

The New National Standard for the Canadian Common Law Degree:  
What place for internationalization in our strategic planning?

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*“Educar a todo el pueblo”*

— HENRY MARSHALL TORY, PRESIDENTE Y FUNDADOR, 1908

## The new national standard for the Canadian common law degree: What place for internationalization in our strategic planning?

Joanna Harrington\*

### Introduction

Faced with an increasing number of Canadian students going abroad to secure a legal education, and recognizing interest from both Canadian and non-Canadian educational institutions, public and private, to establish new law degree programs for the Canadian market, the law societies of Canada's common law jurisdictions have recently adopted a new national standard with respect to the academic requirements of a Canadian common law degree. While universities as independent actors determine the curricular requirements for their degree programs, pragmatism requires that Canada's existing Faculties of Law must meet the new national standard so as to ensure that their degree programs continue to lead to the attainment of a professional degree that leads to the practice of law. After all, almost all students in Canadian law schools proceed from graduation to seeking admission to the Bar.

In this paper, I begin with an overview of the Canadian context for the provision of legal education, before discussing the work of the legal profession's Task Force on the Canadian Common Law Degree and its recommendations concerning the required competencies for a common law degree to be considered acceptable for admission to practice. I then provide an internationalist's critique of the resulting national standard that Canada has now adopted, with an opportunity having been missed to establish the basics of international law as a required component of a 21<sup>st</sup> century lawyer's toolkit.

### The Canadian Context

Canada has too few law schools and a shortage of lawyers.<sup>1</sup> In a country with a population of 33 million, there are 21 post-secondary educational institutions providing programs for the attainment of a professional degree leading to the practice of law.<sup>2</sup> By comparison, Australia has 32 law schools<sup>3</sup> and a population of at least 21 million, and the United Kingdom, with a population of 61 million, has at least 80 law schools. No new law school has been created in Canada in over 30 years,<sup>4</sup> notwithstanding the shortage of lawyers, especially in rural and northern communities, and the ready supply of suitable and qualified students. A new law school is set to open its doors in September 2011.<sup>5</sup>

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<sup>1</sup> See Kate Lunau, "Where's a lawyer when you need one? Canada's legal system is hobbled by our dearth of law schools" *Macleans* (2 February 2009), at: <http://www2.macleans.ca/2009/02/02/where's-a-lawyer-when-you-need-one/>

<sup>2</sup> A twenty-second institution offers an undergraduate Bachelor of Arts degree program in legal studies, but this program does not lead to a professional degree leading to the practice of law.

<sup>3</sup> See further, Council of Australian Law Deans at <http://www.cald.asn.au/schools.htm>

<sup>4</sup> The last new Faculty of Law established in Canada was at the University of Calgary in 1979.

<sup>5</sup> A new law degree program is scheduled to begin at Thompson Rivers University in conjunction with the University of Calgary, with another institution to be added to the count in 2012 if plans by Lakehead University to offer a new law degree program receive government approval.

Canada's Faculties of Law must also meet the demands of a bilingual and bijuridical nation.<sup>6</sup> As a result, some law schools offer their degree programs in English, others in French, and some offer their degree programs in both official languages. In similar fashion, 16 of Canada's 21 law schools provide training in the common law, while six law schools provide training in civil law, with two schools providing training in both legal traditions. In this paper, I will focus on the common law degree program in Canada.

### **The FLSC Task Force on the Canadian Common Law Degree**

While a law degree is required to gain admission to the Canadian legal profession, along with the successful completion of a Bar admission exam or course, and a period of apprenticeship known as articling,<sup>7</sup> the practice of law within each of Canada's ten provinces and three territories, including its admission requirements, is regulated by one of fourteen law societies (with the province of Québec having two regulatory bodies as a reflection of the civil law tradition).<sup>8</sup> Each law society within Canada has the statutory capacity to act independently of the others, with the existence of fourteen independent regulatory bodies for the practice of law reflecting the federal nature of Canada's political organization and structure. As a result, there has never existed in Canada an agreed and uniform national standard as to the academic requirements for a common law degree.

There is, however, a national process for the accreditation of law degrees that are earned outside Canada, with this process also being available to Québec graduates of civil law programs who wish to practice in a Canadian common law jurisdiction. Established by the law societies, in conjunction with the Council of Canadian Law Deans (CCLD),<sup>9</sup> and serviced by the law societies' national coordinating body, the Federation of Law Societies of Canada (FLSC),<sup>10</sup> it is the mandate of the National Committee on Accreditation (NCA) to make the assessment that ensures that the legal education and training of the holder of a law degree from outside Canada is comparable to that provided by an approved Canadian law school. In providing this service, the NCA applies what it refers to as "a uniform standard on a national basis so that applicants with common law qualifications obtained outside of Canada can apply regardless of where they wish to practise in Canada."<sup>11</sup> Once assessed, an applicant typically meets any necessary additional requirements through the passage of exams or through registration as a special student in a Canadian common law degree program to take additional courses. As for where these applicants are educated, almost 25% come from the United Kingdom (England and Scotland), followed

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<sup>6</sup> Canada's dual legal system was first sanctioned by the *Quebec Act* of 1774, and reaffirmed by the distribution of powers found in the *Constitution Act, 1867*. The French civil law tradition regulates the private law of Québec, while in Canada's nine other provinces and three territories, private law is derived from the English common law tradition.

<sup>7</sup> The Canadian use of the term "articling" is equivalent to the use of "pupillage" and "traineeship" in the United Kingdom.

<sup>8</sup> Specifically, the *Barreau du Québec* and the *Chambre des notaires du Québec*. The *Chambre des notaires du Québec* governs the notarial profession within Québec, while the *Barreau du Québec* governs the lawyers.

<sup>9</sup> The official website of the Council of Canadian Law Deans can be found at: <http://www.cclld-cdfdc.ca/>

<sup>10</sup> The official website of the Federation of Law Societies of Canada can be found at: <http://www.flsc.ca/>

<sup>11</sup> See "Joining Canada's legal community" at: <http://www.flsc.ca/en/foreignLawyers/foreignLawyers.asp>

by the United States, India, Australia and Nigeria as the next four most frequent source countries.<sup>12</sup> Approximately 30% of NCA applicants are Canadian citizens.<sup>13</sup>

Recognizing that an anomaly existed as between those who earn their common law degree in Canada, and those who do not, and recognizing that more and more Canadian students are going abroad to earn a law degree but with the desire to return to Canada to practise,<sup>14</sup> the FLSC appointed a task force in June 2007 to “review the criteria in place for the approved common law degree and, if appropriate, to recommend modifications to achieve a national standard for recognition of an approved common law degree for entry to the profession.”<sup>15</sup> The FLSC’s Task Force was comprised of eight benchers and former benchers and three staff members from three Canadian law societies, only one of whom was a law professor (as distinct from members of the profession who teach a course as an adjunct or sessional instructor), and with no designated representative from the 16 university Faculties of Law in Canada that provide the course delivery.<sup>16</sup>

The Task Force met on several occasions, before meeting in November 2007 with the Council of Canadian Law Deans to invite their input, with the Council creating their own working group to assist with their engagement with the Task Force. A draft discussion paper containing the Task Force’s preliminary views was in circulation in November 2007,<sup>17</sup> which in turn led to a discussion session with an ad hoc group of law professors in March 2008, followed by the submission of a written response from this unnamed “Ad Hoc Law Professor’s (*sic*) Working Group on Law School Accreditation” in April 2008.<sup>18</sup> In September 2008, the Task Force distributed a “Consultation Paper” nationally to law societies, the legal academy, the profession and legal organizations with an express request for comments by mid-December 2008. In March 2009, the Task Force reported to the FLSC on the results of its consultation process via an Interim Report, then met with certain Law Faculties in Ontario for further discussions,<sup>19</sup>

<sup>12</sup> See National Committee on Accreditation, “Statistics 1999-2009” at: <http://www.flsc.ca/en/foreignLawyers/stats.asp>

<sup>13</sup> See Federation of Law Societies of Canada, *Task Force on Accreditation of Canadian Common Law Degrees: Draft Discussion Paper* (November 2007) at 8, a copy of which has been made available online by the University of Toronto Faculty of Law at: [http://www.law.utoronto.ca/documents/conferences/Legaethics08\\_FLSC%20TaskForce.pdf](http://www.law.utoronto.ca/documents/conferences/Legaethics08_FLSC%20TaskForce.pdf)

<sup>14</sup> The Task Force was also cognizant of legislative developments underway in several Canadian provinces to ensure that regulated professions and individuals applying for registration by regulated professions are governed by practices that are transparent, objective, impartial and fair. See Ontario’s *Fair Access to Regulated Professions Act*, S.O. 2006, c. 31.

<sup>15</sup> Federation of Law Societies of Canada, *Task Force on the Canadian Common Law Degree: Consultation Paper* (September 2008) at 2, available at: [http://www.flsc.ca/en/pdf/2008Consultation\\_paper.pdf](http://www.flsc.ca/en/pdf/2008Consultation_paper.pdf). See also Federation of Law Societies of Canada, *Task Force on the Canadian Common Law Degree: Final Report* (October 2009) at 4, available at: <http://www.flsc.ca/en/pdf/CommonLawDegreeReport.pdf>. A similar initiative has been undertaken in Australia, but led by the educators rather than the regulators: see Council of Australian Law Deans, *Standards for Australian Law Schools: Final Report* (March 2008), also known as the Roper Report, available at: [http://www.cald.asn.au/docs/Roper\\_Report.pdf](http://www.cald.asn.au/docs/Roper_Report.pdf)

<sup>16</sup> The members of the Task Force are listed in footnote 11 of the 2008 Consultation Paper, *supra* note 15, and Appendix 1 of the 2009 Final Report, *supra* note 15.

<sup>17</sup> 2007 Discussion Paper, *supra* note 13.

<sup>18</sup> A copy of this ad hoc working group’s 10-page submission is reproduced as Appendix 9 to the 2008 Consultation Paper, *supra* note 15. See also Canadian Association of Law Teachers, *Response to the Consultation Paper of the Task Force on the Canadian Common Law Degree of the Federation of Law Societies of Canada: December 15, 2008* (2009) 3 Can. Legal Educ. Ann. Rev. 151-168.

<sup>19</sup> See Appendix 1 to the 2009 Final Report, *supra* note 15.

and in October 2009, the Task Force published its Final Report containing its recommendations to the FLSC.

The Task Force's recommendations have now received approval from each of the law societies regulating the practice of law in Canada's common law jurisdictions. As a result, Canada is set to gain a uniform national standard as to the academic requirements of a Canadian common law degree by 2015, with an implementation committee consisting of representatives from the law societies and the Faculties of Law having been established to address potential difficulties and obstacles.<sup>20</sup>

### **The Required Competencies for Common Law Practice in Canada**

As for the components of this new national standard, the Task Force report requires every law school graduate entering a Bar admission program or licensing process in a common law Canadian jurisdiction, including those who obtain their law degree from an institution located outside Canada, to have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada. These core legal concepts are identified by the Task Force as: the principles of common law and equity; the process of statutory construction and analysis; and the administration of the law in Canada; as well as the constitutional law of Canada, including federalism and the distribution of legislative powers, the *Charter of Rights and Freedoms*, human rights principles and the rights of Aboriginal peoples of Canada; Canadian criminal law; and the principles of Canadian administrative law; and also contracts, torts and property law; and legal and fiduciary concepts in commercial relationships. In addition, every law school graduate must demonstrate certain skills competencies in problem-solving, legal research, and oral and written communication, as well as an awareness and understanding of the ethical requirements associated with the practice of law in Canada.

The Task Force has also made clear that an acceptable common law degree program for the purposes of admission to practice in Canada must be of three academic years in duration,<sup>21</sup> and cannot consist solely of online or distance learning.<sup>22</sup> The law school granting the degree must also be appropriately resourced, financially and physically, maintain a law library, and must also have appropriate numbers of "properly qualified academic staff" (although the Task Force left this phrase undefined, leaving open the question as to whether those who teach law students must themselves hold an approved law degree).<sup>23</sup>

### **An Internationalist's Critique of the New National Standard**

While some law professors have expressed concern about the perceived intrusion of the legal profession into the university's domain with respect to matters of curriculum, and others have worried that the

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<sup>20</sup> The new national academic standard has already being used to evaluate applications to establish new law degree programs in Canada: see Federation of Law Societies of Canada, Ad Hoc Committee on Approval of New Canadian Law Degree Programs, *Report on Applications by Lakehead University and Thompson Rivers University* (January 2011), available at: [http://www.flsc.ca/en/pdf/Task\\_Force\\_Report.pdf](http://www.flsc.ca/en/pdf/Task_Force_Report.pdf)

<sup>21</sup> The Task Force believes that: "This is consistent with requirements throughout North America and in other jurisdictions" (2009 Final Report, *supra* note 15 at 40), but makes no mention of the fact that some universities in the United Kingdom are offering a two-year law degree program for students holding a university degree in another discipline, sometimes termed a "Graduate Bachelor of Laws" program. Such programs may attract Canadian students, as they tend to complete a university degree in a variety of disciplines before pursuing a legal education.

<sup>22</sup> 2009 Final Report, *supra* note 15 at 5, 11 and 41.

<sup>23</sup> *Ibid* at 5, 11 and 42.

uniformity of the profession's approach may lead to a loss of flexibility and creativity in our curricular offerings, my own critique of the new national standard is that it largely codifies what was already in place, with the exception of training in ethics and professional responsibility, although there are already law schools in Canada, including my own, that include a course on ethics and professional responsibility as a mandatory component of their degree programs. But apart from this "new for some" requirement, for which support from the profession was very strong, the Task Force's recommendations are not radical, nor innovative, and on subject areas where there were debates, such as whether knowledge of the rules of civil procedure and evidence should be a required substantive component of the Canadian common law degree, the end result has been to list neither.<sup>24</sup> (The dropping of civil procedure from the list of required knowledge competencies was a significant retreat for the Task Force in light of its earlier musings.)<sup>25</sup> A similar result has occurred with respect to company law, (or the law of business associations), and the final list of obligatory knowledge competencies is certainly shorter than what had been required of NCA applicants who had obtained their common law degrees abroad.<sup>26</sup>

For most of Canada's existing Faculties of Law, the new national standard imposes few burdens, putting aside the philosophical objection held by some as to the role of the profession in determining the content of a university degree. Courses in contracts, torts, property, criminal law and constitutional law are already required components for every common law degree earned in Canada. Most law schools also require their students to undertake obligatory training in legal research, writing and mootings, and foundational concepts, such as the principles of common law and equity and the process of statutory construction and analysis, are covered in either a standalone "Legal Process", "Introduction to Law" or "Foundations of Law" course in first year, or as component parts of other first and upper year courses. The addition of administrative law to what will inevitably become a list of required courses in practical terms, notwithstanding the Task Force's stated focus on competencies,<sup>27</sup> is also reflective of a current trend already underway in many Canadian law schools given the importance of the modern regulatory state.<sup>28</sup> In fact for those law schools that already have a required course in ethics and professional responsibility, the only matter of debate might be whether to advise a law student to take trusts, company law or commercial law, or perhaps all three, to meet the Task Force's, and now the

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<sup>24</sup> "Civil procedure", "Equitable principles, including fiduciary obligations, trusts and equitable remedies", "Business organization concepts", and "Dispute resolution and advocacy skills and knowledge of their evidentiary underpinnings" were all included in the listing of required competencies included in the 2008 Consultation Paper, *supra* note 15 at 4-5, 20, 22-23, but were then dropped from the 2009 Final Report, *supra* note 15 at 10. By comparison, evidence and civil procedure, as well as equity and company law, are four of the eleven subjects necessary for an Australian common law degree. On the other hand, evidence, civil procedure and company law are not required in England and Wales, where the required foundational subjects are: Public Law (including Constitutional Law, Administrative Law and Human Rights), Law of the European Union, Criminal Law, Obligations including Contract, Restitution and Tort, Property Law, Equity and the Law of Trusts.

<sup>25</sup> In its 2007 Discussion Paper, *supra* note 13 at 14, the Task Force viewed civil procedure, in the sense of a course that familiarized students with the nature and purpose of civil processes, as one of the foundations of the common law and expressed the view that law schools would have little difficulty or complaint with civil procedure as a required component of a Canadian legal education.

<sup>26</sup> As outlined in the 2007 Draft Discussion Paper, *supra* note 13 at 25-26, and reproduced in appendix 1 to the 2008 Consultation Paper, *supra* note 15, NCA applicants were expected to demonstrate competence in at least the following basic practice areas: Administrative Law, Business Law (Corporate and Commercial), Civil Litigation, Constitutional Law, Contracts, Criminal Law, Criminal Procedure, Estate Planning and Administration, Evidence, Family Law, Professional Responsibility, Property, Real Estate, Taxation, Torts, and "Trusts, Equity, Remedies".

<sup>27</sup> 2009 Final Report, *supra* note 15 at 26-27.

<sup>28</sup> Six Canadian law schools currently designate administrative law as a required course, while another seven law schools require students to take an introductory course on public law, the administrative process, or the regulatory state.

profession's, somewhat cryptic requirement for competency in "legal and fiduciary concepts in commercial relationships."

As a result, what is more surprising from my perspective about the Task Force's recommendations for a new national standard is not the content of the requirements, but the lack of innovation and strategic consideration in light of the realities of an increasingly globalized world.<sup>29</sup> No mention is made in the 2009 Final Report of the increasingly cross-border nature of the practice of law, nor of the internationalization of legal policy development, nor is any consideration given to the need for Canadian lawyers to understand such concepts as jurisdiction in an increasingly internationalized legal environment. Moreover, in a country with significant cross-border trade and investment activities generating work for the legal profession, the legal significance of the North American Free Trade Agreement and the impact of the World Trade Organization, as well as the role for bilateral investment treaties to secure protections for investors, are completely overlooked with respect to the academic training of future members of the Canadian legal profession. One would have also thought that the rules of state immunity, the international legal protection of human rights, certain key principles of environmental law, the rules governing the use and protection of coastal seas and the Arctic region, the growth of international criminal law, the general rules of the law of treaties, and the rules governing the invocation of international law in domestic courts, were all matters of current interest and relevance to the educational training of a large segment of the Canadian legal profession.

This blind spot for the Canadian legal profession, and a strategic misstep in terms of training Canadian law students for both the Canadian and global legal market, also stands in contrast with other common law jurisdictions, such as England and Wales where the law of the European Union is a necessary foundational subject for a future lawyer's university education. The Council of Australian Law Deans has also recognized that the curriculum for a common law degree should, among other goals, seek to develop "international and comparative perspectives on Australian law and of international developments in the law."<sup>30</sup> The United Nations has also recognized the need for improved exposure to international law at the university stage of a lawyer's education, with then Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, Hans Corell, writing an appeal to the Deans of law schools worldwide in 2001 advising of the unprecedented development in the field of international law and urging for greater attention to be paid to education in international law to meet the demands of the 21<sup>st</sup> century. Corell urged all law schools to ensure that students graduate from law degree programs with a basic knowledge of international law; "to be schooled in its methods and to know how to research it when the need arises" as he later explained in an address to the annual conference of the American Society of International Law.<sup>31</sup>

Individual law schools have also adapted their curricular offerings to meet the changing needs of today's society, with several including some required exposure to international law (whether public or private,

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<sup>29</sup> In a report from the Law Society of British Columbia to the FLSC, it was documented that the "globalization of practice" was identified by B.C. lawyers as one of the "chief challenges" facing the legal profession "over the next five years." See Law Society of British Columbia, *2000-2001 Report to the Federation* (6 July 2001), cited in Trevor C.W. Farrow, "Globalization, International Human Rights, and Civil Procedure" (2003) 41 *Alta L Rev* 671 at fn 114.

<sup>30</sup> Council of Australian Law Deans, *The CALD Standards for Australian Law Schools* (as adopted 17 November 2009) at 3, available at: <http://www.cald.asn.au/docs/CALD%20-%20standards%20project%20-%20final%20-%20adopted%2017%20November%202009.pdf>

<sup>31</sup> Hans Corell, "The Visible College of International Law: Towards the Rule of Law in International Relations" (2001) 95 *Am Soc'y Int'l L Proc* 262 at 269, available at: [http://untreaty.un.org/ola/media/info\\_from\\_lc/asil\\_6apr01\\_final.pdf](http://untreaty.un.org/ola/media/info_from_lc/asil_6apr01_final.pdf)

or a hybrid of the two), transnational law,<sup>32</sup> or a combination of international law and comparative law, within their degree programs. Others have taken the approach of mainstreaming a focus on globalization into their curriculum by the addition of international modules in traditional courses,<sup>33</sup> and still others have included international law as one of those four or five recommended courses that students should take in second or third year “as part of the portfolio of any well-educated lawyer.”<sup>34</sup>

In 2006, Harvard Law School announced that a three-year process of study and consultation had led to fundamental changes to its first year curriculum, with Canada’s Task Force clearly being aware of this development since it reproduced the text of the Harvard Law School announcement as an appendix to its 2007 Discussion Paper.<sup>35</sup> Apparently, however, the Task Force failed to notice that the curricular changes adopted at Harvard Law School that it was now circulating for discussion included the introduction of a new first year compulsory course in international and comparative law, precisely because it was an area of “great and ever-growing importance in today’s world”<sup>36</sup> (according to then Dean Elena Kagan, now an Associate Justice of the Supreme Court of the United States) and because law students should learn to locate what they are learning “within the context of a larger universe.”<sup>37</sup> As a result, every first year student at Harvard Law School must now take “one of three specially crafted courses introducing global legal systems and concerns” with those course offerings being:

- Public International Law (to introduce students to the sources, institutions and procedures emerging over time through the bilateral and multilateral arrangements among states as well as the participation of nongovernmental actors);
- International Economic Law (to introduce students to the network of economic regulation and private ordering affecting commercial transactions, trade, banking and other systems for facilitating and regulating economic relations around the globe); and
- Comparative Law (to introduce students to one or more legal systems outside our own, to the borrowing and transmission of legal ideas across borders and to a variety of approaches to substantive and procedural law that are rooted in distinct cultures and traditions).<sup>38</sup>

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<sup>32</sup> A descriptor suggested by then Columbia Law School Professor Philip Jessup in his Storrs Lectures delivered at Yale Law School over half a century ago to refer to “all law which regulates actions or events that transcend national frontiers”: Philip C Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) at 2.

<sup>33</sup> See, for example, the discussion of this approach with respect to the Yale Law School in Harold Hongju Koh, “Why Transnational Law Matters” (2006) 24:4 Penn State Int’l L Rev 745 at 751-2. See also Mathias W Reimann, “Two Approaches to Internationalizing the Curriculum: Some Comments” (2006) 24:4 Penn State Int’l L Rev 805.

<sup>34</sup> Anne-Marie Slaughter, “The International Dimension of Law School Curriculum” (2004) 22:3 Penn State Int’l L Rev 417. Several symposia have been held on including international law within the law school curriculum, including a symposium on internationalizing the first year curriculum at the Association of American Law Schools Annual Meeting in 2006, with the contributions published in (2006) 24:4 Penn State Int’l L Rev 735-839. See also (2002) 96 Am Soc’y Int’l L Proc 54-64.

<sup>35</sup> 2007 Discussion Paper, *supra* note 13 at 42-44 (Appendix 9).

<sup>36</sup> “HLS faculty unanimously approves first-year curricular reform,” reproduced in the 2007 Discussion Paper, *supra* note 13 at 42.

<sup>37</sup> *Ibid* at 44.

<sup>38</sup> The course descriptions were included in the HLS announcement, *ibid* at 43-4.



## Conclusion

Admittedly, innovation may not have been the goal, nor an aspiration that was politically possible, for a task force whose job was to locate the common ground within existing Faculties of Law in Canada so as to provide a standard by which to measure applicants for admission to practice coming from outside Canada or from as yet established new schools of law. This work has led to the adoption of a bland set of largely uncontroversial knowledge and skills requirements, albeit with one cryptic requirement concerning corporate fiduciary relationships, that has become Canada's first national standard for the academic requirements of a Canadian common law degree. But an opportunity has been missed for the profession to move beyond the traditional core subjects, and now potentially freezing in time what one considers a core subject, with the parochial focus on educating lawyers for the practice of law in Canada missing out completely on the prospects for educating Canadian lawyers for the global legal market. There also seems to be a misunderstanding as to what is meant by international law, at least among lawyers in practice of a certain generation, with the Task Force referring throughout its reports to "international law degrees", "international law schools" and the "internationally trained" or "internationally educated" as a significant impetus for its work and a problem to be addressed through the adoption of a national standard. Clearly, we need to work on our understanding of "international" as something other than not-Canadian, or foreign, in an increasingly interdependent global world.