Poor Canadian Legal Education: So Near to Wall Street, So Far From God

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Abstract
The recent appearance of recruiters from Wall Street firms at several Canadian law schools, and the recent hiring by American law schools of several mid-career Canadian law professors, has created a "moral panic" as journalists, academics and law firms have expressed great concern over the loss of Canada's "best and brightest" to the United States. Properly understood as part of a larger debate about globalization and regional economic integration, these developments are less important in themselves than for what they reveal about the present and future of the Canadian state, and the Canadian business community, legal profession and universities.
POOR CANADIAN LEGAL EDUCATION:
SO NEAR TO WALL STREET,
SO FAR FROM GOD©

BY HARRY W. ARTHURS*

The recent appearance of recruiters from Wall Street firms at several Canadian law schools, and the recent hiring by American law schools of several mid-career Canadian law professors, has created a "moral panic" as journalists, academics and law firms have expressed great concern over the loss of Canada's "best and brightest" to the United States. Properly understood as part of a larger debate about globalization and regional economic integration, these developments are less important in themselves than for what they reveal about the present and future of the Canadian state, and the Canadian business community, legal profession and universities.

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* University Professor, Osgoode Hall Law School of York University. I should like to express my thanks to the Foundation for Legal Research for its financial support, to Matina Karvellas for her fine assistance with many difficult research tasks, to Lisa Philipps, Hans Mohr, and participants in the Osgoode Hall Law School Summer Seminar Series for their comments on an earlier draft, and to Ron Daniels, Bruce Chapman and a number of Canadian-based and expatriate law deans and professors, contacted through the Internet, for their willingness to share experiences, views, and information with me.
I. HOW NEAR TO WALL STREET?

Just recently, Wall Street law firms have begun to recruit actively at Canadian law schools and American law schools to entice Canadian law teachers across the border to professorial, even decanal, positions. These developments have surprised Canadian legal academics and practitioners, and provoked speculation over their short-term causes, effects and extent as well as their long-term implications. The first order of business, then, is to attempt to establish what exactly has happened in recent years to excite this controversy. As it turns out, much less than meets the eye.

The arrival of recruiters from Wall Street law firms in the late 1990s at three law Canadian schools—Osgoode Hall at York University, the University of Toronto and McGill University—caught the attention of the general, and especially the legal, press. The most startling fact, for journalists, was the apparent ease with which these law firms were able to attract students who would, in previous times, have been candidates for articling and associate positions with leading Canadian firms.

Most noticeable has been the number accepting summer associate positions with U.S. law firms, which has over the years 1998-2000 risen from an estimated total of about thirty per year to about seventy per year for the three schools. However, although the numbers have also risen sharply, on average each year only about thirty students from the three law schools accepted first-year associate positions with these firms during the period 1998-2000. Moreover, many of these associates (anecdotal evidence suggests) returned to jobs in Canada within two or three years. Are these numbers significant? Even if this

most recent wave of recruitment has been somewhat underestimated, it represents less than 5 per cent of the annual graduating class of these three law faculties and of the six hundred-or-so Canadians practicing law in the United States, a much smaller proportion of all recent Canadian law graduates, and a minuscule fraction of the overall membership of the Canadian and American legal professions. Nonetheless, though the absolute numbers are small, and in percentage terms insignificant, they have been sufficient to attract attention and generate controversy.

Journalists recorded the defection of Canada’s “best and brightest” to Wall Street; half the law clerks at the Supreme Court of Canada were rumoured to have accepted jobs on Wall Street; columnists wrote of a 300 per cent increase in Canadian recruits to Wall Street; legal “head hunters” began to advertise the availability of jobs for Canadian law graduates in New York and London firms; and the elite Canadian law firms moved swiftly to protect their pool of prospective recruits by forcing the governing body of the profession to streamline procedures governing the hiring of articling students and by improving their own remuneration practices. That so much publicity,
and such a dramatic riposte from the elite firms, should have been triggered by Wall Street's recruitment of a few score young Canadian graduates is surprising. Of course, Wall Street firms pay starting salaries two or three times that of equivalent Canadian firms; life in New York is exciting; excellent learning opportunities are available to new recruits; and being recruited to serve large, transnational clients in an intensely competitive recruitment market is itself an honour. And of course if existing trend lines are extrapolated into a period when U.S. law firms are expected to experience many retirements, there is a possibility that much more dramatic data will soon appear. But none of these considerations quite explains the "moral panic" that ensued, except in the sense that moral panics are generally understood to involve controversial predictions of dire social consequences based on dubious but dramatic data.

Nor do they explain a second, even more improbable, "moral panic" engendered by the recruitment of a half-dozen mid-career Canadian law teachers by American law schools during this same period. In all, only ten or twelve of the thirty or so expatriate Canadians currently teaching in American law schools moved there in mid-career, while the rest were recruited directly from graduate schools or legal personnel agency—has compared salaries paid to first year lawyers in leading firms:

<table>
<thead>
<tr>
<th>Associate</th>
<th>Toronto</th>
<th>New York</th>
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<tbody>
<tr>
<td>1st year</td>
<td>$88 K</td>
<td>$187.5 K - $210 K</td>
</tr>
<tr>
<td>2nd year</td>
<td>$98 K</td>
<td>$202.5 K - $240 K</td>
</tr>
<tr>
<td>3rd year</td>
<td>$105 K to $117 K</td>
<td>$225 K - $255 K</td>
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<tr>
<td>4th year</td>
<td>$115 K to $135 K</td>
<td>$240 K - $270 K</td>
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<tr>
<td>5th year</td>
<td>$135 K to $150 K</td>
<td>$255 K - $285 K</td>
</tr>
<tr>
<td>6th year</td>
<td>$125 K to $160 K</td>
<td>$270 K - $300 K</td>
</tr>
</tbody>
</table>


practice. True, more appear to have been hired during the 1990s than in previous decades; and more yet may be recruited if, as projected, retirements create an unusual number of professorial vacancies in American law schools during the decade 2000-2009. However, it is far too soon to declare that a mass exodus is likely to occur. According to anecdotal evidence, many of those who accepted their first jobs in the United States would have preferred to teach in Canada, but no jobs were available due to hiring embargoes in most universities; others elected to make their careers there because of family ties or other personal circumstances; and only a handful appear to have made a deliberate decision to move from a Canadian to an American law school. There is reason for concern, of course: the overall numbers of Canadians teaching abroad is increasing; more mid-career departures are rumoured to be imminent; some Canadian deans report losing out to American schools in competitive bids to hire young Canadians seeking their first law teaching jobs; and vis-à-vis leading U.S. law schools, Canadian law faculties pay much lower salaries, provide less research support, cannot match the professional challenges available in a larger, more sophisticated legal system, and are generally less prestigious. But once again, the situation seems well short of crisis: most Canadian law schools have lost no faculty members to American recruiters; expatriates in the United States represent at most 2 or 3 per cent of the total complement of Canadian law teachers; the presence of as many—or more—Canadians on Australian or British law faculties excites little

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12 Using listserves to contact law professors in the United States and at six Canadian law schools, I was able to identify approximately thirty expatriate Canadian law teachers currently teaching in the United States. A number of these contacted me and contributed anecdotal evidence concerning their own experience. The Directory of the Association of American Law Schools identified an additional twenty persons with U.S. law degrees who were born in Canada or held Canadian undergraduate or graduate degrees in disciplines other than law. In addition, the Directory lists eight Canadians as "Associates in Law"; they are typically graduate students involved in part-time teaching of legal writing or legal method courses. Association of American Law Schools, The AALS Directory of Law Teachers, 1998/1999 (Eagan: AALS West Group, 1999).


14 Confidential analysis of salaries in twelve leading American state and private university law schools in possession of the author. Reliable salary information is notoriously hard to come by, and transborder comparisons are difficult due to exchange rates, differences in buying power, taxation rates, benefit packages, summer supplements etc. However, estimates provided on a confidential basis to the author by individuals in the Canadian law school community of the salary premiums paid by elite U.S. law schools have ranged from 50 per cent to 300 per cent.
opportunities to teach in Canada are opening up to an extent not seen for many years; and the resources gap between law faculties north and south of the border—while considerable—seems no longer to be growing. Why, then, the “moral panic”—the articulation of public, expert or establishment concern disproportionate to actual events?

The explanation, I will argue, is that Wall Street law firms, and the elite law schools which train new recruits, represent more than a unique and powerful presence within world legal-professional and legal-academic circles. In both a professional and a symbolic sense, they represent a particularly aggressive variant of capitalism and of U.S.-led globalization and hemispheric economic integration. For this reason, the controversy which greeted the arrival of recruiters from Wall Street law firms and from leading U.S. law schools had much to do with widespread concerns over the absorption of Canada into a continental economic space—and ultimately a political, juridical and intellectual space—dominated by the United States. These concerns, moreover, are rooted not merely in the geo-politics and ideologies of continentalism and resistance to it. They have also to do with the material interests and ambitions of the Canadian bar which senses, not without reason, that Wall Street—its stock exchange, its corporations, its ideology, its legal expertise, its law firms—will soon reshape the political economy not only of Canada but of its legal profession. If this occurs, not only will the fate of elite Canadian law firms be transformed, but so too the careers of individual Canadian lawyers and the prospects of Canadian law students. These perturbations of Canada’s political and legal-professional economy, and of law student attitudes and behaviours, are in the end bound to affect Canadian legal academe quite profoundly.

Indeed, the career paths, pay scales and scholarly agendas of Canadian law professors are already being shaped by two influences closely associated with Wall Street: neo-liberalism, which has eroded state support for higher education and research; and “globalization of the mind”, the dominance of professional discourse by American experts, intellectuals and professionals.

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In this context, it is not surprising to find that some law students, lawyers, law firms, and law faculties are attempting to position themselves to take best advantage of continentalism and globalization. This takes several forms: the acquisition of capacities and credentials which will be negotiable in an integrated continental legal community; the development of reputations which will have transborder currency; and the forging of transnational alliances and partnerships which will enable Canadians to survive and flourish in the new continental dispensation. In the short term, moreover, legal actors are staking out their claims as managers of continental integration, as stalwarts of the resistance movement or as honest brokers between the two. This claim-staking has taken the form of dramatic or dismissive rhetoric, and of impassioned arguments for and against policy ripostes to the perceived threat of U.S. raiding—the "moral panics" referred to earlier.

Thus, the Canadian legal academy's recent highly publicized encounter with Wall Street cannot be seen as an isolated event; it has to be understood as one episode in the broad-ranging, complex and recurring debates over continentalism, and over the size and significance of Canada's "brain drain" to the United States. Moreover, as these debates pertain to law, they sit in an historical context.

In effect, Canadian legal education has never been far from Wall Street. Weldon, the founding dean of Dalhousie Law School—the oldest in common law Canada—held a Ph.D. in Constitutional and International Law from Yale; he was a strong admirer of American higher education, dispatched an early reconnaissance mission to law schools in Massachusetts and New York,18 and in his 1883 inaugural address drew specific parallels between Dalhousie's role in Canada and that of Harvard and Yale in New England.19 In 1889 and 1896 first Reeve and then Hoyles, the founding Principal of Osgoode Hall Law School and his successor, went off to visit American law schools; Reeve was impressed, though Hoyles was not.20 They were but the vanguard of a century-long procession of influential Canadian legal educators for whom the elite American law schools were both the source of inspiration and the benchmark of their own achievements. Implicit in this perspective was the notion—not necessarily mistaken—that their own institutions were of lesser quality. Consequently, it is not surprising that

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18 J. Willis, History of Dalhousie Law School (Toronto: University of Toronto Press, 1979) at 25 ff.

19 Ibid. at 34.

some talented young Canadians apparently concluded that there was no point in studying at an imitation Harvard or Yale or Columbia when they could attend the original. Many of these students later became iconic figures in Canadian law. Indeed, from 1945 onward, graduate training in the United States gradually became the preferred route to a Canadian legal academic career, especially for Anglophones. True, the influence of the United States was neither total nor immediate. The reasons were complex: respect for the legal and educational traditions (real or imagined) of the United Kingdom and France; hostility to American populism and pragmatism; provincial—rather than national—law societies and law schools; the general underdevelopment of Canadian universities and intellectual life; and the opposition of conservative elements of the Canadian—and especially the Ontario—bar, which fought a rearguard action against university-based legal education long after it had become commonplace elsewhere on the continent. Thus, while Harvard-style case-method teaching made an appearance in the interwar period, and in the end became the conventional pedagogy of Canadian common law schools, its use was vigorously resisted as late as the 1950s. Likewise, the American legal

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21 Among those who attended Harvard prior to World War II were Supreme Court of Canada Justices I.C. Rand, J.W. Estey, B. Laskin and W. Spence; leading academics such as N. MacKenzie, H. Read, C.A. Wright, J. Willis and, of course, Laskin; important practitioners such as J.S.D. Tory; and distinguished politicians such as P. Martin Sr. Columbia, Chicago, Michigan and Yale also contributed many outstanding graduates to the Canadian legal scene. See for Harvard: Quinquennial Catalogue of the Law School of Harvard University published in 1948 and Alumni Directory of the Harvard Law School (Cambridge: President and Fellows of Harvard College, 1963).

22 Overall data are not available. However, 59 per cent of all Canadian law professors who teach constitutional or administrative law hold U.S. graduate degrees, a number which rises to 64 per cent amongst those who publish in English in the field. U.S. graduate degrees are much rarer amongst francophone teachers and scholars, almost 80 per cent of whom attended French or Canadian graduate schools. Arthurs, supra note 17 at 234, n. 59.


realist movement of the 1920s and 1930s initially claimed few recruits amongst Canadian legal scholars (themselves a mere corporal's guard) until the 1950s. But by the early 1960s, the American model of legal education was generally regarded as paradigmatic by Canadian legal educators and Canadian legal scholars had come to accept the dominant American view of law as a form of social engineering. From this point onward, the two legal academic communities and cultures became ever more closely aligned. When American law schools began to recruit faculty members with interdisciplinary credentials to teach "law and ..." courses, a number of Canadian law schools followed suit. When American law schools began to experiment with new pedagogies, such as the clinical method, these were promptly imported into Canada by U.S.-trained or U.S.-influenced academics, occasionally with financial help from U.S. foundations and—more importantly—with the legitimacy and credibility conferred by the experience of leading U.S. law schools. In the 1970s and 1980s, foundational texts by leading American scholars on feminist legal theory, critical legal studies, law and economics, and legal pluralism helped to reconfigure the landscape of Canadian legal scholarship, although mutant strains of these intellectual and political perspectives ultimately emerged in northern latitudes.

Indeed, despite the obvious importance of its English inheritance, like Canadian legal education, Canadian law in general

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has been influenced by the United States for a very long time. For much of the nineteenth century, American texts and treatises circulated widely in this country, leading to the relatively frequent citation of American decisions in Canadian courts. Legislative borrowing likewise occurred in the years before World War I: Ontario succession duty legislation and federal railway legislation are but two well-documented examples. Then, in the interwar and postwar years, American legal institutions and doctrines began to be imported with increasing frequency: by constitutional amendment, by legislation, by judicial notice and through creative borrowing by leading advocates and by corporate, tax, and property lawyers in elite law firms. At the heart of Canadian collective bargaining law lies the U.S. Wagner Act; legislation governing consumer credit transactions in Canada draws extensively on the Uniform Commercial Code; Canadian freedom of information and protection of privacy legislation was inspired by counterpart U.S. statutes; and so on through environmental, family and consumer laws to corporations and securities regulation statutes. The culminating event in this process occurred when—beguiled by the civil rights jurisprudence of the Warren Court—Canada adopted its Charter of Rights and Freedoms in 1982, the predictable consequences of which include the increasingly frequent citation in Canadian courts of American


34 Canada's first comprehensive railway regulation was drafted by J.S. McLean, an expatriate Canadian economist teaching at the University of Arkansas, who drew heavily on U.S. state and federal legislation. Reports upon Railway Commissions, Railway Rate Grievances and Regulative Legislation (Canada House of Commons, Sessional Papers 1902, No. 20A).


constitutional jurisprudence and secondary literature\textsuperscript{38} and, arguably, the slow transformation of Canada's legal and political culture.\textsuperscript{39}

These borrowings—educational, scholarly, decisional and legislative—have all helped to pull Canadian academic law more and more decisively into the orbit of American legal culture and thus have made logical and feasible the recruitment of Canadians by Wall Street firms and good U.S. law schools.

What does this have to do with the moral panic over the appearance of American law firm and law school recruiters on Canadian campuses? The convergence of Canadian and U.S. law, legal practice, pedagogy and scholarship; the tendency of Canadian law firms and law schools to imitate the strategies and structures of the American bar and legal academy; the use of American professional and scholarly standards as the benchmark for achievement by Canadian lawyers and law schools: all these have had the unintended consequence of helping to incorporate Canada into a continental legal system and legal culture dominated by the regional hegemon, the United States. That, I think, is one explanation of the current moral panic. But it is only a partial explanation: to understand its full implications, it is necessary to locate it within the context of a discussion of continentalism on Canada's economy, society and polity.

II. POOR CANADA: THE BRAIN DRAIN AND CONTINENTAL ECONOMIC INTEGRATION

Canada by any measure—except comparison to the United States—is not "poor." It is an affluent country and, given its small population, a significant presence in the global economy. It is a member of the G-7 group of advanced industrial nations, and is one of the OECD countries which exports the largest proportion of its GDP.\textsuperscript{40} On the UN


\textsuperscript{40} World Trade Organization, \textit{Annual Report} (Geneva: World Trade Organization, 2000).
Human Development Index, it has ranked first for several years, and while its ranking in terms of per capita income has been declining, Canada still ranks seventh amongst twenty-nine OECD member states. However, these impressive statistics should not be allowed to obscure the most fundamental and apparently immutable fact of Canada's political economy: it is a "branch plant" economy in which, to an unusual degree, foreign capital occupies a dominant role.

Some 22 per cent of Canada's corporations are foreign-owned or controlled, accounting for 31 per cent of corporate operating revenues. Of these, some 58 per cent are U.S.-based firms, which amongst them account for 68 per cent of the operating revenues attributable to foreign firms. Most manufacturing and resource sectors of the Canadian economy are wholly or predominantly owned by U.S.-based transnationals; other sectors—such as retailing—are apparently moving in the same direction; and sectors which up to now as a matter of public policy have been protected against foreign control or ownership, such as banking, transportation and telecommunications, seem to be on the verge of losing this protection. Important firms in Canada's "new economy" have been lost to foreign—especially American—takeovers; some of the largest Canadian companies—Nortel, Thompson, Bombardier—retain Canadian head offices but are gradually moving key functions abroad, especially to the United States; and even companies which remain Canadian in every sense of the term are with increasing frequency hiring U.S. chief executives, a number of whom commute electronically or in person from their home base in the United States. Canada, it sometimes seems, is even closer to Wall Street than Mexico is.

Canada's economic integration with the United States is not a new phenomenon; it has been a leitmotif of Canada's entire post-colonial history, and has been especially significant since the 1920s. However, three recent developments have intensified and accelerated the process. First, technology has altered the contours of corporate activity, by enabling the global movement of capital, the integration of widely-dispersed production processes, and the development of

world-wide brand-name marketing strategies. Second, globalization has altered the logic of corporate organization, generally leading to more generic functions being performed at the periphery while strategic and coordinating functions, control of capital and a range of specialized services such as research and development are increasingly concentrated at the centre. Canadian head offices of foreign-owned transnationals have therefore been dismantled, disempowered or selectively stripped of important corporate functions and Canadian suppliers of so-called “producer services”—advertising agencies, designers, business consultants, and financial houses—have been displaced by suppliers located nearer the American head office where power has been increasingly consolidated. And third, the so-called Washington consensus, which enshrined neo-liberal values in trade regimes such as the WTO, has left member countries such as Canada with very limited capacity to resist this new corporate dispensation, even if there were a political will to do so—which there is not. Canada, in fact, is increasingly a fixture within the continental economic space defined by NAFTA and dominated by the United States.

These developments, many argue, are responsible for the “brain drain”—the emigration to the United States of many highly-trained Canadians with professional, technical, scientific, academic and executive credentials. Canadian executives, researchers and other providers of producer services are moving to New York and other global cities where their services are more in demand. Canadian entrepreneurs and venture capitalists are tempted, it is said, to invest in the United States—and high-earning high-technology personnel to move there—in part because of lower tax rates and more favourable treatment of stock.

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46 Most recent studies focus on scientists, engineers, medical personnel and executives. None appears to focus exclusively on lawyers and/or academics.

options,\textsuperscript{48} in part to escape the generally more risk-averse culture of Canadian business. Canadian public and para-public sector workers—many displaced by cut-backs in state funding for schools, hospitals and cultural institutions—have found employment in American communities where some mixture of public and private funding has created a demand for their services. And all of this movement has been facilitated by NAFTA provisions which provide temporary access to U.S. jobs for highly-skilled and well-credentialed Mexicans and Canadians,\textsuperscript{49} thereby making easier their permanent migration as well. But while a brain drain of some sort is clearly evident, much disagreement exists about its causes, consequences, extent, and significance. No one is quite sure, for example, how large this brain drain has been, the degree to which it is offset by immigration into Canada from other countries, how many expatriate Canadians return after spending some time in the United States and whether free trade has accelerated the brain drain or merely formalized it.

A recent Statistics Canada study concludes that:

\begin{quote}
During the 1990s Canada suffered a net loss of skilled workers to the United States in several economically important occupations, although the numbers involved have remained small in an historical sense and small relative to the supply of workers in these occupations. ... While losses of highly skilled workers to the United States accelerated during the 1990s, so too did the influx of highly skilled workers into Canada from the rest of the world. This is particularly true of high-technology industries where immigrant workers entering Canada outnumber the outflow to the United States by a wide margin.\textsuperscript{50}
\end{quote}


\textsuperscript{50} J. Zhao, D. Drew & T. Murray, "Brain Drain and Brain Gain: The Migration of Knowledge Workers from and to Canada" (2000) 6:3 Educ. Q. Rev. 8.
The Bank of Montreal,51 the C.D. Howe Institute52 and the Business Council on National Issues53 are respectively rather less sanguine, less sanguine, and much less sanguine about the situation. And a prominent academic economist argues that although the brain drain has increased somewhat through the 1990s, it remains well below historical levels; that it reflects increasing divergences between the Canada and U.S. economies; and that heroic policy interventions will do nothing to diminish it.54 However, disagreements over the extent and significance of the brain drain have not dampened enthusiasm in some quarters for such interventions. For example, despite extensive evidence and persuasive argument to the contrary,55 leading elements of the Canadian business community contend that high taxation rates are driving educated Canadians into unwilling exile in low-tax America.56 This argument is, of course, a codicil to the more far-reaching contention that discrepancies between Canadian and U.S. tax rates and public expenditures must be reduced to maintain a healthy climate for investment in Canada.57 On the other hand, Canadian governments have recently begun to reinvest in the health system, science, technology and higher education, in part as a response to the argument that the provision of greater opportunities and incentives for Canadians to remain at home will staunch the brain drain.58 The outcomes are not yet


52 D. DeVoretz & S. Laryea, "Canadian Human Capital Transfers: The United States and Beyond" C.D. Howe Institute Commentary (October 1999); and D. Schwanen, Putting the Brain Drain in Context: Canada in the Global Competition for Scientists and Engineers (Toronto: C.D. Howe Institute, 2000).

53 See supra note 48.

54 J. Helliwell, "Checking the Brain Drain: Evidence and Implications" (1999) 20:7 Pol'y Options 6. A revised and expanded version of this paper was provided to me by the author.

55 See, for example, N. Brooks, "Flattening the Claims of the Flat Taxers" (1998) 21 Dal. L.J. 257 at 357 ff.


57 To the extent that this argument has prevailed, it has contributed to a ten-year erosion of the Canadian welfare state which remains, however more generous than that of its neighbour, at least as measured by aggregate state expenditures. See D. Drache, "Happy 5th Birthday, NAFTA! Thinking Outside the Box" Robarts Centre for Canadian Studies, online: Auditing Public Domains Research Paper <robarts.yorku.ca/pdf/happy5th.pdf> (date accessed: 26 February 2001).

manifest, but it is reassuring to note that universities\textsuperscript{59} and their faculty associations\textsuperscript{60} are at loggerheads over both the diagnosis and the policy prescriptions.

For much the same ostensible reasons—to foster a favourable business climate which will encourage Canadians to stay at home—Canadian statutory regimes governing intellectual property, labour relations, the environment and telecommunications are being gradually harmonized downward in the direction of those prevailing in the United States.\textsuperscript{61} But once again, it is by no means clear that unfettered entrepreneurial freedom would induce Canadians (or their money) to remain at home rather than migrate southward.

Thus, the brain drain debate is part of a larger concern about “poor Canada,” about Canada’s integration into a continental neo-liberal political economy. We must next ask how continentalism affects the Canadian legal profession and the Canadian legal academy.

III. THE EFFECT OF CONTINENTAL ECONOMIC INTEGRATION ON THE CANADIAN LEGAL PROFESSION

Continental economic integration has produced a number of changes in the structure of the Canadian legal profession. As foreign, especially American, transnational corporations manage more and more of their Canadian operations from headquarters abroad, certain kinds of legal work are affected. For example, prior to 1985, most Canadian subsidiaries of large foreign transnationals were listed on the Toronto Stock Exchange and their shares were held by Canadian investors; they had prestigious Canadian boards of directors; and they maintained a considerable cohort of Canadian executives. That situation changed considerably between 1985 and 1995. As the vast majority of these firms were “taken private”—converted into wholly-owned private

\textsuperscript{59} Association of Universities and Colleges of Canada, \textit{Fostering a Climate of Innovation: Notes for a Statement to the House of Commons Standing Committee on Finance} (Ottawa: Association of Universities and Colleges of Canada, 1998).

\textsuperscript{60} Canadian Association of University Teachers, “Have We Lost our Minds?” (1999) 1:2 C.A.U.T. Education Review 1.


companies—their shareholders were bought out and their Canadian boards were downsized or disbanded.\textsuperscript{62} The practices of Canadian lawyers who dealt with financing and related regulatory matters, and who served on corporate boards, were obviously affected. As foreign transnationals consolidated more and more of their executive functions at head offices, as the autonomy and authority of their Canadian subsidiaries eroded, further risks emerged for Canadian law firms which provided advice to Canadian head offices, executed strategies conceived in those offices or were in other ways nourished by the “food chain” which descended from them. Finally, the takeover of Canadian companies by foreign firms accelerated during this same period, partly as a result of the advent of continental free trade,\textsuperscript{63} partly as the result of restructuring in response to longstanding structural problems in the Canadian economy. Once again, law firms were affected: in the short to middle term, they perhaps gained mergers and acquisitions work; in the longer term, their client base seems destined to shrink. Finally, coinciding with these disturbing consequences of continental economic integration—some would say as a direct result of it—Canada experienced a relatively deep and long-lasting recession through the early and mid-1990s. While arguably some fields of corporate legal practice flourished during the recession and others declined, the overall effects were almost certainly negative.

Moreover, partly under the pressure of a shrinking tax base, partly out of a desire to attract investment and generate jobs, partly under assault from neo-liberal politicians and ideologues, Canadian governments at all levels and of all stripes have been reducing state expenditures and levels of regulatory intervention. This has also had a negative effect on the careers of many lawyers, especially in fields of practice financed directly or indirectly by the state: lawyers in government departments and agencies which have been “downsized,” lawyers practicing in fields where clients depend on strained legal aid budgets, even to an extent lawyers who practiced regulatory law for private clients. To be sure, the resurgence of the Canadian economy in the latter part of the 1990s has brought in its wake a recovery in the legal services market. Moreover, some lawyers who were dislodged from government or government-funded activities as a result of neo-liberal policies have found new jobs in the private sector. But despite this recovery in the fortunes of the profession, the long-term result of the

\textsuperscript{62} "Corporate Canada," supra note 44.

\textsuperscript{63} In 1989, Canada entered into a free trade agreement with the United States; in 1994 this was replaced by NAFTA, a continental free trade agreement including Mexico as well.
restructuring of the Canadian economy and of the recession of the early 1990s was to introduce a considerable amount of uncertainty especially on the demand side of the market for high-end legal services.

The response on the supply side was predictable. Given that the large corporate law firms are driven by their own internal dynamic to constantly expand their base of business, they have attempted to reinvent themselves by making themselves attractive to American and other foreign transnationals as well as to Canadian subsidiaries and Canadian-based corporate clients. One aspect of their new strategy has been to offer "one-stop shopping"—a complete array of legal services which can be delivered seamlessly across provincial jurisdictional boundaries to all major Canadian cities. The result has been the consolidation of a number of Canadian law firms into multi-jurisdictional alliances and, ultimately, integrated national partnerships. However, while consolidation of law firms has apparently produced positive results, the fact remains that there is only a finite amount of significant legal work to do in Canada.

A second strategy for Canadian law firms has therefore been to expand abroad, especially in the United States, the United Kingdom and other jurisdictions where their Canadian-based clients do business. However its success depends crucially on the number and affluence of such clients—a serious limitation, since the number of large Canadian companies doing significant business abroad is quite modest. Consequently, the strategy of expanding abroad to serve Canadian clients has recently begun to give way to a third expansionary strategy. Canadian law firms have merged with smaller American firms in order

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65 A study by the Statistics Canada shows that Canadian exports of legal services exceed imports by a margin of $263 million to $208 million Two-thirds of the flows originate in and are destined for the United States. However, these numbers are suspect. They appear not to include legal services purchased abroad by or on behalf of Canadian corporations or Canadian subsidiaries of foreign-based companies. Statistics Canada, Balance of Payments and Financial Flows Division, Canada's International Legal Services, 1995/1996 (Ottawa: Statistics Canada, 1997); D. Walton, "Legal Services," The Globe and Mail (22 December 1998) B7.

66 Canadian firms have opened offices inter alia in London, New York, Los Angeles, Paris, Moscow, Hong Kong, Shanghai and Singapore. However, a number of these offices lasted a relatively short time and, it is said, many do not turn a profit. See M. Kideckel, "Going Global: More Canadian Law Firms are Eyeing International Markets, But is a Branch Office Worth It?" Canadian Lawyer 13:5 (June 1989) 14; C. Kentridge, "Canadian Firms Worldwide" Canadian Lawyer 18:6 (July-August 1994) 31; and B. Daisley, "Boldly Going Where No Canadian Firms Have Gone Before" 17:27 Lawyers Weekly (21 November 1997).
to gain a base of American clients, which will enable them both to expand their overall business opportunities and to attend to the needs of Canadian clients doing business in the United States. The trend is very recent—only two such mergers have occurred so far—but it may well accelerate in the near future. However, it may also be overtaken by a fourth strategy: Canadian law firms may enter into alliances with, or allow themselves to be absorbed into, the great global law firms based on Wall Street and, to a lesser extent, in the United Kingdom.

Nor does this exhaust the range of developments which may dramatically alter the relationship of the Canadian legal profession to Wall Street and the American legal profession. A few American law firms have opened small offices in Canada, often staffed by U.S.-trained Canadian nationals operating as “foreign legal consultants” who provide advice on American and international law but do not attempt to build a conventional local practice. It is not difficult to imagine that these modest beach-heads could be expanded rapidly to become full-service law firms advising on both local and foreign law, if business opportunities warranted. Finally, the “Big Five” consulting firms have established multi-disciplinary practices (MDPs) employing large numbers of lawyers in Europe, and clearly wish to do so in North America. Local legal professional bodies can be expected to resist the incursion of MDPs into the profession’s monopoly, or if that fails, to attempt somehow to regulate them. However, it may be too late to prevent the growth of MDPs in Canada. One of the Big Five consulting firms has already established an “affiliated” law firm which has grown rapidly by recruiting experienced practitioners from large Bay Street firms; and at least two

69 Chicago-based firm Baker & McKenzie has had a full-service Canadian affiliate since 1962.
72 The eighty lawyer firm in question recently changed its name to Donahue Ernst & Young LLP. “Professional Briefs” The Globe and Mail (24 April 2000) B8.
others are thought to be planning to do likewise. While MDPS are not necessarily tied to Wall Street, in fact the logic of globalization and of continental economic integration almost guarantees that they will be, as evidenced by the announcement by KPMG that the presidency of its Canadian firm will hereafter be filled by the president of its U.S. firm.73

So far, this account has dealt largely with large law firms which serve high-end corporate clients which are almost inevitably implicated in global and continental business arrangements. However, it is likely that the low-end of the legal services market will also be influenced by Wall Street. For example, in the U.S. several large firms provide routine legal services cheaply and efficiently in walk-in offices located in shopping malls and other high-traffic locations, using information technology and a staff of para-professionals to perform standardized legal transactions.74 It would not be surprising if these American firms adapted their software packages and training practices, and expanded into the Canadian market in which no comparable service has so far appeared. Or to take another example, traditional Canadian conveyancing procedures encumber clients with significant risks and costs. It would not be surprising if American title insurance and escrow companies established themselves in Canada.75 Although neither of these U.S.-based innovations in legal practice directly involves Wall Street law firms, which generally do not serve individual clients or undertake routine conveyancing, both rely on similar strategies: standardized services, high-volume sales, heavy investment in technology and replacement of highly-paid lawyers by poorly-paid para-professionals. These are the very strategies which have been used so successfully by other American-based providers of products and services to penetrate Canadian markets with relative ease by reducing unit costs and consumer prices: deep pockets, developed technology, know-how, brand name advertising and expansion through the shrewd use of excess capacity. In this very general sense they represent the influence of Wall Street: they adhere to its economic logic, raise capital there, and, if thwarted by Canadian law, policy or practice, will some day


75 While initial attempts by an American company to penetrate the Ontario conveyancing market have been vigorously resisted by the local bar, it still provides a variety of services; it searches titles, closes residential real estate transactions, and claims to have sold over 135,000 title insurance policies in 1999: advertisement by First Canadian Title, (2000) 1:9 Lexpert 53.
retain Wall Street law firms to make WTO- or NAFTA-based claims to secure their access to Canadian markets. If they succeed, Wall Street will have played its part in transforming conventional law practice in Canada just as surely as it has in transforming the character and clientele of elite firms.

These changes in the character of, the demand for and the supply of legal services in Canada, which involve increased integration of Canadian lawyers into new national and especially transnational law firms and other organizations supplying legal services, will—I argue next—significantly affect Canadian legal education.

IV. HOW THE MODALITIES OF LEGAL PRACTICE AFFECT LAW AND LEGAL EDUCATION

Lawyers practice law, and law schools teach it. But what lawyers practice and legal academics teach is much more than the pronouncements of parliament and the Delphic utterances of superior court judges. Law—in both a practical and an academic sense—is to a significant extent generated by actors who populate distinct, semi-autonomous "legal fields." As early work in legal pluralism showed, these legal fields may comprise pre-modern societies or modern workplaces, ethnic communities or neighbourhoods, trading networks, or criminal gangs. Indeed, public bureaucracies, transnational corporations and professions themselves may also constitute legal fields. However, these legal fields do not exist in isolation from the state or the larger society constituted by the state; they interact with adjacent fields, and with forces at work in the society which surrounds them:

76 The Canadian Bar Association has begun to lobby the Canadian government to ensure that proposed WTO talks designed to liberalize trade in professional services do not compromise the regulatory authority of professional governing bodies. C. Schmitz, "CBA Urges Ottawa to Protect Law Society's Regulatory Powers" The Lawyers' Weekly (29 September 2000) 22.


81 Arthurs & Kreklewich, supra note 15.
they are only semi-autonomous, though the degree of their autonomy is a matter of dispute amongst scholars.82 Thus, to speak of “Canadian law” is to speak of a densely populated universe of distinctive normative orders originating both within the structures of the state and beyond them. To accept this pluralistic description of the legal universe, is to acknowledge the influence of the actors who formulate its concepts, conduct its discourses, operate its processes, staff its institutions and give expression to its norms. These are not necessarily elite actors who have been officially mandated to make or administer law; but make and administer law they do, nonetheless. It is for this reason that we can say that as Canadian business executives, public servants, journalists, academics, and lawyers are drawn more and more into the powerful legal field of Wall Street—the legal field of global business and global law firms and global consulting firms—the character of Canadian law is almost sure to change.83 The question then becomes, what effect will the resulting changes have on Canadian legal education?

Of course, one response is that legal education will decide its own destiny, that it is an autonomous system designed by curriculum committees and promulgated by faculty councils. This view was once held by those who sought to ensure that the legal profession would promote traditional social, economic, and political values;84 and it was all-too-readily adopted by those who thought that by changing the formation of young lawyers, one could remake society.85 But alas, things are more complicated than that.

It is not possible to think usefully about legal education without thinking about law itself—the subject that is taught—about its complexity and polycentricity, its political and economic functions in the larger society, its social origins and cultural significance, its epistemology and deontology. Nor is it possible to think about the architects, theorists, practitioners, critics, clienteles, benefactors, and beneficiaries of legal


83 Arthurs, supra note 17.

84 J.S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (New York: Oxford University Press, 1976); R.B. Stevens, Law School: Legal Education in America from the 1850s to the 1980s (Chapel Hill: University of North Carolina Press, 1983); and W. Pue, supra note 24.

education without recalling that they are also embedded in the larger polity, society, economy, culture, professional ethos, and higher education system—all dynamic and conflicted systems. Nor finally, can we ignore the fact that the relationships amongst these actors constitute an internal political economy, which does much to define the character and strategies of the legal academy. That is why curriculum committees and faculty councils may propose, but cannot dispose. And that is why even what they propose is often the outcome not so much of reasoned debate as it is of contestation for control over scarce resources of time, money and prestige. In the sum, the influence of Wall Street on Canadian legal education is likely to be mediated through a series of context-defining, law-generating, institution-shaping, rent-seeking, resource-allocating rivalries.

What will be the outcome of these rivalries, and how will the influence of Wall Street on Canadian legal education become manifest? In some respects, the influence of Wall Street will be very visible and straightforward. Wall Street lawyers have been responsible for some changes in the constitutional, statutory, and common law which comprises the basic content of Canadian legal texts and casebooks. These include new rules of international law contained in treaties such as the WTO and the International Convention on Intellectual Property, as well as consequential statutory amendments designed to bring Canada’s domestic law into conformity with its international undertakings. Second, Wall Street lawyers have inspired changes in Canadian state law and legal practice designed to make Canada more “business friendly” and thus more susceptible to continental economic integration. Examples include amendments to labour legislation and environment regulations. Third, Wall Street-inspired changes in corporate governance structures, contractual practices, human resources policies or financial instruments are soon likely to be mentioned in well-constructed casebooks, classroom discussions, or clinical settings as timely hypotheticals or as examples of how things “really” work in practice. In that way, they gradually reshape the paradigms—the fundamental intellectual assumptions—underlying the way in which Canadian law students and professors, as well as Canadian practitioners, understand state law.

In other respects, the influence of Wall Street is less overt, though arguably even more important. Wall Street is a compendious term: it includes the stock market; the transnational corporations which raise capital on it; the analysts and traders whose judgments on the

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86 I have developed these ideas in “The Political Economy,” supra note 16.
performance of businesses and governments cause share and bond prices to rise and fall; the consultants, advisors and publicists who try to influence and respond to these judgments; and the lawyers who serve all of the above by inventing new transactional forms, litigation claims and strategies of regulatory avoidance. Wall Street—used in the sense which encompasses all of these—in effect shapes what it means to be a legislator, a civil servant or tribunal member, a judge, a lawyer, a client in a postmodern, post-industrial, globalized capitalist economy. This process in turn influences the billing procedures, workloads, ways of dealing with potential conflicts of interest, recruitment of associates and partners, clienteles, fields of professional practice, and attitudes towards the state, the profession, the courts, employees, consumers, and the environment which are thought to be appropriate for prestigious law firms.

The assumptions engendered by Wall Street and its legal culture ultimately leach back into the legal academy, not only in the United States, where its influence has long been noted,87 but in Canada as well. Canadian law students—no less than their American counterparts—overtly or tacitly choose the legal education which they imagine will advance their future careers. As Wall Street firms, or Wall Street-influenced Canadian firms, come to dominate the Canadian legal scene, many law students will try to make themselves attractive to those firms. This will affect the way in which they prepare themselves for their careers: the courses they choose to take, the attitudes towards colleagues and clients they develop, the amount of debt they are prepared to accumulate, the alacrity with which they will take up offers of summer internships on Wall Street or seek opportunities to study in the U.S.88 and the balance they strike between their studies and other activities. Wall Street-influenced student attitudes will in turn reshape the "real" curriculum of Canadian legal education—the curriculum which students choose to pursue, rather than the one mandated by faculty policy.

Some law faculties will embrace these developments and seek to position themselves as global or continental institutions by redesigning


88 Several Canadian law schools now have exchange agreements with U.S. law schools.
their curricula, by hiring more foreign-trained academics, by seeking accreditation from the American Bar Association and membership in the Association of American Law Schools, and by awarding degrees which will be recognized in the United States. These initiatives will be well received by many students and professors, will contribute to significant new curriculum developments and most importantly, will “brand” these faculties in ways which will make them attractive to prospective employers and donors on both sides of the border. However, some faculties may decide to ignore or resist the allure of Wall Street whether for ideological reasons, or because they do not see their students as destined for corporate practice. They may well experience difficulties in maintaining this stance. Students and prospective students are likely to want to keep all their options open, and use their power as “consumers” and as political actors to ensure that their law school keeps up with more continentally-minded institutions. Faculty members and potential recruits will likely want to feel that they are playing in the big pond of North American legal education and scholarship, not in the relatively small puddle of Canadian academe. And in an era when state support for higher education is shrinking, when student fees and alumni donations are becoming a more important part of law school budgets, when competition for high quality faculty recruits is becoming very keen, law school deans may well be tempted to become more sensitive to professional, professorial and student views on a variety of matters, including the way in which law school curricula should respond to the issue of continental integration.

Indeed, there is at least some risk that student and professional influences, subtly reshaped by the growing influence of Wall Street, may affect not only the teaching programs but the research profiles of Canadian law schools. For example, faculty recruitment priorities tend to be demand-driven, which is why most Canadian law schools are


90 In principle, hiring foreign academics is possible under Immigration regulations only after exhaustive and unsuccessful attempts to hire a qualified Canadian citizen or resident; however, enforcement of these regulations does not seem to be particularly rigorous and exemptions are available for entire academic disciplines or sub-disciplines, in the event of a long-term shortage of potentially qualified domestic candidates: Immigration Regulations, S.O.R. 1978-172 s. 20 (1)(a).

91 One Canadian law faculty—the University of Toronto—has now introduced the J.D. degree. See J. Berkovits, “U. of T. to Get J.D. Degree: Opinions divided over whether new degree is forward thinking or a sign of Americanization” Ultra Vires (October 2000), online: Faculty of Law, University of Toronto, <http://www.law.utoronto.ca/ultravires/oct2000/news_03.htm> (date accessed: 26 February 2001).
already looking for additional faculty in fields such as commercial and corporate law, taxation, and intellectual property. Recruitment candidates in other subject areas may suffer a considerable disadvantage, which may ultimately tempt or force them to present credentials which demonstrate that they can contribute to the new, Wall Street-influenced, curriculum. Or to take another, less obvious, example: as mid-career Canadian law professors begin to see themselves as prospective recruits for American law schools, some may begin to shift the focus of their research into areas which have currency in the emerging continental academic marketplace.

None of these tendencies have emerged strongly in Canadian legal education; but we should not be surprised if they do.

There is a final, more remote, sense in which Wall Street may be said to influence Canadian legal education. As noted, Wall Street currency traders and bond dealers have had a significant disciplining influence on Canada's fiscal and monetary policy, and in that sense have helped to force Canadian governments to reduce taxes, retrench public spending, and cut back on social programs—including public post-secondary education. This has had at least three results pertinent to the present discussion. First, Canadian law schools have become impoverished relative to American law schools. This makes them unable to continue to offer the same rich curriculum, with at least a risk that "fringe" courses, which are unpopular with careerist students, will be sacrificed in favour of "core" courses which are thought to have professional salience. Moreover, as noted, declining faculty budgets have resulted in lagging professional salaries, which leaves Canadian law schools vulnerable to raiding by more affluent U.S. faculties. Second, as a matter of government policy in some provinces, professional school fees have been deregulated. The result has been that law schools—desperate for resources after years of cutbacks—have been tempted to raise their fees. Several have yielded to temptation.

92 It has been suggested that the existence of a continental academic labour market for economists has led to a focus on theoretical and methodological scholarship, which has international currency, rather than on applied work involving Canadian public policy issues, which does not. See A. Scott, "Does Living in Canada Make One a Canadian Economist?" (1993) 26:1 Can. J. Econ. 26.


95 Law school fees have risen from about $4500 to over $8,000 per year at York University and to over $10,000 per year at the University of Toronto. Further increases are planned and other Ontario schools are following suit.
Consequently, a significant proportion of the cost of legal education has been shifted from the state to the student. While law schools have made extraordinary efforts to develop financial aid programs to insulate students from the effects of this shift, it is at least possible that the impact on student recruitment will be socially regressive. Or, to return to a point made earlier, Canadian law graduates may find offers from Wall Street increasingly attractive in part because high salaries enable them to rapidly retire their increasing load of student debt. Third, cuts in legal aid and in state regulatory expenditures may make practicing law for the poor and powerless even more difficult than it always was. As a result, areas of practice such as poverty law, immigration law, or workers’ compensation may be less likely to attract and sustain a cohort of practitioners, a fact that may ultimately discourage students from enrolling in courses in those fields.

V. HOW FAR FROM GOD?

I have tried to show how Canadian law, legal practice, and legal education are becoming more and more susceptible to the influence of developments in the United States, and especially those connected with the powerful forces of Wall Street capitalism and of Wall Street law firms. This might lead one to conclude that Canadian legal education is very far indeed from God. However, as I want to suggest in four brief qualifying observations, redemption is by no means beyond reach.

First, we must not completely conflate debates over Canadian domestic policy with debates over American influence, or blame Wall Street for all that we have brought on ourselves. American influence does shape our domestic policy, no doubt, but we have no shortage of home-grown neo-liberals and it is by no means the case that they have succeeded politically in Canada only because of American influence. Second, while Wall Street’s influence over the Canadian economy is powerful and palpable, many of its implications for Canadian legal education remain purely conjectural. After all, other aspects of Canadian life have somehow managed to resist equally powerful influences emanating from the United States: support for gun control, public health care and collective bargaining—to cite but three examples—are all significantly higher in Canada than in the United States. And many aspects of legal education in Canada so far also remain quite different from those in the United States. Third, while continental economic integration seems to be Canada’s destiny at the moment, it is important not to succumb to fatalism or determinism. It is
not clear, for example, that the shape of American capitalism or the
definition of American political self-interest is fixed for all time. One can
imagine that—for reasons of internal American politics, or because of
global developments, or as the result of renewed Canadian
nationalism—Canadians may one day be less susceptible to the influence
of continentalism and to the charms of Wall Street and the leading U.S.
law schools. And finally, we should recall that continentalism need not
be synonymous with the influence of Wall Street and, for that matter,
that Wall Street need not be synonymous with crass professionalism or
uncaring conservatism. As I have several times mentioned, emancipatory
legal ideologies and strategies—no less than those associated with Wall
Street capitalism and mega-law firms—have also been imported from
the United States. These importations notably include several modest
proposals: that lawyers should be advocates of social justice and
architects of social reform; that even—especially—lawyers in elite firms
ought to commit themselves to public service and to pro bono work;96
and that law professors should regard themselves as citizens of
counter-hegemonic enclaves.97 Paradoxically, by acknowledging the
provenance of these proposals while locating them within a sophisticated
analysis of globalization and continentalism, progressive Canadian law
teachers and lawyers might one day find themselves making common
cause with like-minded colleagues at home and abroad. Doing so may
not leave them any farther from Wall Street; but they may still find
themselves a little closer to God.

96 One large U.S. law firm recently committed itself to offering an annual allocation of free
legal services to the world's poorest countries. K. Richter, "Law Firms Set Sights on WTO Practices"
97 Kennedy, supra note 87.