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'...And the Learners Shall Inherit the Earth': Continuing Professional Development, Life Long Learning and Legal Ethics Education

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“... AND THE LEARNERS SHALL INHERIT THE EARTH:”* CONTINUING PROFESSIONAL DEVELOPMENT, LIFELONG LEARNING, AND LEGAL ETHICS EDUCATION

Richard F. Devlin & Jocelyn Downie***

After many years of debate and resistance the Canadian legal profession is finally accepting that compulsory professional development is a necessity. We argue that as the legal profession begins to design and deliver these programmes it should take into consideration the insights of the educational literature on lifelong learning. By way of a concrete example we explore the ways in which lifelong learning theory can inform the design and delivery of legal ethics education.

Après plusieurs années de débats et de résistance, les professionnels du domaine juridique au Canada ont finalement reconnu la nécessité de la formation continue obligatoire. Il est, selon nous, important que soit prise en compte la littérature scientifique portant sur la formation continue lorsque les barreaux créeront et mettront sur pied de tels programmes. À l'aide d'un exemple concret, nous explorons dans quelle mesure la théorie en matière de formation continue peut influ-

* A number of authors who write on lifelong learning attribute the quotation “the learners shall inherit the earth” to Eric Hoffer, usually as part of the following: “In times of change learners shall inherit the earth while the learned are beautifully equipped for a world that no longer exists.” See e.g. Janis E. Clark, “Transition Education: One Step in a Lifetime of Education of Learning for Lawyers” (2005) 40 Val. U. L. Rev. 427 citing Hoffer’s *The Ordeal of Change*, but without a pinpoint citation. The actual quotation is: “[i]n a time of drastic change it is the learners who inherit the future. The learned usually find themselves equipped to live in a world that no longer exists.” Eric Hoffer, *Reflections on the Human Condition*, 1st Perennial Library ed. (New York: Harper & Row, 1974) at 22.

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1. INTRODUCTION

For some time now, the issue of compulsory continuing education has been the subject of heated debate in the legal profession¹ and, in January 2009, British Columbia became the first province in Canada to require continuing professional development (CPD) for all members of the legal profession.² Since then, four other provinces — New Brunswick,³ Ontario,⁴ Saskatchewan⁵ and Quebec⁶ — have adopted a similar requirement and several others appear to be moving in the same direction.⁷ While we have argued elsewhere for mandatory continuing legal ethics education,⁸ we have not to date entered into the broader debate over CPD.⁹ However, prompted by the recent developments in BC and elsewhere, we do so here. It must be noted immediately that we do so in a limited and exploratory way. Specifi-

¹ For a helpful overview of the arguments for and against CPD see Tina Cockburn, "Mandatory Continuing Legal Education: 'Imprisonment in the Continuing Professional Education Classroom?'" (1996) 14 J. Prof. Legal Educ. 227.

² The Law Society of BC, "Continuing Professional Development: Overview" *The Law Society of BC* (July 2008), online: The Law Society of BC <http://www.lawsociety.bc.ca/licensing_membership/profdev/overview.html>.

³ The Law Society of New Brunswick, "MCPD Requirements" *The Law Society of New Brunswick* (2010), online: The Law Society of New Brunswick <<http://www.lawsociety-barreau.nb.ca/emain.asp?794>>.

⁴ The Law Society of Upper Canada, "Continuing Professional Development Questions and Answers" *The Law Society of Upper Canada* (2010), online: <<http://rc.lsuc.on.ca/jsp/cpd/index.jsp>>.

⁵ The Law Society of Saskatchewan, "Mandatory Legal Education Policy" *The Law Society of Saskatchewan* (2009), online: The Law Society of Saskatchewan <<http://www.lawsociety.sk.ca/>>.

⁶ Barreau du Québec, *Guide du Nouvel Avocat 2009-2010* (Montréal: Barreau du Québec, 2009) at 14.

⁷ Conversation with Darrel Pink, Executive Director, Nova Scotia Barristers' Society (18 May 2009); Thomas Claridge, "Treasurer wants mandatory post-call education for Ontario lawyers" *The Lawyers Weekly* (12 June 2009) 29:6 (QL).

⁸ Richard Devlin & Jocelyn Downie, "Mandatory Legal Education is a Step in the Right Direction" *The Lawyers Weekly* (28, March 2008); See also Richard Devlin & Jocelyn Downie, "Fitness for Purpose: Mandatory Continuing Legal Ethics Education for Lawyers" (2009) 87 Can. Bar. Rev. 773-804.

⁹ For critical analyses of how CPD has developed in the United Kingdom see Andrew Friedman & Mary Phillips, "Continuing Professional Development: Developing a Vision" (2004) 17:3 Journal of Education and Work 361; Richard Thorpe *et al.*, "Studying CPD in Professional Life" (2004) 2:2 British Journal of Occupational Learning 3; Jeff Gold *et al.*, "Continuing Professional Development in the Legal Professions: A Practice Learning Perspective" (2007) 38:2 Management Learning 235. For a more general critical reflection on the state of the CPD see Christopher Roper, "The Need for a Conceptual Framework for Continuing Professional Development for Lawyers" (1997) 15 J. Prof. Legal Educ. 169.

cally, rather than canvassing all of the arguments for and against CPD in law (and, in particular, mandatory CPD), we explore what can be drawn from the theory and practice of lifelong learning for the CPD issue. By bringing together what have, until now, been two parallel tracks (i.e., two literatures that have not yet spoken to each other), we hope to bring some new ideas and new possible directions to the CPD conversation in law.

In this paper, we first explore various aspects of lifelong learning theory and practice and relate them to continuing professional development. Then, using the topical area of legal ethics at the continuing education stage of a lawyer's life (as a generalizable illustration grounded in a particular topic and at a particular time), we explore some of the implications of taking a lifelong learning approach to legal education. Again, it must be emphasized, the goal is to open up a conversation.¹⁰

2. SOME BACKGROUND CONTENT

For the last several decades, but especially since the 1990's, there has been an increasing interest in, and analysis of, lifelong learning in the education literature.¹¹ Not surprisingly, lifelong learning is a fluid, contested and perhaps even amorphous concept. Some commentators ascribe to it a relatively thin character; others endow it with a thicker participatory democratic significance. We do not seek to resolve, or even to enter, the debates around its precise meaning. For the purposes of this paper, grounded in our own commitments to relational theory and radical democracy,¹² we take the following thick conception from Jacques Delors and UNESCO

¹⁰ Once such a conversation is opened up it could go in various directions. On the practical level, much more would need to be said about how, precisely, such programs would be designed, delivered and assessed. On the theoretical level, there are large debates on the nature and function of education that take us all the way back to Plato, who stated that "education . . . commences in the first years of childhood and lasts to the very end of life." See Plato, Aristotle & Benjamin Jowett, *Dialogues of Plato: Containing the Apology of Socrates, Crito, Phaedo and Protagoras* (Whitefish, MT.: Kessinger Publications, 2005) at 170. We encourage such conversations, but candidly concede that they are beyond the parameters of this initial foray.

¹¹ Several key general texts include: Peter Jarvis, *Adult Education and Lifelong Learning: Theory and Practice*, 3rd ed. (New York: RoutledgeFalmer, 2004); Brenda Morgan-Klein & Michael Osborne, *The Concepts and Practices of Lifelong Learning* (New York: Routledge, 2007); Dorothy MacKeracher, *Making Sense of Adult Learning*, 2nd ed. (Toronto: University of Toronto Press, 2004); David Aspin *et al.*, eds., *International Handbook of Lifelong Learning* (Boston: Kluwer, 2001); Paul Oliver, ed., *Lifelong and Continuing Education: What is a Learning Society? Monitoring Change in Education* (Vermont: Ashgate, 1999); Deo H. Poonwassie & Anne Poonwassie, eds., *Fundamentals of Adult Education: Issues and Practices for Lifelong Learning* (Toronto: Thompson, 2001); See more specifically Kenneth Wain, "Lifelong Learning: Small Adjustment or Paradigm Shift?" in Aspin *et al.*, eds., *International Handbook of Lifelong Learning* (Boston: Kluwer Academic Publishers, 2001) at 185–193.

¹² It is beyond the parameters of this essay to provide a full account of either relational theory or radical democracy a.k.a. "radical democratic relationalism." But, briefly, relational theory sees the self as inextricably bound up in, and constituted by, social relationships. These relationships are personal, institutional, and systemic and they contrib-

as our working definition:

[lifelong learning is] a continuous process of forming whole human beings — their knowledge and aptitudes, as well as the critical faculty and the ability to act. It should enable people to develop an awareness of themselves and their environment and encourage them to play their social role at work and in the community.¹³

An explicit engagement with lifelong learning has been proposed for various disciplines (e.g., engineering,¹⁴ pharmacy,¹⁵ medicine¹⁶) and has been influential in education policy at many levels — local, national, regional and international.¹⁷ It has been gestured towards by the American legal profession.¹⁸ It has also begun to manifest itself in the Canadian judiciary. For example, under the auspices of the

ute to the ongoing development of the individual and his or her capacities in both positive and negative ways. See further Jocelyn Downie and Jennifer Llewellyn eds., *Being Relational: Reflections on Relational Theory and Health Law and Policy* (forthcoming, 2011). Radical democracy argues that contemporary liberal democratic societies have stalled in the quest for increased liberty and equality. Politics and law have become frozen and mostly serve to stabilize and maintain deep structures of social, economic and political inequality. What is required is a cracking open of law and politics by innovative and inclusive participatory processes that allow for both destabilization and experimentation in the pursuit of more substantive equality. See further Roberto Mangabeira Unger, *The Self Awakened* (Cambridge, Mass.: Harvard University Press, 2007) and Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT Press, 1999). See further Jocelyn Downie & Richard Devlin, "The Great Canadian Lawyer: A Manifesto, eh?" in David Blaikie, Thomas Cromwell & Darrell Pink, eds., *On Being a Lawyer* Irwin Law [forthcoming].

- 13 Jacques Delors, International Commission on Education for the Twenty-first Century & UNESCO, *Learning, the Treasure Within: Report to UNESCO of the International Commission on Education for the Twenty-First Century* (Paris: Unesco Pub., 1996) at 21.
- 14 Graham Guest, "Lifelong Learning for Engineers: A Global Perspective" (2006) 31:3 *European Journal of Engineering Education* 273.
- 15 Kenneth Kirk & Alan Hanson, "Challenges and Opportunities in Lifelong Learning: Perspective of Pharmacist Employers" (1996) 16 *The Journal of Continuing Education in the Health Professions* 69.
- 16 Nuala Kenny *et al.*, "Lifelong Learning in Ethical Practice: A Challenge for Continuing Medical Education" (2001) 21 *The Journal of Continuing Education in the Health Professions* 24.
- 17 See European Commission, *Making a European Area of Lifelong Learning a Reality: Communication from the Commission* (Luxembourg: Office for Official Publications of the European Communities, 2001); ILO, *Lifelong Learning in the Twenty First Century: The Changing Roles of Educational Personnel* (Geneva: ILO, 2000). See also Judith Walker, "The introduction and construction of the worthy citizen through lifelong learning: a focus on the OECD" (2009) 24:3 *Journal of Education Policy* 335.
- 18 See e.g., *Legal Education and Professional Development: An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Chicago, IL.: American Bar Associations, Section of Legal Education and Admissions to the Bar, 1992) at 3. [McCrack Report].

National Judicial Institute, the Canadian judiciary has taken a lifelong learning approach to issues such as ethics, social context, technology and aging.¹⁹ However, in contrast to other professions and the Canadian judiciary, the practicing bar in Canada has not demonstrated much, if any, interest in a lifelong learning approach to education. Furthermore, there is evidence to suggest that the Canadian legal profession is actually ill-informed about the importance of lifelong learning. For example, in its recent *Consultation Paper on An Approved Common Law Degree*,²⁰ a Task Force of the Federation of Law Societies has recommended a regime of law school accreditation that fails to adequately recognize that law school education is but one part of a much larger process of lifelong learning.²¹ The result is a deeply flawed consultation paper. The uncritical adoption of the Report by Canadian law societies does nothing to advance the project of lifelong learning, and is likely to have a regressive impact upon its prospects in legal education in Canada.²²

3. FROM CONTINUING PROFESSIONAL DEVELOPMENT TO LIFELONG LEARNING

Although there has been very little discussion in professional legal circles about lifelong learning there is an extensive literature in the educational sphere that addresses the opportunities and challenges of such initiatives. In this section, we briefly discuss: two conceptual commitments that underlie the work of some lifelong learning advocates; a context within which a lifelong learning approach is particularly useful; a view that taking a lifelong learning approach can lead to the realization of both public and private goods; and two innovative judicial education initiatives that have taken a lifelong learning approach. We relate all of these to CPD for practicing lawyers.²³

[T]he skills and values of the competent lawyer are developed along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and *continues through a lawyer's professional career* [emphasis added].

¹⁹ National Judicial Institute, "NJI Courses by Category" *National Judicial Institute* (2009), online: NJI <http://www.nji.ca/nji/Public/courses_category.cfm>.

²⁰ Federation of Law Societies of Canada, "Task Force on the Canadian Common Law Degree: Consultation Paper", *Federation of Law Societies of Canada*, (24 September 2008), online: Federation of Law Societies of Canada <http://www.flsc.ca/en/pdf/2008Consultation_paper.pdf>.

²¹ Canadian Association of Law Teachers / Canadian Law and Society Association, "Response to the Consultation Paper of the Task Force on the Canadian Common Law Degree of the Federation of Law Societies of Canada" *Canadian Association of Law Teachers* (15 December 2008) (2009) 3 C.L.E.A.R. 151 at 154-155.

²² See also "Response of the Canadian Council of Law Deans to the Consultation Paper on the Canadian Common Law Degree" *Canadian Council of Law Deans* (15 December 2008), online: CCLD <<http://www.cclld-cdfdc.ca/publications.html>>.

²³ There are, of course, many other themes we could explore but these are the most illuminating with respect to the objectives and parameters of this paper.

(a) Personhood and Identity

Some advocates of lifelong learning conceive of the human being as a protean character, something that is dynamic, flexible, and capable of ongoing reconstitution and self-actualization.²⁴ Aspin *et al.*, for example, argue:

... one of the chief characters by which human beings may be distinguished from other forms of organic entities and sentient creatures is their endless curiosity, their desire to have their questions answered, their awareness of the need to cope with and master change, and their propensity always to seek improvement in their situation.²⁵

A lifelong learning approach, as described by Aspin and others, feeds the task of constant, ongoing self-actualization.

Other advocates also embrace a relational conception of the self — a situated self, a contextual self, a self whose potential is always embedded in a larger set of social, economic, political and cultural forces.²⁶ These forces can be both enabling and restraining, empowering and constraining, emancipating and repressive. As these forces are always changing, lifelong learning is one way the relational self can, on an ongoing basis, come to terms with this larger set of constitutive circumstances. As noted by Aspin and Chapman:

people will need to know and to learn, in order to perpetuate their lives as well-functioning and productive individuals in present and future economic conditions, to understand, grasp and seek to expand the opportunities offered them by the right of participating in the political institutions of the modern democratic state, and to judge intelligently and make well-informed choices from among a range of activities that will increase their independence, confirm their autonomy and extend their cultural horizons.²⁷

Inasmuch as one shares these foundational conceptual commitments (as we

²⁴ James Marshall, “Caring for the Adult Self” in Aspin *et al.*, *supra* note 11 at 119; Robin Usher “Lifelong Learning in the Postmodern” in Aspin *et al.*, *supra* note 11 at 168; MacKeracher, *supra* note 11 at 174. In particular, there has been a lot of recent interest in neuroscience research which indicates that, suitably stimulated, the brain can continually develop well into adulthood. See e.g. Antonio M. Battro, Kurt W. Fisher, & Pierre J. Léna, *The Educated Brain: essays in neuroeducation* (New York: Cambridge University Press, 2008); Norman Doidge, *The Brain That Changes Itself: Stories of Personal Triumph from the Frontiers of Brain Science* (New York: Viking, 2007); Sharon Begley, *Train your mind, change your brain: how a new science reveals our extraordinary potential to transform ourselves* (New York: Ballantine Books, 2007); Jarvis, *supra* note 11 at 68–72.

²⁵ Aspin *et al.*, *supra* note 11 at xvii.

²⁶ See Richard Devlin, “Law, Postmodernism and Resistance: Re-Thinking the Significance of the Irish Hunger Strike” (1994) 14 Windsor Yearbook for Access to Justice 3–81; Jocelyn Downie & Jennifer Llewellyn, “Relational Theory and Health Law and Policy” (2008) Special ed.: Visions, Health L. J. 193.

²⁷ David Aspin and Judith Chapman, “Towards a Philosophy of Lifelong Learning” in Aspin *et al.*, *supra* note 11 at 17.

believe the designers of legal education should²⁸), it makes sense to adopt an approach to legal education that engages and serves these commitments rather than more traditional approaches to legal education (substance + skills) that seem grounded in, and serve, traditional conceptions of personhood and identity. Thus it seems that law could gain much by embracing a lifelong learning approach. This would have implications both in terms of providing support for the claim that CPD should be required of all lawyers (so that the inevitable ongoing constitution of the self is well-informed and coheres with the evolving norms of the legal profession, e.g., constitutional norms) and that CPD program design should draw on lifelong learning approaches as they share and serve these non-traditional conceptions of personhood, identity, and the self.²⁹

(b) Constant Change

A lifelong learning approach is particularly useful in the context of constant change. Lifelong learning approaches pay explicit attention to, and are designed to respond to, the inevitability of constant change, the fact that we live in a “permanent state of impermanence.”³⁰ There are at least three areas of change that are relevant to an argument that a lifelong learning approach could usefully, and should, be taken to legal education.

First, the law is constantly changing. Whole areas of law exist now that were not even contemplated when practitioners who are twenty years out went to law school.³¹ Similarly, new approaches to legal analysis have been developed.³²

Second, the practice of law is also constantly changing. Over the last two decades, we have witnessed extraordinary shifts: from local to national and international practices; from paper-based to electronic management of information; and from a traditional professional model to a business model. If anything, the pace of this change is likely to increase in the next ten years.³³

Third, the social context within which law operates (and which lawyers must understand in order to practice effectively and capably³⁴) is also constantly changing. Consider the following descriptions of recent change found (on purpose and appropriately enough) on the Internet:

²⁸ For obvious reasons, we cannot develop the arguments in support of this conclusion within the confines of this paper and so we merely frame this as a conditional statement.

²⁹ We unpack and illustrate this point in Part 4.

³⁰ Bauman Lyons Architects, *How to be a Happy Architect* (London, UK: Black Dog Publishing) at 91.

³¹ For example, Elder Law, Internet Law.

³² For example, Critical Disability Theory, Empirical Legal Studies.

³³ See e.g. Richard E. Susskind, *The End of Lawyers: rethinking the nature of legal services* (New York: Oxford University Press, 2008).

³⁴ Rosemary Cairns Way, “Reconceptualizing Professional Responsibility” (2002) 25(1) *Dat.L.J.* 27.

- “The top ten in-demand jobs in 2010 didn’t exist in 2004.”³⁵
- “We are currently preparing students for jobs that don’t yet exist, using technologies that haven’t been invented, in order to solve problems we don’t even know are problems yet.”³⁶
- “The first commercial text message was sent in December of 1992. Today, the number of text messages sent and received everyday, exceeds the total population of the planet.”³⁷
- “It is estimated that a week’s worth of the New York Times contains more information than a person was likely to come across in a lifetime in the 18th century.”³⁸

A lifelong learning approach attends to the fluidity, perhaps even turbulence, of the (post) modern condition. Most people, including lawyers, are likely to experience significant personal and career changes in the course of their lives. Knowledge, technology, experiences, and relationships are in a constant state of flux.³⁹ As a result, the rules and norms that govern our lives are also in a state of flux and they are also constantly contested.⁴⁰ An approach to education that explicitly attends to the fact of constant change (and is designed to enable the learners to function in a constantly changing environment) is therefore well-suited to legal education. As Janis Clark has argued, it is no longer sufficient to be a “learned” profession; we must be a “learning” profession.⁴¹

(c) Public and Private Goods

It has been argued that lifelong learning is a form of “investment” — a personal investment, a social investment, and a community investment.⁴² As such, lifelong learning is simultaneously both a private good and a public good.⁴³ More precisely, for Aspin *et al.*, a democratically inclined vision of lifelong learning can

³⁵ Karl Fisch, Scott MacLeod, & Jeff Brenman, “Did You Know 3.0” *The Fischbowl Presentations* (2008), online: The Fischbowl Presentations <<http://www.lps.k12.co.us/schools/arapahoe/fisch/fischbowlpresentations.htm>>.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Paul Hagar, “Lifelong Learning and the Contribution of Informal Learning” in Aspin *et al.*, *supra* note 11 at 83.

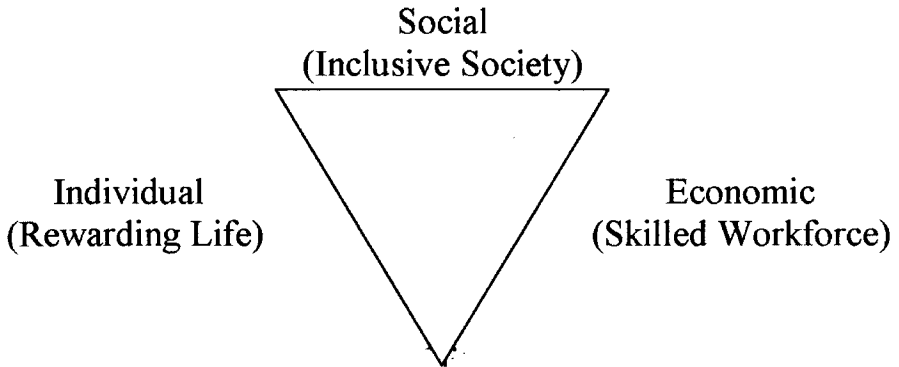
⁴⁰ Roberto Mangabeira Unger, *The Self Awakened: Pragmatism Unbound* (Cambridge, Mass.: Harvard University Press, 2007).

⁴¹ Janis E. Clark, “Transition Education: One Step in a Lifetime of Learning for Lawyers” (Spring 2006) 2:2 Val. U. L. Rev. 427.

⁴² See more generally, Alexandra Dobrowolsky & Ruth Lister, “Social investment: the discourse and the dimensions of change” in Martin Powell, ed., *Modeling The Welfare State: The Blair Legacy* (Bristol: The Policy Press, 2008) at 125–142.

⁴³ Of course we cannot do justice to these arguments here but rather must refer the reader to the literature. See, for example, Aspin *et al.*, *supra* note 11 at xxi; Richard Bagnall, “Locating Lifelong Learning and Education in Contemporary Currents of Thought and Culture” in Aspin *et al.*, *supra* note 11 at 38.

engender a triad of goods: “education for a more highly skilled workforce; personal development leading to a more rewarding life; creation of a stronger and more inclusive society.”⁴⁴ Or, as they rephrase it a few lines later, lifelong learning “will help achieve a variety of policy goals that include building a strong adaptable and competitive economy, providing a fertile range of opportunities for growth and personal development and developing a richer social fabric where principles and ideals of social inclusiveness, justice and equity are practiced and promoted.”⁴⁵ These goals can be represented in the following (intentionally unstable) inverted pyramid:



It must be noted, however, that advocates of lifelong learning are sensitive to a risk of characterizing the benefits of lifelong learning as an “investment” — specifically, the risk that too great a focus may be placed on the development of economically salient utilitarian skills and that this may result in the marginalization of the values of individual autonomy and social inclusion.⁴⁶ Hence the instability of the pyramid. This concern about an excessive focus on human capital formation is especially pertinent for a discussion on lifelong learning and legal education; it may well be tempting for the legal profession to focus on the potential economic benefits of lifelong learning and to seek to design lifelong learning initiatives to maximize them to the detriment of the others (e.g., by focusing solely on competencies in substantive law and mechanical skills). However, while the concerns of advocates are legitimate, they are not fatal. Rather, they serve a cautionary purpose and they take us to a tempered conclusion that the triad of a rewarding life, skilled workforce, and inclusive society can help to ground an argument for adopting a lifelong learning approach (all three goods are indeed worthy of pursuit), so long as an eye is kept squarely on the full triad and no one element is allowed to dominate.

⁴⁴ Aspin *et al.*, *supra* note 11 at xxi.

⁴⁵ *Ibid.* A defence of this empirical claim is found in David Aspin *et al.*, *International Handbook of Lifelong Learning*, *supra* note 11.

⁴⁶ See e.g. Bagnall, *supra* note 43 at 47; Robin Barrow & Patrick Keeney, “Lifelong Learning and Personal Fulfillment” in Aspin *et al.*, *supra* note 11 at 51; Ranson, Rikowski & Strain, in Aspin *et al.*, *supra* note 11 at 135.

(d) Learning from Others

Earlier in this paper we briefly referred to the fact that a lifelong learning approach has been embraced by the judiciary in Canada. Here we offer a brief description of two initiatives and suggest that these provide the basis for an argument in support of the claim that the Canadian legal profession should take a lifelong learning approach to CPD.

The National Judicial Institute (N.J.I.) has developed two lifelong learning programs for Canadian judges. First, in response to a developing awareness of inequality and discrimination in Canadian society and law, the Canadian judiciary endorsed and adopted a program of “social context education.” This was an ambitious project that brought together judges, academics from several disciplines, lawyers and community representatives to conceptualize, design, deliver and evaluate judicial education programs that were “comprehensive, indepth and credible . . .”.⁴⁷ These programs were grounded in a lifelong learning approach.⁴⁸ More recently, in August 2009, the N.J.I. rolled out a new program, “The Art and Craft of Judging: Your Sophomore Years” which was a five day workshop specially designed for judges who have been sitting for approximately five years, and which invokes some of the insights of lifelong learning.⁴⁹ Through these N.J.I. social context and sophomore programs, the Canadian judiciary has shown a commitment to, and demonstrated the feasibility and value of, taking a lifelong learning approach in a continuing legal education context.⁵⁰ Lawyers can, and should, learn from the judges’ examples.

4. IMPLICATIONS OF A LIFELONG LEARNING APPROACH FOR CONTINUING PROFESSIONAL DEVELOPMENT (THROUGH THE LENS OF CONTINUING LEGAL ETHICS EDUCATION)

(a) From Pedagogy to Andragogy⁵¹

We turn now to a brief consideration of some of the implications for taking a lifelong learning approach to legal education. The first proposition is that, as we are talking about lifelong learning, we are talking about education for adults and so we need to go beyond pedagogy — the teaching of children — to andragogy — the

⁴⁷ Resolution of the Canadian Judicial Council, March 1994.

⁴⁸ See further Justice Lynn Smith, “Judicial Education on Context” (2005) 38 U.B.C. L. Rev. 569; Justice Donna Hackett & Richard Devlin, “Constitutionalized Law Reform: Equality Rights and Social Context Education” (2005) 4 Journal of Law and Equality 157. See further Rosemary Cairns Way, “Contradictory or Complementary? Reconciling Judicial Independence with Social Context Education” in Lorne Sossin & Adam Dodek, eds. *The Future of Judicial Independence* (University of Toronto Press, forthcoming) at 14.

⁴⁹ Materials, “The Art and Craft of Judging: Your Sophomore Years” (Aug. 2009) [on file with authors].

⁵⁰ See Hackett & Devlin, *supra* note 48.

⁵¹ For the etymological source of the term “andragogy” see Malcolm S. Knowles, *The Adult Learner: A Neglected Species* (Houston: Gulf Publishing, 1973) at 40–43.

teaching of adults.⁵²

Barbara Bichelmeyer, drawing on Malcolm Knowles' *The Adult Learner*,⁵³ has developed the following table to demonstrate some of the differences between pedagogy and andragogy:⁵⁴

ASSUMPTIONS ABOUT LEARNERS		
About	Pedagogical	Andragogical
Concept of learner	Dependent personality	Increasingly self-directed
Learner's experience	To be built on more than used as a resource	Rich resource for learning by self
Readiness to learn	Uniform by age-level and curriculum	Develops from life tasks and problems
Orientation to learning	Subject-centered	Task- or problem-centered
Motivation	By external rewards and punishment	By internal incentives, curiosity

Adults are increasingly self-directed and education programs should work with the internal incentives and the adults' wealth of values, knowledge, experiences, understandings, skills and needs.⁵⁵ Viewed in this light, learning is characterized:

as a process of making sense of life's experiences and giving meaning to whatever "sense" is made; using those meanings in thinking, solving problems and making choices and decisions; and acting in ways that are congruent with these choices and decisions as a means of obtaining feedback to confirm or disconfirm means and choices. *Learning results in relatively permanent changes not only in meanings and behaviours but also in the ways one goes about making sense, making meaning and thinking, making choices, and acting.*⁵⁶

A concrete example can help illustrate this point about an enlarged conception of the significance of learning. There is widespread agreement that the shift to the business model of the law firm has had an impact on the nature of firms and the role of lawyers.⁵⁷ Recently, however, both American and Australian researchers have been discussing the creation of an "ethical infrastructure" for law firms to

⁵² Jarvis, *supra* note 11 at Chapters 3–5.

⁵³ Knowles, *supra* note 51.

⁵⁴ Barbara A. Bichelmeyer, "Best Practices in Adult Education and E-Learning: Leverage Points of Quality and Impact of CLE" (Spring 2006) 2:2 Val. U. L. Rev. 509.

⁵⁵ Patricia H. Murrell, "Experiential Learning and Learning Styles: A Model for Continuing Legal Education", (Spring 2000) 2:2 The CLE Journal, at 6-7; Jay Conison, "Law School Education and Liberal CLE" (Spring 2006) 2:2 Val. U. L. Rev. 325 at 336-337; Bruce Green, "Teaching Lawyers Ethics" (2007) 51 St. Louis U.L.J. 1091 at 1097–1099.

⁵⁶ MacKeracher, *supra* note 11 at 7-8. [emphasis added]

⁵⁷ See e.g. Frank Iacobucci, "The Practice of Law: Business and Professionalism" (1991) 49 The Advocate 859.

complement and balance the business model.⁵⁸ Building on this research,⁵⁹ we suggest that an andragogically informed program of experiential and reflective learning, specifically designed for, and delivered at, the level of managing partners would not just focus on a set of rules, general principles, or pragmatic skills, but would seek to enlarge the vision of the managing partners and transform the norms of law firms . . . and the lawyers who work within the structures of those firms. Such a program could have a significant impact on how lawyers think, on the ways lawyers go about “*making sense, making meaning and thinking, making choices, and acting*”⁶⁰.

In order to realize this shift from pedagogy to andragogy, we need to make at least three important transitions. First, we must shift the emphasis from teaching to learning,⁶¹ from the instructor as the sole source of information to the participants as fully engaged contributors. The students are then the subjects rather than the objects of activity. They are actors with a background of rich experience to be unpacked, not simply empty vessels to be filled up. For example, a concrete legal ethics suggestion in the criminal law context would be to design a module on what a lawyer might do with physical evidence of a crime that comes into her possession. If participants were more actively included, this would likely move beyond the old chestnut examples like the bloody knife, smoking gun or hidden videotapes, to more quotidian situations, for example, taking possession of broken eyeglasses or a cellphone. Such examples could better enable the lawyers to see themselves as ethical agents and to bring their experiential knowledge to the discussion. Similarly, in the corporate law sphere, modules could be built around the issue of whether lawyers should sit as members of a board of directors,⁶² or what the appropriate responses are if a client asks a lawyer to backdate a document.⁶³

Second, education must no longer be primarily about “front end loading” with substantive knowledge (i.e. a talking head delivering the canned version of five recent cases on a particular point). Rather, education must be about creating systems that would take the particular issue, with the attendant five cases, and facilitate ongoing opportunities for understanding, analysis, reflection, critique, and

⁵⁸ See e.g. Christine Parker & Adrian Evans *et al.*, “The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour” (2008) 31:1 U.N.S.W.L.J. 158; Elizabeth Chambliss & David Wilkins, “The Emerging Role of Ethics Advisors, General Counsel and Other Compliance Specialists in Large Law Firms” (2002) 44 Arizona L. Rev. 559.

⁵⁹ This, and all subsequent examples, acknowledge that programs need to be designed to respond to adult learners’ diverse learning styles. A detailed discussion of this challenge is beyond the scope of this paper, but see e.g. Robin A. Boyle, “Applying Learning Styles Theory in the Workplace: How to Maximize Learning Styles Strengths to Improve Work Performance in Law Practice” (2005) 79 St. John’s L. Rev. 97.

⁶⁰ MacKeracher, *supra* note 11 at 7-8. [emphasis added]

⁶¹ See e.g. Jarvis, *supra* note 11 at Chapter 2; MacKeracher, *supra* note 11 at 4.

⁶² Jim Middlemiss, “Directorships losing their marketing appeal” 25:17 *The Lawyers Weekly* (9 September 2005) (QL).

⁶³ Thanks to Sarah Bradley for this example.

problem-solving.⁶⁴ For example, recently Michelle Leering and Chantal Morton have been developing the idea of the “Integrated Reflective Practitioner”,⁶⁵ where the focus is not so much on the transfer of knowledge and skills, but collaborative, participatory and engaged reflection on actual issues in legal practice. Building on this work, we would suggest that billing practices, particularly in the corporate law context, could be a provocative example,⁶⁶ as could complex contemporary issues of client confidentiality.⁶⁷ In the family law context, legal ethics modules could be built around the appropriateness of arguing, for example, the parental alienation syndrome.⁶⁸ In the criminal law sphere, legal ethics modules could be developed on how to legitimately, appropriately and effectively raise and respond to potential racial variables in a case.

Third, education initiatives must focus students on “learning how to learn”⁶⁹ — the move here is from acquisition of content to development of capabilities, from the gathering of information to self-actualization. In pursuit of this goal, andragogy seeks to enhance not just cognitive skills (“thinking like a lawyer”) which are already well (perhaps overly?) developed, but to promote emotional intelligence, critical thinking, and generative learning.⁷⁰ Emotional intelligence fo-

⁶⁴ The major voice in this tradition, of course, is Donald A. Schön, *The Reflective Practitioner: How Professionals Think in Action* (New York: Basic Books, 1983); *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions* (San Francisco: Jossey-Bass, 1987). For a discussion of one such innovative program see Donald S. Murphy & Thomas Schwen, “The Future: Transitioning from Training Lawyers to Improving Their Performance” (Spring 2006) 2:2 Val. U. L. Rev. at 521.

⁶⁵ Michele Leering & Chantal Morton, “Encouraging Reflective Practice” (Paper presented at The Geographies of Legal Education: Policy, Practice and Theory Conference, delivered at the Canadian Association of Law Teachers Annual Conference, Carlton University, Ottawa, 26 May 2009). See also Julie McFarlane, “Assessing the Reflective Practitioner: Pedagogic Principles and Certification Needs” (1998) 5 International Journal of the Legal Profession 63 at 78.

⁶⁶ See Alice Woolley, “Evaluating Value: A Historical Case Study of the Capacity of Alternative Billing Methods to Reform Unethical Hourly Billing” (2005) 12 International Journal of the Legal Profession 339–365; Duncan Webb, “Killing Time: A Limited Defense of Time-Cost Billing” (2010) 13 Legal Ethics 39.

⁶⁷ Green, *supra* note 55.

⁶⁸ See e.g. “Understanding Parental Alienation” 29:4 *The Lawyers Weekly*, (29 May 2009) (QL).

⁶⁹ See e.g. MacKeracher, *supra* note 11 at 15–16, 129.

⁷⁰ There is, of course, a massive literature on each of these forms of intelligence. Classic texts include: Daniel Goleman, *Emotional Intelligence* (Toronto: Bantam Books, 1995); James E. Stice, *Developing Critical Thinking and Problem Solving Abilities* (San Francisco: Jossey-Bass, 1987); Robert E. Young, ed., *Fostering Critical Thinking: New Directions for Teaching and Learning* no. 3 (San Francisco: Jossey-Bass, 1980); Chris Argyris, *Social Science Approaches to Business Behaviour* (London: Garland Publishing, 1987); Chris Argyris and Donald A. Schön, *Organizational Learning* (Reading, MA.: Addison-Wesley, 1981); Robert Kegan & Lisa Laskow Lahey, *Immunity to Change: how to overcome it and unlock potential in yourself and your organization* (Boston, MA.: Harvard Business Press, 2009); Robert Kegan & Lisa Laskow La-

cuses on the following abilities:

to recognize and understand emotions and to express feelings non destructively . . . to understand how others feel and relate with them co-operatively . . . to manage and control emotions effectively . . . to manage change and the emotions generated by change, and to adapt and solve problems of a personal and interpersonal nature . . . [and] to generate positive affect and be self-motivated.⁷¹

Critical thinking “is not a skill but an attitude of mind: a disposition not to take statements for granted, not to accept dogmatic beliefs no matter how sanctioned, not to go along with the dominant simply because they are a majority.”⁷² Generative learning is “learning that enhances our capacity to create.”⁷³ When we combine these four elements of “learning how to learn” — cognitive intelligence, emotional intelligence, critical thinking and generative learning — information gathering, knowledge generation, critical analysis, problem-solving, etc. can become optimized. This can be represented as follows:

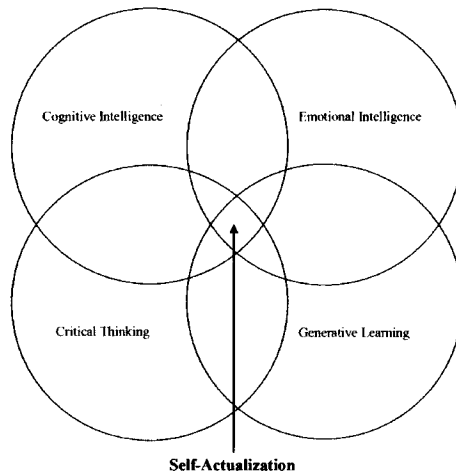
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hey, *How the way we talk can change the way we work: seven languages for transformation* (San Francisco: Jossey-Bass, 2001).

⁷¹ Reuven Bar On *et al.*, eds., *Educating People to Be Emotionally Intelligent* (Westport, Conn.: Praeger, 2007) at xiv. See also MacKeracher who, synthesizing Goleman, describes emotional intelligence as “the ability to motivate oneself and persist in the face of frustrations, to control impulses and delay gratification, to regulate mood and keep distress from swamping one’s ability to think, to empathize with others, and to hope.” MacKeracher, *supra* note 11 at 137. See also Peter Reilly, “Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence” (2005) 21:2 *Negotiation Journal* 301. See also Andrea Chisholm, *Enriching and Humanizing Canadian Legal Education with Multiple and Emotional Intelligences* in this volume.

⁷² Ivan Snook, “Lifelong Education: Some Deweyan Themes” in Aspin *et al.*, *supra* note 11 at 162.

⁷³ Murrell, *supra* note 55 at 16; Patricia H. Murrell, “Competence and Character: The Heart of CLE for the Profession’s Gatekeepers” (Spring 2006) 2:2 *Val. U. L. Rev.* 485 at 500.



To illustrate, we could create a module addressing a lawyer's duty to report misbehaviour of another lawyer (a colleague, or a lawyer for the other side) to the regulating body. In this example cognitive intelligence would draw upon rules to be found in Codes of Conduct or caselaw; emotional intelligence would address the complexity of the relationships involved; critical thinking would interrogate both the relevant rules revealed by cognitive learning and the (perhaps unspoken) norms of the legal community; and generative learning would seek out innovative, even transgressive, solutions. Another, especially ethically challenging, area that continues to be a problem is the limits on the examination and cross-examination of a complainant in a sexual assault case.⁷⁴ While there are some clearly wrong answers in this area, right answers remain elusive. Properly conceived programs in which lawyers (with the help of others) learn how to learn — drawing not only on the legal rules but also on the insights of emotional intelligence, critical thinking and generative learning — might help lawyers to escape current stultifying role moralities (the zealous advocate who proceeds “reckless of consequences”⁷⁵), generate new approaches and thereby enhance the quality of the justice of the system and, most importantly, assist the people who are caught up in the system.⁷⁶

⁷⁴ See David Layton, “The Criminal Defense Lawyer’s Role” (2004) 27 Dal. L.J. 379; Ronald Murphy, “S.(J.H.): A New and Improved W.(D.),” (2008) 57 C.R. (6th) 89.

⁷⁵ From Lord Henry Brougham’s famous description of the duty of loyalty, spoken in the course of his 1820 defence of Queen Caroline against a charge of adultery brought by King George IV, see J. Nightingale, *Trial of Queen Caroline*, vol. 2, The Defence, Part 1 (1821) at 8.

⁷⁶ For example, Layton argues that if defence counsel are cross-examining a sexual assault complainant who they know is telling the truth, they must “apply a personal conception of shared professional values and so make normative decisions that impact on the course of justice:” *supra* note 74 at 379.

(b) From Individual Learning to Communities of Learning

Traditionally, educational theorists have focused their analyses on the conventional institutions of learning — schools, universities, community colleges etc. Although advocates of lifelong learning do not abandon these institutions, they argue that we also need to consider other important “communities of learning” such as firms, social groups, religious communities, towns etc.⁷⁷

We suggest that the professions, including the legal profession, also constitute communities of learning.⁷⁸ In fact, we argue that given the functional diversities of the Canadian legal profession — private/public lawyers, sole/firm-based practitioners, local/regional/national/multinational lawyers, urban/rural lawyers, criminal/family lawyers, corporate/poverty lawyers etc. — there are multiple legal communities of learning.⁷⁹ As a result, continuing legal ethics education must be designed with the needs and potential of these diverse legal communities of learning in mind. For example, all lawyers owe a duty of loyalty to their clients, with the correlative obligations to avoid conflicts of interest, but how these relatively abstract principles are concretized in the multiple legal communities will obviously be very context specific, and programs designed for these diverse communities must be responsive to these specificities.

Furthermore, lifelong learning does not understand learning as simply the acquisition of personal, individual substantive knowledge and skills. Rather, as the emphasis on community indicates, it sees learning as relational,⁸⁰ a collaborative process, where people learn together and take collective responsibility for realizing their andragogical objectives. This is especially important for lawyers. Historically, legal education and legal practice have encouraged highly individualistic and competitive approaches to learning and doing. As a result, many lawyers have a very high level of confidence in, and regard for, their own understanding of problems and potential solutions. Lifelong learning, with its espousal of relational selves and communities of learning, questions this worldview.⁸¹ It suggests that collaborative

⁷⁷ See e.g. Peter Senge, *The Fifth Discipline: The Art and Practice of the Learning Organization* (London: Random House Business, 2006); Etienne Wenger, Richard A. McDermott & William Snyder, *Cultivating Communities of Practice* (Boston, Mass.: Harvard Business School Press, 2002); Nancy Sherman Shapiro & Jodi Levine Laufgraben, *Creating Learning Communities: a practical guide to winning support, organizing for change, and implementing programs* (San Francisco: Jossey-Bass, 1999); Murphy & Schwen, *supra* note 64 at 537–540.

⁷⁸ See also Randall T. Shepard, “The ‘L’ in ‘CLE’ Stands for ‘Legal’” (Spring 2006) 2:2 Val. U. L. Rev. 311 at 318–319.

⁷⁹ See e.g. Leslie Levin, “The Ethical World of Solo and Small Law Firm Practitioners” (2004) 41 Houston L. Rev. 309.

⁸⁰ MacKeracher, *supra* note 11 at Chapter 8; See also Gold *et al.*, *supra*, note 9 at 244–248 discussing the importance of “interdependency and dialogic relations” for the learning community of a law firm, and David Beckett & Jenny Gough, “Perceptions of Professional Identity: A Story From Paediatrics” (2004) 26:2 Studies in Continuing Education 196 at 207 discussing “relational constructions” in the context of medical education.

⁸¹ Some of the literature on lifelong learning emphasizes the importance of individual self-motivation and self-direction. We accept the significance of these claims to some

approaches are likely to generate better analyses and solutions rather than individual analyses, and that “learning how to learn together”⁸² is a vital first step.

A final example that brings many of these themes together — learning not just teaching; enhanced creativity not just substance and skills; emotional intelligence, critical thinking and generativity not just conventional legal analysis; and learning how to learn together, not just individual competence building — might be to develop a module that would introduce groups of lawyers to a proposed “framework of ethical analysis” and then to work with them to analyse, modify and deploy that framework in the context of their own diverse experiences.⁸³ Such a framework of ethical analysis is explicitly designed to complement conventional legal knowledge and skills and be sufficiently flexible to respond to the plurality of experiences as lawyers, but its core ambition is to help lawyers improve their skills of ethical judgment and thereby enhance their capability for an ethically engaged practice of law.⁸⁴

degree, but emphasize that it is through collective learning that self-critique and self-reflection can be optimized . . . “you don’t know, what you don’t know” is an aphorism that is even more true in a complex, ever changing world.

⁸² Aspin *et al.*, *supra* note 11 at xi; Aspin & Chapman, in Aspin *et al.*, *supra* note 11 at 21-22; MacKeracher, *supra* note 11 at 17; Ranson, Rikowski & Strain, in Aspin *et al.*, *supra* note 11 at 147.

⁸³ For example, we have developed the following “Framework of Ethical Analysis”:

- Get the facts
- Investigate the governing “rules” (from law and ethics)
- Reflect on the underlying philosophy and spirit of the “rules”
- Identify the client’s interests, wishes, rights, and obligations
- Identify the interests of the other side(s) and any other affected parties
- Identify one’s duties to the state, the court, the profession, one’s colleagues, the public, one’s family
- Identify one’s own personal values that are relevant to the situation
- Identify the choices for action/inaction that are available
- Weigh the possible consequences of each of the choices
- Identify the scope of your discretion to act in particular ways
- Discuss the situation with others
- Engage in self reflection
- Identify priorities among competing “rules” and values
- Choose and implement course of action/inaction
- Review decision after the fact

⁸⁴ See also David Tanovitch, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28 Dal. L.J. 267; Chris Trevitt & Chandi Perena, “Learning about professional learning: a curriculum where ‘self’ takes precedence over ‘action’ and ‘knowledge’ (in medicine)” (Paper presented at the Professional lifelong learning: beyond reflective practice, a workshop held in association with the 36th Annual Standing Conference on University Teaching and Research in the Education of Adults (SCU-TREA) conference on “Inter-cultural perspectives on research into adult learning — a

5. CONCLUSION

In this short paper we have attempted to provide a bird's eye view of the potential contribution of lifelong learning theory and practice to legal education.⁸⁵ We have argued that taking a lifelong learning approach to legal ethics education would be good for several reasons:⁸⁶ it is consistent with a rich understanding of personal identity; it fits the reality of a constantly changing world within which law exists; it has the capacity to produce public and private goods; and clearly it can be done (as it has been done successfully by the judges in the narrower contexts of social context education and the sophomore program). The implications of taking a lifelong learning approach for legal ethics education are significant — we must shift from pedagogy to andragogy and we must nurture communities of legal learning.

We also believe that it is reasonable to move from the specifics of lifelong learning and continuing legal ethics education to a similar analysis for other topics in legal education (e.g., constitutional law, environmental law, and practice management) and at other stages in legal education (e.g., in law school and in bar admission programs). In other words, legal educators could, and should, take up the challenges of lifelong learning and, thereby, realize its opportunities.⁸⁷ To do so would benefit the individuals involved in the practice of law and, more importantly, those served by the legal profession.

global dialogue," Lifelong Learning Institute, School of Education, University of Leeds, 3–6 July 2006). Even more ambitious projects could be imagined, for example, introducing lawyers to the ways in which "categorization, narrative, rhetoric and culture" construct and "dull" legal thinking. See especially Anthony Amsterdam & Jerome Bruner, *Minding the Law* (Cambridge, Mass.: Harvard University Press, 2000) who advocate a "methodology of estrangement" which proposes "a way of thinking about the law that is intended to enliven consciousness as a ward against the numb acceptance of injustices and inhumanities so rooted in routine that they seem natural, inevitable or not really to be going on at all." *Ibid* at 2, 4, 17.

⁸⁵ Such a macro level analysis obviously invites us to add meso and micro analyses where, as the saying goes, the devil is in the details. Although we have provided indications of what such levels of analysis might look like via several examples from corporate law, criminal law and family law, such a project is premature until our potential partners in the practicing profession buy into the nature and function of lifelong learning at the macro level.

⁸⁶ We are of course aware, as we have indicated on several occasions, that lifelong learning might have some potentially significant downsides, especially in its vocationalist forms [See e.g. D.W. Livingstone *et al.*, eds., *The Future of Lifelong Learning and Work: Critical Perspectives* (Rotterdam: Sense Publishers, 2008) and Walker, *supra* note 17] but we do believe it creates a space in which we might be able to enhance the ethical capabilities of the Canadian legal profession.

⁸⁷ See also Terry Gygar & Kay Lauchland, "Lifelong Learning for Reforming Law, Refining Lawyers, Refreshing Education" in Liu Guofu, ed., *Legal Relevance and Good Governance: Comparative Law Study in the Asia Pacific Region* (Beijing, China Economic Publishing House, 2008) at 154.