

Legal Education in Australia – Is it time to take a (Maple) Leaf out of Canada’s book?

On January 25, 2005 one of Canada’s most respected law schools, Osgoode Hall Law School of York University (Osgoode), announced the launch of its new LL.B./JD programme with New York University Law School (NYU). The programme provides an opportunity for students to earn both a Canadian LL.B. and a U.S. (ABA - American Bar Association approved) JD degree in four years. An LL.B. is a three-year Canadian law degree. A JD is a three-year U.S. law degree. A JD that is “ABA” approved allows U.S. law graduates to take the bar exam in any U.S. state. The programme has been structured so that students will do two back-to-back years at Osgoode and two back-to-back years at New York University Law School. Students will receive both the LL.B. and JD degrees at the end of the fourth year. It is necessary to note that Osgoode Hall is not the only school to enjoin with an American university. Both Windsor and Ottawa have already established bilateral degree arrangements with U.S. law schools. Windsor has partnered with the University of Detroit whereas Ottawa has partnered with both Michigan State University as well as American University in Washington. Effectively, therefore, three of Canada’s seventeen law schools now have agreements with U.S. law schools allowing students to graduate with both Canadian and U.S. law degrees. In addition, McGill University in Montreal awards students both civil and common law degrees in three years. Commentators have suggested that it is only a matter of time before other Canadian schools will seek to establish similar programmes.

Like Australia, common law Canada has historically conferred the law qualification in the form of a Bachelor of Laws or LL.B. However, in recent times (and as recent developments would show) various Canadian universities have come to question whether the traditional LL.B. is capable of meeting the needs of an increasingly global legal market. Indeed, Canadian law firms and selected law schools have arrived at the realisation that equipping their lawyers to operate in one jurisdiction/province is no longer satisfactory. This will not strike many as surprising. A recent article in the *Toronto Star*, for instance, indicated that Canada does more trade with the head office of Home Depot in Georgia, than it does with all of France. It was also noted that there are approximately 300 treaties governing trade between the U.S. and Canada, many of which are contingent on the knowledge, skills and abilities of lawyers on both sides of the American border (Tyler 2005).

Overwhelmingly, however, it was the *Canada-U.S. Free Trade Agreement of 1989* and the *North American Free Trade Agreement*, which came into effect in the mid 1990s that provided the impetus for the current upsurge in trade between the two countries. When the first agreement was signed, concurrent trade of goods was US\$192.4 billion a year. In 2003, that figure surpassed US\$441.5 billion – more than double the amount of 14 years earlier (Richardson 2005).

In response some Canadian law firms have denied further expansion options within Canada, opting instead to ‘open up shop’ in America. Tory’s LLP and Blake, Cassels & Graydon LLP are but two examples of large Canadian law firms that have expanded their operations to the U.S. in order to meet the needs of the rapidly growing Canadian clients with American interests (with the inverse too becoming increasingly common) (Richardson 2005). Thus since its merger with New York situated Haythe & Curley in October 1999, Tory’s has established itself as a law firm that practises U.S. law as well as Canadian law. Its New York office has approximately 75 lawyers – 70 American and 5 Canadian lawyers who have passed the New York State Bar – while its Toronto Office has 250 lawyers. Approximately

ten percent of them have passed the New York Bar as well, with another five percent expected to attain that designation shortly. As a consequence, the firm's business has become increasingly cross border (Richardson 2005).

Such developments will have far reaching implications for traditional modes of education. Lawyer Virginia Davies, a Canadian practising in a New York office, says lawyers in general must be better trained to deal with cross-border matters. Hence "Every transaction has multi-jurisdictional aspects and needs lawyers who are not only experts in their own jurisdictions, but who can manage the process of multi-jurisdictional transactions" (Richardson 2005).

Educational initiatives of this nature will not suddenly make the Canadian law student an expert in U.S. law, but there is little doubt that the foreign exposure it presents will offer real advantages in an increasingly globalised world. As Glenn indicates, a Canadian lawyer practising in Hong Kong or Paris brings Canadian legal information to bear on Chinese or French legal problems, whether explicitly or implicitly. Whilst on occasion this may be negative, evidence overwhelmingly suggests that it is positive (Glenn 2001).

It is worth noting that the recent moves towards Canadian/American degrees were not the result of a request or pressure from the legal profession, but rather was the brainchild of two U.S. law deans keen to foster an increasingly international perspective in syllabi (Richardson 2005). Of course, now that the idea has come to fruition the legal profession is hardly complaining.

Early evidence in the Canadian context also suggests that these degrees have had an impact on combating the academic 'brain drain' - keeping meritorious Canadian law students in Canada (Australia has had its own problems on this front). Osgoode Hall Law School's Dean, Professor Patrick Monahan, says that Osgoode's new LL.B/J.D. programme is attracting interest from high achieving Canadians who were only considering leading U.S. law schools, but now see the Osgoode-NYU joint-degree as an opportunity for the 'best of both worlds.' Similarly, Dean Feldthusen of Ottawa Law School has

received interest from Canadians in the U.S. who see it as a way to return to Canada (Richardson 2005).

What can Australia learn from this?

Perhaps more so than many other nations, Canada provides a useful point of reference for Australia (De Brennan 2004; De Brennan 2005). This argument has been put convincingly by Ross and Mundy who indicate that “Canada and Australia share many common ecological factors, societal norms, and societal consequences” (107). In terms of ecological factors, they note, both Canada and Australia are immigrant based, self-governing federal democracies following the Westminster form of government. Each country has a market free economy with remarkable similarities in terms of natural resources, agriculture and financial sectors. Both have longstanding indigenous cultures. Both began their contemporary existence as British colonies. Each country is highly advanced in technological capacity, and both nations could be characterised as highly urbanised with vast expanses of sparsely populated territory. Social norms are also very similar in both countries - it is hard to imagine typical Canadian social behaviour being viewed as abnormal in Australia or vice versa. Finally, both Canada and Australia have borne the same social consequences with similar religious, educational, and judicial institutions, similar family patterns, similar expectations for men and women within their society, similar electoral representation with their federal systems, and similar legislation – even to the point where legislative frameworks and case law are often deemed to be highly persuasive in determining matters of a legal nature (Ross and Mundy 2003).

It would now seem time for Australia to take a leaf out of Canada’s book, and more specifically, for Australian universities to consider the nature of their degrees and whether there is any scope to consider equivalent bilateral arrangements with significant trading partners in the Asia Pacific region.

Despite a wide scale review of legal education and some excellent recommendations culminating in the Australian Law Reform

Commission's (ALRC) Issues Paper in 1997 (ALRC 1997), and then the subsequent Managing Justice study in 2000 (ALRC 2000), inroads in the legal education front have not moved with the rapidity that one might have expected. For instance, it can only be described as curious that the 'Priestly 11' continues to act as the guiding formula for law school curricula. On 1 April 1992 the Consultative Committee of State and Territorial Law Admitting Authorities of Australia, chaired by Mr Justice Priestly, prescribed eleven 'areas of knowledge' that must be covered by students during their law degrees in order to satisfy the academic requirements for admission. These include civil procedure; evidence and professional conduct; criminal law and procedure; torts; contracts; property (real and personal); equity, administrative law; federal and state constitutional law; and, company law (ALRC 2000). With all the talk of globalisation it might strike the onlooker as a little strange that such a list does not include any comparative law as well as international law based subjects. Of course, students can choose a variety of subjects as electives which incorporate comparative or international perspectives, but the question why they were not deemed of sufficient importance to include them as part of the 'Priestly 11' from the outset remains a real one.

The verities of international trade, international criminal justice, the environment, and more recently, the scourge of terrorism represent but a few of the multifarious issues facing nation states. The friction points are obvious. The current Corby case;¹ Australian police cooperation resulting in the arrest of the 'Bali nine';² the tension between free trade and human rights in the case of China; and our close relationship with the U.S. with the implications that presents for our relations in the Asia Pacific region, show the inherent complexity of a globalised legal order. Few, if any, of these issues originate in one country and accordingly the response must involve all countries. If lawyers, as agents of states, are to play a part in resolving these challenges they may very well need to go beyond conventional notions of legal education and training.

There can be no doubt that large Australian law firms would gain from Canadian style joint degrees. Few non-lawyers – and perhaps a substantial number of lawyers themselves – appreciate just how many ‘mega firms’ are actually Australian. The *International Financial Law Review’s* 1999 rankings indicate that of the world’s 40 largest law firms, six are from Australia, 22 are from the U.S., nine are from the U.K., three are from continental Europe, with one only from Canada. Indeed large Australian law firms dominate the Asia Pacific region, providing eleven of the largest 15 firms (Attorney General’s Department 1999).

Sadly, it would seem that Australian legal education has not kept pace with developments on this front. The need for less talk and more action in respect of legal education was made apparent last year when Professor David Weisbrot, the president of the Australian Law Reform Commission and former Dean of the University of Sydney’s Faculty of Law, suggested that law schools “were out of touch” (O’Keefe 2004). This is not to say that Australia has been oblivious to the challenges that lie ahead. The incumbent Free Trade Agreement (FTA) with America, further liberalisation talks for the East Asian Trading bloc (Australia already has FTAs with Thailand and Singapore, and has embarked upon feasibility studies with China and Japan for the same), as well as the launching of the National Legal Profession Model Bill by the Standing Committee of the Attorney General, are just a few of the developments which have touched upon the topic of legal education.

In sum, although there has been no shortage of activity surrounding the need to rethink educational linkages with Asia, the option of permitting the conferral of joint legal qualifications (as embraced by the Canadians) seems to have received comparatively little attention. One can quickly contemplate some exciting possibilities. An Australian university might consider aligning itself with a Chinese or Japanese university so as to formulate a degree that would allow the student to practice in both jurisdictions at the end of his/her studies.

It is necessary to note that Australia and its Asian counterparts would not be approaching this from the cold. Australia already boasts some impressive linkages with its Asian counterparts on the legal education front. Noteworthy in this regard is the Australian Network for Japanese Law (ANJeL) – an initiative of the law faculties of the Australian National University, the University of New South Wales and the University of Sydney and various universities in Japan (Australia’s largest trading partner and accounting for 17% of all Australian exports). Most Australian universities now offer law subjects relevant to the Asian Pacific region. The challenge for the future is crystallising these relationships by formalising and harmonising the respective qualification frameworks.

Australian universities must be careful not to let the economic imperatives of serving the Asia Pacific region compromise the academic integrity of the Australian law degree. Further, any move to review Australia’s methods of legal education will necessitate thorough and informed consideration. The University of Toronto provides a case in point. As part of a desire to emulate leading American law schools (and position a Canadian law school amongst the various ‘Ivy League’ law faculties), four years ago the University of Toronto changed the designation of its law degree from an LL.B. to a JD. It would now seem that the University of Toronto has been outmanoeuvred inasmuch as the University of Toronto JD is not an ABA approved JD - like the JD available from Windsor, Ottawa and more recently Osgoode.

Conclusion

As Australia rethinks its methods of legal education it would do well to consider recent developments in Canada. The Canadian approach provides an attractive option for law students seeking to add value to the law degree whilst simultaneously ensuring the more satisfactory servicing of crucial foreign markets. It is anticipated that both will have a material impact upon the economic success of Australian law firms. In an increasingly global world, it may be time to

move from 'talking legal education' to 'doing legal education'.

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Notes

¹ Schapelle Leigh Corby (born 10 July 1977) is an Australian who is serving a 20 year sentence for the importation of 4.1 kg of cannabis into Bali, Indonesia. She is a former shop assistant and beauty student from Queensland. She was sentenced on May 27, 2005 and is currently serving her sentence in Kerobokan Prison, Indonesia. Despite the conviction, Corby maintains that the drugs were planted in her bag, and that she did not know about them. Her trial and conviction were a major focus of attention for the Australian media.

² The 'Bali Nine' is the name given to nine Australian citizens arrested on 17 April 2005 in Denpasar on the island of Bali, Indonesia, in a plan to smuggle 8.3kg of heroin valued at approximately \$4 million from Indonesia to Australia. Andrew Chan, Si Yi Chen, Michael Czugaj, Renae Lawrence, Tac Duc Thanh Nguyen, Matthew Norman, Scott Rush, Martin Stephens and Myuran Sukumaran, all aged between 18 and 28 at the time of their arrests, were convicted. Several have been handed the death penalty.