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INTRODUCTION

In the past several decades Canadians have increasingly opted to study abroad, especially in the United States. We are four Canadian students who are part of this growing trend. All of us completed our undergraduate educations in Canada, and we are all now students or graduates at New York University School of Law in New York City. However, home for each of us is Canada: Calgary, Ottawa, Toronto, and Vancouver.

We write to urge the National Committee on Accreditation (NCA) and the provincial law societies to abandon their inequitable treatment of graduates of U.S. law schools as compared with graduates of Canadian common law schools. Under the current rules, to return to Canada to practise law after graduation we would have to surmount a number of costly and time-consuming hurdles not imposed on graduates of Canadian common law schools. For example, before we could write the bar examinations, we would have to apply to the Ottawa-based NCA for a Certificate of Qualification. Moreover, the NCA likely would require us to complete an additional one or one-and-a-half academic years of coursework at a Canadian common law school, as well as an additional eight to ten examinations costing more than \$500 each, before we could sit for the standard bar examinations.¹

Notably, no comparable extra requirements are imposed on graduates of Canadian law schools who wish to write the bar examinations in New York State. Instead, the eligibility requirements for the New York bar clearly allow graduates of Canadian law schools to write the state's bar examination immediately after they graduate on the same basis as graduates of U.S. law schools approved by the American Bar Association (ABA). Indeed, we know of and work with many Canadians who have graduated from Canadian law schools, written the New York bar immediately after graduation, and now work at New York-based law firms.

It is time for the NCA and the Canadian provincial law societies to adopt a bar that is open to the graduates of ABA-approved U.S. law schools, just as New York's bar is open to graduates of Canadian law schools. In particular, the law societies should allow graduates of U.S. law schools approved by the ABA to write the provincial bar examinations on the same basis as graduates of Canadian common law schools. As New York State's experience demonstrates,

¹ FEDERATION OF LAW SOCIETIES OF CANADA, EVALUATION GUIDELINES FOR FOREIGN QUALIFIED LAWYERS, COURSE REQUIREMENTS AND CHALLENGE EXAMS, at <http://www.flsc.ca/en/foreignLawyers/guidelines.asp> (last visited Feb. 2006).

there is no valid reason for the existing prejudiced treatment of graduates of other common law schools. Moreover, the law societies' unjust rules have many negative public policy consequences and are fundamentally incompatible with the law societies' mandate of governing the legal profession in the public interest. In particular, the unreasonable requirements:

- exacerbate the exodus of highly educated Canadians to the United States by discouraging professionals with strong ties to Canada but who trained in the United States from returning to Canada to practise law;
- deprive Canadians of highly qualified law graduates who could help Canadian industry—including Canadian law firms—compete in Canada's most important foreign marketplace, the United States;
- discourage highly qualified immigrants from coming to Canada, by making it harder for non-Canadians trained in the United States to use their skills in Canada; and
- make it harder for Canadian governments to argue for the removal of similar protectionist barriers to the free movement of labour that harm Canadians who wish or need to work in other jurisdictions.

The remainder of this paper describes in greater detail:

- how the law societies' rules unfairly burden graduates of U.S. law schools;
- the similar nature of legal education in U.S. and Canadian law schools that routinely makes it possible for graduates of Canadian law schools to write and pass the New York bar on the same basis as graduates of U.S. law schools, and to work in New York;
- how other jurisdictions deal with foreign graduates;
- why the law societies' should abandon their prejudiced rules; and
- how these rule changes would be consistent with the law societies' mandates of ensuring service by lawyers who meet high standards of learning, competence and professional conduct.²

² See, e.g., LAW SOCIETY OF UPPER CANADA, ABOUT THE SOCIETY, LAW SOCIETY MANDATE, at <http://www.lsuc.on.ca/about/> (last visited Mar. 21, 2006); LAW SOCIETY OF ALBERTA, ANNUAL REPORT 2005, <http://www.lawsocietyalberta.com/files/annualreport/annualreport2005.pdf> (last visited Feb. 20, 2007); LAW SOCIETY OF BRITISH COLUMBIA, OVERVIEW, <http://www.lawsociety.bc.ca/about/overview.html> (last visited Feb. 20, 2007).

CURRENT RULES UNFAIRLY BURDEN GRADUATES OF U.S. LAW SCHOOLS

To be eligible to write the bar exams in a given province, as required to practise law in the province, it is necessary to have completed a basic education in law. Most of the individuals who, for example, write the Ontario bar exams complete their basic legal education at a common law school in Ontario. However, a smaller number of those who write provincial bar exams do so after completing a common law degree from a university in a different province, a civil law degree in Quebec, or a law degree from a law school outside of Canada.

The provincial law societies allow graduates of common law schools in other Canadian provinces to sit for their provincial bar examinations on the same basis as graduates of Canadian schools. However, students who have not studied at a common law school in Canada must apply to the National Committee on Accreditation (NCA) for a Certificate of Qualification before being allowed to take any provincial bar exam in Canada. The NCA is composed of representatives from provincial law societies and academia, and is administered through the offices of its Executive Director, the University of Ottawa Law School's Professor Vern Krishna. Among those who must apply to the NCA before writing the bar exams are graduates of Quebec civil law schools, U.S. law schools, U.K. law schools and law schools in all other countries. Each year, the NCA receives over 900 inquiries and processes more than 300 applications.³ The chart below details NCA evaluations and Certificates of Qualification issued by country of law school over the past five years. The NCA evaluates the legal training and professional experience of persons with non-common law (including Quebec) and foreign legal credentials who wish to be admitted to a common law bar in Canada. Upon completion of its review, the NCA issues a recommendation describing the scope and extent of any further legal education that, in its opinion, the applicant should complete to meet the standard of Canadian common law trained lawyers. The Committee is authorized to issue a Certificate of Qualification to any candidate who has attained education and training equivalent to a graduate of a Canadian law program.⁴ The Certificates are good for use in any common law province.

³ FEDERATION OF CANADIAN LAW SOCIETIES, NATIONAL COMMITTEE ON ACCREDITATION, STATISTICS, at <http://www.flsc.ca/en/foreignLawyers/stats.asp> (last visited Feb. 20, 2007).

⁴ FEDERATION OF LAW SOCIETIES OF CANADA, NATIONAL COMMITTEE ON ACCREDITATION, EVALUATION GUIDELINES FOR FOREIGN QUALIFIED LAWYERS, at <http://www.flsc.ca/en/foreignLawyers/guidelines.asp> (last visited Feb. 2006).

Table 1 - NCA Evaluations (E) & Certificates Issued (I), 2001-05⁵

	2001		2002		2003		2004		2005	
	E	I	E	I	E	I	E	I	E	I
Canada (PQ)	15	3	13	10	14	11	7	5	19	5
England	59	29	67	23	86	21	67	39	86	42
India	49	10	62	9	55	18	69	23	110	16
U.S.A.	38	19	62	40	78	37	85	39	97	49
All other	100	18	124	38	134	50	120	47	152	51
TOTALS	261	79	328	120	367	137	348	153	464	163

The NCA reviews each applicant's file on a case by case basis and makes one of three recommendations:

1. that the applicant pass exams in specified areas of Canadian law;
2. that the applicant take further education at a Canadian law school with a specified program of studies; or
3. that the applicant complete a Canadian law program.⁶

Generally, applicants with recent law degrees from ABA-accredited law schools in the United States are asked to complete between 30-45 credit hours in a Canadian law school (which is equivalent to one or one-and-a-half academic years), or, in appropriate cases, write 8 to 10 prescribed examinations that cost more than \$500 each.⁷ The Committee considers each applicant's academic performance and class standing in her foreign legal program, relevant graduate legal education, experience teaching at a University law school level, American professional qualifications (such as membership by examination in a state bar), and legal experience as a practising lawyer. The weight attached to experience depends upon the length and nature of the applicant's practice and its relevance to Canadian law practice.⁸ The NCA also demands applicants demonstrate competence in a number of subject areas, many of which are not required of students in Canadian law schools.⁹

⁵ FEDERATION OF LAW SOCIETIES OF CANADA, NATIONAL COMMITTEE ON ACCREDITATION, SUMMARY OF EVALUATIONS 1999-2005, at <http://www.flsc.ca/en/foreignLawyers/ncaEvaluations.asp> (last visited Mar. 21, 2006); FEDERATION OF LAW SOCIETIES OF CANADA, NATIONAL COMMITTEE ON ACCREDITATION, SUMMARY OF CERTIFICATES 1999-2005, at <http://www.flsc.ca/en/foreignLawyers/statisticsSum.asp> (last visited Mar. 21, 2006).

⁶ FEDERATION OF LAW SOCIETIES OF CANADA, NATIONAL COMMITTEE ON ACCREDITATION, EVALUATION GUIDELINES FOR FOREIGN QUALIFIED LAWYERS, at <http://www.flsc.ca/en/foreignLawyers/guidelines.asp> (last visited Feb. 2006).

⁷ *Id.*

⁸ *Id.*

⁹ "NCA applicants are expected to demonstrate competence in at least the following basic practice areas: Business Law (corporate and commercial); Civil litigation; Criminal Law and Procedure; Estate Planning and Administration; Family Law; Public and Constitutional Law; Real Estate; Taxation; Evidence; and Trusts, Equity, Remedies." "Typically, the Committee requires the following courses for applicants who are asked to complete

The rules and regulations for admission to a province's bar lie exclusively within the jurisdiction of provincial and territorial law societies. The NCA-issued Certificate of Qualification is a preliminary step in the education and training program necessary for admission as a lawyer in Canada.

The Certificate of Qualification entitles one to enter the provincial bar admission course and is officially recognized by the law societies of Ontario, Alberta, British Columbia, Prince Edward Island, and Saskatchewan as equivalent to graduation from an approved Canadian law school. Other law societies and law schools use the NCA's recommendation on a more informal basis. So, while the NCA system is national, individual provincial law societies set their own bar admissions standards. Our group is working towards equal recognition of ABA-approved law school degrees in all the common law provinces.

30 credit hours or less of additional studies: Constitutional Law (Charter of Rights), Evidence, Taxation, Basic Corporate Law (Business Associations), Administrative Law. Applicants who are asked to complete 45-60 credit hours may, in addition to the above, be required to take some or all of the following: Family Law, Real Estate Law, Criminal Procedure, Civil Procedure, Commercial Law/Secured, Transactions/Debtor Creditor Law, Trusts, Remedies, Tort, Property." *Id.*

AMERICAN AND CANADIAN LAW SCHOOLS PROVIDE SUBSTANTIALLY SIMILAR LEGAL EDUCATION

The NCA and the law societies' prejudiced treatment of graduates of U.S. law schools ignores the fundamentally similar nature of legal education in the United States and Canada. It is this underlying similarity that allows graduates of Canadian law schools to routinely write and pass the New York State bar without additional formal legal education or examinations.

AMERICAN LEGAL EDUCATION GREATLY INFLUENCED THE DEVELOPMENT OF CANADIAN COMMON LAW EDUCATION

Historically and up to the present, Canadian legal education has been influenced by U.S. legal education. As is well-known, the first modern, university-based law school in Ontario was established in 1949, after Osgoode Hall dean Cecil Wright, Bora Laskin and John Willis broke with the Law Society of Upper Canada's proprietary law school and moved to the University of Toronto. As University of Toronto Professor Stephen Waddams writes in his *Introduction to the Study of Law*:

The pattern of legal education that Wright established at Toronto, and which was copied throughout Canada, was strongly influenced by the American model, in particular Harvard Law School. The curriculum was designed to give students three years of thorough academic grounding in the law. The guiding spirit was a wish to impart a critical understanding of legal institutions, and the scope and purpose of legal rules, rather than simply a training for day-to-day practise. The university did not claim to teach everything the law student would need to know. Many pieces of practical knowledge, it was considered, could best be imparted outside the university, and this duty was left to the profession.¹⁰

¹⁰ Waddams continues: "Meanwhile the law schools themselves have moved a little from Wright's model towards greater emphasis on the practical." He cites the greater use of clinical programmes, practitioner lecturers, and course drafting exercises as instances where Canadian law schools have shifted from Wright's model. His chapter on legal education is overwhelmingly focused on the theoretical as opposed to practical training predominant in Canadian law schools. STEPHEN WADDAMS, *INTRODUCTION TO THE STUDY OF LAW*, 19–20 (6th ed. 2004).

With Harvard Law School at the forefront, American legal education had begun to shift in the late nineteenth century from an apprentice model, where legal education primarily was understood as training for a practical trade, to a university-based academic discipline.

AMERICAN AND CANADIAN COMMON LAW SCHOOLS APPLY SIMILAR PEDAGOGICAL METHODOLOGIES

To a large extent, contemporary American and Canadian legal education is oriented towards teaching students the common law legal method. The underlying methodological objective of legal education in both U.S. and Canadian common law schools is captured in the following description by the Law School Admissions Council, which administers the Law School Admission Test (LSAT) in both Canada and the United States. According to the Council, both U.S. and Canadian law schools subscribe to

... the general belief that the primary purpose of law school is not to teach substantive law, but to teach students to think like lawyers. Teachers of law are less concerned about rules and technicalities than their counterparts in many other disciplines. Although the memorization of specifics may be useful to the law student, the ability to be analytical and literate is considerably more important than the power of total recall.¹¹

Law schools in both the United States and Canada obviously teach local law in the context of imparting the common law legal method. But legal education is not regarded in either jurisdiction as the primary route through which lawyers learn the content of the law that they need to practise. Instead, in both jurisdictions, law school is intended to teach students how to analyze issues by methodically drawing on existing legal materials such as statutes, regulations, case law, and secondary sources, and to instil in students an appreciation of the need for thoroughness. Lawyers acquire the substantive knowledge they need to practise through means including the bar admission process, training received under the guidance of senior practitioners, independent research, and ongoing professional training.

In many ways, the process by which law graduates are accredited to practise law in a particular province implicitly recognizes that students graduating from Canadian common law schools have not learned the substantive law that they will need to practise. For example, students are not allowed to practise law on their own immediately after they graduate from law school. Instead, they are

¹¹ LAW SCHOOL ADMISSIONS COUNCIL, LEGAL EDUCATION IN CANADA, *at* <http://www.lsac.org/canadianCFC/template2.asp?url=LegalEdCanada.htm> (last visited Mar. 22, 2006).

required to pass the bar examinations of the particular province in which they wish to practice and to article. The preparation for, and writing of, the bar examination builds and tests students' knowledge of substantive law in the jurisdiction. Articling further develops candidates in these areas—giving trainees a chance to work with and learn from established lawyers. As the Law Society of Upper Canada explains, “[t]he focus of the Licensing Process is to ensure that candidates have demonstrated that they possess the required competencies at an entry-level in order to provide legal services effectively and in the public interest.”¹²

Graduates of U.S. law schools are not required to article to become licensed in the United States, but they are required to pass a state bar examination similar to the Canadian provincial bar examinations. As in Canada, the bar examination is used as the test of competency to enter the practice of law.

THE UNITED STATES AND CANADA REGULATE LEGAL EDUCATION SIMILARLY

In the United States, the ABA accredits law schools. Founded in 1878 to improve the quality of legal education, the ABA has been administering standards of legal education and publishing a list of law schools that comply with these standards for 85 years.¹³ Because of the respect given to the ABA standards, graduates of ABA-approved schools are able to sit for the bar in every jurisdiction in the United States.¹⁴

The ABA accreditation process requires a law school to have operated for at least one year before applying for provisional approval. The evaluation process includes on-site evaluations and review by the ABA Accreditation Board and Council. A school granted provisional approval is re-evaluated on-site annually for three years, at which point it may apply for full approval. If full approval is granted, the school is continually monitored to ensure it meets the ABA standards, including on-site evaluations three years after full approval and every seven years thereafter.¹⁵ There were 194 institutions with ABA approval as of August 2006, including both institutions with final and provisional approval.¹⁶

The overarching principles of the ABA evaluation ensure that the law school fulfils its responsibility to guarantee that graduates: understand their ethical

¹² LAW SOCIETY OF UPPER CANADA, LICENSING PROCESS INFORMATION BULLETIN FOR 2006 LAW SCHOOL GRADUATES, at <http://education.lsuc.on.ca/Assets/PDF/lp/memNewLicensingProcess2006.pdf> (last visited Oct. 2005).

¹³ AMERICAN BAR ASSOCIATION, ABA'S ROLE IN THE ACCREDITATION PROCESS, at <http://www.abanet.org/legaled/accreditation/abarole.html> (last visited Feb. 11, 2007).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

responsibilities; understand the basic principles of public and private law; and develop the skills of legal analysis, reasoning, problem solving, oral and written communication, and legal research.¹⁷

The ABA requires law school applicants to hold a Bachelor's degree, or to have successfully completed three-quarters of the requirements for such a degree.¹⁸ Applicants are also required to write a valid and reliable admission test.¹⁹ Currently applicants to all ABA-approved schools must write the LSAT.²⁰ These educational requirements for applicants to law school at ABA schools are essentially identical to those at Canadian law schools.

Law schools face additional requirements in order to qualify for ABA approval. For example, the ABA enforces academic standards and regulates the academic calendar,²¹ the student-faculty ratio, and the responsibilities of full-time faculty.²² It also addresses each school's libraries, research and study space, and technological capacities.²³

In Canada, provincial law societies oversee law schools.²⁴ While the specific standards vary between provinces, they are in fact very similar to those set by the ABA. In Ontario, for example, the Law Society of Upper Canada established mandatory criteria for law schools in 1957. These criteria include educational requirements (minimum of two years of university study), the academic program and calendar (15 hours per week, 30 weeks per year, for 3 years), minimum library size and basic curriculum.²⁵ Requirements for other law schools in Canada are similar. Most provincial law societies grant substantial autonomy to law schools to execute their educational programs, and without further scrutiny the law societies admit graduates of all Canadian law schools to their bar admission programs.²⁶

¹⁷ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS – PREAMBLE, at <http://www.abanet.org/legaled/standards/preamble.html> (last visited Mar. 22, 2006).

¹⁸ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS – ADMISSIONS, STANDARD 502, at <http://www.abanet.org/legaled/standards/chapter5.html> (last visited Mar. 22, 2006).

¹⁹ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS – ADMISSIONS, STANDARD 503, at <http://www.abanet.org/legaled/standards/chapter5.html> (last visited Mar. 22, 2006).

²⁰ LAW SCHOOL ADMISSION COUNCIL, ABOUT THE LSAT, at <http://www.lsac.org/LSAC.asp?url=lsac/about-the-lsat.asp> (last visited Mar. 22, 2006).

²¹ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS – PROGRAM OF LEGAL EDUCATION, STANDARDS 303-04, at <http://www.abanet.org/legaled/standards/chapter3.html> (last visited Mar. 22, 2006).

²² AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS – FACULTY, at <http://www.abanet.org/legaled/standards/chapter4.html> (last visited Mar. 22, 2006).

²³ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS – FACILITIES, at <http://www.abanet.org/legaled/standards/chapter7.html> (last visited Mar. 22, 2006).

²⁴ LAURENTIAN UNIVERSITY, WHY STUDY LAW AND JUSTICE?, at <http://laurentian.ca/justice/english/eabout.html> (last visited Mar. 22, 2006).

²⁵ Constance Backhouse, *The Changing Landscape of Canadian Legal Education*, Article from Excellence, Competition and Hierarchy: Workshop on the Future of Canadian Legal Education (May 3, 1999), http://www.umanitoba.ca/faculties/law/LRI/Legal_education/backhouse.htm (last visited Feb. 21, 2007).

²⁶ *Id.*

CANADIAN LAW SCHOOLS RECOGNISE THE VALUE OF EDUCATION AT ABA-ACCREDITED SCHOOLS

One indication of the value in Canada of a legal education from an ABA-accredited U.S. law school is the number of faculty members at Canadian law schools with degrees from ABA-accredited schools. Consider, for example, the educational backgrounds of the full-time faculty at the Canadian common law schools in Table 2.

The hiring practices of Canadian law schools suggest that foreign training, especially in the United States, is valuable for analyzing and understanding Canadian legal issues. This is not surprising. Foreign precedents play an important role in Canadian law. Indeed, former Supreme Court of Canada Justice Gérard LaForest once described the use of foreign precedents in the Canadian judicial system as “expansive.”²⁷ Notably, a recent study of Supreme Court of Canada decisions under the *Charter of Rights and Freedoms* suggests that the United States is the leading source of foreign precedents, at least in this area. The study examined the source of foreign references in Supreme Court of Canada decisions invoking the *Charter of Rights and Freedoms* between 1998 and 2003. It concluded that more than half of the 87 individual foreign references in these decisions were to American sources.²⁸ Given the significant role that foreign and especially American precedents play in the Canadian legal system, it is easy to understand why Canadian law schools would value faculty with American training. It is also easy to imagine that the practice of law would be enriched more generally in Canada if American-trained lawyers had equal access to the provincial bar examinations.

THE SUPREME COURT OF CANADA RECOGNISES THE VALUE OF EDUCATION AT ABA-ACCREDITED SCHOOLS

Even Canada’s highest court respects the quality of ABA-accredited law schools. Clerking for the Supreme Court of Canada is a highly competitive and much respected position, accessible only to outstanding law school graduates, who “research points of law, prepare memoranda of law and generally assist the Judges” of Canada’s high court.²⁹ To qualify for the position, applicants must have a “Bachelor of Laws or J.D., or other law degree from a recognized Canadian university or its equivalent.”³⁰ “Proficiency in both official languages is

²⁷ Gérard V. LaForest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 212 (1994).

²⁸ Bijon Roy, *An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation*, 62 U. TORONTO FAC. L. REV. 99, 100–101 (2004).

²⁹ SUPREME COURT OF CANADA, EMPLOYMENT OPPORTUNITIES, LAW CLERK PROGRAM, at http://www.scc-csc.gc.ca/aboutcourt/lawclerks/LawClerk_e.asp (last visited Mar. 27, 2006).

³⁰ *Id.*

Table 2 - Educational Backgrounds of Full-Time Faculty at Canadian Law Schools³¹

	Total Full-Time Faculty	At Least One Foreign Law Degree	At Least One U.S. Law Degree	Foreign J.D. Equivalent	U.S. J.D.	No Canadian Law Degree	No Law Degree
Alberta	39	15	6	5	1	0	1
U.B.C.	46	31	20	17	5	12	0
Calgary	18	9	7	3	1	3	0
Dalhousie	41	17	11	4	1	2	0
Manitoba	25	13	7	4	0	3	1
McGill	47	35	17	8	2	2	1
Moncton	14	5	0	1	0	0	0
U.N.B.	18	12	8	2	0	2	0
Osgoode	54	30	19	12	0	6	5
Ottawa (Eng.)	40	24	18	5	2	4	0
Queen's	32	11	8	3	2	2	0
Saskatchewan	27	13	6	3	0	1	0
Toronto	59	44	22	15	4	14	3
Victoria	37	19	10	6	0	3	0
U.W.O.	42	23	10	4	2	7	0
Windsor	35	22	14	8	1	5	0

³¹ UNIVERSITY OF ALBERTA FACULTY OF LAW, FACULTY PROFILES, at <http://www.law.ualberta.ca/Faculty--Research/Faculty/Faculty-Profiles/index.php> (last visited Feb. 20, 2007); UNIVERSITY OF BRITISH COLUMBIA FACULTY OF LAW, FACULTY DIRECTORY, at <http://www.law.ubc.ca/faculty/faculty.html> (last visited Feb. 20, 2007); UNIVERSITY OF CALGARY FACULTY OF LAW, FULL-TIME FACULTY at <http://www.law.ucalgary.ca/faculty/faculty-bios.htm> (last visited Feb. 20, 2007); DALHOUSIE LAW SCHOOL, FULL-TIME FACULTY at http://law.dal.ca/Faculty/Full_Time_Faculty/index.php (last visited Feb. 20, 2007); ROBSON HALL, FACULTY PROFILES at http://www.umanitoba.ca/law/newsite/faculty_directory.php (last visited Feb. 20, 2007); MCGILL FACULTY OF LAW, FACULTY MEMBERS at <http://www.mcgill.ca/law/about/profs/> (last visited Feb. 20, 2007); UNIVERSITY OF NEW BRUNSWICK LAW SCHOOL, LAW FACULTY DIRECTORY at <http://law.unb.ca/faculty.html> (last visited Feb. 20, 2007); OSGOODE HALL LAW SCHOOL, FULL TIME FACULTY, at <http://www.osgoode.yorku.ca/faculty.htm> (last visited Jan. 30, 2006); UNIVERSITY OF OTTAWA FACULTY OF LAW, COMMON LAW, ENGLISH PROGRAM PROFESSORS, at http://www.commonlaw.uottawa.ca/index.php?option=com_contact&catid=13&Itemid=26&pid=26&lang=en (last visited Jan. 30, 2006); QUEEN'S UNIVERSITY FACULTY OF LAW, FACULTY - STAFF DIRECTORY AND FACULTY PROFILES, at <http://law.queensu.ca/faculty/profiles/> (last visited Jan. 30, 2006); UNIVERSITY OF SASKATCHEWAN COLLEGE OF LAW, FACULTY AND STAFF CONTACT INFORMATION at <http://www.usask.ca/law/people/> (last visited Feb. 20, 2007); UNIVERSITY OF TORONTO FACULTY OF LAW, FACULTY DIRECTORY, at http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/3/4/0/0&contentId=345&cType=facMembers (last visited Jan. 30, 2006); UNIVERSITY OF TORONTO FACULTY OF LAW, JD PROGRAM GUIDE 2006-07 8, available at http://www.law.utoronto.ca/documents/JD/JD_program_guide.pdf; UNIVERSITY OF VICTORIA FACULTY OF LAW, FACULTY DIRECTORY, at http://www.law.uvic.ca/Faculty_Staff/faculty_directory.php (last visited Feb. 20, 2007); WESTERN LAW, PROFESSOR DIRECTORY, at http://www.law.uwo.ca/redesign/Faculty_Staff/Professors.html (last visited Feb. 20, 2007); UNIVERSITY OF WINDSOR FACULTY OF LAW, FACULTY BIOGRAPHICAL INFORMATION, at <http://www.uwindsor.ca/units/law/LawTop.nsf/inToc/7F3889858EE10F5F85256D87004B4434#bio> (last visited Jan. 30, 2006).

not required for all positions, but is an asset.”³² In accepting graduates of American ABA-approved law schools as clerks for the Supreme Court, Canada’s highest court has recognised the calibre of the educational experience and the quality of the graduates of these schools.³³ The Supreme Court of Canada therefore views at least some ABA schools as ‘equivalent’ for clerkship purposes.

³² *Id.*

³³ Nancy Brooks, Executive Legal Officer of the Supreme Court of Canada, advised Noah Waisberg on June 23, 2006 that the Court declined to provide data on the numbers of American educated Supreme Court of Canada law clerks in recent years. Anecdotally, the authors have heard of American educated Supreme Court law clerks in recent years.

OTHER JURISDICTIONS ACCEPT THE QUALIFICATIONS OF FOREIGN-TRAINED LAWYERS

Canadian provinces are by no means the only jurisdictions that have to deal with requests to practise from lawyers educated in other jurisdictions. Other legal jurisdictions are more open to candidates trained elsewhere than the legal profession currently is in Canada.

UNITED STATES

As previously mentioned, the eligibility requirements for writing the provincial bar examinations are one-sided with respect to the primary legal market in the United States. New York, the largest and most sophisticated legal market in the United States, allows any law graduate trained in a common law country to sit the State's bar exam, as long as the individual's education is judged "substantially equivalent" to that of an ABA-approved law school.³⁴ Canadian-educated lawyers are granted access to New York's legal market equal to that of American-educated lawyers, facing only the requirement that they have attended a common law school and passed the New York State bar exam. In New York, for applicants who have a substantially equivalent legal education, passage of the State bar examination is considered to be a sufficient test to ensure that only those lawyers who are competent to practise in the jurisdiction are licensed. In other words, Canadian-trained lawyers receive the same treatment as their American-trained counterparts in terms of qualifying for admittance to the principal legal market in the United States.

Some other American states, including Massachusetts, allow Canadian-trained applicants to sit their bar without additional requirements. However, the majority of U.S. states, like the Canadian provinces, have protectionist restrictions requiring domestic U.S. legal education prior to writing the bar

³⁴ NEW YORK STATE BOARD OF LAW EXAMINERS, FOREIGN LEGAL EDUCATION, at <http://www.nybarexam.org/foreign.htm> (last visited Mar. 22, 2006); see also Eric Freedman, *Barriers to Foreign Professional Working in the United States*, Center for Economic and Policy Research (Sept. 15, 2003), http://www.cepr.net/publications/professional_supplement.htm.

examination. These include states such as Florida, Texas, and to some extent, California.³⁵

Canada's protectionist restrictions make it harder for Canadians to argue that graduates of Canadian law schools should be allowed to write the bar examinations on the same basis as graduates of U.S. law schools in U.S. states that currently have protectionist eligibility requirements. Our provinces should join New York and Massachusetts in adopting an unrestricted, merit-based qualification system, and help set an example for other restrictive jurisdictions by allowing well-qualified ABA law school graduates equal access.

AUSTRALIA AND NEW ZEALAND

New Zealand and Australia share a similar relationship in many respects to that of Canada and the United States. However, unlike Canada and the United States, New Zealand and Australia have formally agreed to facilitate the accreditation of their lawyers in both jurisdictions. In 1997, both countries implemented the Trans-Tasman Mutual Recognition Act, a treaty allowing Australian and New Zealand practitioners to apply for parallel recognition of the qualifications which they hold in their home jurisdictions.³⁶ Practitioners from either jurisdiction simply apply to the other's High Court registry for admission to practise in the other jurisdiction.³⁷

EUROPEAN UNION

European Union member states are very open to law graduates of other member states. Applicants educated in another EU jurisdiction can become licensed to practise after passing an aptitude test examining competence in local law.³⁸ And under the Lawyers Establishment Directive, "EU lawyers can now acquire the same status as their locally-trained and traditionally-qualified

³⁵ AMERICAN BAR ASSOCIATION, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, CHART X: FOREIGN LAW SCHOOL GRADUATES (2005), available at <http://www.abanet.org/legaled/publications/compguide2005/chart10.pdf>; see also Eric Freedman, *Barriers to Foreign Professional Working in the United States*, Center for Economic and Policy Research (Sept. 15, 2003), http://www.cepr.net/publications/professional_supplement.htm.

³⁶ AUSTRALIAN PRACTITIONERS AND THE TRANS TASMAN MUTUAL RECOGNITION ACT OF 1997, NEW ZEALAND LAW SOCIETY (Nov. 24, 2003), <http://www.nz-lawsoc.org.nz/os/transtasmra.asp>.

³⁷ *Id.*

³⁸ "The alternative, . . . , was to require an adaptation period during which an applicant for admission would gain familiarity with local law through practical experience." All member states apart from Denmark require the aptitude test. Wayne J. Carroll, LIBERALIZATION OF NATIONAL LEGAL ADMISSIONS REQUIREMENTS IN THE EUROPEAN UNION: LESSONS AND IMPLICATIONS, 22 PENN ST. INT'L L. REV. 563, 572-73 (2004); see also Directive 89/48/EEC Council Directive, On a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of at least Three Years Duration (Dec. 21, 1998) http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31989L0048&model=guichett.

colleagues by being “sufficiently exposed” to local law for a period of at least three years.”³⁹

³⁹ Wayne J. Carroll, LIBERALIZATION OF NATIONAL LEGAL ADMISSIONS REQUIREMENTS IN THE EUROPEAN UNION: LESSONS AND IMPLICATIONS, 22 PENN ST. INT'L L. REV. 563, 574–77 (2004); *see also* Directive 98/5/EC of the European Parliament and of the Council, To Facilitate the Practice of the Profession of Lawyer on a Permanent Basis in a Member State other than that in which the Qualification was Obtained (Feb. 16, 1998) O.J. L 77/36 (14.3.98), http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_077/l_07719980314en00360043.pdf.

THE PROVINCIAL LAW SOCIETIES SHOULD MODIFY THEIR RULES

There are six principal reasons that the law societies' accreditation rules should be changed to allow graduates of U.S. law schools to write the provincial bar exams on the same basis as graduates of Canadian common law schools.

CANADIAN COMMON LAW SCHOOLS ARE FUNDAMENTALLY SIMILAR TO THOSE IN THE UNITED STATES

As described above, legal education in Canada and the United States is similarly structured. Historically, modern, university-based legal education developed in Canada under a strong American influence. Moreover, both Canadian common law and American legal education are fundamentally oriented to teaching students the common law method, not substantive law. In Canada as in the United States, the bar examination, training and mentoring by seasoned professionals, personal experience and ongoing independent and professional education are the main ways that lawyers learn the substantive law that they need to practise. This reinforces the idea that the bar examination, rather than a student's university-based legal education, should be the main test of competence for practising law.

CANADIAN LAW SOCIETIES RECOGNISE THAT KNOWLEDGE OF SUBSTANTIVE LOCAL LAW IS NOT A PREREQUISITE TO PRACTISE

Currently, to write the licensing examinations in Canada, a student must have graduated from a common law program at a Canadian university. This qualification recognises that the legal education provided in every province is essentially equivalent to that of the law schools in any other province. While students at all Canadian law schools share a common law foundation, the particulars of the law differ by province. By granting out-of-province law students an equal opportunity to qualify for the provincial bar, the law societies show that their priority is ensuring that students, while at law school, have received quality training in lawyering skills and legal reasoning, and that the provincial law societies do not expect students to know local rules.

Under the current model, a lawyer does not need to have subject-specific courses while at law school to practise in that area. For example, a law school

graduate could go on to practise tax law without having studied taxation in law school. A real estate lawyer might never have taken anything beyond a tangentially-related first year course in Property, but is still permitted to practise real estate law. A course in Business Associations or Corporations is not a prerequisite for a transactional practice. Such examples demonstrate that training in substantive legal disciplines in law school is not essential to practise competently, as far as the current lawyer accreditation model is concerned. The law societies' policies in this area recognise both that lawyers can learn the substantive law that they need (through the bar examination and articling process, as well as research and consultation with other lawyers), and that the market for legal services will value a lawyer's preparedness to work in a given area.

LAWYERS WITHOUT A CANADIAN LEGAL EDUCATION HAVE EXCELLED IN CANADIAN LAW

Some of the foremost experts in Canadian law received no Canadian legal education. Peter Hogg and Garry Watson serve as excellent examples; having qualified under an exception to the usual rules for faculty members of Ontario law schools, they have become leaders in Canadian constitutional law, and civil procedure, respectively.⁴⁰ Professor Hogg holds a Victoria University of Wellington LL.B. and Harvard LL.M., as well as a Ph.D. from Australia's Monash University. He is widely regarded a leading expert on the Canadian Constitution, and has served as Dean of Osgoode Hall Law School. In the Supreme Court of Canada alone, Hogg's writings have been cited 166 times, more than twice as often as any other source.⁴¹ Professor Watson, "known for his comprehensive annotated publications of the Ontario Rules of Civil Procedure such as Ontario Civil Procedure and Ontario Civil Practice," holds a Melbourne LL.B. and Yale LL.M.⁴² Foreign legal training has not kept Hogg and Watson from two of law school's central academic fields: constitutional law and procedure. Indeed, training at foreign law schools often provides excellent preparation for success in Canadian law.

⁴⁰ There is an exception to the LSUC licensing rules permitting law deans and professors of Ontario law schools to qualify for the bar without examination and despite not having any Canadian law degrees. To qualify, deans must be entering their second consecutive year in the position, professors their third. Law Society of Upper Canada, By-Law 11, § 5, available at <http://www.lsuc.on.ca/regulation/a/by-laws/bylaw11/>.

⁴¹ Hogg does hold two Canadian law degrees: honorary LL.D.s from the Law Society of Upper Canada and the Université de Montréal. BLAKE, CASSELS & GRAYDON LLP, PROFILE, PETER W. HOGG, at <http://blakes.ca/english/people/lawyers2.asp?LAS=PWH> (last visited Mar. 27, 2006); OSGOODE HALL LAW SCHOOL, PROFESSOR EMERITUS PETER HOGG TO BE AWARDED HONORARY DEGREE, at <http://osgoode.yorku.ca/media2.nsf/58912001c091cdc8852569300055bbf9/86ed9d31f0f943368525713800519dff!OpenDocument> (last visited Mar. 27, 2006).

⁴² OSGOODE HALL LAW SCHOOL, FACULTY, GARRY D. WATSON, at <http://www.osgoode.yorku.ca/faculty/garrydwatson.html> (last visited Mar. 27, 2006).

MODIFYING THE RULES WOULD STRENGTHEN THE CLOSE RELATIONSHIP BETWEEN CANADA AND THE UNITED STATES

Canada and the United States have long enjoyed a close and open relationship on many fronts. Goods and services flow easily across the border, as do people. Firms, investors, and consumers are highly integrated between our two countries. This spirit of free flow across the border underlies NAFTA, and the Canada-U.S. Free Trade Agreement before it. Allowing graduates of U.S. law schools to write the provincial bar examinations on the same basis as the graduates of Canadian law schools would allow Canadian law firms, private firms more generally and the public sector to hire lawyers trained in Canada's most important foreign marketplace. Lawyers in Canada who have an understanding of American law and legal culture will bring depth and innovation to legal practice in Canada with respect to our country's most significant international relationship.

THE NCA AND THE PROVINCIAL LAW SOCIETIES SHOULD SHOW LEADERSHIP IN THE GLOBAL LEGAL MARKET

Canadian law schools educate many students who are interested in practising in other jurisdictions. Showing leadership in allowing the graduates of U.S. law schools to write the provincial bar examinations on the same basis as graduates of Canadian common law schools would make it easier for Canadians to argue for the removal of similar protectionist barriers to the free movement of labour that harm Canadians who wish or need to work in other jurisdictions.

ALLOW GRADUATES OF ABA-ACCREDITED LAW SCHOOLS TO PARTICIPATE FAIRLY IN THE LICENSING PROCESS

The law societies should allow graduates of ABA-approved U.S. law schools to participate in the licensing process on the same basis as graduates of Canadian common law schools. For example, the current Law Society of Upper Canada rules state the academic requirements for applying and entering the Licensing Process as

Graduation from a common law program offered by a university in Canada approved by Convocation; or [r]eceived a certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Committee of Canadian Law Deans.⁴³

The rule should be changed to allow entrance to the Licensing Process on the basis of

Graduation from a common law program offered by a university in Canada approved by Convocation, *or an American Bar Association accredited law program*; or received a certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Committee of Canadian Law Deans.

Alternatively, the law societies could change the text of their rules to require approval of U.S. law schools individually, and then consider which American schools to approve. A third choice would be to join New York in allowing all graduates of “substantially equivalent” law programs equal access to the

⁴³ LAW SOCIETY OF UPPER CANADA, LICENSING PROCESS, at <http://mrc.lsuc.on.ca/jsp/licensingprocess/index.jsp> (last visited Mar. 22, 2006).

Licensing Process.⁴⁴ Though we are not asking that the law societies change to this third option, New York has successfully adhered to this rule since 1979.⁴⁵

Experience from New York, which treats foreign-educated law students equally, shows that these students tend to practise in environments where they receive significant coaching and oversight in local law. As discussed above, New York allows students with a substantially equivalent common law education open access to its bar admissions process. A study of all lawyers holding only a foreign law degree in New York State shows that these individuals overwhelmingly practise in firms with supervision, especially when relatively new to the jurisdiction. Only fifteen percent of the foreign-trained lawyers in New York practise in a firm where they are among the name partners or as a solo-practitioner. And less than two percent of the foreign-trained lawyers practise in a firm where they are among the name partners or as a solo-practitioner before having been admitted for five years in the jurisdiction.⁴⁶ Foreign-educated law students in Canada are likely to follow these trends. Beyond the articling period, foreign-trained law students are likely to have guidance in local law.

Firms and legal consumers can adequately determine whether to give jobs or business to lawyers who did not receive relevant substantive law training in law school. Firms should be especially good judges of legal training—they must be to succeed. If ABA-trained law students are allowed equal access to the bar admissions process, and firms do not believe these students are adequately trained, the candidates will not get jobs. Similarly, if legal consumers feel that they need a Canadian-trained lawyer, they will hire one—information on a lawyer’s educational history is readily available on public lawyer databases. Firms and consumers should decide whether ABA-approved law schools provide a sufficient law school education for a successful practice in Canada.

⁴⁴ NEW YORK STATE BOARD OF LAW EXAMINERS, FOREIGN LEGAL EDUCATION, at <http://www.nybarexam.org/foreign.htm> (last visited Mar. 22, 2006).

⁴⁵ 22 NYCRR § 520.6 (2006); see also Howard A. Levine, *Keynote Address: The Regulation of Foreign-Educated Lawyers in New York: The Past, Present, and Future of New York’s Role in the Regulation of the International Practice of Law*, 47 N.Y.L. SCH. L. REV. 631 (2003).

⁴⁶ Information is based on a study by Noah Waisberg using the Martindale-Hubbell legal directory. For access to the data set, or more information about the study, contact him at noahw@nyu.edu.

CONCLUSION

In sum, the NCA and the Canadian law societies should abandon their unjust treatment of graduates of U.S. law schools. The prejudiced qualification rules currently in place unfairly burden graduates of U.S. law schools, particularly by exacerbating the difficulties faced by Canadians who have received their legal education in the United States and who wish to return home to pursue their practice. The similar nature of legal education, in terms of teaching methodology, skills imparted, and legal philosophies, between Canada and the United States has proven sufficient grounds for allowing graduates of Canadian law schools to write and pass the bar on the same basis as graduates of ABA-approved U.S. law schools and to then practise in New York. On this same basis, Canada would be well-served to take a leadership role on the issue, in company with New York, by abating its prejudiced practice and giving graduates of ABA-approved law schools the same access to the provincial bar as graduates of Canadian common law schools. Indeed, as legal scholars have recognized, and as is demonstrated by the law societies' practice of allowing graduates from law schools in other provinces to write their bar exams, law school is not about learning jurisdiction-specific knowledge, but rather is focussed on developing lawyering and reasoning skills. These skills are developed as rigorously in ABA-approved law schools as they are in Canadian common law schools. Allowing equal access to students of ABA-approved law schools would contribute to the high calibre of legal practice in Canada. Canadian practitioners with an understanding of American law and legal culture will make effective and innovative contributions to Canada's most significant economic and social relationship, with the United States. As four Canadian students interested in returning to Canada to practise, we urge the NCA and the provincial law societies to remove the prejudiced barriers to foreign-educated law school graduates.