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Judicial Education: Pedagogy for a Change

T. BRETTEL DAWSON*

INTRODUCTION

Canadian judges have maintained a steadfast, long-term commitment to judicial education. Through teaching one another, judges renew their vision over time,¹ and more concretely, address their concerns and challenges today. Since its inception in 1985, the National Judicial Institute (NJI)² has sought to be a partner and a resource to judges and Courts in a shared endeavour to create relevant, practical, and effective judicial education. Working together, the NJI, judges, and Courts have built a “Canadian model” of judicial education widely respected and emulated.³

This model of education can be summed up as follows: judicial education will be most effective when it is judge-led, judging focused, skills-based and experiential.⁴ The model is derived from the principles of adult education and research on teaching and learning as discussed in this article. In shorthand, NJI refers to the model as “skills-based education.” This idea can be further distilled to a practice of judicial education where judges receive information and also have opportunities to use it within the course. This approach guides the design and teaching of all courses—whether they focus on substantive law, judge craft, social context, or the characteristics of judging.

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1. Justice Nicole Duval Hesler expressed this concept in remarks made as part of a panel (of which I was also a member) addressing a visiting delegation of Croatian judges in Montreal in 2005. Justice Duval Hesler is now the Chief Justice of the Court of Appeal of Quebec.

2. The NJI is Canada’s most extensive provider of specifically judicial education. It provides education only to judges. The Chief Justice of Canada chairs the Board of Governors. The NJI offers national seminars and also supports court-based education seminars in both official languages and legal systems of Canada. It partners with other organizations for several programs including new judges’ education (e.g., Canadian Institute for the Administration of Judges; Canadian Provincial Judges Association). In any year, NJI is involved in over 70 judicial education seminars representing more than 185 days of education. *See generally* NAT’L JUDICIAL INST., <https://www.nji-inm.ca> (last visited June 6, 2015). Due to funding issues, the support NJI can provide to provincial court education is limited. In terms of national seminars offered to judges that NJI is not involved in, there are 2-3 seminars that take place outside of Canada and one seminar offered by CIAJ on judgment writing. *Id.*

3. I have been associated with the NJI since 1999, first in the role of National Coordinator for the Social Context Education Project (SCEP), a multi-year initiative focused on developing social context education at the NJI and more recently as Director of Education. I have worked on several NJI international judicial education projects and have also served as a Senior Advisor on a portfolio of courses offered in Canada. Currently I am the NJI Academic Fellow.

4. *See Judicial Education Course Calendar And Education Resources*, NAT’L JUDICIAL INST., at 8-9 (Apr. 2013) <https://www.nji-inm.ca/index.cfm/judicial-education/judicial-education-in-canada/?langSwitch=en>.

In this article, I reflect upon the lessons learned about developing and delivering judicial education. In proposing appropriate pedagogies for judicial education, I explore a number of questions: What kind of learning is judicial education? What learning environment should be created to foster that learning? How should judicial education be conducted—both in planning and in delivery? How significant is the role of judicial educators in making effective education happen? I argue that how educators approach teaching and learning is guided by how they understand the purposes of judicial education, and their willingness to apply theories of teaching and learning in their practice.⁵

I. JUDGING AND JUDICIAL EDUCATION

Judges have a distinct constitutional obligation to impartially adjudicate disputes according to the rule of law. The associated guarantee of judicial independence is an entrenched value in many democratic societies. These conditions set judges apart and cloak them with authority, and often result in judging being an isolating occupation. In Canada, judges rarely, if ever, sit in the court of another judge. It is not a mechanistic pursuit. As Judge Posner has recently commented: “Law . . . involves making and applying rules of conduct; the rules are based on legislative and other political decisions, common sense, societal values, judges’ personal preferences, intuition, rhetoric—not logical or scientific rigor.”⁶ Judges inhabit a continually changing environment where legal principles meet life in all its vicissitudes. For this reason, the view that judges should engage in continuous learning and have access to education throughout their judicial careers has become generally accepted. Judicial education assists judges to connect with each other and with the larger flow of ideas and experience in society.

Judicial education provides a unique forum outside of the adjudicative process, for judges to enhance their knowledge, their skills, and their awareness of social conditions. It also assists judges in developing an understanding of the judicial role and their own identity as judges. Appropriately structured judicial education settings⁷ allow judges to share information, explore questions, and obtain feedback from peers, thereby learning from one another. Exchanges with academics and community members are also possible within this forum, exposing judges to systemic analysis of jurisprudence and socio-legal trends as well as direct experience. By facilitating a learning environment among peers, judicial education expands the pool of knowledge and experience available to judges and develops their capacity to take into account a diversity of perspectives, thereby strengthening judicial reasoning and decision-making. This type of judicial edu-

5. A recent review of research underpinning teaching and learning theory is provided by Robert Coe. ROBERT COE, CESARE ALOISI, STEVE HIGGINS & LEE ELLIOT MAJOR, *WHAT MAKES GREAT TEACHING?* (2014), available at <http://www.suttontrust.com/researcharchive/great-teaching>. Their research focused on teaching in schools, and identified practices that improved student attainment. These practices included asking students a large number of questions, making students generate answers even before they have been taught the material, and spacing out studying or practice. *Id.*

6. Ronald K.L. Collins, *On legal education & legal scholarship — More questions for Judge Posner*, CONCURRING OPINIONS (Dec. 8, 2014), <http://www.concurringopinions.com/archives/2014/12/on-legal-education-legal-scholarship-more-questions-for-judge-posner.html>.

7. See also National Judicial Institute, *Twenty Principles of Judicial Education* (approved by the NJI Board of Governors in October 2006, on file with the author). These conditions include respect for judicial independence, non-prescriptive approaches and judicial leadership of judicial education.

cation provides an edifying process between judges as they navigate their complex roles.

II. LEARNING SETTINGS AND JUDICIAL EDUCATION

There are different kinds of learning settings in which learners gather. Conferences, or symposia such as the one in which this article was originally delivered, allow speakers to convey knowledge grounded in research and experience. Dialogue between participants at these types of conferences and symposia can facilitate a process of confirming or deepening what a participant knows, and can challenge contributors' ways of thinking about and conceptualizing subjects. Ideally, such a process lays neural pathways to new thinking. If one is a (more or less passive) listener, written notes or rereading of a written copy of a paper is generally needed to recall specific content for longer than a day or two. If one is the speaker, these settings provide a deeper learning experience. The process of distilling research, organizing thoughts, and crafting argumentation creates an active and generative process through which the speaker refines their own understanding. The professor's role in a lecture-based university course shares some similarities—albeit in a more explicitly didactic setting. This is a form of legal education with which we are all very familiar. It is teaching by talking (or learning by listening).

There are also other kinds of learning, such as learning by observing.⁸ This form of learning involves seeing someone do something that you also have to do and ideally, discussing it with them. Learning by doing is another—this learning generally takes place 'on the job' in the workplace (learning through practice). It can also take place in settings which closely reproduce the key facets of the work activity.⁹

A major question that matters when thinking about pedagogies for judicial education is what kind of learning is best suited to judges and judicial education? Do judges best learn by listening to lectures (given by other judges) as fellow scholars of the law or as students? Do judges best learn by observing how other judges conduct proceedings? Do judges best learn by doing judicial tasks and receiving feedback from peers?

There are many factors in play when determining which form of learning is most aligned with the situation of judges. Learning by observing "on the job" is not practically feasible for many judges. As noted, judges have very few opportunities to observe other judges in action. Judges are not in each other's literal courtrooms or chambers. Many judicial tasks (e.g., thinking and deciding) are not directly observable. Because it is not really possible for judges to learn through observation, this leaves as options, learning by listening or learning by doing (in which judicial tasks are simulated).

At this point, it is pertinent to better define what it is that judges do and thus, what judicial education should address. If judges are applied legal scholars concerned with subtleties of legal principle, the receipt of learned discourse on juris-

8. See e.g., ALBERT BANDURA, *SOCIAL LEARNING THEORY* (1977).

9. See generally *LEARNING THROUGH PRACTICE: MODELS, TRADITIONS, ORIENTATIONS AND APPROACHES* (Stephen Billett ed., 2010); *THEORIES OF LEARNING FOR THE WORKPLACE: BUILDING BLOCKS FOR TRAINING AND PROFESSIONAL DEVELOPMENT PROGRAMS* (Filip Dochy et. al. eds., 2011).

prudence would be in order (learning by listening). If judges are, rather, legal actors concerned with legal principles in process and context, then a more active learning approach might be best. Accordingly, figuring out the best approach for judicial education requires consideration of an elemental question: what is judging?¹⁰ Here Judge Posner supplies insight in some recent remarks:

Many academics . . . who write about law don't understand judges The way [that] academics . . . talk about judges . . . is that they think of judges [as] being like academics [and] looking for correct answers to questions that arise in cases [in much the same way that academics tackle questions they think they can answer]. They differ only in that they are not as smart as academics. But judges make decisions in cases that come at them randomly. So the judge's duty is to decide, even if the judge has no idea what a correct sensible decision would be in a case, or a decision congenial to the judge's views. The duty to decide is fundamental, and that makes a tremendous difference to how one thinks about problems, and what one brings to the problems¹¹

What Posner is suggesting then is judges—particularly trial judges—do not think like law professors, and their work is not the work of legal scholarship. Rather, they are decision-makers who must resolve problems using the tools and tests of law and adjudication. They must engage with stories and resolve uncertainty and conflict to find facts. In doing so they must engage in sub-inquiries into the credibility of those witnesses and the veracity and meaning of documents and experts. They manage a courtroom, with or without sufficient resources and time. They encounter a wide swath of the community.¹² They receive and probe submissions from counsel. They interpret, analyze and apply legal rules. They exercise discretion. They make choices. They must come down on one side or the other and craft their reasons for so doing as clearly and expeditiously as possible. They must do this repeatedly in a busy, revolving docket of cases. For these reasons, judges must be intensely practical and applied in their work.

Expertise in the law is, of course relevant and required of judges. This raises the question again though: is judicial education a primary conduit to provide judges with information about current legal developments? Certainly this was an original rationale when there was a delay (at times lengthy) in the publication of decisions.¹³ However, the advent of online legal information services¹⁴ has ren-

10. There is a growing body of literature by senior appellate judges on the subject of judging. See THOMAS BINGHAM, *THE BUSINESS OF JUDGING* (2000); E.W. THOMAS, *THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES* (2005); ALBIE SACHS, *THE STRANGE ALCHEMY OF LIFE AND LAW* (2009); RICHARD POSNER, *HOW JUDGES THINK* (2008); AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006).

11. Richard Posner, Empirical Legal Studies Conference Keynote, University of Chicago Law School (October 23, 2014), <https://www.youtube.com/watch?v=18i5yUNJq30> (last visited Aug. 5, 2015). See also Collins, *supra* note 6.

12. The element of diversity is of great importance. Judges encounter people from all walks of life and backgrounds. Nor is judging itself normative and monolithic. Efforts to ensure a more diverse and representative judiciary have both reflected and created a polyolithic concept of judging and judges.

13. This point was discussed by Justice Brian W. Lennox in an address to the Provincial Education Chairs Seminar, Ottawa 2014 (on file with the author).

14. Public access to decisions of Canadian courts is through Court websites, e.g., access to Ontario courts through <http://www.ontariocourts.ca>, and the Canadian Legal Information Institute is a gateway

dered this transmissive purpose largely peripheral. I have observed that rather than coming to seminars to learn the law, judges are intensely interested in hearing from colleagues about how vexing puzzles in interpretation and application of the law are being approached by others. Thus, rather than lectures (or listening), what is indicated for judges is an active modality of exchange between judges is indicated through which judges can explore legal developments in the context of problems where the law must be applied. Learning by listening, then, is supplanted by an interest to work out legal ideas in practice.

The limitations of a lecture-based listening approach to judicial education were also manifested in a national program of social context education,¹⁵ undertaken by the NJI consequent to a recommendation by a special committee of the Canadian Judicial Council on Equality in the Courts that a “comprehensive, in-depth, credible education programs on social context issues which includes gender and race” be developed for the judiciary.¹⁶ The National Judicial Institute was selected to implement the resulting Social Context Education Project (SCEP).¹⁷ The problem it faced was how to provide education in this area that judges would accept as consistent with their independence and impartiality and that they would find relevant and practical. The nature of the topic—diversity, disadvantage, inclusion and equality in legal process and legal principles—was new to many judges. It asked judges to look at the world around them and to look at themselves. It invited consideration of values and attitudes and it put on the table the concept that myths and stereotypes abound and hold the potential to influence judicial decision-making.

From a pedagogical point of view, staff on the SCEP quickly concluded that the subject matter could not be taught by lectures (learning by listening). Rather, it required engagement in a transformational learning process involving dialogue between judges in frank and open, examination of experience and world views as an intensely personal learning process. Lectures providing general exposition or exhortation would hold little interest. As concrete problem-solvers, judges would prefer to focus on how social context factors operate in courtroom processes, legal interpretation and decision-making—and what they as judges should appropriately do in response to this awareness. When NJI gathered judges at a national Needs Assessment Seminar in 1996 at the outset of its work, the judges themselves rejected lecturing, urging instead small group discussion, real-life

to most decisions in Canada, see <http://www.canlii.org/en/index.html>. Legal database services such as Quicklaw, www.quicklaw.ca, and Westlaw are available to all judges in Canada. Supreme Court of Canada decisions are also available as of day of release through the Lexum Collection at <http://scc-csc.lexum.com>.

15. “Social context” is a term coined by the Canadian Judicial Council. It encompasses the idea that judging is grounded in human conditions and the society where judging takes place. Law should therefore respond to the needs and reasonable expectations of the communities it serves in a manner consistent with constitutional values, recognizing that social context is a component of many cases given that social realities shape individuals and disputes.

16. In 1994, the full Canadian Judicial Council unanimously approved this recommendation, setting in motion a process that would evolve over the next decade. Decisions of the Canadian Judicial Council, other than those published on its website (www.cjc-cmc.gc.ca) are not public documents. As such, no specific citation can be provided for this or other social context resolutions or some other Council documents.

17. See ROSEMARY CAIRNS WAY & T. BRETTEL DAWSON, *Taking a Stand: Bertha Wilson’s Public Commitment to Judicial Education*, in JUSTICE BERTHA WILSON: ONE WOMAN’S DIFFERENCE, 278-98 (Kim Brooks ed., 2008) (providing more information on the genesis and operation of the SCEP).

scenarios, and inclusion of diverse faculty members including those from the community.¹⁸

All of this then points to a view of judicial education as active, interactive, practical and focused on what judges do. Thus, learning by doing (as simulated in a learning setting) has become the preferred mode of judicial learning in NJI programming.

As this approach is associated with adult experiential learning theory,¹⁹ the parameters of this theory of teaching and learning will now be considered in the context of judicial education.

III. EXPERIENTIAL ADULT LEARNING

Understanding the conditions for adult learning has been the basis of considerable research. Knowles described the adult learner as someone who is self-directed, goal oriented, relevancy-oriented, practical, and wants to be respected in the learning process.²⁰ Adult learners thereby prefer conditions conducive to psychological safety.²¹ Brookfield states six principles of effective practice in facilitating adult learning: 1) recognizing the decision to learn is the learner's, and their participation in learning is voluntary; 2) mutual respect among participants for each other's self-worth; 3) a collaborative spirit when identifying learning needs, setting objectives, developing curriculum, and selecting methods of instruction; 4) a continuous process of action, reflection, and experimentation is placed at the heart of learning; 5) fostering a spirit of critical reflection; towards 6) nurturing of self-directed, empowered adults.²²

18. This Canadian Judicial Consultation Seminar took place in May, 1997. It marked the first time that such a meeting had been held in Canada in which participating judges came from every province and all levels of court. At the Consultation, two questions were posed to the judges: first, what kinds of issues involving persistent disadvantage or inequality and its consequences come up in your court most frequently? And, secondly, what forms of education would be most effective in addressing these issues? On the first question, judicial participants identified *groups* (poor people, single mothers, Aboriginal peoples, young offenders, unrepresented litigants, recent immigrants, disabled people, and same-sex couples), and *issues* (spousal abuse, sexual assault, credibility assessment and culture, custody, systemic racism, and low literacy). On the second question, the judges who attended the Consultation recommended development of an approach other than lectures and identified the importance of involving senior judges in planning the education programs.

19. See generally MALCOLM S. KNOWLES, *THE ADULT LEARNER: A NEGLECTED SPECIES* (1990); DAVID A. KOLB, *EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT* (1984); CHARLES CLAXTON & PATRICIA MURRELL, *EDUCATION FOR DEVELOPMENT: PRINCIPLES AND PRACTICES IN JUDICIAL EDUCATION* (1992); ALICE Y. KOLB & DAVID A. KOLB, *KOLB LEARNING STYLE INVENTORY 4.0 2* (1992) (stating that “[t]he Kolb LSI is based on a theory of learning from experience that draws on the work of prominent 20th century scholars who gave experience a central role in their theories of human learning and development—notably William James, John Dewey, Kurt Lewin, Jean Piaget, Lev Vygotsky, Carl Jung, Paulo Freire, Carl Rogers and others. From this Experiential Learning Theory (ELT) perspective, learners construct knowledge by experiencing, reflecting, thinking and acting.”).

20. KNOWLES, *supra* note 19.

21. See generally Amy C. Edmondson & Lei Zhike, *Psychological Safety: The History, Renaissance, and Future of an Interpersonal Construct*, 1 ANN. REV. ORG. PSYCHOL. & ORG. BEHAV. 23, 23-43 (2014).

22. See STEPHEN D. BROOKFIELD, *UNDERSTANDING AND FACILITATING ADULT LEARNING* (1986) [hereinafter BROOKFIELD 1986]; Stephen D. Brookfield, *Understanding and Facilitating Adult Learning*, 16 SCH. LIBR. MEDIA Q. 99 (1988).

When leading judicial faculty development seminars with Canadian judges, I have discussed this list with judges. They have whole-heartedly concurred with it. A restatement focused on judges as adult learners would look something like this: judges are intelligent, fast learners and are used to receiving a lot of information which they continually and actively filter, reflecting their repeated practice of deliberative thinking.²³ Judges do not tolerate education which they cannot connect directly to doing their jobs better or developing dexterity in navigating their complex, multi-faceted roles. Judges do not warm to theoretical or abstract discussions, and judges will remain guarded in any education setting where non-judges are present.

It is relatively easy to align the aspiration of NJI's model of judicial education (judge-led, judging focused, skills-based and experiential) with these concepts. Participation in judicial education seminars is voluntary.²⁴ The principle of judicial leadership protects judicial independence and ensures judges play a primary role in shaping the content and method of instruction. The focus on judging and related skills²⁵ ensures a focus on practical and relevant content, and creating judge-only learning environments fosters confidentiality and safety in the learning environment.²⁶ An emphasis on experiential learning methods places action and reflection at the heart of the learning process.

Moving from theory to practice, however, requires educators to make several shifts in mindset or learning culture. The primary learning experiences of most lawyers and judges—reinforced in law school and continuing legal education teaching methods, are likely to have been learning by listening or teaching by talking (lectures).²⁷ By definition, these traditional learning modes are teacher-centered, as expert knowledge transmission. Adult learning approaches require an approach that is more learner-centered. At any given time, the focus needs to be on what the learner is doing and not what the teacher is saying. Often this will mean the teacher says or does very little, with greater emphasis placed on peer interaction, drawing on the knowledge and experience of judicial participants. Teaching in this model is often referred to as facilitative instruction.²⁸ “Teachers” must be willing to accept that learning does not happen because they are talking but rather occurs only when the learner is engaged.²⁹

23. See DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011) (discussing the application to judicial decision-making); Chris Guthrie et al., *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777 (2001); Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 *CORNELL L. REV.* 1 (2007).

24. Although in practice, attendance at court seminars is expected by members of the Court.

25. The term “skills” as used by the NJI includes: cognition or thinking skills (analysis and reasoning, credibility assessment and decision-making including fact finding); judge craft skills (managing hearings and communication skills); and contextual skills (identifying and assessing social context, examining values and attitudes as they affect perception, interpretation and action) together with skills supporting ethical conduct.

26. We require faculty members who are not judges to sign confidentiality agreements. We generally provide judge-only discussion groups facilitated judges.

27. See e.g., Annie Rochette, *Teaching and Learning in Canadian Legal Education: An Empirical Exploration* (Oct. 29, 2010) (unpublished D.C.L. dissertation, McGill University, Montreal).

28. See BROOKFIELD 1986, *supra* note 22.

29. A recent study of learning theory concluded learning takes place whenever (and only when) a learner is engaged, this can occur through lectures and interactive activities. Learning by judges is undoubtedly self-learning in the form of reading and critical reflection. See generally, COE ET AL., *supra* note 5.

Another shift that must be made by educators in practice: moving away from providing comprehensive instruction in substantive legal principles towards working with the legal principles relevant to judging. While principles must be set out, the goal is not their exposition; instead, it involves laying a basis for judges to work with the principles in a process of analysis and application to typical legal disputes.

The planning of judicial education also shifts. Under this model, instead of signing up lecturers to speak about topics, planners and faculty must work together to identify the skill(s) to be addressed and the learning outcomes to be achieved.³⁰ Thereafter they need to consciously sequence learning activities that will draw on the learner's experience, encourage reflection, provide relevant principles, and create opportunities for judges to practice the skill in question and receive constructive feedback.

IV. LEARNING STYLES, TEACHING STYLES, AND THE LEARNING CIRCLE

The pedagogy supported by NJI is also influenced by Kolb's related concept of learning styles³¹—both as it informs thinking about how judges learn, but also as it informs the structure and sequence of learning activities in the learning circle.

Kolb has argued a person's learning style is a composite of how "grasp or take in" information and how they transform or deal with information.³² The aspects of learning styles theory that have most resonated with the NJI include the following. First, people approach learning and integrate learning in different ways. Some start with their brain, i.e., "thinking" about the problem, whereas others begin with their heart, i.e., "feeling" or "experience" is the starting point. Some learn alone and some learn best in contact with others. Some require instruction first, but others like to be "hands on" right away. Consequentially, in any group of learners there will be a diverse mix of learning styles. A tool developed by Kolb to identify learning styles is the Learning Style Inventory (LSI).³³ The NJI has used the LSI in its faculty development courses.³⁴ Feedback and results³⁵ confirm that judges have a range of different learning style preferences. When putting a course together, on any subject, it is very useful for educators to recognize that not everyone learns in the same way the educators do, in order to be alert to the value of including a broader range of learning activities. There is also a connection between teaching philosophy and learning design.³⁶ Clarifying how

30. See generally DECLAN KENNEDY, WRITING AND USING LEARNING OUTCOMES: A PRACTICAL GUIDE (2006).

31. KOLB, *supra* note 19.

32. *Id.*

33. KOLB & KOLB, *supra* note 19.

34. The faculty development courses aim to enhance judges' skills as education planners and instructors. They include the "Judicial Faculty Development Seminar," the "Federal Education Chairs Seminar" and the "Provincial and Territorial Court Chairs Seminar." See *Judicial Education Course Calendar And Education Resources*, *supra* note 4.

35. *Id.* In NJI's recent first use of the Kolb LSI 4.0 instrument, a small group of 25 judges completed the online instrument. All learning styles were represented. The largest grouping in this small sample was in the analyzing category—Kolb posits this group prefers to learn through reflecting (observing and discussing) and thinking.

36. Lorraine Zinn created the PAEI (Philosophy of Adult Education Inventory) to enable adult educators to identify their teaching philosophy. *The PAEI Questionnaire*, LABR LEARNING RES., <http://www.labr.net/apps/paei/inventory.php?Start=Start> (last visited Aug. 5, 2015). See also Lorraine

one understands the purposes and goals of teaching may in turn encourage a consideration of a wider range of teaching styles.

Kolb proposes another idea—that learning has multiple dimensions. We are generally familiar with the idea that learning is about developing knowledge, skills and attitudes. Kolb supplements this idea with that of learning “quadrants” setting out four dimensions of learning. These in turn are engaged by different learning activities or methods. The quadrants are: 1) emotions correlated to experience and feeling; 2) perceptual abilities correlated to capacity to observe and reflect; 3) intellectual capacity associated to assimilating conceptual knowledge; and 4) behavioural capacity developed through experimenting with the application of concepts.³⁷

A theory or learning design or sequence flows from these concepts. Indeed, Kolb posits that learning will be most engaging and will develop multiple dimensions of a learner’s capacity if it moves through a recurring cycle of activities.³⁸ First in this cycle is experience—meeting a learner in the context of their existing experience and capturing their interest in learning more.³⁹ This can be done through simulating the judicial setting in which the topic of the session arises, through short role-plays or keynote addresses.⁴⁰ Once the learner feels connected to the topic and has made the connection to his or her work, the next set of learning activities must focus on introducing different perspectives or approaches to the subject.⁴¹ The use of clickers to poll the views of a group of learners in the area, or small discussion groups can also pull the range of views into the open.⁴²

Observing different styles of performance of the judicial task in question, e.g. giving an oral judgement, can have the same effect. It is at this point that learners are primed to sift through legal or other principles to guide judicial practice. This is where a lecture or reading can be most helpful. What then follows is the critical next step in learning by doing. Following the generation or transmission of principles, judges must put them into practice. If the task relates to legal analysis, time should be provided for judges to analyze a problem scenario using those principles. If the task relates to a process such as communication, judges should have a chance to try out the skill in question with feedback (following the adage that practice without feedback simply makes bad habits permanent). To capture this process and remind planners to follow it, I created an abbreviation: “ERCA,” or, Experience, Reflection, Conceptualization, and Application.

M. Zinn, *Identifying Your Philosophical Orientation*, in ADULT LEARNING METHODS 39-78 (Malcolm W. Galbraith ed., 1990); Gary J. Conti, *Identifying Your Philosophical Orientation*, in ADULT LEARNING METHODS, *supra* (stating that instead of randomly changing their teaching styles, teachers link their teaching philosophies to their ethical, spiritual, and political beliefs).

37. KOLB & KOLB, *supra* note 19.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

V. THEORY IN PRACTICE: PEDAGOGY FOR EFFECTIVE JUDICIAL EDUCATION

This article now returns to address what type of pedagogy provides a firm foundation for an engaging and effective judicial education. I begin with the story of a particular NJI seminar: *Hearing and Deciding Charter Cases*.

A. Learning the CHARTER

In 1982, Canada repatriated its constitution from the United Kingdom—in the process transforming the *British North America Act* into the *Constitution Act, 1982*.⁴³ A new *Canadian Charter of Rights and Freedoms (Charter)* was enacted and integrated with the *Constitution Act*.⁴⁴ The *Charter* contains a raft of provisions including protection from unreasonable search and seizure,⁴⁵ a right to a fair trial with the right of full answer and defence,⁴⁶ rights to liberty and security of the person,⁴⁷ and rights to mobility, freedom of expression,⁴⁸ and equality.⁴⁹ Many of these provisions codified constitutional conventions and common law rights. Some provisions were new or expanded, such as equality rights. Their restatement in the *Charter* as a sweeping aspiration and legal foundation was new. The role of judges was also expanded to include power to strike down legislation and other acts of the government as unconstitutional and provide other remedies.⁵⁰ Few, if any, judges had studied the *Charter* during their legal education and few had used it while practicing as lawyers. By 2000, cases were coming through the courts at an increasing rate, bringing new features into litigation including extensive motions in criminal cases.⁵¹ In 2002 the NJI decided it was time for a course devoted to the *Charter*. What emerged was an “Intensive Seminar” running over 6 days. The question for the developers of the seminar, similar to the question animating this article, was “what was the appropriate pedagogy for this major, new course?”

When the judges on the planning committee and NJI staff first sat down to plan the course, it was to be organized around the provisions of the *Charter* with lectures to be given on each provision and a focus on emerging case law. The planning committee then met with an expert in adult education to consider how the course might be taught. In NJI legend this is referred to as the moment “the

43. The British North America Act 1867, which contained the constitution of the Dominion of Canada, was a statute of the United Kingdom Parliament. See generally *British North America Act, 1867* (U.K.), available at <http://canada.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/p1t11.html> (last visited June 6, 2015). In 1982 it was re-enacted as the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, c 11 (U.K.).

44. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, c 11 (U.K.).

45. *Id.* at sec. 8.

46. *Id.* at sec. 11.

47. *Id.* at sec. 7.

48. *Id.* at sec. 2.

49. *Id.* at sec. 15.

50. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, c 11 (U.K.) at sec. 24.

51. See e.g., Alan D. Gold & Michelle Fuerst, *The Stuff That Dreams are Made Of! Criminal Law and the Charter of Rights*, 24 OTTAWA L. REV. 13 (1992); James Stribopoulos, *Has Everything Been Decided? Certainty, the Charter and Criminal Justice*, 34 S.C.L.R. 381 (2006).

light bulb went off” and a fundamental change in approach emerged. Instead of assuming judges needed to learn the law of the *Charter*, the NJI considered the challenges judges were facing when a *Charter* motion or ground was raised in a case. In informal conversations judges had identified managing these Charter elements as particularly taxing. From this insight came a revised focus, and name for the course as hearing and deciding *Charter* cases. Two rolling case studies were created: one in criminal law, and one involving civil law claims. By working through the elements of each case as it unfolded, judges were able to manage the analysis and process components. Case law was distilled into frameworks that became the basis of small group discussions. Scenarios were introduced through videos including court simulations of examination and cross-examination. Court papers such as search warrants were drafted and contributed a sense of reality to the rolling cases. At the conclusion of each segment, a panel of senior judges contributed their views about the resolution of issues. A range of outcomes was expected rather than one indisputably correct result. NJI course evaluations to date have shown the course to be highly rated by judges. It has also become a staple (and showcase) in the NJI curriculum for over ten years with a dedicated faculty of judges, counsel, and academics.⁵²

B. Retention

An important consideration in identifying appropriate pedagogy is effectiveness. This is a very inconclusive inquiry in judicial education.⁵³ One measure, if attainable, might be retention of content provided. Indeed, a chart that has proved instrumentally valuable for arguing a shift from “talking head” instruction towards skills-based instruction is one showing the learning retention increases the more learners are active.⁵⁴ Simply hearing (through lecture) is said to result in 5% retention while practising by doing yields retention of 75%. This makes a compelling argument in favour of active learning methods. It also corresponds with the intuitive experience of educators.⁵⁵ However, there is considerable debate about these percentages, and doubt about the research which generated learning pyramids apparently demonstrating a percentage of learning retention by activity level. James Lailey and Robert Miller conducted a comprehensive literature review on

52. See also T. Brettel Dawson & Natalie Williams, *Innovations in Judicial Education: Preventing Wrongful Convictions*, 1 JUD. EDUC. & TRAINING 59, 59-68 (2003) (analyzing another NJI course designed using the model of judge-led, judging-focused and experiential judicial education), available at <http://www.iojt.org/journal/iojtJournal001.pdf>.

53. See generally Roger Kaufman, John Keller & Ryan Watkins, *What works and what doesn't: Evaluation beyond Kirkpatrick*, 35 PERFORMANCE + INSTRUCTION, no. 2, at 8 (1996); MAUREEN E. CONNER, CONDUCTING IMPACT EVALUATION FOR JUDICIAL BRANCH EDUCATION (2002), available at <http://cj.msu.edu/assets/JERITT-Monograph-11-Conducting-Impact-Evaluation-for-Judicial-Branch-Education.pdf> (Judicial Education Reference, Information and Technical Transfer Project (JERITT): Monograph Eleven).

54. This chart pyramid can be found online at http://siteresources.worldbank.org/DEVMARKETPLACE/Resources/Handout_TheLearningPyramid.pdf. For a critical compilation, see <http://www.willatworklearning.com/2015/01/mythical-retention-data-the-corrupted-cone.html>.

55. See e-mail exchange between Dr. Simon Polovina, Professor, Sheffield Hallam Univ., and Dr. Steve Eskow, (Aug. 7-9, 2005) available at <http://homepages.gold.ac.uk/polovina/learnpyramid/disputed.htm>.

the point.⁵⁶ While they reported that they were unable to uncover “any credible research to support the pyramid,” they also concluded:

. . . clear research on retention was discovered regarding the importance of each of the pyramid levels: each of the methods identified by the pyramid resulted in retention, with none being consistently superior to the others and all being effective in certain contexts. A key conclusion from the literature reviewed rests with the critical importance of the teacher as a knowledgeable decision maker for choosing instructional methods.⁵⁷

Other research has also established is that it is not the activity level *per se* that is determinative of retention, but rather whether the activity gets learners to respond to or engage with the material. Thus, learning can “be achieved by being ‘active or passive.’”⁵⁸ Similar to the disputes over learning styles,⁵⁹ the debate on retention seems to come down to a shared view that learning methods need to be tailored to purpose.

Moreover, there is other recent research supporting the proposition that experiential learning approaches are more effective for learning than lecture-based instruction. One study examining teaching and learning methods and retention is of particular interest. It involved introducing experiential learning methods for a common module in a large first year physics course taught in different sections at the University of British Columbia.⁶⁰ The study did not address retention *per se* but sought a rather sharper measure of achievement on testing results. In this study, one section of the physics course was divided in half for one module with both halves containing “similar students, and teachers with the same learning objectives and the same instructional time and tests.”⁶¹

One half of the class continued to attend the regular class, taught by a senior, well-published, charismatic professor who had won several teaching awards.⁶² The professor used clickers—an in-class student response polling system—for summative evaluation. He asked students to define concepts covered in class before moving on to additional concepts.⁶³ The other section of the class was given over to the ministrations of an inexperienced post-doctoral fellow who did not give lectures.⁶⁴ In this other section, students were assigned pre-class reading

56. James Lalley & Robert Miller, *The Learning Pyramid: Does it Point Teachers in the Right Direction?*, 128 EDUC. AND INFO. TECH. 64, 76 (2007).

57. *Id.*

58. COE ET AL., *supra* note 5.

59. See Harold Pashler et al., *Learning Styles: Concepts and Evidence*, 9 PSYCHOL. SCI. PUB. INT. 106 (2008) (discussing an ongoing debate about whether learning styles are a myth). In my review of various postings on the point, the main point is to contest the idea that learners should be taught in their learning style. This is not the argument made by Kolb and indeed is inconsistent with his theory of teaching and learning.

60. Louis Deslaurier et al., *Improved Learning in a Large-Enrollment Physics Class*, 332 SCIENCE 862, 862-64 (2011) (replicating research undertaken by Etienne Bourgeois and others); see also Benoit Galand et al., *The Impact of a PBL Curriculum on Students' Motivation and Self-Regulation*, Cahiers de Recherché du GIRSEF, Ref 28001100944150, available at <http://www.i6doc.com/en/livre/?GCOI=28001100944150>.

61. *Id.* at 864.

62. *Id.*

63. *Id.*

64. *Id.*

and they completed a true-false online quiz on the reading before coming to class.⁶⁵ At the outset of class, the instructor gave two or three clicker questions and then commented on the results of each in turn.⁶⁶ Students then responded to the clicker questions again. This was followed by a demonstration. Another set of clicker questions followed but before answering them, students were required to discuss the questions among themselves. The instructor then made comments on what he had been hearing and responded to questions before the clicker exercise was completed. It took longer for the post-doctoral section to move through the material and indeed, students did not complete the syllabus for the module, covering only 11 of the 12 topics.⁶⁷

Students in both sections took an examination on the module. The hold-your-breath question and the focus of the study was whether students in the post-doctoral led class did better on the examination. When I have discussed this case study with judges and legal academics many have been inclined to believe the students in the Professor's section would have done better on the exam. Others have been willing to concede that the post-doctoral section might have been comparable—maybe it was a close-run thing. However, the results were startlingly different. The average test score in the Professor's section was 41% while in the post-doctoral section the average score was 74%. The authors concluded: "use of deliberate practice teaching strategies can improve both learning and engagement in a large introductory physics course as compared with what was obtained with the lecture method."⁶⁸

Another technical study testing a wearable sensor that recorded student brain waves during various activities,⁶⁹ incidentally yielded the following intriguing result—student brains were inert during class-time but far more active during lab or study time—even sleeping.⁷⁰ The difference seems to be whether the learner is *doing* something or not. In another study, the same lecture was given to different groups. One group heard an accomplished lecturer speaking fluently without notes, and maintaining eye contact. The second received the lecture from a hesitant speaker, who slumped over her notes and stumbled over her words.⁷¹

The now familiar question: which lecture was more effective? The researchers reported the group that heard the accomplished lecturer enjoyed it more and rated it more highly. However, when tested, "those attending the 'better' lecture barely outperformed their poorly taught peers. Thus, lecture fluency did not significantly affect the amount of information learned."⁷² In his comment on this

65. *Id.*

66. Deslaurier et al, *supra* note 60, at 864.

67. *Id.*

68. *Id.*

69. Ming-Zher Poh et al., *A Wearable Sensor for Unobtrusive, Long-Term Assessment of Electrodermal Activity*, 57 IEEE TRANSACTIONS ON BIOMEDICAL ENGINEERING 1243, 1250 (2010), available at <http://affect.media.mit.edu/pdfs/10.Poh-et-al-TBME-EDA-tests.pdf>.

70. *Id.* See also Chart, *infra* note 83.

71. Shana Carpenter et al., *Appearances Can Be Deceiving: Instructor Fluency Increases Perceptions of Learning Without Increasing Actual Learning*, 20 PSYCHONOMIC BULL. & REV. 1350 (2013).

72. Chris Parr, *Charisma Doesn't Count*, TIMES HIGHER EDUC. NEWS (May 30, 2013), <http://www.insidehighered.com/news/2013/05/30/study-finds-students-dont-learn-more-charismatic-lecturers#ixzz2f1byPGOD>.

study, Harvard Professor Eric Mazur, who has developed a collaborative Peer Interaction method for teaching large lecture classes,⁷³ explained:

With a better presenter it might seem like you are taking more in, but it doesn't mean that anything has actually been learned—it doesn't mean there has been an “Aha!” moment, Mazur said. “The hard work has to be done by the learner—there's not much the instructor can do to make the neuro-connections necessary for learning.”⁷⁴

In other words, the key to learning retention is engagement—getting the student present and participating in the learning activity. In my view, the active, experiential model used by NJI enhances the opportunity for judges to engage.

C. *The View From the Seats*

A final test of the validity of the pedagogical approach taken by the NJI lies with the judges themselves who are creators and consumers of judge-led, judging focused, experiential judicial education. A synthesis of course evaluations completed by judges in the NJI national courses and court-based seminars depicts consistent support for the model.⁷⁵

Judges appreciate blending of law, craft, and context (“good blend of black letter law and social awareness issues; I loved the mix of very substantive black letter law and the practical, judicial-skills issues”).⁷⁶ They also appreciate varied content and learning formats (“the strength of the program is in its deliberate mix of learning methods and type of content. The course offered the right amount of interactive participation with lectures”).⁷⁷ Judges require relevance to their work (“I liked that this program was designed to deal with real issues experienced on a regular basis in [our] courtrooms. It was valuable because of that”).⁷⁸ Judges also strongly preferred practical education (“the areas dealing with issues encountered in the courtroom were the most beneficial”).⁷⁹ Judges prefer interactivity over listening to lectures (“the method of delivery could be improved by providing more opportunities for interaction between the presenters and the attendees. Court is very interactive and it's frankly difficult to stay awake through lecture format, or talking heads presentations”).⁸⁰ Consistent with adult education literature demonstrates judges also highly value learning from colleagues (“It is always a good idea to promote sharing ideas. Lots can be learned from each other's experi-

73. See e.g., Catherine H. Crouch & Eric Mazur, *Peer Instruction: Ten years of Experience and Results*, 69 AM. J. PHYSICS 970 (2001).

74. Parr, *supra* note 72.

75. The material which follows has been synthesized by the author from all evaluations completed by participants in NJI judicial education programs at the national and court level during 2013-14. Comments are those made by judges in these evaluations. As these are anonymous, confidential documents, on file with NJI, specific citation to programs is not provided. This snapshot is consistent with evaluations received throughout the period since 1998 during which the NJI has been developing and delivering judicial education reflecting experiential adult learning principles.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

ences”).⁸¹ Well-planned small group discussion is also considered useful, (“[s]mall group discussions are one of the best ways to learn at these conferences. They provide a break from too much lecturing or panel presentations, and are a much more in-depth way to analyse a problem than clickers”).⁸²

Overall, it can be seen that judges as participants in Canada clearly appreciate experiential, interactive judicial education.

VI. CONCLUSION

The experience of the National Judicial Institute and my own participation as a judicial educator has shown it is possible and worthwhile to introduce pedagogy based on experiential learning for professionals. I consider the quality of education and learning to be significantly improved with experiential learning. Given the findings of adult education research it is not surprising judges have come to accept this approach to judicial education taught by judges themselves.

While I hope this discussion of pedagogy in judicial education has been useful, an important supplementary point must be made. Having identified “best pedagogy” (or at least, indications of best directions in pedagogy), it is essential to emphasize that it has to be implemented. In this regard, the onus is on those who are responsible for designing and teaching in judicial education to accept the lessons of research and experience and be willing to actually use them. Judicial champions and Chief Justices can support and signal their confidence expectations that judicial education will be an experiential “learning by doing” that provides sufficient time to plan an experiential course.

However, for busy judges who work on judicial education in scarce free time, this can be a real challenge to produce skills based education. It can be easier to default into old modes which are more familiar and take less time resulting in courses which are packed with lectures, panels, and a deluge of topics. This is where a judicial education body can assist judges and support implementation of skills based education. By recognizing that judges as planners—especially in Court programs—face time pressures, the worry of direct scrutiny from their peers on the court, and the pull of multiple demands from multiple judges about what should be covered, a judicial education body can assist judicial educators.

The response of NJI has been to “create time” and ideas for judicial educators by developing and deploying a cadre of Judicial Associates and Senior Advisors. The Judicial Associates have been a small group of judges who have become very knowledgeable and skilled judicial educators, who understand the principles of teaching and learning for adults. They teach and plan in this way. Their impact on the profile and legitimacy of the NJI model, and indeed on the quality of education offered, has been enormous. Senior Advisors—legal educators—assist judges and planning committees with education expertise. They coordinate and manage the planning process, faculty preparation, program flow, and logistical details. They have also made a critical contribution to sustaining the model.

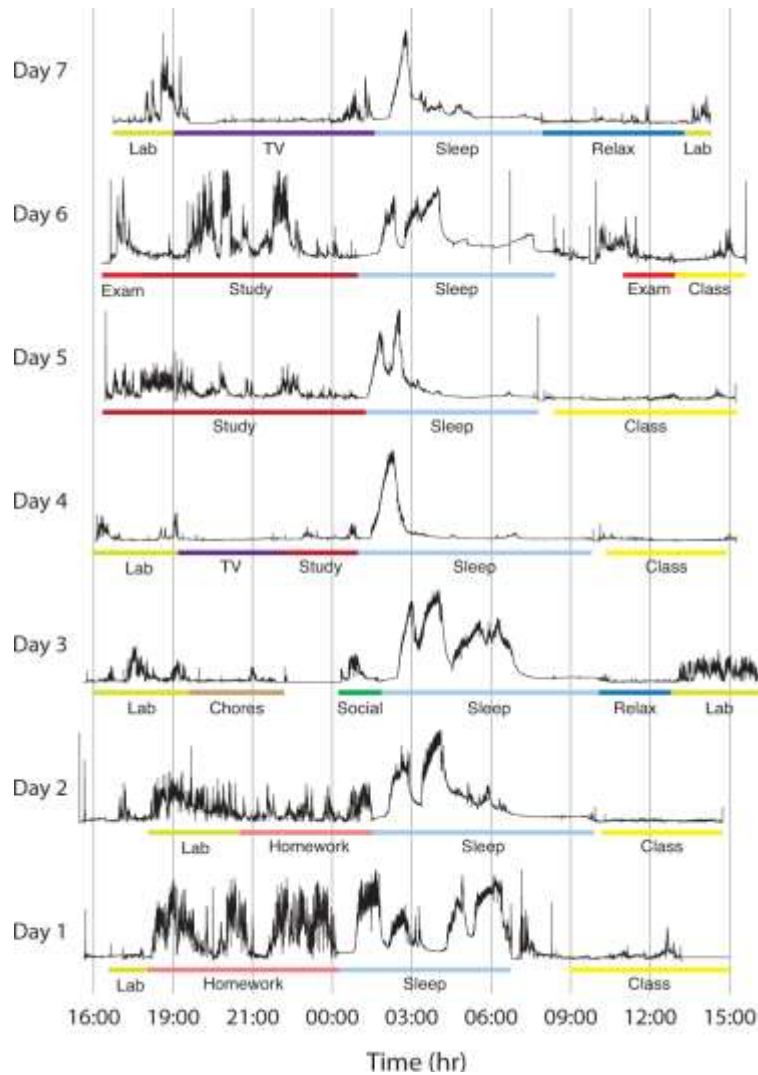
With that closing point made, let me reiterate that judges are tremendous students and passionate educators. It is a privilege to meet them in judicial education settings where they reflect upon their work—that most crucial place for litigants

81. *Supra*, note 75.

82. *Id.*

and parties where law meets life. Through steady attention to good pedagogy, judicial education can indeed help judges develop their artistry. Indeed, moving from myth to method.

Chart⁸³



83. Poh et al., *supra* note 69.