have been flourishing for over 20 years.

Without long-term solutions to the front-end burdens and barriers to accessing legal education (e.g. through lowering tuition), providing greater flexibility in how students can obtain legal education provides an attainable and meaningful pathway to greater access and inclusion in Canadian law schools. We situate this examination in historical and comparative perspective in light of part-time legal education models in the US, which reflect some of the benefits of legal education accessibility, as well as pointing to a range of cautionary tales about programs whose students allege isolation from the main currents of student life and intellectual engagement at law school.

The first part of the paper moves from the existing models of legal education to consider one that has yet to be contemplated in Canada and attempts to answer the calls for financially accessible legal education—a Flex

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<sup>3</sup> CBA Futures Initiative Team, *Futures: Transforming the Delivery of Legal Services in Canada* (Ottawa: Canadian Bar Association, 2014), online: <[www.cba.org/CBA-Legal-Futures-Initiative/Reports/Futures-Transforming-the-Delivery-of-Legal-Service](http://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Futures-Transforming-the-Delivery-of-Legal-Service)> [CBA, *Futures Report*].

<sup>4</sup> Students must first meet the ordinary admission requirements and be offered admission to a full-time JD program in a Canadian law school before they can apply through each school's internal application process for an exception from full-time degree studies.

Time JD program. The introduction of a Flex Time JD program in Canada offers promise in the face of barriers recognized in the CBA *Futures Report*.<sup>5</sup>

Drawing on the research gathered in Osgoode Hall Law School's Accessible JD Working Group over the last two years, including surveys of prospective law students, the second part of this paper examines the potential features of a Flex Time legal education program. We observe that if a flexible legal program can meet the diversity, family status, ability, and financial needs of present and future lawyers, then a Flex Time JD has the potential to enhance both the accessibility and quality of legal education.

## How Did We Get Here? A Static Model of Legal Education

The existing model of legal education in Canada provides an excellent learning experience for many students, but it is also a model based on exclusion and resistance to change. As Paul Maharg has written,

[I]t is becoming clearer to many of us involved in legal education that our current educational approach to legal education is, in the longer term, unsustainable. It is heavily front-loaded ... at a time when the law school student population is diversifying in age as well as experience and culture ... Many of our twenty-first century law schools still inhabit an industrial system of education inherited from a twentieth century mired in nineteenth-century structures—a system that is entrenched by the massification of higher education.<sup>6</sup>

Reimagining the landscape of legal education requires consideration of the historical evolution of training for lawyers in North America. The path to becoming a lawyer was once determined by social location including factors of race, gender and religion where “[s]ome of the established university-affiliated law schools excluded minorities (religious and ethnic/racial), women, and immigrants and their children, openly questioning the character of these groups and their competence to practice law effectively and ethically.”<sup>7</sup> In the nineteenth and twentieth century, the legal education available to racially and ethnically diverse communities, women and immigrants in the US were primarily part-time programs at schools like University of Notre Dame, Georgetown University and the historically Black college, Howard University, discussed below.<sup>8</sup>

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<sup>5</sup> CBA, *Futures Report*, *supra* note 3.

<sup>6</sup> Paul Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-first Century* (Abingdon, UK: Routledge, 2016) at 4–5.

<sup>7</sup> Kermit L Hall et al, eds, *The Oxford Companion to American Law* (New York: Oxford University Press, 2002) at 241.

<sup>8</sup> Hall notes that part-time programs allowed students to work full-time day jobs to finance their legal studies, and incidentally allowed the schools to draw their faculty

Much like the US, racial discrimination in Canadian legal education blocked certain groups from becoming lawyers. Legislation in Ontario and Nova Scotia facilitated racial segregation until the mid-1960s. Segregated schools in Ontario for Black children continued until 1891 in Chatham, 1893 in Sandwich, 1907 in Harrow, 1917 in Amherstburg, and 1965 in North Colchester and Essex counties. Further, in Halifax County, Black children were prevented from attending the only public school up until the 1940s. Until 1951, the *Indian Act* required Aboriginal peoples to give up their status if they pursued post-secondary education.<sup>9</sup>

Racial and ethnic barriers were ingrained beyond post-secondary education in Canada, as the self-regulating legal profession also engaged in exclusionary policies that prohibited “Chinese, Japanese, South Asian and Aboriginal peoples ... from becoming members of the Law Society of British Columbia until 1947, and 1948 for people of Japanese descent.”<sup>10</sup> On November 15, 1886, the Law Society of Upper Canada allowed Delos Rogest Davis to be called to the Ontario Bar making him among the first Black lawyers in Canada to be lawfully recognized.<sup>11</sup> As the first Black, East Asian, Indigenous, Jewish and South Asian students sought entry to Canadian law schools, universities and the legal profession reacted by establishing higher barriers of entry and linking university-based legal education with moral suitability for the practice of law.<sup>12</sup>

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members from the rank of practicing lawyers and sitting judges (rather than having to hire full-time academics to teach law). *Ibid.*

<sup>9</sup> *Indian Act*, RSC 1985, c 1-5. See also Charles C Smith, “[Tuition Fee Increases and the History of Racial Exclusion in Canadian Legal Education](#)” (December 2004), *Ontario Human Rights Commission*, online: <[www.ohrc.on.ca/en/race-policy-dialogue-papers/tuition-fee-increases-and-history-racial-exclusion-canadian-legal-education](http://www.ohrc.on.ca/en/race-policy-dialogue-papers/tuition-fee-increases-and-history-racial-exclusion-canadian-legal-education)>.

<sup>10</sup> *Ibid.* For a discussion of these and other exclusionary policies in the regulation of the Canadian legal profession, see W Wesley Pue, “Common Law Legal Education in Canada’s Age of Light, Soap and Water” (1995) 23 *Man LJ* 654 [Pue]; Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1990–1950* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1999); James W St G Walker, “Race,” *Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Canada: Osgoode Society for Canadian Legal History and Wilfrid Laurier University Press, 1997); Barrington Walker, *Race on Trial: Black Defendants in Ontario’s Criminal Courts, 1858–1958* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2010).

<sup>11</sup> Mary Stokes, “Three ‘First’ Black Lawyers in Canada: Robert Sutherland, Abraham Walker, Delos Davis,” [The Osgoode Society for Canadian Legal History](#), online: <[www.osgoodesociety.ca/encyclopedia/three-first-black-lawyers-in-canada-robert-sutherland-abraham-walker-delos-davis](http://www.osgoodesociety.ca/encyclopedia/three-first-black-lawyers-in-canada-robert-sutherland-abraham-walker-delos-davis)>; Moya Teklu & Roger Love, “[Written Submissions of the African Canadian Legal Clinic to the Law Society of Upper Canada Articling Task Force](#),” *African Canadian Legal Clinic* (March 2012) at 3–4; “First Black Lawyer in Canada,” *Walkerville Times Magazine*, online: <[walkervilletimes.com/black-lawyer.htm](http://walkervilletimes.com/black-lawyer.htm)>.

<sup>12</sup> See Pue, *supra* note 10 at 685–86.

Despite the recent climate of most Canadian law school admission criteria emphasizing the importance of enhancing diversity and inclusion, barriers remain, with significant implications for the legal system and society at large. As a thoughtful study conducted by a group at the University of Windsor, Faculty of Law observed,

By necessity, the nature, quality, and effectiveness of the legal system is 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 social groups in Canada. Therefore, minority perspectives concerning our societal choices may have had only limited influence.<sup>13</sup>

While Canadian legal education has shed many of the explicit trappings of exclusion steeped in racism and religious intolerance, the barriers of entry to socioeconomically disadvantaged students remain salient. The inextricable connection between socioeconomic status and underrepresented communities in the legal profession was explored in the *Study of Accessibility to Ontario Law Schools* submitted to the deans of Ontario law schools in 2004.<sup>14</sup> The report revealed that Black students and students of South Asian and Southeast Asian background were more likely than non-minority students to anticipate having debt after law school, and were less likely to anticipate having no debt at graduation.<sup>15</sup> Further, mature students and those students with dependents tended to project or have had more debt

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<sup>13</sup> Dolores J Blonde et al, "The Impact of Law School Admission Criteria: Evaluating the Broad-Based Admission Policy at the University of Windsor Faculty of Law" (1998) 61:2 Sask L Rev 529 at 530–31.

<sup>14</sup> Alan JC King, Wendy K Warren & Sharon R Miklas, *Study of Accessibility to Ontario Law Schools: Report Submitted to Deans of Law at Osgoode Hall, York University, University of Ottawa, Queen's University, University of Western Ontario, University of Windsor* (Toronto: Social Program Evaluation Group, Queen's University, 2004), online: <<http://educ.queensu.ca/sites/webpublish.queensu.ca/educwww/files/files/Research/SPEG/SPEG%20Study%20of%20Accessibility%20to%20Ontario%20Law%20Schools.pdf>> [King, Warren & Miklas].

<sup>15</sup> *Ibid* at 138.

at graduation from law school than did younger students and students and graduates without dependents.<sup>16</sup>

The 2004 *Study of Accessibility to Ontario Law Schools* further identified that the “household income of law school students [was found] to be much higher than that observed for” families generally in Canada with almost zero law students having grown up in “homes in the lowest family income group.”<sup>17</sup> A study of postal code data at the University of Toronto, Faculty of Law demonstrates that even when law school tuition was significantly lower, access remained disproportionately weighted toward students from higher-income families.<sup>18</sup> Gesturing to a broader correlation between socioeconomic status and educational attainment in Canada, the data gathered in the 2004 report reminds us that children from low-income families in Canada have significantly lower post-secondary participation rates than those from high-income families.<sup>19</sup>

When Ontario government grants to universities dropped by more than 20 percent in the 1990s, followed, in 1998, by deregulated tuition fees for defined professional programs like law,<sup>20</sup> faculties met the funding crisis by doubling tuition in most cases.<sup>21</sup> Today, most government initiatives are aimed at undergraduate, as opposed to professional, post-secondary opportunities.<sup>22</sup> Complicating existing patterns of access, student loan borrowing systems at federal and provincial levels are not harmonized, while amendments to the *Bankruptcy and Insolvency Act* make student loans non-dischargeable for a period of seven years after the completion

<sup>16</sup> *Ibid* at 127.

<sup>17</sup> *Ibid* at 89.

<sup>18</sup> Matt Howe, “[Faculty Affairs: Dean Iacobucci Discloses Data in Response to Student Requests](#),” *Ultra Vires* (27 January 2016), online: <ultravires.ca>.

<sup>19</sup> Yvan Guillemette, “The Case for Income-Contingent Repayment of Student Loans” (May 2006) C.D. Howe Institute, Commentary, The Education Papers No 233 at 9 [Guillemette]; Charles C Smith, “Deregulation and Accessibility for Law Students at the University of Toronto” in Denise Doherty-Delorme & Erika Shaker, eds, *Missing Pieces V: An Alternative Guide to Canadian Post-Secondary Education* (Ottawa: Canadian Centre for Policy Alternatives, 2004) 75 at 75.

<sup>20</sup> Bruce Pardy, “Poor Students, Well-Paid Lawyers: Post-Graduation Income-Contingent Tuition Fees for Law Schools” (2004) 29:2 *Queen’s LJ* 848 at 850–51 [Pardy].

<sup>21</sup> “The increase in tuition from 1998 to 2002 for each Ontario school is as follows: Ottawa \$3,450 to \$7,375; Osgoode \$3,874 to \$8,000; Queen’s \$3,874 to \$7,792; Toronto \$5,237 to \$13,071; Western \$4,000 to \$8,500; Windsor \$3,500 to \$6,688.” Pardy, *supra* note 20 at 851, n 9.

<sup>22</sup> E.g. in 2016, Ontario announced “free” tuition “for families earning less than \$50,000.” This financial aid strategy, however, defines tuition as the average undergraduate tuition in the Province as \$6,160 based on arts and science degrees. See Kristin Rushowy, “[Free Tuition for College or University Promised to Students from Low-Income Families](#),” *Toronto Star* (25 February 2016), online: <www.thestar.com>.



of studies.<sup>23</sup> In 2005, Bob Rae's report to the Minister of Training, Colleges and Universities sounded warning bells about tuition costs and the limited availability of financial aid. Rae recommended that Ontario's provincial government address the financial barriers to post-secondary education by helping with loan repayment by "working with the federal government and other provinces to make it possible for students to pay for their education after graduation through a payment option that is geared to income and administered through payroll deductions."<sup>24</sup> The reduction in government funding for rising tuition costs was noted by Bruce Pardy, former Associate Dean of the Faculty of Law at Queen's University, as a significant and likely permanent departure from previous publically supported education models in Canada: "there is little chance that funding will be returned to previous levels ... even if significant reinvestment were to be made, it would take many years to return to a funding environment able to maintain quality programs in the absence of significant tuition fees."<sup>25</sup>

In light of confined governmental responses, models for reducing the financial barriers to legal education have primarily focused on back-end debt relief such as income-contingent loans credited to economist Milton Friedman in 1945.<sup>26</sup> Less common solutions to the economic disincentives for students from lower-income backgrounds to attend law school, like Pardy's model of post-graduation tuition fees contingent upon the income earned by the graduate, are fewer and far between.<sup>27</sup> Existing financial aid programs in Canadian law schools focus, to the greatest extent, on front-end assistance with entrance bursaries and scholarships and to some extent on in-program bursary assistance. The urgency of debt forgiveness, identified in the CBA *Futures Report* as the thirteenth recommendation, remains in focus today: "Debt forgiveness programs should be established for graduates who practise within under-serviced communities, with low-income individuals, or primarily in the public interest."<sup>28</sup>

A 2014 study by the Law Students' Society of Ontario ("LSSO"), *Just or Bust?*, analyzed survey responses from 941 Ontario law students to take

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<sup>23</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 178(1)(g), (h), 178(1.1).

<sup>24</sup> Ontario, The Honourable Bob Rae, Advisor to the Premier and the Minister of Training, Colleges and Universities, *Ontario: A Leader in Learning, Report & Recommendations* (Ontario: Queen's Printer for Ontario, 2005) at 33.

<sup>25</sup> Pardy, *supra* note 20 at 852.

<sup>26</sup> Milton Friedman & Simon Kuznets, *Income from Independent Professional Practice* (New York: National Bureau of Economic Research, 1954) at 90, n 20.

<sup>27</sup> Pardy notes that McGill University, Faculty of Law pursued front-end financial options as a "social contract" with the university in which the student would provide the institution with a portion of their earnings over a limited period of time. Pardy, *supra* note 20 at 858, n 26.

<sup>28</sup> CBA, *Futures Report*, *supra* note 3 at 56.

the temperature of the financial well-being of students, most of whom cobble together enough money to pay for law school from government and commercial loans.<sup>29</sup> The LSSO found that students averaged a debt load of \$71,444, and 64.4 percent of students relied on secured lines of credit with private banking institutions.<sup>30</sup> While the situation is particularly acute in Toronto, where the two highest-tuition law schools are located, these dynamics arise throughout Ontario and across Canada.<sup>31</sup>

Attention paid to the barriers imposed by tuition and debt related to law school has recently culminated in media stories that foreshadow an erosion of access to justice: “Today’s law grad: Six figures in debt and heading to Bay Street”,<sup>32</sup> “Let’s tie student debt to student risk”,<sup>33</sup> “Law student survey raises red flags over access to legal education”,<sup>34</sup> “Becoming A Lawyer: Is A Law Degree Still A Golden Ticket?”,<sup>35</sup> and “Tuition fees on the rise ... again”.<sup>36</sup> Law students at the University of Toronto, Faculty of Law recently protested at their own graduation and saw two thirds of the student body calling for the administration to work with students to address tuition rates by way of a petition.<sup>37</sup>

Over the last ten years, a growing focus on financial accessibility has contributed to the development of increased options to back-end assistance for law graduates. In 2011, the University of Manitoba, Law Society of Manitoba and the Manitoba Bar Association launched a Forgivable Loan

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<sup>29</sup> Law Students’ Society of Ontario, *Just or Bust?: Results of the 2014 Survey of Ontario Law Students’ Tuition, Debt, & Student Financial Aid Experiences* (2014), online: <lssso.ca/wp-content/uploads/2014/09/LSSO-Report-2014.pdf>.

<sup>30</sup> *Ibid* at 23.

<sup>31</sup> It is beyond the scope of this paper to provide detailed context about the province and territory-specific barriers to access to legal education across Canada.

<sup>32</sup> Sarah Rankin, “Today’s Law Grad: Six Figures in Debt and Heading to Bay Street”, *The Globe and Mail* (2 April 2013), online: <www.theglobeandmail.com>.

<sup>33</sup> Grant Bishop, “Let’s Tie Student Debt to Student Risk”, *The Globe and Mail* (5 March 2013), online: <www.theglobeandmail.com>.

<sup>34</sup> Mallory Hendry, “Law Student Survey Raises Red Flags Over Access to Legal Education”, *Canadian Lawyer Mag* (22 September 2014), online: <www.canadianlawyermag.com> [Hendry].

<sup>35</sup> Siobhan McClelland, “Becoming a Lawyer: Is a Law Degree Still a ‘Golden Ticket?’”, *The Huffington Post* (4 September 2012), online: <www.huffingtonpost.ca>.

<sup>36</sup> CBC News, “Tuition Fees on the Rise ... Again”, *CBC News* (16 June 2008), online: <www.cbc.ca>.

<sup>37</sup> Niamh Harraher, “Ron Daniels, Responsible for Six-Figure Student Debt, Receives Honorary Law Degree: U of T Law Grads Protest”, *Now Toronto* (10 June 2014), online: <nowtoronto.com>; Alyshah Hasham, “U of T Law Students Says Honouring Former Dean at Graduation Adds ‘Insult to Injury’”, *The Toronto Star* (14 March 2014), online: <www.thestar.com> [Hasham]; Heather Gardiner, “U of T Students Protest Planned Tuition Hikes”, *Canadian Lawyer Mag* (11 February 2013), online: <www.canadianlawyermag.com>.

Program that awards one student, who was raised in an underserved Manitoba community, an interest-free and forgivable loan once they are granted admission to the law school.<sup>38</sup> The Manitoba Law Society then marries the front-end financial support with back-end relief by forgiving 20 percent of the loan each year that the recipient practices in her or his community after being called to the bar.<sup>39</sup>

At Osgoode, more than \$3.5 million in financial assistance is distributed annually to students and graduation bursaries to help mitigate student loans. Osgoode's income-contingent loan pilot program, launched in 2015, will provide 22 students with bursary and loan funding that covers the entire cost of tuition for the three-year JD degree.<sup>40</sup>

The University of Toronto, Faculty of Law addresses having the highest tuition fees in Canada with financial aid and a Post-Graduation Debt Relief Program established in 1999.<sup>41</sup> The University of Toronto, Faculty of Law mitigates the cost of tuition by paying off principal and interest repayments on eligible academic student debt after graduation for students who earn less than \$75,000 annually and ultimately discharging the debt if the student is in the program for more than ten years.<sup>42</sup>

Whether expressed in front-end loans, in-program bursaries or back-end debt relief, university and government-based financial assistance, or private loans, leave out an important group of potential law students—those who simply cannot afford to give up work or care commitments to enter

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<sup>38</sup> “[Law Society removes application deadline for the Forgivable Loans Program](#),” *The Law Society of Manitoba*, online: <[www.lawsociety.mb.ca/news/law-society-extends-forgivable-loan-program](http://www.lawsociety.mb.ca/news/law-society-extends-forgivable-loan-program)> [Manitoba, “Forgivable Loans Program”]; see also Daniel Fish, “[Law Grads Need Debt Forgiveness Programs, says Canadian Bar Association](#),” *PrecedentJD Magazine* (14 August 2014), online: <[precedentjd.com](http://precedentjd.com)>.

<sup>39</sup> Manitoba, “Forgivable Loans Program,” *supra* note 38.

<sup>40</sup> Recipients must agree to repay their loan after graduation over a ten-year period once they are employed and earning more than \$80,000. If their income in any of those years is below that amount, the loan repayment may be forgiven in whole or in part. Katrina Clarke, “[Too Poor to Go to Law School? York U Now Offers Income-Contingent Loans](#),” *The Toronto Star* (18 September 2014), online: <[www.thestar.com](http://www.thestar.com)>; Alex Usher, “[Osgoode's Income-Contingent Experiment](#)” (16 October 2014), *Higher Education Strategy Associates*, online: <[higherstrategy.com/osgoodes-income-contingent-experiment](http://higherstrategy.com/osgoodes-income-contingent-experiment)>; Hendry, *supra* note 34.

<sup>41</sup> “[Post-Graduation Debt Relief Program](#),” *University of Toronto Faculty of Law*, online: <[www.law.utoronto.ca/academic-programs/jd-program/financial-aid-and-fees/back-end-debt-relief-program](http://www.law.utoronto.ca/academic-programs/jd-program/financial-aid-and-fees/back-end-debt-relief-program)>; “[2014 Post-Graduation Debt Relief Program Policy Booklet](#),” *University of Toronto Faculty of Law*, online: <[www.law.utoronto.ca/utfl\\_file/count/media/Post-Graduation%20Debt%20Relief%20Booklet%20-%202014-1.pdf](http://www.law.utoronto.ca/utfl_file/count/media/Post-Graduation%20Debt%20Relief%20Booklet%20-%202014-1.pdf)>.

<sup>42</sup> Hasham, *supra* note 37.

full-time study. It is this group who we suggest has been shut out of access to legal education in Canada.

Importantly, the calls for action on accessibility has focused on who pays for legal education (and when), but not how legal education itself is structured or how students earn their degree. We believe this is an oversight that should be addressed. Access to legal education should not assume that legal education is static—requiring that an approved JD program must necessarily take place over three years rather than four or five (or two).

The Flex Time JD options advocated for in this paper aim to create pathways to greater access for equity-seeking constituencies especially affected by high tuition. As the history of part-time legal studies (discussed below) demonstrates, there are important links between enhancing the diversity of the pool of law students with legal education that is flexible, institutionalized and proactively offered. Most importantly, however, Flex Time JD programs provide a potential response to the financial barriers that law students need to overcome in order to obtain a JD. Today, in many parts of Canada, high tuition has emerged as a crucial barrier for many seeking a legal education; and for those who do, high debt creates additional barriers to becoming a lawyer and to the areas of practice a recent law school graduate might choose.<sup>43</sup>

## The Emergence of Part-Time Law School

From the outset, part-time legal studies have been associated with access.<sup>44</sup> Georgetown Law School's decision to establish a part-time evening program in 1870, for example, was intended to provide a pathway for civil servants to obtain a law degree without giving up their job,<sup>45</sup> and followed an earlier program established with the same rationale by The George Washington University (then Columbian College) in 1865 (which also led to the first recorded part-time law student protest in 1872, over a diploma fee).<sup>46</sup> Outside the capital, the first night programs emerged in larger urban areas—in Metropolis Law School (later to become New York University) and the

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<sup>43</sup> See Brad Morse, "[Student Loan Debt: A Crisis for Law Students, Young Lawyers and Far Too Many Underserved Communities](#)", *Slaw* (14 October 2016), online: <[www.slaw.ca](http://www.slaw.ca)>.

<sup>44</sup> For a description of the emergence of part-time evening law schools, see Dorothy E Finnegan, "Raising and Leveling the Bar: Standards, Access, and the YMCA Evening Law Schools, 1890–1940" (2005) 55:1/2 *J Leg Educ* 208 at 213–14 [Finnegan].

<sup>45</sup> "[Part-Time Program](#)," *Georgetown Law*, online: <[www.law.georgetown.edu/academics/academic-programs/jd-program/part-time-program/](http://www.law.georgetown.edu/academics/academic-programs/jd-program/part-time-program/)>.

<sup>46</sup> See "[A Select Chronology of George Washington University](#)", *George Washington University*, online: <[library.gwu.edu/scrc/university-archives/gw-history/a-select-chronology-of-george-washington-university](http://library.gwu.edu/scrc/university-archives/gw-history/a-select-chronology-of-george-washington-university)>.

Chicago College of Law (later Chicago-Kent College of Law).<sup>47</sup> Not all part-time programs were in large cities. The Iowa Law School, for example, launched an independent evening law school granting a bachelor of law degree in 1866 (and later affiliated with the University of Iowa). Howard University launched an evening law school in 1868 for African American men and women. By the 1880s, according to Joseph T. Tinnelly, evening law programs had sprung up from coast to coast—making appearances in Portland, Minneapolis, and Baltimore.<sup>48</sup>

This was a time of great expansion for legal education generally in the US. In the 1890s, there were approximately 60 law schools in the US, while by 1910, the number of such schools had doubled to 124.<sup>49</sup> The number of part-time law programs over this same period quadrupled.<sup>50</sup> While 403 students were enrolled in night school programs in 1889, this number exceeded 5500 by 1915.<sup>51</sup>

According to Robert Stevens, the leading historian of US legal education, there were 1,200 law students in 21 law schools in 1870, and in 1890, 4,500 students in 61 law schools, and then the figure mushroomed to 140 law schools with over 21,000 students by 1916. In his words, “legal education had become urbanized.”<sup>52</sup>

In a study of “the rise and fall of part-time legal education in Wisconsin”, Michael Mazza describes the forces that historically shaped such programs in the US.<sup>53</sup> The first part-time program in Milwaukee opened in 1892, not as a profit-making enterprise but as a voluntary initiative by lawyers and judges (where the proverbial hat was passed to come up with a stipend for instructors).<sup>54</sup> At that time, a high school diploma was not yet a requirement to pass the Bar (that came in 1903); rather, candidates had to be 21 years

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<sup>47</sup> Alfred Zantzinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States with Some Account of Conditions in England and Canada*, The Carnegie Foundation for the Advancement of Teaching, Bulletin No 15 (New York City: D.B. Updike, 1921) at 397 [Reed].

<sup>48</sup> Joseph T Tinnelly, *Part-Time Legal Education: A Study of the Problems of Evening Law Schools* (Brooklyn: Foundation Press 1957) at 5.

<sup>49</sup> Reed, *supra* note 47 at 442.

<sup>50</sup> *Ibid* at 398.

<sup>51</sup> *Ibid*.

<sup>52</sup> Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983) at 76.

<sup>53</sup> Michael J Mazza, “The Rise and Fall of Part-Time Legal Education in Wisconsin” (1998) 81:4 *Marquette L Rev* 1049.

<sup>54</sup> *Ibid* at 1054.

old, answer questions of a judge in open court, and be of “good moral character.”<sup>55</sup>

Alfred Reed, one of the first scholars to explore the evolution of legal education, characterized night school as an option designed for those unable to access other options to qualify as a lawyer. He stated in an article published in 1931 that “the mission of an evening or part-time law school is to enable young men and women, who cannot afford to attend a better school, to prepare themselves for legal practice.”<sup>56</sup>

Almost from the outset, and certainly by the turn of the century, accessibility and inclusion were key drivers of the rise of part-time legal education in the US. The YMCA alone founded ten law schools to serve new immigrant communities in urban settings during this initial period of rapid growth. As Sterling, Dinovitzer and Garth observe:

These law schools had different missions at the outset, and a number became part of larger universities soon after their creation. But access to law school was one of the goals shared by all the urban schools. The focus on providing access gained further momentum with the proliferation of Catholic and YMCA law schools designed with new immigrants specifically in mind. By the turn of the century, a number of Catholic colleges established evening law schools (most were operated by the Jesuit order) to provide legal education for those who were denied opportunities in the established schools.<sup>57</sup>

In his 1921 Carnegie Foundation study of legal education, Reed advocated for part-time legal education on this basis as well: “Humanitarian and political considerations unite in leading us to approve of efforts to widen the circle of those who are able to study law. ... It is particularly important that the opportunity to exercise an essentially governmental function should be open to the mass of our citizens.”<sup>58</sup>

By the 1920s, in some states, more than two-thirds of the law graduates were educated in part-time programs. From the outset, the rise of part-time legal education in the US reflected broader tensions around inclusion. As Tavares and Scalio explain,

Evening programs were designed largely to “abolish economic handicaps—intended to place the poor boy, so far as possible, on an equal footing with the rich.” Because

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<sup>55</sup> *Ibid* at 1055.

<sup>56</sup> See Finnegan, *supra* note 44 at 217.

<sup>57</sup> Joyce Sterling, Ronit Dinovitzer & Bryant G Garth, “The Changing Social Role of Urban Law Schools” (2006) University of Denver Sturm College of Law Working Paper Series 07-16 at 6.

<sup>58</sup> Reed, *supra* note 47 at 398.

the classes were held in the evening, students did not have to give up their jobs to obtain their education; however, the traditional elite class who originally comprised the legal profession was not happy with this development. "Not only did these night law schools threaten the status quo by educating non-traditional law students, but these schools educated students in such numbers that the very endeavor of professionalization—the licensing of small numbers of well-trained and select experts—seemed to be at risk." The face of the legal profession was changing and many sought to reverse this trend through tougher standards in both education and bar admission.<sup>59</sup>

While part-time legal education was flourishing (though not without controversy) in the US, Canadian legal education was in the midst of a different dilemma. Canadian law schools were divided between those based in universities (Dalhousie and McGill, for example) and those based in law societies (Osgoode and Manitoba, among others).<sup>60</sup> Under the law society-based systems of legal education, it was possible to combine part-time legal studies with part-time articles/apprenticeship.<sup>61</sup> Gradually, however, as the university-based law schools with full-time LLB programs became the norm throughout the country by the 1960s, part-time LLB options waned.<sup>62</sup>

Proprietary law programs (such as the YMCA law schools) were actively opposed in Canada, precisely because they were aimed at enhancing inclusion. As Wesley Pue observed in relation to the Manitoba experience, proprietary programs were opposed because "[j]udging by U.S.A experience ... [they] 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."<sup>63</sup> Ironically, until legal education moved to the University of Manitoba in the

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<sup>59</sup> Bonny L Tavares & Rebecca Lee Scalio, "Teaching After Dark: Part-Time Evening Students and the First-Year Legal Research & Writing Classroom" (2011) 17 *Leg Writing J* 1 at 8 [Tavares & Scalio].

<sup>60</sup> See C Ian Kyer & Jerome E Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923-1957* (Toronto: For Osgoode Society by University of Toronto Press, 1987) at 35–36.

<sup>61</sup> *Ibid.*

<sup>62</sup> See Roy J Matas & Deborah J McCawley, eds, *Legal Education in Canada: Reports and Background Papers of a National conference on Legal Education held in Winnipeg, Manitoba, October 23-26, 1985* (Montreal: Federation of Law Societies Canada, 1987).

<sup>63</sup> Pue, *supra* note 10 at 669. See also Brian D Bucknall, Thomas CH Baldwin & J David Lakin, "Pedants, Practitioners and Prophets: Legal Education at Osgoode Hall to 1957" (1968) 6:2 *Osgoode Hall LJ* 137; Alfred Watts, *History of the Legal Profession in British Columbia, 1869-1984* (Vancouver: Law Society of British Columbia, 1984); John Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979).

1920s, classes were first held in Winnipeg's YMCA building on a part-time basis!<sup>64</sup>

Part-time law programs continue to play a significant role in American legal education. The American Bar Association data discloses that some 13,686 students (12 percent of the total 110,951 JD students in the US) were enrolled part-time in the Fall of 2016.<sup>65</sup> The US News Best Law Schools ranking of part-time law programs include 79 accredited law schools offering part-time JD degrees and are based on “reputation among deans and faculty at peer law schools; the breadth of each school’s part-time program; and the LSAT scores and undergraduate GPAs of students entering in fall 2016.”<sup>66</sup>

Interestingly, part-time programs are on the rise in the US in part as a response to the precipitous drop in American law school enrollment (which in turn has been fueled by high tuition, high debt and a shrinking employment market for lawyers—particularly following the major recession in 2007 and 2008). The City University of New York (“CUNY”) School of Law, for example, opened a part-time JD program in 2015 expressly to address drops in enrollment to its full-time program, particularly since 2011.<sup>67</sup> CUNY retained an outside market research firm to determine if there was unmet demand for part-time legal studies in New York and found a substantial level of interest. The CUNY part-time program is essentially the same as its full-time program, though courses take place in the evenings and students take ten to 12 credits in the fall and spring semesters and four to six credits during a summer semester, so it is expected their JD program will take four, rather than three, years to complete. CUNY’s commitment to provide commensurate student services, financial assistance and experiential opportunities to part-time law students reflects the general American approach to emphasizing that the part-time program is as close as possible to the full-time model but spread over more time.

What is lacking in the American debates on models of legal education appears to be any recognition that a part-time JD may require, or simply be better suited for, different formats or approaches to legal education itself. This lack of innovation may stem from the reputational risk American law schools fear in their part-time programs, so the “case” to be met in starting

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<sup>64</sup> Pue, *supra* note 10 at 671.

<sup>65</sup> See “[2016 JD/Non-JD Enrollment Data](#)” link at “Statistics,” *American Bar Association*, online: <[www.americanbar.org/groups/legal\\_education/resources/statistics.html](http://www.americanbar.org/groups/legal_education/resources/statistics.html)>.

<sup>66</sup> See Robert Morse, “[Methodology: 2018 Best Part-Time Law Programs Rankings](#)” (13 March 2017), *US News & World Report*, online: <[www.usnews.com/education/best-graduate-schools/articles/part-time-law-programs-methodology](http://www.usnews.com/education/best-graduate-schools/articles/part-time-law-programs-methodology)>.

<sup>67</sup> ABA Report on Proposed Part-Time Evening Program, CUNY, March 7, 2014 (on file with the authors).



such a stream is that it will be “just the same” as the full-time stream, rather than highlighting the need for more diverse approaches to pedagogy, evaluation and learning to respond to the needs of more diverse students.<sup>68</sup> Indeed, of the top 20 American law schools in the US News rankings, only Georgetown Law offers a part-time program.<sup>69</sup>

No Canadian law school has developed a JD program aimed expressly at those unable to engage in full-time legal studies. We suggest one aspect of the resistance to such models has been the concern that somehow to do so would be to turn the clock back on the university-based model of legal education itself, and to a time when part-time studies were associated with practically oriented law society-governed training. There is no reason why changing the pace and method in which law students learn need affect the commitments of law schools to research, multi-disciplinarity, clinical and experiential learning or other defining elements of Canadian legal education. Indeed, as noted above, nearly all Canadian law schools already allow those admitted to study part-time as a discretionary accommodation.<sup>70</sup> In other words, part of the journey we are advocating amounts to reimagining an exceptional category (i.e. law students who can only complete their studies if able to meet other care or work responsibilities or who are otherwise limited in the time they can devote to legal studies) as the new norm.

In contrast to the absence of a Canadian investment in a JD program aimed expressly at those unable to engage in full-time legal studies, the trend toward flexibility in professional Master of Laws (LLM) programs has been growing. Osgoode’s Professional Development specialized LLMs have been offered primarily on a part-time basis since 1996 (and, ironically, have just recently launched its first full-time LLM programs to meet a growing demand, especially from internationally trained lawyers transitioning into the Canadian market). The University of Toronto, Faculty of Law’s Global Professional LLM is similarly designed for flex-time students; and similar general and specialized part-time LLM programs have sprung up around the country. These programs provide a rich source of learning about how to tailor pedagogy to different learning environments, from courses taught

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<sup>68</sup> For an exception to this lack of attention see Tavares & Scalio, *supra* note 59. The authors observe: “[A]s a result of the current economic downturn, we predict that enrollment in part-time programs will increase and more schools will become interested in offering part-time programs to meet the needs of students who must work to afford law school. The necessity for affordable, adaptable legal education requires us to embrace part-time evening J.D. programs. Therefore, it is up to law professors and law school administrators to ensure that part-time J.D. programs adapt, improve, and respond to the needs of our students” at 2.

<sup>69</sup> See “[Best Law Schools 2018](#)”, *U.S. News & World Report*, online: <[www.usnews.com/best-graduate-schools/top-law-schools/law-rankings](http://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings)> (Georgetown is tied for 15th).

<sup>70</sup> See e.g. Connie Crosby, “[Should There Be Parttime Law School in Canada?](#)”, *Slaw* (16 January 2012), online: <[www.slaw.ca](http://www.slaw.ca)>.

one evening a week, to intense courses taught over weekends and courses blending in person and online learning.

Below, we argue the time is right for a Flex Time model of legal education in Canada—not because such a model rolls back high tuition, but rather it enables students to overcome barriers of entry to law school for a more diverse student body. In short, we contend that one way to support the increasing diversity of students is to enable them to obtain legal education in more diverse ways.

### **1. Why the Time is Right for a More Dynamic Model of Legal Education**

The first part of this analysis elaborates on why we believe the time is right for a more dynamic model of legal education. By a more dynamic model of legal education, we mean a format for pursuing legal education that is designed to be adaptive and customized to the needs of students. The model seeks both to broaden accessibility to legal education for groups who now face barriers (both economic and social) and to enhance the quality of legal education for all students once admitted. The discussion around Flex Time JD options forms just one of the features of a more dynamic model.

Other aspects of a more dynamic model of legal education, beyond the scope of this study, engage issues of “universal design” (e.g. developing forms of law school evaluation that minimize the need for accommodations), counter-narratives to the norms of legal education (e.g. involving Indigenous approaches to legal knowledge, or TWAIL (Third World Approaches to International Law)), community based legal education and alternative pedagogies, among other innovations.

A key justification for a Flex Time JD model is the potential that such an option could address the financial and social barriers of obtaining a law degree by limiting or eliminating the need for students to assume the level of debt required in a full-time program and allowing students to pursue legal education while also performing care responsibilities. A Flex Time JD program responds in a new and different way to the chorus of concern about the increasing inaccessibility of legal education in Canada.

Presently, students who attend law school must largely forego three years of earnings from work or spend funds for three years to replace the time they are unavailable for care responsibilities—or both. A program of legal education able to meet the financial barriers many students face in allowing them to earn full-time work salaries, develop their careers and complete a legal education provides students with “insurance against adverse post-

graduation outcomes.”<sup>71</sup> Further, such programs help law schools ensure they do not lose out on students who “have incentive to reduce such risks by choosing less expensive programs, programs that lead to occupations with more certain outcomes, more general rather than very specialized training.”<sup>72</sup> Specifically, the Flex Time model aims to address financial and social accessibility for new generations of lawyers in at least three ways.

Firstly, the architecture of a flexible model of legal education may allow students to earn monies through employment while studying to mitigate student debt. While the Flex Time JD model anticipates offering solutions in specific circumstances that cannot be homogenized to all law students, the ability to maintain a secure job in a potentially law-adjacent field offers value in our current reality of temporary, part-time and contract-based work combined with an ever-evolving model of lawyering. Further, leveraging earning power to mitigate educational debt may encourage civic-minded career building by putting less pressure on law students to default to corporate careerism to pay off educational debt.

The substantive impact of law school debt was documented in the 2004 report to the deans of Ontario as, “having a significant adverse impact on important aspects of their academic and personal life, including articling and practising decisions, satisfaction with the law school experience, basic needs and family/personal relationships ... Approximately 30 percent of Year 2 students with debt (65.1 percent of Year 2 respondents) indicated that their debt had a substantial effect on their articling and practicing decisions.”<sup>73</sup> In 2003, the CBA identified a potential correlation between high debt load and job choice after observing “quite dramatic shifts” in students declining articling positions from small firms to accept large firm positions at that same time that tuition fees climbed dramatically.<sup>74</sup> The CBA went on to state, “it seems obvious that debt burdens make it impossible for students to choose legal aid as their path of choice.”<sup>75</sup> In consideration of how the sticker shock of law school may dissuade the legal field from accurately representing the diversity of Canada, the CBA explained that: “It is ... difficult to assess whether or not potential students will be willing to invest in an educational career at such a high cost if their career opportunities are, or even are merely perceived to be, dramatically limited as is the case for

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<sup>71</sup> Guillemette, *supra* note 19 at 1.

<sup>72</sup> *Ibid* at 8.

<sup>73</sup> King, Warren & Miklas, *supra* note 14. See also Pete Davis, “[The first thing we do is nudge the lawyers](#)” *Aeon* (26 January 2016), online: <[aeon.co/ideas/law-schools-should-nudge-their-students-into-civic-minded-jobs](http://aeon.co/ideas/law-schools-should-nudge-their-students-into-civic-minded-jobs)>.

<sup>74</sup> Canadian Bar Association, *Response to the Provost Study of Accessibility and Career Choice in the University of Toronto Faculty of Law* (Ottawa: The Canadian Bar Association, 2003) at 14.

<sup>75</sup> *Ibid* at 15.

women, Aboriginal peoples, persons with disabilities and individuals from subordinate racialized groups.”<sup>76</sup>

Second, the Flex Time JD model allows students who do not qualify for a commercial loan and/or government loan to supplement the shortfall in coverage for full-time legal studies with work. University of Ottawa, Faculty of Law graduate Eric Girard succinctly reveals the structural classism embedded in the price tag of a legal degree in “What I learned at law school: The poor need not apply.” Girard was on the verge of dropping out of law school because he could not secure enough money by way of private credit or school relief to pay his law school tuition: “I was dropping out because I couldn’t afford to continue. Tuition for the year was \$15,000 and the government’s cap on student loans for me was \$12,000. I was denied a line of credit by five commercial banks because I had a low credit score and no one to co-sign. I had no one to co-sign because my mother made \$19,000 last year.”<sup>77</sup>

Third, the Flex Time JD model also addresses the front-end barriers to accessing legal education for students with family, health or community-related care responsibilities that require their divided participation. For example, attending law school at the cost of replacing care responsibilities is an important human rights issue in a country without a national child care system.

All three areas of anticipated solutions offered by a Flex Time JD model rely on a line of inquiry about populations excluded from existing legal education models in Canada. This gap, in turn, raises the challenge of how to track and understand the needs of potential law students who are not now applying to law schools.

The accessibility goals to which we suggest the Flex Time model aspires are based on several assumptions, which while existing to hold for some, may not hold for all. First, this argument assumes law students seeking Flex Time models have secure employment and sufficient salaries to limit the debt necessary to obtain a legal education. At a time of greater precarious employment and more part-time work, this assumption may overestimate the ability of low-income or financially vulnerable students to support high tuition without high debt. Additionally, this premise assumes that the cost of Flex Time JD options would not be higher than full-time JD programs. Third, the perceived financial benefits of a Flex Time model assume that the JD attained would not be significantly different, and so the earning

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<sup>76</sup> *Ibid* at 8.

<sup>77</sup> Eric C Girard, “[What I Learned at Law School: The Poor Need Not Apply](http://www.theglobeandmail.com)”, *The Globe and Mail* (17 November 2013), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.

opportunities with each would be roughly similar. Another limitation of the proposed Flex Time JD program here is that it could not purport to ‘level the playing field’ of socioeconomic status for students as it would not portion fees for law school to economic need. In light of the history of part-time legal education in the US, discussed further below, these assumptions cannot be accepted without critical analysis. That said, we remain convinced there is a sound basis for the claim that Flex Time JD programs are more likely to lead to accessible and more inclusive law school learning communities.

To the extent that some data relevant to this examination have been obtained, assumptions referred to above are substantiated—at least in part. As part of the dialogue on Flex Time legal education at Osgoode, the Accessible JD Working Group established an on-line survey that prospective students could choose to complete on the Law School Admissions’ webpage.<sup>78</sup> Over the Fall of 2015 and Winter of 2016, 437 people completed the survey.<sup>79</sup> Slightly more women than men took the survey and over 70 percent of survey-takers described themselves as employed full-time. Approximately 16 percent reported their household incomes as below \$39,999, while approximately 60 percent reported their household income

Answer Options	Response Percent	Response Count
Financial reasons	61.8%	270
Not able to take time off of work to attend law school	76.9%	336
Not able to attend full time due to family responsibilities	49.0%	214
Not able to attend full time due to physical, mental or learning disabilities	7.8%	34
My grades and/or LSAT score are not competitive	20.8%	91
I have not graduated from university yet	8.5%	37
Uncertainty in the legal job market	15.3%	67
Not sure if law school is right for me	12.6%	55
Not applicable	1.8%	8
Other (please specify)		27
<b>answered question</b>	<b>437</b>	
<b>skipped question</b>	<b>0</b>	

<sup>78</sup> The “Accessible JD Working Group” at Osgoode Hall Law School is described in Lorne Sossin, “[New Approaches to Financial Accessibility and Law School](#)” (14 September 2014), *Dean Sossin’s Blog*, online: <deansblog.osgoode.yorku.ca/2014/09/new-approaches-to-financial-accessibility-and-law-school>.

<sup>79</sup> Survey results on file with authors.

as below \$99,999. A little over 25 percent reported household incomes over \$100,000. The data suggests the importance of financial access for many, but also the constituency of relatively affluent people who share an interest in Flex Time programs.

When asked to describe the factors that might influence these prospective law students' decision to apply to law school, the following reasons were selected:

**What factors might influence your decision not to apply to law school (please choose all that are applicable)?**

Over 94 percent of those who chose to take the survey indicated they would apply for a Flex Time program if one existed. While it is impossible to know how many applied for law school anyway, the survey provides a window into the unmet demand for a more flexible legal education program.

While a key goal of Flex Time legal education is to broaden the pool of people able to obtain a legal education, changing how students obtain that education can also address access to justice more broadly.

Osgoode's consultation revealed a wide range of support for Flex Time legal education among existing students, including those in Osgoode's existing Extended Time Program (which allows students to pursue their JD credits on a half-time basis), though this consultation took place without a specific proposal of what Flex Time might entail. In other words, some students viewed Flex Time through the lens of enhanced digital legal education offerings (or simply remote access to existing classes), while others assumed it would mean a summer semester, more intensive courses, or independent/directed-reading courses. Some of these operational distinctions are canvassed below. It would appear that while Flex Time legal education is generally popular among students (both potential and actual students), the term means different things to different people.

The reactions from faculty and staff members have been more mixed. While many have been supportive of the notion of law school responding more effectively to student needs, others expressed worries about potential negative impacts of Flex Time programs on student engagement, on the student experience, and on the role of faculty in the delivery of law courses in new and diverse formats.

There is no guarantee that financially accessible legal education will address the issue of indebted students bypassing public interest jobs because of incurred debt. Further, it is true that income-contingent loans cannot

guarantee that lawyers working in underserved communities will make a positive social benefit. In Canada however, the need for legal services in “under-served communities, with low-income individuals, or primarily in the public interest” is widely acknowledged.<sup>80</sup> The August 2014 report from the CBA recommends increasing access to debt-forgiveness programs to encourage lawyers to work in underserved communities.<sup>81</sup>

While there is insufficient data on the impact of enhancing access to legal education, schools like New York University School of Law implemented free education for graduates working in low-paying public service jobs for up to ten years as an actionable step to address unmet legal demands.<sup>82</sup> The absence of Canadian-based evidence is primarily a reflection of the lack of implemented solutions to pricing legal education beyond the reach of many. Although the Flex Time JD model may not be a panacea for high student debt, the model announces a potential, albeit partial, solution to the urgent problems faced by the increasing prevalence of socioeconomic status as a criteria for entry to law school.

## 2. Developing a Flex Time JD Program

In this section, we outline the key reforms to the existing JD model by which it could accommodate the goals of the Flex Time JD outlined above—goals including the enhancement of financial accessibility and social inclusion in legal education on the one hand and enhancement of the quality of the law school experience on the other.<sup>83</sup>

For each potential reform, we consider the extent to which it advances these two goals, and the extent to which it could, if implemented, give rise to objections on equity, efficiency, efficacy or effectiveness grounds (though these are not intended to exhaust the grounds of concern that may be raised in the circumstances of particular programs).

Operationalizing a Flex Time JD could be accomplished in a variety of ways, including (but certainly not limited to) the mechanisms discussed below.

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<sup>80</sup> CBA, *Futures Report*, *supra* note 3 at 56.

<sup>81</sup> *Ibid.*

<sup>82</sup> Mark Hansen, “[NYU Experiment Offers Free Education: Law school’s goal is to test whether more students will take public service jobs](#)”, *ABA Journal* (February 1995) 20. See also “Public Interest Law Centre”, *New York University School of Law*, online: <[www.law.nyu.edu/publicinterestlawcenter](http://www.law.nyu.edu/publicinterestlawcenter)>.

<sup>83</sup> Debates about the goals of legal education more broadly are crucial, though beyond the scope of this paper. For more discussion, see the exploration of the contributions of Roderick A Macdonald in Janda, Jukier and Jutras, *The Unbounded Level of the Mind: Rod Macdonald’s Legal Imagination* (McGill-Queen’s University, 2015).

### **A) Remove or Alter the Minimum and Maximum Credit Thresholds**

This model for a Flex Time JD likely constitutes the most modest change. The JD program itself would remain unchanged, but the floor and ceiling for credits would be altered or removed entirely so students could take classes at their own pace and extend or accelerate their path toward a JD at their discretion. This reform allows for mass customization—every student can ensure the length of their JD reflects their own needs, preferences and priorities.

Key risks include equity and effectiveness. Traditional JD students may perceive Flex Time JD students who enroll in one or two courses a term at an advantage as they can focus their studies in a more concentrated way in those areas. By the same token, those extending or accelerating their time may feel at a disadvantage by not following what may continue to be perceived as a “normal” track. Law student recruitment for summer positions or articling, for example, are tied to perceived progress through a three-year, 90-credit JD program (or combined program with another degree over four years). With respect to the effectiveness of the legal education, there are few relevant studies on the impact of accelerating or decelerating the pace of the legal education or how best to provide for the service needs and academic success of a law student population pursuing legal education at different speeds across different years of the program. Additionally, experiential, oral advocacy, research and writing and public interest graduation requirements all must be modified to fit these different circumstances. The administrative impact may make a complete removal of maximums and minimums not feasible.

Extended or part-time programs provide modest additional flexibility while retaining the concept of minimum and maximum credit limits. At Osgoode and the University of Toronto, Faculty of Law, for example, the extended-time/half-time programs envision students taking approximately half a full-time load per term in the program. The University of Saskatchewan, College of Law’s part-time studies program illustrates the present status quo of existing flexibility:

Applicants are generally expected to study law on a full-time basis. However, part-time status may be granted on a discretionary basis in certain circumstances. Applications for part-time status are assessed on a case-by-case basis.

The part-time program is available to assist applicants who have family commitments, disabilities, health needs, occupational obligations or financial needs which prevent full-time study. It is also available to applicants who have not been



in an academic institution for a significant number of years. The program is not intended for those who want to test their interest in law or who would prefer a light course load. Part-time students are required to attend classes at regularly scheduled times, and therefore must be available to attend classes during the day time.

Applicants who wish to be admitted on a part-time basis must submit a written statement giving reasons why they are unable to pursue full-time studies. Those admitted as part-time students must complete the first year of the three-year Juris Doctor degree before they can change their status to full-time.<sup>84</sup>

If students can access existing course offerings at existing times at a different pace, one goal of the Flex Time JD is met, but others remain unfulfilled.

We suggest that this status quo is insufficient on its own to advance key aspects of the Flex Time JD. This approach does not address the inability of some students to take courses as currently scheduled—particularly in the first-year program where there is less flexibility and more required elements. Additionally, this approach assumes Flex Time legal education will attract students with the same learning needs and interests as full-time legal education, and this assumption may be false. That said, this model likely has the fewest costs and therefore represents, for many law schools, a sustainable and important first step down the road of a Flex Time model.

This kind of shift can also create important momentum by attracting more law students seeking greater flexibility. For example, if Flex Time legal education succeeds in attracting more diverse law students, more mature law students, and students with more work and/or care experience, it is reasonable to suggest that such students may seek more variety in the format and timing of their courses than the present cohort of full-time students.

Additionally, the idea that full-time legal education is the norm, and that part-time programs exist as an accommodation—a deviation from the norm—is itself, in our view, a deficiency of the model. A growing cohort of law students are seeking and expecting more flexibility, and once this shift starts, it may create the momentum for further injections of flexibility in the design of the JD program.

## **B) Digital and other Flex Delivery of JD Courses**

An additional model for a Flex Time JD is to offer courses at different times and in different formats that can be accessed more flexibly. The classic model of the US part-time law degree was referred to as “Night School”, as it

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<sup>84</sup> “[Applying to Law](http://law.usask.ca/students/becoming-a-law-student/applying-to-law.php#Parttimestudies)”, *University of Saskatchewan College of Law*, online: <law.usask.ca/students/becoming-a-law-student/applying-to-law.php#Parttimestudies>.

typically featured evening classes to accommodate the expectation that most, if not all, students were engaged in work or care responsibilities during the day. New variations on this theme have featured accessing courses through video-conference software (e.g. Skype) so that a student could attend a class remotely from home or other locations.

“Courseware” such as Blackboard and Moodle, in addition to course websites, listservs, cloud-based documents (e.g. Google docs), chat spaces and social media platforms (e.g. Facebook groups), further allow course materials, discussions and assignments all to be accessed from any location with an internet connection.

Digital delivery may also lend itself to be combined with problem solving and client simulation pedagogies. Australian National University, College of Law’s JD program, for example, combines a problem-solving curriculum with digital and distance-based access, and is designed to be taken over six years.<sup>85</sup> Ryerson University and the University of Ottawa have both piloted digital virtual firms as a model of legal education through the Law Society of Upper Canada’s Law Practice Program (LPP).<sup>86</sup>

While digital and distance formats allow maximum accessibility from multiple and shifting locations, and may create opportunities for virtual communities, they also miss much of the lived experience designed to take place in physical environments around the law school and university. Moreover, if such options are designated only for Flex Time law students, this distinction may give rise to stigma or a “second tier” impression of Flex Time students, just as night school legal education in the US is often referred to as less rigorous and of lower quality than day programs.

Where Flex Time students also have disproportionately high numbers of equity-seeking students, or students from segments of society underrepresented in the legal profession, the impact of this stigma or “second-tier” law school concern are exacerbated. A similar dynamic may arise if on-line law school courses are juxtaposed with in-person courses. For this reason, it may be important to introduce digital courses enrolled in by all students—full time and Flex Time—or hybrid models where on-line

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<sup>85</sup> “[ANU Juris Doctor \(Online\)](#)”, *Australian National University*, online: <law.anu.edu.au/sites/all/files/media/browser/flyer\_jd\_online\_f\_august\_2016.pdf>.

<sup>86</sup> See “[Law Practice Program](#)” (updated October 2016), *The Law Society of Upper Canada*, online: <[www.lsuc.on.ca/licensingprocess.aspx?id=2147497057](#)>. Integrating the LPP digital platforms into a JD program is a key feature of Ryerson’s Letter of Intent to establish a new law program, Chris Evans, “[Law School Letter of Intent and Whitepaper Now Available](#)” (20 October 2016), *Ryerson University*, online: <[www.ryerson.ca/ryersontoday/data/news/2016/10/20161020-law-school-letter-of-intent-and-whitepaper-now-available/>](#).

and in-person elements are designed with different learners (full time and Flex Time) in mind.

There are significant costs associated with the start-up of digital/simulation models of legal education but also savings that may flow over time. While digital legal education is unlikely to be less expensive than in-person legal education, it may be structured and funded on a revenue-neutral model over a sustainable time horizon, particularly as more widely adopted and mature digital platforms drive costs down. For example, the introduction of “clickers” was hailed as a major pedagogical technological advance in the late 1990s, allowing for instant polling at significant expense for the hardware and software involved.<sup>87</sup> Today, greater instant polling functionality is readily available and free of costs on a range of widely available apps for smartphones.

### C) Summer Term

A number of Canadian law schools have summer courses or allow students to study abroad in summer programs for credit. The Peter A Allard School of Law at the University of British Columbia, for example, offers two summer “terms” covering the mid-May to mid-June, and late June to late July periods, and include a range of core courses available to JD and LLM students.<sup>88</sup> Additionally, some programs offer summer courses to students from other law schools—for example, the University of Victoria, Faculty of Law has a “summer session” open to any JD or graduate student in “good standing” from any “recognized law school.”<sup>89</sup>

A summer term may help achieve the goals of the Flex Time JD in at least two ways. First, by offering a further span of time, students can spread the approximately 30 credits needed annually over three terms—requiring less intense fall and winter terms. Second, summer courses may lend themselves to greater experimentation along the lines of the alternate delivery models of the second model (e.g. through intensive delivery methods or remote access recognizing the different scheduling challenges and preferences of students not engaged in full-time study during that period).

Summer terms can be structured to spread existing course offerings over three terms and use classrooms and law school infrastructure that

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<sup>87</sup> See Catherine Easton, “[An Examination of Clicker Technology Use in Legal Education](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2009_3/easton/)” (2009) 3 J Inf L & Tech, online: <[www2.warwick.ac.uk/fac/soc/law/elj/jilt/2009\\_3/easton/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2009_3/easton/)>.

<sup>88</sup> See “[JD and LLMCL Summer Program](http://www.allard.ubc.ca/jd-and-llmcl-summer-program)”, Peter A. Allard School of Law, University of British Columbia, online: <[www.allard.ubc.ca/jd-and-llmcl-summer-program](http://www.allard.ubc.ca/jd-and-llmcl-summer-program)>.

<sup>89</sup> See “[Summer Session](http://www.uvic.ca/law/admissions/upperyearstudents/summersession/index.php)”, University of Victoria Faculty of Law, online: <[www.uvic.ca/law/admissions/upperyearstudents/summersession/index.php](http://www.uvic.ca/law/admissions/upperyearstudents/summersession/index.php)>.

otherwise often lie fallow in the summer. As a result, summer terms also have the benefit of modest, if any, additional costs to a legal education program. Students themselves may incur greater costs if summer programs overlap with summer job opportunities; but again, this can be addressed through the scheduling of summer courses or through permitting self-selection so only those with compatible work and care schedules seek out summer course offerings.

While a summer term cannot in and of itself achieve the Flex Time goals, it represents an important incremental step toward a JD program better able to respond to diverse students' interests and goals.

## **D) Flex Time Cohorts**

As we note above, many law schools already have extended-time or part-time status for students—often as a response to students who entered the full-time program but cannot complete their JD on a full-time basis. This model is distinct from a Flex Time cohort, where a program is designed and delivered specifically for a group of students expected to complete the program over a longer (or, shorter) period than three years. For upper year students, the logistics of such status turns primarily on the first model discussed above—lowering (or raising or removing) the minimum number of credits students must take in a term. First year programs, however, are more complicated, as many aspects of this program interrelate and so become more difficult to spread over two or more years or accelerate.

For example, hiving off a separate first-year section or group as “Flex Time” students requires choosing particular times or delivery models for the course content that increases administrative complexity (e.g. course calendar scheduling, academic success supports, experiential education programming, student services, career development and library resources, etc) and the risk of equity concerns, as students both in full-time and Flex Time cohorts may have concern about the benefits their counterparts in the other cohort enjoy. Separating cohorts can also give rise to stigma or the notion of a first and second tier of legal education experience noted above, which some of the US night schools have experienced from time to time. Finally, to some, a Flex Time cohort within at least the first-year program will appear less of a flexible or elastic model of legal education, but simply a differently rigid option, with specific times and modes where required courses must be taken. This is just as likely as the full-time model to work for some but not others in a diverse group of students. A Flex Time cohort may involve the greatest costs, given the administrative complexity of managing admissions and course requirements within a Flex Time cohort context, and the additional student services, library services, clinical education offerings,

and other customization of the law school experience to a Flex Time model (e.g. moots, pro bono or public interest placements, exchanges, student clubs and associations, etc).

That said, the notion of a cohort also has some distinct benefits. There are potential advantages of students in such a cohort relying on each other for solidarity and support and for a law school to offer specific services (e.g. academic success and wellness, library research, legal writing, career development, etc) tailored for Flex Time students. Additionally, the cohort model may create opportunities to explore specific kinds of pedagogy designed for these students and distinct from pedagogy employed with full-time students. Finally, a specific cohort model may allow a law school to seek specific funding sources to support Flex Time legal education, ranging from law foundations with access to justice and inclusion mandates, government programs and donors seeking new avenues to support low-income or financially vulnerable law students.

As we learned during discussions of Flex Time legal education at Osgoode, however, many who support the idea of a Flex Time cohort also want many of the benefits (e.g. a summer term, digital delivery of courses, etc) extended to all students. In other words, as much as stigma remains a concern, so does limiting the benefits of Flex Time legal education only to Flex Time law students.

The inherent tension between whether Flex Time legal education should be the *same* legal education delivered in different ways, or an opportunity for innovation in creating distinct forms of legal education, remains a constructive (and potentially disruptive) aspect of the dialogue around accessible legal education.<sup>90</sup> Given the cultural shift this entails, and the need to explore new funding models, a more incremental approach to Flex Time legal education may be advisable.

## **E) Regulation and Governance of Flex Time Legal Education**

Virtually all the reforms set out above would involve at least two layers of governance—first through the law school and university collegial governance for approval of changes to academic rules (assuming the model chosen is not already provided for in the rules) and through the Federation of Law Societies of Canada's approval process. The latter includes a "national

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<sup>90</sup> The Flex Time model described here does not necessarily require abandoning the model of legal education aimed at exposing students to what it means to 'think like lawyers.' See Elizabeth Mertz, *The Language of Law School: Learning to Think Like a Lawyer* (NY: Oxford University Press, 2007). The Flex Time model could be a catalyst, however, for re-imagining pedagogy in legal education.

requirement” of competencies but also sets out minimum standards for other aspects of an approved law school program in Canada, including the overall number of credits (presumptively 90 based on a model of three years of full-time study) and the “course of study consists primarily of in-person instruction.”<sup>91</sup>

At first glance, it would appear some approaches to Flex Time legal education would have very little impact on governance (e.g. where an existing course is taught at night) while others could have significant impact (e.g. where a summer semester is created or a digital course that no longer accords to the metrics for assessing course credit—such as “contact hours” in a classroom).

Beyond academic governance, Flex Time models may also have an impact on collective agreements (which stipulate working hours and requirements of consultation and/or agreement prior to changes in the delivery of courses affecting terms and conditions of staff or faculty work) or on law school budgets (some of which collect tuition by “term” rather than for each credit). It may be important to establish design constraints on the development of Flex Time JD models that satisfy other equity or policy considerations. For example, as part of Osgoode’s Accessible JD Working Group, we considered as a point of departure that the cost model of Flex Time and full-time JD programs be similar, so that neither group of law students is asked to “subsidize” the other, or may feel their law school experience has been deemed more or less deserving of law school resources. Additionally, we took the view that even though tuition may be paid over a longer period of time for some, the actual cost of a JD would be identical for students who started the program at the same time, whether on a full-time or Flex Time basis.

Our point here is simply that a shift to Flex Time legal education will likely not only involve operational planning and academic community support, but may also be a catalyst for revisiting other premises and frameworks for how law schools structure, staff and budget for their academic programs.

### 3. Conclusion

There are many reasons to explore different models of legal education and we are living through a particularly fluid and vibrant moment in the history of legal education—at least in North America. We have chosen to examine one aspect of this dynamic (the shift to Flex Time JD programs) through one lens (its capacity to enhance financial accessibility and inclusion). It is

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<sup>91</sup> See [Federation of Law Societies of Canada, “National Requirement”](https://www.flsc.ca/National-Requirement-ENG.pdf), online: <docs.flsc.ca/National-Requirement-ENG.pdf>.

not possible to guarantee that a measure such as increasing Flex Time JD programs would lead to greater financial accessibility, and indeed, a premise of our examination has been that the actual cost of a JD would be identical in full-time and Flex Time models. That said, the ability to combine work and study, and the ability to spread the cost of a JD over a longer period (or accelerate the time needed to complete a JD) together make possible new ways to finance the cost of legal education. Even without a guarantee of the kind of problems a Flex Time model may solve, the urgency of the financial and accessibility barriers it seeks to address demand that a perfect solution need not be the enemy of a good one.

While a Flex Time cohort remains the desired goal, in our view, it may be a goal best achieved incrementally—with more modest shifts to more flexible course requirements, a summer term, digital courses or some combination of these models as a precursor to a Flex Time JD. These incremental measures can allow law schools to assess the impact of particular measures, determine which response best meets the needs of students seeking greater flexibility, and build towards a Flex Time cohort with less stigma and more sustainable resources.

The CBA *Futures Report* highlights the need for increased flexibility in the models of legal education available to Canadian law students,<sup>92</sup> and the example cited is the possibility of an accelerated JD program, which might be completed in two years, or taking four years to allow for more integration of theory and practice. The *Futures Report* appears to assume the status quo of full-time legal education in Canada without considering its alternatives. While Flex Time initiatives such as a summer term or digital courses may well open the door to accelerated completion of a JD where that responds to full-time students' needs (and the aforementioned challenges of high tuition and high debt), it is also necessary for some students to take longer than the conventional three-year model, and to have available alternatives to full-time study. In our view, this is entirely aligned with recommendation #15 in the *Futures Report*, which states, "Legal education providers, including law schools, should be empowered to innovate so that students can have a choice in the way they receive legal education, whether through traditional models or through restructured, streamlined or specialized programs, or innovative delivery models."<sup>93</sup>

Innovation involves risks. It is not possible to guarantee, for example, that a Flex Time JD program will be treated the same as a full-time program in terms of stature and quality. Certainly, the US experience suggests at least some dangers that certain night school programs will be considered

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<sup>92</sup> CBA, *Futures Report*, *supra* note 3 at 57.

<sup>93</sup> *Ibid* at 58.

as inferior to full-time legal education. That said, no Canadian law school has yet promoted a program designed for students engaged in full-time work and/or care responsibilities and also designed to enhance quality and accessibility.

A Flex Time JD is not self-executing. It will take shared effort and shared commitment to achieve its benefits. The question is whether it is a model worth developing. We believe the potential for greater accessibility and inclusion in legal education far exceeds the risks. The recent reminder of the urgency of financially accessible legal education in the CBA *Futures Report* makes clear that the status quo of access to Canadian legal education is not tenable.