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## Improving Access to Legal Education for Native People in Canada: Dalhousie Law School's I.B.M. Program in Context

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Hugh MacAulay\*

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## I. *Introduction*

This paper is about access to legal education for Native peoples in Canada. It is important at the very outset of this undertaking to explain my interest in this issue and to describe the perspective from which I write.

At the beginning of the 1989-90 academic year I returned to Halifax to discover that Dalhousie had implemented a program to increase access for Blacks and Micmacs to legal education. Motivated by my support for this initiative, I applied to be a tutor in the program and was fortunate enough to be selected.

The objective of this paper is to put Dalhousie's Law Program for Indigenous Blacks and Micmacs (the I.B.M. Program), in context. While Dalhousie's program is in its infancy and conclusions can only be drawn with caution, it is hoped that an examination of different approaches to Native legal education, both those successful and those not, will help the I.B.M. program avoid many of the growing pains experienced elsewhere.

I will first discuss why access to legal education for Native peoples should be improved and what formidable barriers must be overcome in the process. Then, I will focus particular attention on what means various Canadian law schools, including Dalhousie's, have adopted to assist Native students and what problems and issues have arisen as a consequence. Two issues emerge as themes throughout this analysis; paternalism and flexibility. Any semblance of paternalism, it will be seen, may undermine even the most ambitious and well-intentioned of efforts to improve Native participation in legal education. Flexibility, conversely, seems to be an essential element in all successful approaches to increase access to Canadian law schools.

I must preface this paper with three important caveats. First, as is obvious, Dalhousie's I.B.M. program is designed for Black as well as Micmac students. Access to legal education for Blacks is not the subject

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of this paper, although some of my analysis may well be applicable. By concentrating on Native issues I am in no way attempting to diminish or ignore the problems facing prospective law students from the Black community.

Second, it is very important that in any discussion of programs and policies the efforts of the individual students involved not be overlooked. It is, after all, the students who attend classes, write exams and shoulder enormous pressure to succeed. Law school programs for Native peoples may create access, enhance skills and provide support, but without the dedication and perseverance of the Native students involved all programs would fail. The Native law students themselves deserve great credit for their own achievements.

Third and finally, I am White, with all the biases and ignorance that that may inevitably entail. Prior to my experience in the I.B.M. program, I could count the number of conversations I had had with Natives on one hand. Moreover, I will never know what it is like to suffer racial discrimination. Patricia Monture speaks of "getting very very tired of hearing White men speaking for me."<sup>1</sup> It is therefore with considerable care, and not without some trepidation, that I begin.

## II. *The Need and Obligation: Why Natives Should be Afforded Greater Access to Legal Education*

Programs to increase Native participation in Canadian law schools have been justified on a number of grounds. The reasons advanced in support of the programs generally fall into one of three categories, two of which are relatively utilitarian while the third is founded upon considerations of social justice.

First, increasing Native access to legal education is supported as a means to fulfill the need for Native representation in this country's legal system. Second, a heightened presence for Natives in Canadian law schools is seen as a way to add much-needed diversity to the student population and a new perspective to the experience of legal education. Finally, providing improved access to law schools for Native peoples is held to be a fundamental obligation given the history of racial discrimination against Natives in the legal system and elsewhere in this country.

Each of these justifications provides strong support for the I.B.M. program and others like it across Canada. In order to fully describe both

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1. P.A. Monture, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah" (1986), 2 Can. J. Women & L. 159, at p. 166.

the need and the obligation to increase access to legal education for Native peoples, I will outline each justification in turn.

### 1. *Greater Native Representation in the Canadian Legal System*

Although it is difficult to precisely determine how many Native people there are in Canada, it is safe to conclude that, as a group, they are grossly underrepresented in this country's legal profession. If representation in the profession was proportional to population, there should be at least 1400 Native lawyers in Canada.<sup>2</sup> There are currently less than 150.<sup>3</sup>

The situation in Nova Scotia is similarly dismal. There are approximately 12,000 Micmacs in this province and yet there is not a single Micmac lawyer practising here.<sup>4</sup>

Some may contend that becoming a lawyer is a quintessentially White aspiration and that to decry the underrepresentation of Natives in the legal profession is patronizing, in that White values and goals are being imposed on a people who might well have different priorities. Despite the fact that lawyers and law students may exaggerate their importance in society, it is difficult to deny that the legal system, for better or worse, is the focus of considerable power in Canada. Access to the legal profession, especially for those peoples traditionally deprived of power, may therefore be less a luxury than a necessity:

In a society in which government, economy, politics, education, rights, responsibilities and freedom are defined and qualified by law, only those with equal access to legal services have equal freedom, opportunity and protection.<sup>5</sup>

The close relationship between the legal profession and political power is particularly obvious in Canada where lawyers are decidedly overrepresented in the ranks of Members of Parliament, cabinet ministers and provincial premiers.<sup>6</sup> As well as access to power and prestige, however, careers in the legal profession often entail material rewards, something which should not be overlooked considering that many Natives continue to experience severe economic hardship in this country.

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2. R. Thompson, "The University of Saskatchewan Native Law Centre" (1988), 11 Dal. L.J. 712, at p. 717. The term "Native" is meant to include status and non-status Indians, Inuit and Metis people.

3. Information from University of Saskatchewan Native Law Centre pamphlet.

4. The Royal Commission on the Donald Marshall Junior Prosecution Report, at p. 154.

5. C.A. Pinderhughes, "Increasing Minority Group Students in Law Schools: The Rationale and the Critical Issues" (1970-71), 20 Buffalo L. Rev. 447, at p. 448.

6. D.J. Purich, "Affirmative Action in Canadian Law School: The Native Student in Law School" (1986-87), 51 Sask. L. Rev. 79, at p. 79.

In addition to these benefits which accrue to all members of the legal profession, it is important to recognize the specific and significant benefits that the participation of Natives will create. For example, encounters with the legal system of the dominant society can be assumed to be traumatic experiences for minorities and especially so for those for whom English is a second language, as is the case for many Natives. One of the conclusions of the Royal Commission on the Donald Marshall Junior Prosecution was that Natives feel poorly served by the legal profession "because many lawyers seem ill-equipped to deal with the special problems of minority clients."<sup>7</sup>

The relationship between counsel and client is a special one and it would seem only logical that trust and communication would be best fostered where Native lawyers are able to serve Native clients. It may be naive and inaccurate to expect Native clients to always choose to retain Native counsel. However, chronic underrepresentation in the legal profession has effectively denied that choice to many Natives, especially those in Nova Scotia.

Increasing the representation of Natives in the Canadian legal system may also be beneficial to the system itself. Hamlar, for example, suggests that a greater presence for minorities in a legal system engenders greater respect for both the system and the place of law in society.<sup>8</sup> It is not surprising, therefore, that where Natives have occupied the positions of judges and magistrates, the level of acceptance of verdicts within the Native community has been enhanced.<sup>9</sup>

It is, of course, paternalistic to assume that Native lawyers will assume certain roles and advance certain causes. Certainly, no such assumptions are made on behalf of non-Native law graduates. Sam Deloria, former director of the American Indian Law Centre at the University of New Mexico comments on this double standard:

To my knowledge, the average Canadian law school graduate is not pressured to go into any particular form of legal work or even to go into legal work at all.<sup>10</sup>

Nonetheless, the historic underrepresentation of Natives in the legal profession and the resulting need for legal expertise in native communities might be difficult for Native law students to ignore. A

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7. *Supra*, footnote 4, at p. 155.

8. P.Y.T. Hamlar, "Minority Tokenism in American Law Schools" (1983), 26 *How. L.J.* 443, at p. 459.

9. K. Telidetzki, "Educating Natives in the Legal Profession" (1988), 15 *Canadian Journal of Native Education* 49, at p. 50.

10. S. Deloria, "Legal Education and Native People" (1973-74), 38 *Sask. L. R.* 23, at p. 24.

Department of Justice study found, in fact, this need was so great that “demands were made on the students as soon as they entered law school”.<sup>11</sup>

Because Natives are so greatly overrepresented in the Canadian prison population,<sup>12</sup> it might be assumed that legal expertise is especially required in the field of criminal law. Land claims expertise might also be assumed to be much needed. These assumptions ignore the complexity of legal problems which face many Native communities. Legal expertise may be required, for example, in Native political organizations, in the economic development of reserve lands, in deciphering tax provisions as they relate to Natives, in lobbying for legislative reform and in negotiations with governments.<sup>13</sup> As Deloria points out, many Native communities “would give their right arm for an Indian lawyer who knew how to put a financial package together, or to evaluate one that was being offered to them.”<sup>14</sup>

Representation in the legal profession will not be a panacea for all the economic and social problems confronting Native peoples in Canada. Representation and expertise in a diversity of professions and fields is required. However, given the intimate relationship between law and power in this society, greater representation in the legal profession may be an invaluable means for Natives to assert their collective power:

One thing Native people have to be careful of is the assumption that if Indians do not participate in the law, somehow it is going to go away. That is not the case. The law is going to be there anyway, and the question is who is operating it.<sup>15</sup>

## 2. *Diversity in Law Schools*

The diversification of the law student population will serve to fulfill a dire need for non-White insights in the process of legal education. According to Finke, “because race is an important determinant of one’s life experience, minority students bring an important perspective to predominantly White law schools”.<sup>16</sup> One of the central objectives of the

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11. H. MacLean, *Native Law Student Program: An Evaluation Report* (Ottawa: Department of Justice, 1977), at p. 52.

12. The Marshall Commission Report stated that while Natives represent about two percent of the total Canadian population they account for nine percent of the Canadian prison population.

13. B.W. Morse, “Native People and Legal Services in Canada” (1976), 22 McGill L. J. 504, at p. 524.

14. *Supra*, footnote 10, at p. 25.

15. *Ibid.*, at p. 26.

16. C. L. Finke, “Affirmative Action in Law School Academic Support Programs” (1989), 39 J. Legal Ed. 55, at p. 59.

I.B.M. program, in fact, is to expose legal education at Dalhousie to just such perspectives.<sup>17</sup>

The racial and socioeconomic homogeneity of the law school student population is striking if not surprising. This uniformity is unfortunate, not only for those denied access, but also for those accepted:

A great deal of learning at a university occurs informally through interaction among students of both sexes, different religions, races and backgrounds. Law schools, proving grounds for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. It is also important that law practitioners be familiar with the major ethnic and racial actors that make up society and a law school should be a place for future lawyers to become familiar with the social fabric of society.<sup>18</sup>

It is unfair, and perhaps patronizing, to expect Natives to accept the role of spokesperson for their race in every law school discussion. Risks of tokenism and stigmatization aside, such expectations would place an immense responsibility on Native law students. My experience in the I.B.M. program is that generalizations about Native students are of as little value as generalizations about all law students. Some Native students may be very comfortable speaking out on Native issues while some, understandably, may not.

Perhaps the most beneficial result of increased diversity in law schools will be the elimination of negative stereotypes. White law students, even those who do not get to know the Native students amongst them, will be forced to respect their accomplishments as classmates and ultimately as fellow graduates.

Even in 1990 most students continue to “graduate from law school with little exposure to the daily reality of the minority population”.<sup>19</sup> If only for the sake of improving legal education, it is time for law schools to reflect societal diversity.

### 3. *The Obligation to Increase Access to Legal Education*

Law School access programs for minorities can be justified not only on the practical and utilitarian bases described above but also on moral grounds. The obligation to make reparations to ameliorate past injustices or the responsibility to ensure equality in the distribution of opportunities are examples of such moral justifications and each could be advanced in support of increasing access to legal education for Native peoples.

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17. “A Proposal to Enhance Minority Participation at Dalhousie Law School” (1989), at p. 5.

18. *Supra*, footnote 6, at p. 81.

19. *Supra*, footnote 4, at p. 156.

Although somewhat beyond the scope of this paper, it is worth noting that this obligation to improve access to law schools might be legal as well as moral. Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*,<sup>20</sup> for example, may be interpreted as making access to education a basic human right.<sup>21</sup>

Although the difference between a moral obligation and a legal right might seem irrelevant if the results achieved are identical, the distinction could lead to significantly divergent perceptions for those students who are the beneficiaries of access programs. Rights discourse may have inherent limitations but at least the process empowers those who are able to assert their legal rights. Reliance on the dominant society to acknowledge and act upon its moral obligations, or worse, its sense of paternalism, is belittling.

Providing access to legal education for Natives should be viewed as the elimination, not the creation, of advantages. Whites have long enjoyed advantages which have led to their grossly disproportionate representation in law schools and in the legal profession. Whether compelled by a moral or legal obligation, the time has come for law schools to recognize and remove these entrenched advantages.

### III. *Problems and Barriers: The Inaccessibility of Legal Education for Natives*

In order to understand what has been, and should be, done to improve the availability of legal education to Native peoples, it is necessary to examine some of the major barriers which stand between Natives and Canada's law schools. Language and cultural differences, socioeconomic factors, educational background, isolation from the legal system and law school admissions policies may all serve to impair access in varying degrees. This list is not meant to be fully complete but will nonetheless provide an overview of the significant problems and barriers which have served to keep legal education beyond the reach of many Native students.

#### 1. *Language and Cultural Differences*

A comprehensive review of Native legal education published by the Department of Justice in 1977 revealed that "students who spoke a Native language as a first language were less likely to succeed than others."<sup>22</sup> In fact, the report went on to conclude that "the more the

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20. *Constitution Act, 1982*, Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

21. *Breaking Barriers: Report of the Task Force on Access for Black and Native People* (Dalhousie University, 1989), at p. 33.

22. *Supra*, footnote 11, at p. 37.



Native student resembled regular law students, the more likely they were to succeed in law school.”<sup>23</sup> Just what is meant by “regular law students” is uncertain but it is clearly implied that a Native language and cultural background hinder success at law school.

It is often asserted that the importance of the spoken rather than the written word in Native societies leads to difficulties for some Native law students. Morse, for example, states:

This emphasis on the oral word rather than the written one is still present today and leads to some difficulty in comprehending the complicated system of written laws and procedures by which the dominant society lives.<sup>24</sup>

The often strange and complex nature of legal reasoning may further compound linguistic and cultural differences which exist. Literal and conceptual translation of the laws of White society is often very difficult.<sup>25</sup> Many of the concepts encountered in an introductory real property course, an example, will seem alien and inapplicable to those Native students raised on reserves.

Generalizations, though, are to be avoided. Not all Native law students are raised on reserves nor will all have English as a second language. Nevertheless, it is unreasonable to expect students from a culture which differs greatly from that of the dominant society to be immediately conversant with a legal system founded upon laws which are written, procedures which are complicated and concepts which are often alien.

## 2. *Socioeconomic Barriers*

It is difficult to overemphasize the socioeconomic problems confronting Native peoples in Canada. As a group, Natives have “the lowest average education, the poorest quality housing, the lowest income, and the shortest life span” in the country.<sup>26</sup> The Marshall Commission Report reached the conclusion that conditions on Micmac reserves in Nova Scotia were “unacceptably poor,” citing, as evidence, unemployment rates of over fifty percent on some reserves.<sup>27</sup> Such conditions undoubtedly provide Native law students with a background which is very different from those law students that the Department of Justice deemed to be “regular”. Perhaps, though, Monture is correct in saying

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23. *Ibid.*, at p. 40.

24. *Supra*, footnote 13, at p. 512.

25. *Ibid.*, at p. 523.

26. *Ibid.*, at p. 517.

27. *Supra*, footnote 4, at p. 163.

that in focusing on that which is most readily measurable there is a risk of losing sight of what is most important:

Sure, Native people in this country are disadvantaged, everybody knows that. Everybody knows the statistics. But those are all social and economic variables. You cannot go out and measure how happy people are. You cannot count happiness. You cannot turn happiness into nice neat tidy statistics. Native people are only disadvantaged if you use that materialistic yardstick.<sup>28</sup>

At the risk of employing just such a “materialistic yardstick”, I would suggest that financial pressures face all but the most privileged of law students. Given the economic hardships which exist on many reserves, however, these pressures may be especially acute for Native students. Post-secondary education is inescapably expensive, both in terms of actual and opportunity costs. Interestingly, experience at the American Indian Law Center indicated that,

the largest cause of Indian dropouts had not been the culture shock that the experts like to talk about, or the irrelevance of the curriculum that Indian and campus politicians like to talk about. It has been the lack of money.<sup>29</sup>

This problem may be less severe in Canada where some funding for Native law student is available from the Department of Indian and Northern Affairs. However, as is increasingly apparent, government funding is undependable.

It is trite to conclude that socioeconomic problems require socioeconomic solutions. Law schools are unable to improve health care, alleviate poverty, improve housing and create employment in the Native communities in Canada. However, to ignore that these conditions exist and to continue to effectively exclude Native peoples from this country’s legal system is to perpetuate the deprivation which now exists.

### 3. *Educational Background*

Although education may be regarded as a socioeconomic factor, its distinct importance as a barrier to legal education for Natives warrants separate consideration. In fact, the above-mentioned report by the Department of Justice identified the “primary problem” facing Native law students as insufficient preparatory education and found that “the more years of undergraduate university education, the higher the chance of success at law school.”<sup>30</sup> The problem for many Native students is that

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28. *Supra*, footnote 1, at p. 168.

29. *Supra*, footnote 10, at p. 36.

30. *Supra*, footnote 11, at p. 8.

given the shortcomings of the education system as a whole, obtaining even an undergraduate education may be difficult:

Although great strides have been made in Native education in recent years, Native people in Nova Scotia are still lagging behind the general population in this respect. High school drop out rates are higher among Natives, and the proportion of Native students entering post-secondary studies is dramatically lower. The number of those who continue past this step and on to professional or graduate studies is minute.<sup>31</sup>

While the education traditionally available to Natives has been “qualitatively inferior” to that available to other Canadians,<sup>32</sup> there are some signs that this situation is improving. In Nova Scotia, at least two trends have fostered some hope. First, band control over reserve schooling has improved the educational experience of Native children. The failings of the residential school system and other attempts by White society to “educate” Natives have been well documented.<sup>33</sup> Native control over Native education, at all levels, provides greater promise.

A second positive trend has been a recognition of the significant effect that the practice of “streaming” has had on Native education in Nova Scotia.<sup>34</sup> Needless to say, expecting and encouraging Micmac students to pursue non-academic high school programs eliminates, at an early stage, post-secondary education as an option for many students. As a consequence, the pool of available Micmac applicants for law schools is further reduced.

The problem of educational preparation is obviously a deep-rooted one. If it is true that success at law school for Native students depends in some degree on a university education, it is also true that a university education is based upon primary and secondary schooling. Although the problems within the education system may be outside the remedial reach of law schools it is essential that this barrier be identified until it is ultimately eradicated. In the words of the Marshall Commission:

It is obvious that visible minorities cannot be represented among the ranks of Crown prosecutors, defense counsel and the judiciary unless they are entering and graduating from law schools in greatly increased numbers, and they cannot do that without a solid educational foundation. Improvements are needed in the education system to ensure that minority students are given support, both educational and financial, to put them on an equal footing with White students.<sup>35</sup>

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31. *Supra*, footnote 17, at p. 4.

32. *Supra*, footnote 21, at p. 29.

33. Purich (*Supra*, footnote 6), cites residential schools, unqualified teachers and high teacher turnover as having a negative effect on native education in Canada.

34. *Supra*, footnote 21, at p. 85.

35. *Supra*, footnote 4.

#### 4. *Isolation from the Legal System*

Natives are figuratively and literally isolated from the legal system in Canada. Morse suggests that this isolation may be geographical, cultural, social and ideological.<sup>36</sup> It is hardly surprising, therefore, that Natives may view the Canadian legal system as foreign and inaccessible.

While the urban focus of the legal system certainly serves to isolate many Natives geographically, the manner in which legal services are provided promotes a more subtle form of isolation:

There is a major drawback in the existing system of delivery of legal services: the underlying philosophy of integration. That is, no special attention is paid towards any one segment of the potential client population and no special efforts are made towards increasing access to the service.<sup>37</sup>

With few, if any, Native lawyers available to serve as role models or accessible representatives of the legal profession, Natives could be inclined to view the legal system as a very alien institution. Even if the system had been a neutral and impartial force in the lives of Natives this perception would be justified. For many Native people, however, the system is viewed with understandable contempt:

Law has meant arrest, jail and harassment by authorities. It has meant restrictive laws prohibiting their cultural activities and laws which prohibited Indians from doing things which Whites could.<sup>38</sup>

Alienation would seem to be a self-perpetuating condition. That is, as long as Natives continue to be largely excluded from the legal system they will tend to view it negatively and decline to be a part of it. Many years of isolation from the legal system of the dominant society may still pose as a barrier to increasing Native enrolment in Canadian law schools but there is some hope that the system itself may be becoming more receptive to Native interests:

Native people are beginning to see the law as a tool for protecting and enforcing their rights. In recent years courts have recognized aboriginal title, have struck down discriminatory laws and constitutional recognition has been given to aboriginal rights. This has in turn increased Native interest in the study of law.<sup>39</sup>

In Nova Scotia, I think it is fair to say, courts are protecting and enforcing the rights of Micmacs as never before. Nonetheless, the legacy

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36. *Supra*, footnote 13, at p. 517.

37. *Ibid.*, at p. 520.

38. *Supra*, footnote 6, at p. 84.

39. *Ibid.*, at p. 85.

of isolation and injustice within the legal system of this province and this country will not be soon forgotten.

### 5. *The Law School Admissions Process*

Even after a Native student has overcome all the barriers discussed above they encounter yet another; the law school admissions process. Most Canadian law schools have two categories of admissions, general and discretionary. Academic performance and Law School Admission Test (L.S.A.T.) scores are the primary determinants of admission in the general category while other factors such as work experience or community service may be relevant in the discretionary category. Disabled, mature and Native students are usually eligible for consideration in the latter category but many are admitted to law schools in the general category as well. All Native applicants must write the L.S.A.T. though the weight which is assigned to their result will depend upon the law school to which they apply and the admissions category under which they are considered.

At a time when there has been “explosive growth”<sup>40</sup> in the number of law school applications received annually, law school admissions officers are in the unenviable position of choosing relatively few successful candidates from a huge pool of applicants. Administrative efficiency dictates that some measure be used as “an easy tool for whittling down the number of applicants.”<sup>41</sup> That tool has been the L.S.A.T. It is not surprising, therefore, that admissions procedures have been the target of much criticism, especially with respect to their professed predictive accuracy:

Admissions policies that purport to select students on the basis of expected performance at law school either ignore the severe limitations of currently available measures of academic promise or are consciously adopted to disguise largely subjective decision making in pseudoscientific garb.<sup>42</sup>

What seems to be overlooked by many opponents of discretionary admissions policies but has not escaped the attention of critics of the L.S.A.T. is that the test was not designed, nor intended, for use in screening minority applicants. The American testing service which administers the L.S.A.T. explicitly recognizes the test’s weaknesses in this regard:

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40. A. J. Scanlon, “The History and Culture of Affirmative Action” (1988), B.Y.U. L. Rev. 343, at p. 343.

41. *Supra*, footnote 6, at p. 86.

42. J. C. Hathaway, “The Mythical Meritocracy of Law School Admissions” (1984), 34 J. Legal Ed. 86, at p. 86.

Scores on the L.S.A.T., as on other tests of this kind, never completely represent the potential of any student. This is especially true for American Indian, Black, Mexican-American, Puerto-Rican and other minority students whose educational experience, in and out of school, has differed significantly from that of the great majority of students.<sup>43</sup>

It has been argued that law school admission processes should be assessed more fundamentally than simply whether they are able to predict success at law school. Obviously, law schools will not want to admit students who may not graduate but perhaps some consideration could be paid to what qualities make people effective lawyers. The Dean of an American law school pointed out that what is not measured in many admissions processes is what is most needed in the practice of law.<sup>44</sup> Leadership, self-discipline, practicality, idealism, tenacity, fidelity, patience, creativity and courage are simply not taken into account, especially by the L.S.A.T.

Evaluating each of a thousand or more law school applicants on such a comprehensive basis is undoubtedly easier to advocate in writing than it is to actually do. Nevertheless, the limited predictive worth and potentially discriminatory nature of traditional admissions criteria, particularly L.S.A.T. scores, can no longer be disregarded. If Natives and other minorities are to be afforded greater access to legal education, the admissions policies which have helped to exclude them from Canadian law schools must be restructured. It is easy for legal educators to cite cultural or socioeconomic reasons beyond their control to explain why there are still so few Native law students in Canada. It is more difficult to take some responsibility for the problem and to dismantle the significant barrier over which they have much control.

#### IV. *The Means of Improving Access to Law Schools*

In view of the above-described barriers which stand between Native peoples and legal education, some Canadian law schools have begun to make special efforts to attract, teach and graduate Native students. Dalhousie's I.B.M. program is new and ambitious but not without its forerunners. Other programs and approaches have been aimed at improving access for Natives and other minorities. Successes and failures elsewhere provide an invaluable perspective on Dalhousie's efforts from which the I.B.M. program will surely benefit.

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43. R. Carter, "University of Saskatchewan Program of Legal Studies for Native People" (1980), 4 *Can. Community L. J.* 28, at p. 29.

44. *Supra*, footnote 8, at p. 501.

Law school programs designed to improve access for Native students have taken many forms. Some focus simply on admissions requirements while others are concerned with providing assistance to Native students once accepted. Dalhousie's I.B.M. program, to its credit, takes a multi-faceted and long term approach.

The following is an overview of the principal issues and means involved in establishing such a program but is not meant to be necessarily exhaustive. As will be clear, flexibility and creativity seem to be prerequisites for successfully improving access to legal education for Native students.

### 1. *Recognition that Racism Exists*

While it will always be possible to direct responsibility for failing to eradicate racism to the school system, the private sector or the government, acceptance of some responsibility on the part of law schools is long overdue. The fact that only one Native student has ever graduated from Dalhousie Law School in its one hundred and seven year history cries out for explanation.<sup>45</sup>

A public recognition that racism has and continues to exist at law schools would signal a willingness to change past practices, and should be a precondition to improving access for those groups traditionally excluded. For those too cynical to believe that a law school would ever voluntarily acknowledge any responsibility for racism, it is worth noting that Northwestern University placed the following statement on the record during the 1960's:

Northwestern University recognizes that throughout its history it has been a university of the White establishment . . . Its members have also had in common with the White community in America, in greater or lesser degree, the racist attitudes that have prevailed in this society and which continue to constitute the most important social problem of our times. This university with other institutions must share responsibility for the continuance over many past years of these racist attitudes.<sup>46</sup>

While perhaps not quite as dramatic a statement, Dalhousie did propose the I.B.M. program "in recognition of our failures and omissions of the past, and in accordance with the spirit of a new era."<sup>47</sup> Furthermore, a comprehensive report on access to the University for Blacks and Natives was completed in 1989.<sup>48</sup> Among the report's many

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45. *Supra*, footnote 4. This student was not a Micmac.

46. *Supra*, footnote 8, at p. 593.

47. *Supra*, footnote 17, at p. 2.

48. *Supra*, footnote 21.

findings was a widespread perception in the Black and Native communities that Dalhousie is an elitist university catering to students of a "White middle class background."<sup>49</sup> Changing perceptions is likely to be a slow process but publicly recognizing that racism exists could be an essential first step.

## 2. *Recruiting*

One commentator has stated that it is not difficult for legal educators to "spin the wheels of bush league recruitment exercises in the name of greater minority enrolment."<sup>50</sup> Effective recruiting obviously requires more effort but is an indispensable component of all established access programs.

Successful programs tend to recruit Native students in a very long-range and very carefully planned manner. Factors as subtle as the attitude of the representatives of the law school or the absence of pictures of Native students in the recruiting information could undermine any commitment to welcoming Native students.

Not coincidentally, the Canadian law school with the highest enrolment of Native students, the University of British Columbia (U.B.C.), also has had one of the most intensive and far-reaching recruiting programs. For the first few years of the program, the Director of the program would select an area of British Columbia and devote one month to recruiting within it.<sup>51</sup> He visited all the bands, high schools and community colleges in the specific area and was involved in in-depth discussions with students, parents and educators. He would also work with students who expressed an interest in studying law as they progressed through university or college by assisting them in "selecting the appropriate courses that will develop the skills necessary for successful completion of law school." Once the program was better established, mailouts, advertisements, career fairs and word of mouth became the primary means of recruitment. The effectiveness of word of mouth promotion should not be overlooked. It remains true that "those law schools which have the largest number of Native students continue to attract the most Native students."<sup>52</sup>

According to Purich, experience with recruiting at the Native Law Centre at the University of Saskatchewan confirms the value of word of

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49. *Ibid.*, at p. 11.

50. *Supra*, footnote 40, at p. 360.

51. This information is from correspondence received from Sam Stevens, Director of the U.B.C. Native Law Program.

52. *Supra*, footnote 6, at p. 86.



mouth advertising. What is also true, he points out, is that “word of mouth advertising takes time.”<sup>53</sup> This implies that new programs will have to follow U.B.C.’s lead and supplement what limited word of mouth is initially available with very intensive recruiting efforts.

Overcoming the barriers of cultural, geographic and social isolation with the message that legal education is now accessible to Native peoples is a major challenge to new programs such as the one at Dalhousie. As Native students participate in these programs, and graduate from law schools in greater numbers, recruiting Native applicants should become far less difficult. Until that happens however, law schools will have to muster all of their available credibility and reach out to Native communities in an active and ongoing manner.

### 3. *Changing Admissions Policies*

Perhaps the most identifiable and contentious, as well as the most basic, method of improving access to legal education for Natives is the restructuring of admissions policies. As discussed above, the traditional criteria used for general admissions to law schools, grade point averages and L.S.A.T. scores, constitute a significant barrier to many Native students contemplating a legal education. Although Purich points out that “without special admissions criteria few Native Canadians have succeeded in gaining admission to law,”<sup>54</sup> most Canadian law schools have only a few places available for discretionary admissions.

It is important to emphasize that Native students are not the only beneficiaries of discretionary admission policies. Mature students, disabled students and others may be eligible as well. It is also important to stress that while critics of special admissions policies speak of lowering standards, the truth is that such policies simply expand the criteria used to evaluate applicants in cases where traditional measures such as L.S.A.T. scores may have little predictive accuracy or may, in fact, be biased.

In the case of Dalhousie’s I.B.M. program, the law school’s existing admissions category for “disadvantaged” and “mature” applicants was expanded to include a number of places for Micmacs and Blacks “broadly reflective of their approximate population base in Nova Scotia.”<sup>55</sup> Although the students in the program may not have been accepted in the general admissions category, admissions requirements have not, as a consequence, been lowered. Most of the students admitted

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53. *Ibid.*, at p. 91.

54. *Ibid.*

55. *Supra*, footnote 17, at p. 8.

in the general admissions category, I suspect, would be unable to match the work experience or community service of the successful applicants in the discretionary category.

At U.B.C., ninety five percent of the students accepted in the "Native discretionary category" graduate from the law school.<sup>56</sup> The success of that program, hopefully followed by the success of Dalhousie's program, may demonstrate that it is necessary to rethink the entire regime of law school admissions.

#### 4. *Pre-Law Programs*

A commitment to increasing access to law schools for Native peoples entails more than allotting a few places in the first year class. It should also involve some effort to prepare Native students for the presumably alien and sometimes competitive world of legal education. One way of accomplishing this objective is through the provision of pre-law programs.

Currently, to refer to a pre-law program in Canada is to refer to the Program of Legal Studies for Native People offered since 1973 by the University of Saskatchewan's Native Law Centre. This program was patterned after a summer orientation program established in 1967 by the American Indian Law Centre at the University of New Mexico.

The Saskatchewan program is open to Native students from across the country who have been conditionally accepted to a Canadian law school, the condition being successful completion of the program. While the emphasis in teaching is on methodology and skill development rather than substantive law, students are deliberately placed under "considerable pressure"<sup>57</sup> during the program's eight-week duration.

Although the Saskatchewan program was only marginally successful in its early years, greater emphasis on writing skills and reading perception has contributed to an improved success rate for program graduates at Canadian law schools.<sup>58</sup> In fact, the Saskatchewan program can fairly take credit for substantially improving the presence of Natives in this country's legal profession. When the program began in 1973 there were, it is believed, four Native lawyers in all of Canada.<sup>59</sup> As of 1989, a total of 118 graduates of the Saskatchewan pre-law program had

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56. *Supra*, footnote 51.

57. R. Carter, "The University of Saskatchewan Native Law Centre" (1979), 44 *Sask. L. Rev.* 135, at p. 136.

58. *Supra*, footnote 43, at p. 32.

59. D. H. Clark, "Legal Education in Saskatchewan: The Last Ten Years" (1983), 7 *Dal. L. J.* 375, at p. 381.

subsequently graduated from law schools across Canada.<sup>60</sup> Progress can obviously be made.

Dalhousie's I.B.M. program will soon include its own version of the Saskatchewan pre-law program. Dalhousie's program will be designed for both Micmac and Black applicants and will be four rather than eight weeks in length.<sup>61</sup> Although there are limits to what can be accomplished in such a short time, Dalhousie has almost twenty years of experience at the University of Saskatchewan to look to and learn from in designing an effective program.

### 5. *Tutorial Assistance*

The provision of tutorial assistance to Native students in law school raises many issues and apparently some controversy. This is not completely surprising given that tutorials are often the most visible aspect of programs in increased access to legal education. The challenge in designing a tutorial program is to ensure that Native students are not stigmatized, that assistance is provided in a non-condescending manner, that non-participating students do not perceive the service to be an unfair advantage, and perhaps most importantly, that all time spent in tutorials is worthwhile for the students.

A general rationale for providing tutorial assistance is expressed eloquently by Finke:

Some students enter law school with knowledge and familiarity of the law gained from family or close friends. Others enter as first generation college students and from cultures unfamiliar with our legal structures. Financial security gives some students a real advantage. Some students have few outside obligations competing for their time, while others must devote large amounts of time to family and child-rearing obligations. Equality of opportunity may therefore mean that certain disadvantaged students should be provided with special help.<sup>62</sup>

This description, of course, may apply to non-Native law students and it is sometimes suggested that tutorial services be accessible to all interested students. In the occasionally competitive law school environment, many students are acutely aware of anything they perceive to be an advantage which is available only to some within their ranks. Opening tutorials to all students would be one, albeit inconvenient, way to eliminate this potential problem.

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60. This information is from correspondence received from the University of Saskatchewan Native Law Centre.

61. "Interim Report on Dalhousie's Law Program for Indigenous Blacks and Micmacs" (1990), at p. vii.

62. *Supra*, footnote 16, at p. 57.

The perceptions of the Native students involved in tutorial programs are of even greater importance. Mandatory tutorials, for example, are easily viewed as heavy-handed and paternalistic by those required to take part. Participants in the first year of the I.B.M. program criticized the compulsory tutorial policy on precisely such grounds and as a result, tutorial attendance is now optional.

It is interesting to note that many of the specific complaints about the tutorials in the first year of the I.B.M. program were also identified by the Department of Justice's review of Native legal education in 1977. The report described a successful tutorial program as follows:

The tutorials were part of a legal writing course offered to all students; the work in the tutorials was integrated with and extended the regular class work; the tutorial instructors taught the substantive courses or close liaison was maintained between the tutorial leader and the instructors. There was a strong emphasis on writing and skill development; the tutorials, if compulsory, did not add more than two or three hours a week to the students' course load; the students did not feel that they were singled out as less competent than regular students.<sup>63</sup>

Although it will always be difficult to determine the role, if any, that tutorial assistance plays in the success of a program for Native students, it can be assumed that successful programs are doing something right. In the highly successful Native Law Program at U.B.C., for example, a tutorial program based on voluntary participation has been developed. The tutorials focus on building skills rather than teaching law. Case analysis, memorandum writing, time management and exam writing techniques are particularly emphasized.<sup>64</sup>

Because different students have different needs, flexibility is very important. Preconceived ideas about what form tutorials should take may, therefore, be counterproductive. Deloria puts it simply: "Whatever your imagination dreams up or whatever the student asks for, provided it does not involving lowering the requirements to graduate is, I think, appropriate."<sup>65</sup>

For those designing programs of tutorial assistance, and especially for the tutors involved, the challenge is to make the tutorials, whatever form they take, useful for all of the students all of the time. In the I.B.M. program, tutorials are provided both in a group setting for specific subject areas and on an individual basis. It will be up to the students, not the tutors, to determine what approach or combination of approaches was of most help.

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63. *Supra*, footnote 11, p. 115.

64. *Supra*, footnote 51.

65. *Supra*, footnote 10, at p. 29.

## 6. *Changing the Law School Curriculum*

In recognition of the fact that an increased presence for Natives and other minorities at law schools should enhance the process of legal education, law schools are increasingly seeking to “take advantage of the rich contributions which visible minorities are making to our culture — legal and otherwise.”<sup>66</sup> Slowly, curricula are being adapted to reflect the diversity which exists in Canadian society if not yet in Canadian law schools.

Native perspectives can no longer be viewed as superfluous to legal education. As Purich states: “It is important that all law students and all faculty be exposed to the Native fact in Canada.”<sup>67</sup> The traditional approach to providing this exposure has been for law schools to offer an upper year elective course in Native legal issues. The limitations of this approach are described by the Marshall Commission Report:

While Dalhousie Law School now offers a course in Native Law, this is only available to a few students. In addition to such specific courses, the Law School must encourage law students to consider minority concerns in all of their courses.<sup>68</sup>

In fact, part of the mandate of Dalhousie’s I.B.M. program is the development not only of additional elective course offerings for second and third year students, but also of “generative themes” in all courses in the law school.<sup>69</sup> This approach parallels that of the University of Ottawa, for example, where the Faculty of Law has established an Aboriginal Advisory Committee to provide advice and direction on course offerings and development.<sup>70</sup>

The importance of not confining Native perspectives to one or two elective courses is clear. Doing so would create two types of law school graduates; the few who benefited from the elective courses (likely those students most interested in Native issues anyway), and the many who did not. If the process which the Marshall Commission Report refers to as “sensitization”<sup>71</sup> is to be meaningful, it must touch all law students.

For Native law students, a greater diversity of perspectives in the law school curriculum may make legal education both more interesting and more welcoming. However, Deloria cautions that legal educators should never forget the primary purpose for which Native students are at law school:

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66. *Supra*, footnote 17, at p. 15.

67. *Supra*, footnote 6, at p. 100.

68. *Supra*, footnote 4, at p. 156.

69. *Supra*, footnote 17, at p. 15.

70. This information is from correspondence received from the University of Ottawa.

71. *Supra*, footnote 4, at p. 155.

We are sending our students to your schools to learn how to be lawyers. They should be exposed to people who realize that their competence is in the law, not in anthropology or social work or revolution, or anything else. Teach the student law, and let the student worry about revolutions when he gets out of law school.<sup>72</sup>

If it is important that Native law students learn legal skills, it should be equally important that non-Native students learn that law has a social context. As a by-product of programs to increase access to law schools, the inclusion of Native perspectives as an integral part of legal education will provide all law students with a valuable insight into Canadian society.

### 7. *Funding*

The last but certainly not least important issue in this discussion of efforts aimed at increasing Native access to law schools is the question of funding. Sufficient and stable funding is imperative for the success of any program designed to improve access to legal education. Programs in the United States have suffered because funding has only been available on a yearly basis.<sup>73</sup> In fact, the ground-breaking American Indian Law Centre at the University of New Mexico was forced to close in 1986 due to lack of money.<sup>74</sup>

Inadequate funding arrangements serve to handicap access programs in two ways. Not only is long term planning difficult in such circumstances but the message presumably sent to minority communities is that a commitment to improving access to legal education is equivocal at best.

The University of Saskatchewan's Native Law Centre obtained funding from the Donner Canadian Foundation to cover its operating budget for its first five years.<sup>75</sup> When the initial funds were exhausted, the University of Saskatchewan decided to finance the Centre as an independent department. Nonetheless, "substantial outside funding is required to carry on many of its activities."<sup>76</sup>

Dalhousie's I.B.M. program received first year funding from the Nova Scotia Law Foundation in the amount of \$76,000 as well as a one time grant from the provincial government for \$15,000.<sup>77</sup> Although the

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72. *Supra*, footnote 10, at p. 34.

73. B. S. Hampden, "Preparing Undergraduate Minority Students for the Law School Experience" (1989) 12 *Seton Hall Legis. J.* 207, at p. 228.

74. *Supra*, footnote 6, at p. 94.

75. *Supra*, footnote 2, at p. 713.

76. *Ibid.*, at p. 714.

77. *Supra*, footnote 61, at p. 9.

former source of funding involves a commitment of just two years, the long term future of the I.B.M. program should be secure if the recommendations included in the Marshall Commission Report are fully implemented. The Commission made the following specific recommendation:

We recommend that the Dalhousie Law School's minority admissions program for Micmacs and indigenous Blacks receive the financial support of the Governments of Canada and Nova Scotia and of the Nova Scotia Bar.<sup>78</sup>

A genuine commitment to creating a greater presence for Native peoples in Canadian law schools requires more than good intentions. Comprehensive programs such as that established at Dalhousie are expensive. In this era of uncertain funding for education generally, the onus is on governments and the profession to demonstrate that their commitment to this issue is more than mere rhetoric.

#### V. *Associated Problems and Issues*

Programs to increase access to legal education for Native students are not without attendant problems. The controversy which seems to be inseparable from any use of the words "affirmative action" has accompanied the introduction of Dalhousie's I.B.M. program and others like it. Rightly or wrongly, legal education is often perceived as a path to prestige and affluence and the issue of who is permitted access to it is thus a sensitive one.

While debate about affirmative action rages on outside law schools, Native law students must contend, on a daily basis, with their classmates and their communities. Therefore, before discussing more general reactions to efforts to increase access to law schools for Natives, I will briefly outline the issues of stigmatization and loss of identity which have been cited as potential problems inherent in these programs.

##### 1. *Stigmatization*

The degree to which participation in law school access programs stigmatizes those Natives students involved is a question to be answered by the students themselves. It should not surprise anyone who has experienced first year law, however, that a potential for stigmatization arises when some students are singled out or treated differently from their classmates. Again though, generalizations are imprudent. Some students may welcome assistance while others may not.

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78. *Supra*, footnote 4, at p. 155.

The potential for the stigmatization of the students involved in Dalhousie's I.B.M. program would seem to be greater than for students involved in programs elsewhere. Students in the I.B.M. program are required to defer one of their courses to the summer following first year and in its place schedule five hours of tutorials into their weekly timetables. Students in other programs, such as that at U.B.C., take the same courseload as their fellow students and therefore have a more limited tutorial schedule.

Dalhousie's I.B.M. program, it must be remembered, is very new. Not only will the program undoubtedly evolve over time, but with a growing Native presence at the law school it is hoped that any feelings of stigmatization will dissipate. Until that happens, however, all those involved in the program; the director, the professors and the tutors have a responsibility to recognize and minimize the adverse effects that participation in the program may give rise to.

## 2. *Loss of Identity*

Other than to identify the issue, it is highly pretentious for non-Natives to describe a loss of identity experienced by Native students pursuing legal education. That said, the Department of Justice's conclusion that success at law schools depended upon the degree to which Native students resembled "regular" law students indicates that the process of legal education includes pressure to conform. For Native students, learning to think, talk and act like a lawyer represents a total immersion in one of the institutions which epitomizes the dominant society.

Deloria, however, does not see indoctrination as a risk as long as skills are separable from underlying values:

I tend to adopt the philosophy of education that says that the more Indians can see the non-Indian educational process as a technical process where they learn skills, the less they are going to be worried about the strange values that are attached to the technical process, and the more they are going to emerge as whole human beings — Indian human beings — when they get out.<sup>79</sup>

Hopefully times have changed since the Department of Justice published its report on Native legal education and Native students are no longer expected to emulate their non-Native colleagues in order to succeed at law school. It is further hoped that as the presence of Natives and other minorities is increased in Canadian law schools, defining what constitutes a "regular" law student will become impossible.

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79. *Supra*, footnote 10, at p. 39.



### 3. *Reactions*

Programs aimed at enhancing access to legal education for Natives and other minorities are the subject of both praise and condemnation. What may be viewed as a long overdue initiative by some is seen as a threat by others. Certainly, Dalhousie's I.B.M. program has not been immune from the debate. The Marshall Commission, for example, was "encouraged by its establishment"<sup>80</sup> while a writer in *Canadian Lawyer* compared the I.B.M. program, and others like it, to "Nazi-type quota systems."<sup>81</sup>

Although it is very difficult to gauge the level of approval for the I.B.M. program within the law school, there are several indications that support is pervasive. The Faculty Council resolution accepting the program was passed with unanimous support.<sup>82</sup> Moreover, nearly forty senior students applied for the eight tutorial positions in the program.<sup>83</sup> Many of these applicants, as well as other students, volunteered to act on committees and do other forms of work to support the program.

Of course, the success of a program to increase access to legal education is not measured by its popularity in the law school or anywhere else. A supportive student body and faculty are unquestionably significant assets to any program but some opposition, inside and outside of law schools, should always be anticipated and should never be dissuasive.

## VI. *Conclusion*

The most practical and succinct conclusion to be drawn from this paper is that the programs which have been most effective in improving access to legal education for Native students place considerable emphasis on recruiting and the development of skills, and provide all forms of assistance with flexibility and without paternalism. Rigid or patronizing approaches generally do not succeed.

Dalhousie's I.B.M. program is new and while much is to be learned from the successes and failures of programs elsewhere, some growing pains should be anticipated. However, as the program becomes more established and Native enrolment at the law school is increased, several of the initial challenges that the program faces will conceivably become less significant. Specifically, knowledge of the existence and the purpose of the program will gradually spread throughout the Native communities

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80. *Supra*, footnote 4, at p. 155.

81. G. Jonas, "Nazi-Type Quota Systems in Law School" *Canadian Lawyer*, October 1989, at p. 36.

82. *Supra*, footnote 61, at p. 3.

83. *Ibid.*, at p. 5.

in this province thereby making future recruiting efforts far more effective. Moreover, a greater number of Native students in the law school will, it is hoped, result in greater Native control over the I.B.M. program and reduce any feelings of stigmatization or paternalism which may now be associated with it.

If nothing else, this paper should demonstrate that increasing access to legal education for Native peoples involves complex issues. In a completely egalitarian society, of course, these issues would never arise. Until Canada becomes such a society and as long as equality of opportunity is held to be a goal worth pursuing, initiatives such as Dalhousie's I.B.M. program will serve as one means to the greater end.