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Response to the Consultation Paper of the Task Force on the Canadian Common Law Degree of the Federation of Law Societies of Canada, Canadian Association of Law Teachers/ Canadian Law and Society Association

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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

Canadian Association of Law Teachers / Canadian Law and Society Association

PREFACE

This Response to the Consultation Paper of the Task Force on the Canadian Common Law Degree (the Task Force) of the Federation of Law Societies of Canada was prepared by a joint Committee of the Canadian Association of Law Teachers (CALT) and the Canadian Law and Society Association (CLSA).

The CALT has over three hundred members, most of whom are full-time law professors in Canadian universities. The Association does not represent law faculties or their administration as such. Rather, it is representative of law teachers and is primarily concerned with their problems and interests. The following are among the general objects of the CALT:

- to promote the interests of Canadian law teachers;
- to contribute to the development of law teaching;
- to improve legal education;
- to disseminate information on and knowledge of our legal systems;
- to contribute to the development and advancement of research in law;
- to encourage meetings and exchanges among law teachers from different faculties or regions or belonging to different specializations and different legal systems; and
- to promote law reform and the improvement of the Canadian legal system.

The CLSA is an organization grouping scholars from many disciplines who are interested in the place of law in social, political, economic and cultural life. CLSA members bring training in law, history, sociology, political science, criminology, psychology, anthropology, and economics, as well as in other related areas of socio-legal inquiry. The following are among the general objects of the CLSA:

- to encourage and develop the interdisciplinary and multi-disciplinary study of the relations between law and society;
- to promote the development of new socio-legal scholars through its activities;
- to hold conferences, lectures and meetings for the promotion and discussion of research in law and society;

- to award grants, scholarships, fellowships and/or awards to deserving individuals, groups of persons or organizations in pursuance of the objects of the corporation; and
- to publish journals (in particular, the Canadian Journal of Law & Society), newspapers, newsletters, books and/or monographs relating to the study of law and society issues.

The CALT/CLSA Joint Committee, comprised of Richard Devlin (Dalhousie), Hester Lessard (Victoria), Roderick Macdonald (McGill) (chair), Diana Majury (Carleton), and Annie Rochette (UQAM) was mandated by the CALT and CLSA Executives to respond to the Task Force Paper. A draft response was reviewed and approved by an Advisory Board from the two associations, comprised of Harry Arthurs (Osgoode), John Borrows (Victoria), Susan Boyd (UBC), Kim Brooks (McGill), Martha Jackman (Ottawa), Wes Pue (UBC) and Lorne Sossin (Toronto). The final Response was circulated to members of the Executive of both associations for their comments before being submitted to the Task Force.

1. INTRODUCTION

The CALT and CLSA welcome this opportunity to comment on the Consultation Paper prepared by the Task Force and to provide specific responses to issues that it raises. Before doing so, however, we wish to express various more general concerns about the Task Force process and about the Consultation Paper itself. These are both procedural and substantive.

Procedurally, we are troubled by the absence of evidence and research offered by the Task Force to support the claims it makes, the options it outlines and the conclusions it reaches. Later in this Response we also signal our unease with the inadequate consultation processes followed by the Task Force. We believe the process leading to the Consultation Paper should have involved early input from a wide variety of other individuals and groups interested in legal education. A third procedural concern is that we have been asked to produce a Response to a far-reaching set of proposals in a very short time frame. We regret that these time limitations have not enabled us to undertake the extensive primary and secondary research needed to ground a comprehensive and in-depth discussion of the issues.

We also have several substantive concerns with the overall framing of the Consultation Paper. The Consultation Paper responds to a number of immediate pressures for which it seeks practical solutions. Such solutions must, however, be grounded in a firm understanding of the multidimensional nature of university legal education. We wish to make three points in this regard. First, a small but significant number of students attend law school with goals other than legal practice in mind. They become part of a more diffuse legal community that encompasses persons in a diverse range of occupations and positions in society. The role of law and legal training in this regard — to serve as a broader preparation for citizenship — is admittedly less tangible than its role in fitting students for eventual practice. Yet this less tangible feature of legal education is vital to the way in which law contributes to a wider social conversation about citizenship, values, and community. A reconfiguration of law school curricula that places a predominant emphasis on professional competencies at the expense of creativity, innovation, and the study of the

broader role of law in society would be a serious loss not only to those individuals who seek a legal education for these ends but also to society and the public interest.

Moreover, it would be a loss as well to those, the majority, who seek a law degree in preparation for a career as a practicing lawyer. For this latter group, a law school curriculum that emphasizes professional competencies at the expense of a liberal legal education would ill-equip them for their chosen vocation. A typical twenty-five year old student in law school today will likely retire in the decade of 2050. As such, he or she will expect to be in the senior leadership in the bar, bench and academy in a very different context than our own. The senior members of the profession today went to law school at a time when gender equality, Charter rights, Aboriginal legal issues and enhanced bi-juralism did not appear in many courses. These dramatic changes, in our own life times, demonstrate that law schools must continue to cultivate and cherish societal perspectives on law as well as pedagogies that enhance the ability to re-educate oneself and to think critically and imaginatively in response to social change.

Finally, the reform of law school curricula envisioned by the Paper's "list of competencies" approach to an approved law degree would hamper the ability of law faculties to address the broader university and societal interests for which they are responsible. For example, in response to its university responsibilities with respect to research, the legal academy has generated scholarship on such matters as the role of law in relation to globalization, trans-systemic conceptions of law, transitional economies and rule of law, the place of indigenous legal systems in the Canadian constitutional order, cyber property regimes, and regulatory impacts of climate change. The adoption of a "list of competencies" approach such as that proposed will likely produce, in the short term, a shift in material resources and faculty personnel away from the richness, diversity and creativity of such scholarship. Longer term impacts would extend to society's and the legal profession's ability to meet the challenges of the future.

These three substantive points rest on quite expansive claims about the importance and role of legal education in society. We make them here simply to raise what we see as some of the larger issues at stake in the Federation Task Force's Paper. We understand that there are constraints and pressures under which the Task Force has been operating and which have precluded a meaningful engagement with these issues. However, because of the seriousness of what is at stake, we do not believe that a fundamental redesign of university-based legal education should occur without a more meaningful process. For this reason, our central recommendation, elaborated more fully in the body of our Response is that the Federation slow down the process of coming to a "global solution" and redirect its energies at constituting an independent National Task Force on Legal Education.

In the meantime, we wish to emphasize that this Submission should not be understood as reflecting the full range of issues that any investigation of the "Canadian Common Law Degree" should address. It is intended (and should be read) only as a comment on and response to the Task Force's Consultation Paper. We make eight basic points, each followed by a brief discussion. For ease of reading and of working with the material, we have started each point on a new page and highlighted the issue in a bolded first paragraph.

1. The Task Force's exclusive focus on the content of the "Canadian Common Law Degree" is misconceived. Legal education is a process of life-long learning, of which formal education in university-based law faculties is only one component. The exclusive focus on the legal education provided by law schools skews the analysis and conclusions of the Task Force. The options put forward address only the education provided prior to entry into professional licensing (including bar admission) programs rather than the ongoing education and training needs of entering and practicing lawyers, and the roles of all of the parties involved in the education of legal practitioners

The four considerations listed as giving rise to the creation of the Federation Task Force — interest by Canadian universities in creating new law faculties, increased number of graduates of international law schools applying for admission to common law bars in Canada, the advent of fair practices legislation, and innovations in legal education — raise complex and interrelated issues. While the Canadian common law degree is integral to some of these issues, it is peripheral to others.

The exclusive focus of the Federation on the Canadian Common Law degree has meant that the Task Force looked to the legal education provided by universities to meet all of the training needs for legal practice. In so doing, the Task Force ignored the distinctive roles and responsibilities of law schools and of law societies, roles and responsibilities that were developed in this country in a spirit of cooperation and experimentation over a long period of time.

We categorically reject the claim made in the Paper that students *entering* the process of professional licensing need to meet all the standards — whether of substantive knowledge, or of technical competencies — for legal practice.¹ To begin, this would mean that law faculties would be required (1) to take responsibility for teaching subjects and skills that heretofore have been within the remit of law societies and for which they currently have neither the resources nor the expertise to undertake, and (2) would be required to re-orient their curricula away from teaching subjects and perspectives on law that lie behind the existence of university-based legal education in the first place.

In addition, the Paper's claim would render bar admission courses redundant. It is the role of professional licensing processes, in conjunction with the bar admission courses, articling and other related requirements for entry into the profession, to ensure that students who are called to the bar are adequately prepared to commence the practice of law. All of these processes are appropriately under the jurisdiction of law societies and all involve activities that they have the capacity and resources to offer.

¹ The Task Force asserts, at — paragraph 31, that law societies "must ensure that candidates for entering into law society bar admission programs meet required standards for the practice of law (emphasis added)." <https://ssrn.com/abstract=2102596>

The fundamental question of what *pre-entry* foundation might be needed for students to be able to successfully complete a bar admission course or other professional training provided by a law society is simply not addressed in the Task Force Paper. We strongly believes that, whatever that *pre-entry* foundation might be, it cannot be “competence to practice law.”

2. The approach of the Task Force to its mandate is narrow and decontextual. By failing to distinguish adequately entrance into bar admission programs from entry into the practice of law it fails to recognize the distinctive contributions made to the training of lawyers by all the different institutions that have a legal education mandate

Legal education for the ethical and competent practice of law is a continuum that begins with a university-based law school degree and continues through bar admission programs, bar exams, articling, mentoring and post-admission professional education programs.² To focus on the former (the law degree), which is *outside* the jurisdiction of the law societies, and to ignore the latter, which are *within* the jurisdiction of the law societies, as the guarantor of competency to practice law is to adopt an impoverished conception of competency, and a very narrow view of the fundamental obligation of law societies towards the public.

We agree that Canadian Law Societies, as part of their obligation to regulate in the public interest, have an obligation to ensure that lawyers are competent to practice law. We also acknowledge that law faculties have an important role to play in fostering those intellectual and critical capacities that are necessary pre-requisites to professional competence. But this is an educational role that is complementary to and different from the educational role of the legal professions. University-based law faculties have their own higher-education objectives. These include, in addition to analytical rigour and substantive knowledge, the promotion of deep understanding of knowledge claims, a capacity to critique those knowledge claims, the inculcation in students of the desire and ability continuously to educate themselves, and self-reflection.³ These goals are realized, for example, through the encouragement of critical perspectives, interdisciplinarity, the inclusion of philosophical and sociological dimensions, the exposure of students to different research methodologies, and the fostering of open, self-directed learning.

We acknowledge that competency to practice law could well be the objective of a Task Force of the Federation of Law Societies. But if this is so, then what is required is an integrated analysis which understands the achievement *and maintenance* of competency as a life-long learning process. We agree that law faculties provide important components of the legal education that would produce “compe-

² On the role of mentoring in experiential learning, see Erica Abner, “Situating Learning and the Role of Relationship: A Study of Mentoring in Law Firms” (2008) 2 CLEAR/REDAC 95.

³ See generally Ronald Barnett, *The Idea of Higher Education* (Buckingham: Society for Research into Higher Education: Open University Press, 1990).

tent lawyers” but we disagree that they ought to ensure that their graduates are ready to practice law. That is the role and responsibility of law societies as the profession’s regulatory body. Finally, to attempt to determine the specific responsibility of law faculties in this educational process, absent meaningful input from university-based legal educators, absent thorough analysis of its other components, and absent inquiry into the responsibilities, capacities and resources of all actors involved, is a recipe for flawed recommendations.

3. **The issues raised by the Consultation Paper are complex and significant. Achieving an appropriately comprehensive and nuanced analysis requires meaningful representation from all of the parties involved. Furthermore, in order to fully understand the strengths and weaknesses of the current system, a broad-based consultation process involving relevant constituencies, including the public, is essential. Consequently, our primary response is to suggest that the Federation Task Force reorient itself, making its primary objective to constitute an independent National Task Force on Legal Education. The CLSA and CALT offer to work with the Federation Task Force on the representative structure and mandate of such a National Task Force**

Although provincial Law Societies have both jurisdiction over and appropriate knowledge and experience with offering bar admission courses, articling programmes and continuing professional education, their jurisdiction, knowledge and experience regarding legal education at Canadian law schools is both circumscribed and limited. Jurisdiction over the content and form of law school programs properly resides with the appropriate academic bodies of Universities. It is Faculty Councils, University Senates, and ultimately Ministries of Higher Education that oversee, evaluate and approve the programmes of study offered by Canadian law faculties. Issues relating to the admission of students, advanced standing decisions, curricula, pedagogy, the modes and objectives of evaluation, joint programmes, exchange programmes and non-classroom components of the Common Law degree (many of which are raised by the Task Force) are beyond the jurisdiction of the Federation or its members and outside its realm of expertise.

However, the Committee does not claim that Law Societies should not be consulted about these larger academic questions (including professional education programmes offered by law faculties), just as it feels that law faculties should have the opportunity to provide input into various post-graduation components of legal education. For several decades there has been a close and complementary relation between law faculties and law societies. The two institutions share many goals, ideals, a long history of mutual respect, and an involvement in and commitment to the lifelong learning of lawyers. But the general issues addressed by the Consultation Paper raise questions that go well beyond matters on which either of these institutions could claim exclusive jurisdiction. We believe that the views of several others should also have been solicited. Indeed, the very manner in which the questions and outline of options set out in the Consultation Paper are framed reveals the absence of these other points of view.

We would also like to note some of the more specific inadequacies of the consultation process undertaken by the Task Force. The Deans of Canadian common law schools were invited to participate in the process by attending specific meetings with the Task Force and to formulate a response to the Draft Report and the Consultation Paper. By contrast, legal educators, via the CALT and/or CLSA, were never invited to participate in the preliminary process before the Consultation Paper was published and circulated for the purposes of consultation. Last spring, an *ad hoc* group of law professors invited and welcomed the attendance of Task Force members to an afternoon discussion at the University of Toronto.⁴ That said, this Response is the first formal involvement of the CALT and the CLSA in work of the Task Force. We are also concerned that law students and members of the public had no formal role as consultees in the work of the Task Force.

In order to address properly the full range of issues relating to legal education a broadly-conceived inquiry should be launched. To be credible, such an inquiry must, at a minimum, provide adequate representation for all those with an interest in legal education — law societies, law Deans, legal educators, law students, relevant government agencies and ministries, NGOs, diverse activist associations of lawyers, and the public at large. The legal profession today is much more diverse than previously, and many perspectives should be explicitly acknowledged in the membership of the body conducting such an inquiry. The same point can be made about law professors. And of course, the diversity and consequent importance of representation of law students are even greater. Students, after all, represent the future diversity of the legal profession in a much fuller and richer way than either members of law societies or legal educators. Moreover, they have been active in establishing organizations — for example, women law student caucuses, the Indigenous Law Students Association, the Black Law Students Association, and Outlaw — that reflect this diversity and that could make a strong contribution to reflection on legal education.

In sum, at this point we do not think that the existing Federation Task Force process should continue to be pursued. Instead we urge that its membership be broadened, its consultations be expanded and its timelines be extended. That is we believe that the Federation Task Force be reconstituted into a National Task Force on Legal Education as a cooperative project of law societies, universities, and governments. This National Task Force would include representatives from the legal profession, Canadian legal academics, Law Deans, law students, provincial Ministries of Education, Ministries of Justice and the general public. Once established, the Task Force should then engage in meaningful consultation with the broader communities affected by its proposals. As noted, the CALT and CLSA would enthusiastically participate in such a National Task Force in an integral way.

Should the Federation nonetheless feel that those issues of legal education that fall directly within its jurisdiction must be addressed as a matter of urgency, we

⁴ We are, however, disappointed that the Consultation Paper fails to adequately consider (indeed gives short shrift to) the concerns raised by the *ad hoc* group of law professors as articulated in Appendix 9 to the Report, and the Law Deans' initial response. Meaningful dialogue between the profession and law professors would, we believe, have resulted in a much more constructive, forward-looking and cooperative picture of 21st century Canadian legal education at all levels of the continuum.

acknowledge that it should continue with the Task Force process. In continuing the Task Force, however, the Federation should considerably narrow the mandate of the Task Force and should circumscribe appropriately the scope of the recommendations that the Task Force should be authorized to make. Here also the CALT and CLSA would be enthusiastic participants in such a Task Force.

4. The issues involved and many of the claims made in the Task Force Consultation Paper require the collection of much more data and a more thorough assessment of the policy options available. In particular both the assumption that there is currently a competency deficit and the assertion that “lists of competencies” should be at the core of an approved law degree require detailed investigation

Many assertions made in the Consultation Paper are not backed by meaningful evidence. For example, the Task Force paper does not show that its list of required competencies is linked to the nature of legal practice in the 21st century and the skills and knowledge required of today’s lawyers. Further, the assumption underlying the Task Force’s list of required competencies is that there is currently a deficit among graduates of law faculties. Yet the Task Force provides no evidence that such a deficit exists. It provides no empirical data to support its position: it does not survey law faculty mission statements, it does not survey curricula, it does not survey professors, and it does not survey students.

Even limiting itself to data collected by or accessible to member Law Societies, the Federation has available substantial evidence to test its assertion of a “competency deficit.” For example, how many students are currently failing the law society licensing exams and bar admissions courses and what factors contribute to this failure rate? Of all lawyers subject to disciplinary proceedings over the past ten years, how many are in their first years of practice, and how many have been members of a law society for at least 10 years? And of those who have been disciplined, how many are disciplined for incompetence that has even a remote connection to anything that might conceivably fall within the mission of a law faculty? The Task Force neither raises nor answers any of these questions. Yet they all bear directly on an assessment of where (if at all) there is a competency deficit in the legal profession.

In attempting to justify its imposition of a substantial mandatory curriculum, the Consultation Paper commits two fundamental errors. First, it assumes that the mere teaching of a substantive course (or part of a course) in an area deemed to be a “core competency” will ensure that a lawyer will display and maintain that competency after graduation. The second, and more serious error, is that the Consultation Paper fails to provide any sort of analysis (whether quantitative or qualitative) of the types of courses that are being selected by Canadian law students and whether this selection is hindering the development of the appropriate competencies. One such study, conducted in 2001, concluded that in the 1990s at the University of British Columbia law faculty, the upper year course load of an average law student was composed by 60% of those “core” courses the Federation of Law Soci-

eties would approve.⁵ If mandatory courses in first year are included, this means that 73% of the coursework done by the majority of students at UBC in the 1990s was in the “core” subject areas, and this, without the interference of the Law Society of British Columbia into the curriculum decisions of the law faculty.⁶

While even more detailed investigation and analysis would be required, this study raises two interesting points. First, if there is, in fact, a competency deficit in B.C. today, it apparently cannot be attributed to failure of students to take the “right” courses. Second, in what ways would a focus on a list of substantive competencies for an “approved law degree” palliate the presumed competency deficit?

The Consultation Paper also touches upon developments and debates in other jurisdictions, including the U.S., Australia, New Zealand and Britain, but does not provide any genuine discussion or assessment of these developments, beyond listing them in an Appendix. The Consultation Paper also fails to consider evidence and analysis from the only existing study of Canadian legal education, the Arthurs Report.⁷ While this Report dates from the 1980s it does provide a wealth of information about Canadian legal education and the work that is going on in law faculties.

Finally, the Consultation Paper is ahistorical, tracing the history of legal education only as far back as the 1950s. A more comprehensive study of the relationship between law societies and law schools can, and should be, traced back to at least the late 19th century. Such a study would show that since the inception of university-based law schools, law societies have (sometimes reluctantly) recognized the importance of the particular university-based mission for law schools.⁸ This history explains, at least in part, why “there has never been a national standard for the approval of law programs or law schools.”

⁵ Annie Rochette & W. Wesley Pue, “‘Back to Basics’?: University Legal Education and 21st Century Professionalism” (2001) 20 Windsor Yearbook of Access to Justice 167 at 185.

⁶ A second important empirical study was also conducted on the enrolment in “outsider” courses in seven given law faculties across Canada. See N. Bakht, K. Brooks, G. Calder, J. Koshan, S. Lawrence, C. Mathen & D. Parkes, “Counting Outsiders: A Critical Exploration of Outsider Course Enrolment in Canadian Legal Education” (2007) 45 Osgoode Hall L. J. 667.

⁷ Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1983).

⁸ See *ibid*, and the several essays published in R. Matas & D. McCawley, *Legal Education in Canada* (Montreal: Federation of Law Societies of Canada, 1987), most notably that of J. McLaren, “The History of Legal Education in Common Law Canada” at 111.

- 5. The issue of competence to practice is distinct from the issue of preparedness for admission to any professional licensing processes. As the bodies responsible for ensuring competence to practice, law societies, can and should focus their attention on this issue. The danger posed by shifting the focus to law school education is the potential offloading of important and specialized law society responsibilities onto the law schools. This is unacceptable from a jurisdictional, pedagogical and resource perspective**

The role of Canadian law faculties is to provide a liberal and a professional legal education and, as the Task Force itself points out, this education is "excellent" (p. 5). Graduates of Canadian law programs undertake an immense variety of careers and the role of law faculties is to give their graduates the tools to undertake such different careers.

Competency can be defined as "an individual's ability to make deliberate choices from a repertoire of behaviours for handling situations and tasks in specific contexts of professional practice, by using and integrating knowledge, skills, judgment, attitudes and personal values, in accordance with professional role and responsibilities."⁹ Competency therefore needs to be developed in context. A university based legal education program which is by definition preparatory, could never provide the richness of context so essential to fostering an appropriate level of competency for legal practice. This context is provided by bar admission courses, but particularly by the mentoring and training involved in articling process and the first few years of practice.

Furthermore, from the resources perspective, the reality is that the vast majority of law schools in Canada have limited budgets. It is essential that law schools have the autonomy to set their own priorities as do other academic units in the university community. Not only are principles of academic freedom engaged but it is inappropriate to have priorities set by a third party that has no responsibility for the disbursements of limited taxpayer resources. Law societies have a role and responsibility in the education of legal practitioners. If they do not have adequate resources to meet this obligation, they need to address the resource problem directly. They cannot simply transfer their responsibility to law faculties and their universities.

- 6. The justifications given by the Task Force for the establishment of an "approved law degree" are not well founded. Nor are the implications of establishing an approved law degree on the basis of "lists of competencies" sufficiently researched**

The Task Force argues that four recent developments necessitate the creation of an "approved common law degree": a) recent proposals for the creation of new law schools; b) an increase in the number of internationally trained lawyers; c) the

⁹ Marjan J.B. Govaerts, "Educational Competencies or Education for Professional Competence?" (2008) 42 Medical Education 234 at 235.
 Electronic copy available at: <https://www.cambridge.org/core/abstract=2102596>

emergence of *Fair Access Legislation*; d) and the emergence of “integrated education.” Of these developments, only the related issues of internationally-trained lawyers and *Fair Access Legislation* have any relevance to whether the current system should be reconsidered.

a. The question of the creation of new law schools is not a matter within the jurisdiction of Law Societies

The first justification given by the Task Force for the establishment of an “approved law degree” is not a relevant consideration. The approval of new faculties of law is an issue for universities and for Ministries of Education. It is up to a democratically elected government (rather than a self-regulating professional monopoly) to decide what academic approval processes it wishes to put in place for the authorization of new university programmes, and what criteria to apply for such approvals. In the case of professional programmes, such approval processes may include consultation with regulatory bodies like Colleges of Physicians and Surgeons and law societies, but it is not the responsibility of these regulatory bodies to determine if there should be new university programmes. Of course, because law societies quite properly control access to the profession (and, concomitantly, to the professional licensing process) they have the jurisdiction to establish pre-requisites for admission to such processes. The current situation of considerable autonomy for law schools in designing their curricula has not been shown to be inadequate or inappropriate to meet the concerns that gave rise to the establishment of the Task Force. The mere possibility that universities and Ministries of Education may establish new faculties should not, of itself, induce law societies to modify the existing system.¹⁰

b. An expeditious and fair method for the assessment of the qualifications of foreign trained lawyers is needed. The Task Force should consider alternatives to the “approved law degree” for the accreditation of foreign-trained lawyers

We acknowledge that recently there has been a significant increase in the number of candidates who have received their legal education abroad and who seek admission to the common law bar in Canada. However, this cohort is far from homogenous. At the very least it includes (1) lawyers who, as foreign nationals, have immigrated to Canada after having completed their law training elsewhere and have been active legal practitioners; and (2) Canadians, some of whom were not accepted at a Canadian law school, who have gone abroad to obtain their law degree,

¹⁰ In making this claim we do not mean to say that current curricula are either “adequate” or “appropriate.” Many faculties are currently engaged in processes of curricular reform, and there is broad sentiment that faculties should seek to experiment, diversify and explore new directions in legal education. The point is that, on the evidence to date, there is no reason to believe that the current system allowing considerable curricular autonomy to law faculties does not meet the concerns of the Task Force.

and seek admission to a common law bar as their first professional qualification. While both of these primary groups would be assessed under *Fair Access Legislation*, they present different problems and concerns. The Consultation Paper does not address the complexity posed by these very different situations.

As well, research needs to be done to clarify other general features and distinctions that pertain to this cohort of candidates for entry into professional licensing processes and bar admission programs. For example, within each of the two primary groups a number of other important distinctions must be drawn: What are the language capacities of the applicant? Does the applicant come from a country where a law degree is a first university degree? Does the applicant have a common law degree? What if the candidate is a practicing lawyer with no law degree, but a call to the bar based on articles of clerkship? Until there is good evidence about the actual numbers of such applicants, their educational background and their experience it is difficult to know what types of criteria should be used to assess their qualifications under *Fair Access Legislation*. Indeed, there is every reason to suspect that an approved law school competency criterion would be no help at all in addressing the issue, given the diversity of applicants.

c. Fair Access Legislation poses a challenge to Law Societies to ensure that foreign trained lawyers are treated equitably and appropriately. The examination option offered as a response to this challenge raises a number of significant substantive equality concerns

Fair Access Legislation requires law societies to designate requirements for entry to the profession of law that are transparent, objective, impartial and fair. The distinction within the class of foreign-trained applicants noted above suggest that much more work needs to be done in order to determine how to address the requirements of *Fair Access Legislation*.

A national examination or set of examinations for determining entry into professional licensing processes and bar admission courses is suggested by the Consultation Paper as an option for testing candidates' competencies in given areas. The attraction of this option is that all applicants, whether they are educated in Canada or elsewhere, would be treated the same; formal equality would be ensured. While this might seem to be the most straightforward way to implement *Fair Access Legislation*, the examination model is quite complex and raises a number of concerns, some of which the Task Force notes. We outline briefly three additional substantive equality concerns which we would urge a reconstituted Task Force to research and consider.

First, although a national exam would treat all candidates as formal equals, some candidates would come to such an exam unfairly hampered by systemic disadvantage. The substantively unequal impacts of exams as measurement tools are somewhat mitigated when used in the context of an educational program that couples exams with other evaluation mechanisms and that has built in academic and cultural support measures. However, the Task Force's examination option does not include those compensating features.

Second, a bar admission program entrance exam would likely spur the growth of private bar entrance preparatory schools or courses. While such programs exist in the United States, where the Bar Examination is not preceded by a Bar Admis-

sion course offered by relevant law societies, in Canada their existence might simply add to the financial barriers already faced by candidates for admission, and to a greater extent by systemically disadvantaged candidates.

Third, the examination option is aimed at individuals, unlike the approved law degree option which is aimed at institutions. Individuals are much more vulnerable than institutions and consequently less likely to raise concerns about systemic inequalities or other discriminatory features of a bar admission process. We have noted, for example, that the Task Force appears to have made no attempt to consult with law students or law student organizations. The examination option would individualize and therefore effectively obscure the predicament and silence the concerns of the most vulnerable stakeholders in the process of professional education and certification.

Let us be clear, however, that we do not take the position that an examination will never be appropriate. To come to that conclusion much more research would be required. Nonetheless, we find the reasons given by the Task Force for rejecting such an option to be unpersuasive.

For example, the Task Force suggests that examinations only prove that students have the “ability to pass an examination, rather than proof of the acquisition of knowledge, skills and abilities that a lawyer requires to practice law.” If this is true, then the current bar admission examinations fall prey to the same criticism, and hence there is a strong argument that the Task Force should consider how the licensing process (including examinations) could be improved so as to teach and test for the “knowledge, skills and abilities that a lawyer requires to practice law.”

Moreover, the Task Force objects that the examination option would require a national body to set the examination and monitor the content. The source of this objection is not clear: is it a resource issue, a capacity issue, or an expertise issue? Interestingly, while the Task Force shies away from examinations because of the complexity of establishing a national body to set the examination and monitoring its content, it expresses no reticence about establishing a national body to monitor law schools for compliance with the list of competencies it proposes.

There may be good reasons for hesitation about adopting a “matriculation examination” approach. After all, from our own experience we are well aware of the many pitfalls associated with law examinations, and the need to always think about an examination in the context of other modes of assessment. But we do not feel that we can come to a conclusion about the appropriateness of an examination for addressing the competency preparedness of students who receive their education outside of Canada because we (like the Federation itself) have no empirical basis upon which to base such a conclusion.

d. The Task Force fails to make a persuasive argument as to the connection between “integrated education” and an “approved common law degree.”

As to the fourth justification for the “approved law degree”, the Task Force suggests, invoking the Carnegie Report¹¹ from the U.S., that the emergence of “integrated education” requires the creation of an “approved common law degree” which meets the required “list of competencies.” Legal educators are not necessarily opposed to a vision of legal education that integrates substantive knowledge, practical skills and ethical awareness. However, the link between the type of integrated education suggested by the Carnegie Report and the list of competencies required for the “approved law degree” is simply not established by the Task Force.

While the Carnegie Report recommends the integration of the three apprenticeships — the cognitive, the practical and the “apprenticeship of identity and purpose” — into a more holistic model of legal education, and, as noted in paragraph 40 of the Consultation Paper, lists the 6 tasks for professional education, it does *not* prescribe a list of specific courses or “competencies” for law school curricula. Citing the Carnegie Report therefore does not lead to the conclusion that the list of competencies proposed by the Consultation Paper must be implemented. Unfortunately, the list of competencies proposed by the Task Force has nothing to do with the recommendations of the Carnegie Report concerning integrated legal education.

Moreover, integrated education in a Canadian context will have a different focus and different content from what is appropriate in the USA. Indeed, when the Carnegie Report does, on the rare occasion, discuss a Canadian law faculty (UBC) it is to praise the school’s focus on “perspectives” courses. Such courses are not recommended by the Task Force in its list of competencies.

We must use American studies, such as a recent ABA Report¹² and those invoked by the Task Force in particular, with caution as they do not necessarily translate well into the Canadian context. As both the Carnegie Report and the Consultation Paper acknowledge, there is nothing in the American model that parallels the articling process in Canada, nor are there comparable bar admission and professional licensing programs in the United States. If the variation in the quality of the articling experience noted in the Consultation Paper means that some students are not adequately prepared for practice, law societies need to review and strengthen oversight of the articling process.

Furthermore, the Task Force does not assess the extent to which Canadian common law faculties are, or are not, offering integrated education. Law faculties are continually revising their curricula and continually experimenting with educational strategies. To imply that they are not up to speed by citing an American study that does not survey Canadian needs or practices ignores the reality of continual curricular development in common law faculties.

To conclude, even accepting the argument for integrated education of the type suggested in the Carnegie Report (which we are not prepared to do in a Canadian context without an appropriate evidentiary basis), no case has been made that such an approach to legal education requires the Federation of Law Societies to establish a list of competencies.

¹¹ William M. Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass, 2007).

¹² Report of the Outcomes Measures Committee, ABA Section of Legal Education and Admissions to the Bar, July 2008.

7. The “list of competencies” approach adopted by the Task Force is a narrow and mechanistic method of assessing qualifications to practice law. We do not agree that this is the best approach to assessment. Moreover, if this approach is adopted, we would object to the chosen list of required competencies as it is both under-inclusive and over-inclusive. The list of required competencies will have the undesirable effect of ossifying legal education and thwarting curricular innovation.

The approved law degree option relies on a “list of competencies” model. As we stated earlier, our fundamental position is first that Law Societies lack the jurisdiction, knowledge and expertise to design and implement an “approved law degree” regime based on this approach. Second, and also noted earlier, the issue is competency to undertake bar admission and professional licensing processes sponsored by Law Societies, not “immediate competency” to practice law. However, beyond that, we have additional concerns about the “list of required competencies” approach that is at the heart of the Task Force’s approved law degree option.

The list is both under-inclusive and over-inclusive. In our opinion, it reflects an archaic view of legal knowledge and of legal practice. If we compare the list with the 1957 list of 20 subjects, we find little innovation. Some subjects such as Banking and Bills of Exchange and Municipal Law are not found in the Task Force list, but most other subjects are back, 50 years later. Some additions to reflect changes in the law and legal practice have been added, such as “Charter values” and dispute resolution. The Task Force has also not demonstrated that this list of required competencies is necessary for law graduates to succeed in bar admission and professional licensing processes (including bar exams), or to be able to practice law. The list is therefore over-inclusive.

The list is also under-inclusive as it does not reflect changes in the nature of law and legal practice. For example, international law and comparative law are not listed, even though the influence of globalization and internationalization on domestic law has been well documented. Most law faculties recognize this fact themselves and offer a series of courses in international law; some even include it as part of the first year curriculum. Legal analysis skills are also missing from the list, although they represent the bulk of the skills learned by law students in their legal studies and are essential to success in the articling process.

Our concerns about the over-inclusiveness and the under-inclusiveness of the proposed competencies list illustrate the dangers of making lists that then become fixed in time. As an example of another approach, the Report of the Outcomes Measures Committee of the ABA Section of Legal Education and Admissions to the Bar published in July 2008 recommends a change in the accreditation standards from input measures to outcome measures, where accreditation would be based on each law school’s success in achieving its own mission and objectives, thus ensuring flexibility, diversity and autonomy — be this in terms of curricula, pedagogy, modes of assessment or skills development.

Currently in common law Canada, while there are some strong similarities between the various law schools, there is also significant diversity. This diversity, in our opinion, is an unqualified public good because it facilitates both institutional

innovation and individual student choice. Although each law faculty offers a mostly mandatory, “core” first year curriculum, several have recently introduced innovations in both their first and upper year curricula, thus broadening the opportunities offered to students, as well as offering different niches of specialization. These innovations, whether they include the integration of indigenous laws, public interest or transnational/international law, reflect the changing nature of law and of legal practice. Law faculties must have the ability to innovate in their curriculum design and the courses they offer, based on the research interests of members of their faculty. Surely no one wants a cookie-cutter approach to legal education. The recommendations of the ABA Outcome Measures Committee encourage creativity and experimentation in legal education:

... the Committee recommends that the resulting system be one that affords considerable flexibility to individual law schools to determine the outcomes the school seeks to effect. . . and the mechanisms by which to measure those outcomes. Such an approach would best fulfill the institutional interest in assuring opportunities for innovation on the part of individual law schools.¹³

Limited law school resources mean that a template of “required competencies” would restrict law faculties’ flexibility, resulting in limited student choice regarding their course work and future career. The result of a broad mandatory curriculum is a lack of opportunity for students to reflect critically on their own studies and career paths, hindering the development of their interest in and capacity for life long learning.

8. The proposal to monitor law schools to ensure compliance with the required competencies list is unrealistic and unacceptable

We have a number of concerns with the proposal to monitor faculty compliance with the required competency system. First, law schools are not self governing professional societies. Rather faculties of law are already heavily regulated and monitored by ongoing processes of informal and formal assessment by governments, universities, peers, popular media, and market forces.

Second, the same issues of representation that concern us about the composition of the Task Force also pertain to the composition and nature of any body established to perform an additional monitoring function of law school compliance with the “required competencies.” It is questionable whether law societies have the expertise, resources, or capacity to effectively undertake the function of on-going curriculum regulation.

Third, law societies have acknowledged that they are struggling to deliver, maintain and monitor their own bar admission courses and continuing legal education programs. In the face of that difficulty, the proposal to establish an additional body to monitor law schools is unrealistic.

Of course, if some approach similar to that suggested by the ABA Outcome Measures Committee were to be adopted — that is, requiring law faculties to de-

¹³ Report of the Outcomes Measures Committee, ABA Section of Legal Education and Admissions to the Bar, July 2008 at 55: <http://ssrn.com/abstract=2102596>

velop specific mission statements, goals and objectives, to implement them, and to show how it is achieving them — a system of monitoring could well be a useful complement. Most universities today subject their academic units to periodic reviews (for example, prior to launching a decadal selection process). It might be that in conjunction with such a review, the law faculty could be asked to provide the legal education committee of the relevant law society with information relating to how it is actually fulfilling the goals of its mission statement.

CONCLUSION

In this Response we have been critical of various aspects of the process being undertaken by the Federation and several specific conclusions suggested by the Consultation Paper.

We are troubled by the lack of representativity of the Task Force. The consultation process undertaken by the Task Force has also been inadequate. We do not believe that the Task Force has grounded its claims in an adequate factual basis. And we do not believe that the analysis that apparently sustains its diagnosis is sufficiently developed or that its conclusions are appropriately justified. We would note that the history of legal education in Canada has been one of constant experimentation and incremental adjustment on the basis of thorough analysis and reflection. By contrast, the Task Force proposes a significant recasting of the relationship between law faculties and law societies on the basis of limited data.

Many scholars and Task Forces in Canada have examined these questions in the past. The Federation itself sponsored a National Conference in October 1985 which commissioned a wide variety of research studies. Since then, many articles and reports on legal education have been published. Of course, while there is now considerable background information, this is not to say that the existing data set is sufficient. Much more research is required. We strongly believe that it should be undertaken — the sooner the better. Like the Federation the CALT and CLSA are deeply committed to achieving the best life-long legal education possible. We would be enthusiastic partners in any research to investigate the current state of legal education in Canada.

We find that the framing of the issues by the Task Force is too limited and not sufficiently responsive to the concerns that all the diverse interests involved in legal education would bring forward. We have indicated our belief that nothing short of an independent, broadly representative National Task Force, with a wider mandate, a more comprehensive consultation process and an appropriate research budget is required to address the myriad questions faced by legal educators and law societies today. Again, the CALT and the CLSA would be enthusiastic partners of such a National Task Force. For we believe that by working together, and bringing as many different constituencies as possible into the inquiry, a careful prescription of the roles and responsibilities of all those involved in legal education may be developed.

We acknowledge that individual Law Societies and the Federation may feel it necessary to take some immediate steps to deal with the challenges posed by *Fair Access Legislation*. But these steps should be minimalist and should focus exclusively on what needs to be done (if anything) to comply with this legislation. Once more, the CALT and the CLSA would be pleased to make further contributions to the work of the current Federation Task Force.

As for a more general inquiry into legal education, we believe that the independent National Task Force we recommend should begin its work by consulting with all interested constituencies to determine what research needs to be undertaken. It should then commission such research and convene a National Conference on Legal Education in Canada similar to that chaired by the late Justice Roy Matas in 1985. This would allow research to be broadly disseminated and a diversity of points of view to be expressed.

Among the types of questions that such a Task Force could be charged with addressing the following:

- What, precisely, is meant by “lawyer competence”?
- How does the concept of competence relate to the public interest?
- How does lawyer competence fit with the process of life-long learning?
- Which institutions are best situated to influence the development of lawyer competence at the different points on the competency continuum?
- How do other professions determine competency?
- What sort of competency regimes do other disciplines adopt?
- Is there in fact a competency deficit for Canadian lawyers? If so, what types of Canadian lawyers? And if so, what is that deficit?
- What costs are involved in promoting lawyer competency?
- Who can bear the costs? Who should bear these costs?

This list is merely indicative. We are confident that other stakeholders and interested parties would be able to develop additional questions that address matters of interest to everyone involved in legal education as well as matters of particular concern to them. The central point is that broad representation on the National Task Force, broad consultation, broad research and a broad mandate is a pre-requisite to developing recommendations that will genuinely address the key issues that are now confronting those who are responsible for all aspects of legal education in Canada.