

**RESPONSE TO THE CONSULTATION PAPER  
OF THE TASK FORCE ON  
THE CANADIAN COMMON LAW DEGREE**

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**1. Introduction**

As someone with a long interest in legal education, and as primary author of the most extensive Canadian review of this subject — *Law and Learning (1983)* — and of many other publications on legal education and scholarship, legal ethics and the sociology and political economy of the legal profession, I welcome this opportunity to respond to the Consultation Paper of the Task Force on the Canadian Common Law Degree.

**2. Evaluating the present performance of Canadian law schools and prescribing their future.**

The Consultation Paper reveals that the members of the Task Force have made every effort to be respectful of the many points of view concerning the issues it was mandated to examine. In particular, it is more respectful of the perspectives of legal educators than many of its provincial predecessors have been and, no doubt, some of its national and provincial successors will be. For reasons that follow, this point is central to my response.

There are good reasons for deference to the views of legal educators, some of which are expressed or implied by the Consultation Paper:

- legal educators devote considerable time and effort to designing law school curricula, developing new approaches to teaching and assessing

- how law schools respond to the legitimate present and future needs of the public, the justice system and the legal profession
- legal educators are familiar with the relevant literature and with the experience of law schools in other jurisdictions
  - legal educators are better able to identify changes in society and in patterns of professional practice and therefore the changes needed in legal education.
  - law faculties are already subject to and must be responsive to multiple forms of evaluation within their own institutions, across the university system and in the media
  - legal educators are uniquely aware of the multiple functions of the law faculties which include, but are not restricted to, preparation of students for professional practice, and are best situated to determine how those functions can best be balanced, given their available human and material resources
  - over the past forty years, since the “settlement” of the late 1960s, law schools have vastly improved the quality of Canadian legal education and the quality of legal practice.

However, this is not to say that self-criticism by the legal academy cannot be improved upon, or that the perspectives of practising lawyers or others are irrelevant. But all critiques of legal education, all proposals for reform, all regulatory strategies are undermined by three serious deficiencies:

- a failure to clearly define the many objectives of legal education and to differentiate amongst them in proposing changes
- a disinclination to develop reliable measures to test the effectiveness of present or proposed educational practices in achieving these different objectives
- the almost total absence of information and analysis concerning what the legal profession knows and does and, more importantly, what its

members will have to know and do in the future to serve the public interest and individual clients.

These deficiencies put seriously into question the proposal of the Task Force to specify a list of “framework competencies” as the benchmark for assessing whether graduates will be admitted to practice in Canada’s common law jurisdictions.

### **3. Why “framework competencies” are an inappropriate benchmark for assessing common law degrees**

The proposed list of “framework competencies” is deficient because it is based neither on historical or current evidence of what lawyers actually know or do nor on evidence-based speculation about what they will have to know or do in the future:

- “foundations of the common law” (torts, contracts, property, criminal law) are not foundational in any historical sense: until the mid-19<sup>th</sup> century, contracts were mostly litigated outside the common law courts; torts was unknown as a unified field of doctrine; common law property concepts applied only to the tiny fraction of the population that held land in fee simple; and common law criminal law — administered largely by lay magistrates and in the absence of counsel — was transformed by statutory reforms and later, by legal aid
- there is no evidence to support the proposition that the “framework competencies” identified by the Task Force describe the actual base of knowledge and skills common to all legal practitioners; on the contrary, whatever we do know about legal practice suggests that while some practitioners possess some of these competencies and use them in their practice, few possess or use them all and many depend on totally different competencies not listed.

- the Task Force neglects the clear implications of the point attributed to Kenneth Jarvis: lawyers are no longer omni-competent; they either practice as specialists; or they do relatively routine work in general practice settings requiring limited foundational knowledge of several fields; or if they are true generalists (e.g. as litigators) they do not need subject-related competencies but rather the capacity to educate or re-educate themselves in law or other fields as circumstances require — a crucial capacity not mentioned in the Task Force enumeration
- lawyers today often have to adapt to change without formal training, or at most with obsolete training, in the fields in which they practice; those who succeed do so because they have the ability to absorb new information, adopt new approaches and develop new concepts — the hallmarks of a liberal education that pass unnoticed by the Task Force; those who do not succeed in adapting typically lack these capacities to the prejudice not only of their clients but of the legal system and society in general.

#### **4. The implications for governance of the profession of adopting “framework competencies”.**

The Task Force recommendations for requiring students to acquire “framework competencies” will — or at very least should — set in motion a chain of consequences that will ultimately transform the governance of the profession:

- governing bodies have been loath — have essentially refused — to test the competence of their current members or even to disbar them for demonstrated lack of competence
- governing bodies will be under pressure to initiate assessment of the field-specific “framework competencies” of all lawyers, or at least of those thought to fall below an acceptable standard, and to either re-educate those who fall below that standard or prevent them from practising in fields in which they lack competence

- licenses to practice limited to specific fields will create pressures for the devolution of licensing to specialist bodies, as in the medical profession.

None of these are intrinsically undesirable developments. But the Task Force should be prepared not only to predict but to advocate them to give its current proposal greater credibility.

## **5. The special case of stand-alone courses in professional responsibility**

The case for requiring a stand-alone course in professional responsibility — the only stand-alone course specifically mandated — depends on the assumption that taking such a course will improve the conduct of legal practitioners. Given that extensive research identifies determinants of professional misconduct other than the absence of instruction in the field, this is a highly debatable assumption. Fortunately, we are now in a position to test it:

- some law schools and governing bodies now offer freestanding courses in professional responsibility; others do not
- before instituting this requirement, the Task Force should undertake or commission a study of whether those who have taken such courses have a better or worse record of professional behaviour, holding all other factors constant (location, type of practice, age, law school performance)
- at the very least, the requirement should be accompanied by a sunset clause to ensure that an empirical test verifies the underlying assumption within a fixed period of years failing which the requirement should expire.

Most, if not all governing bodies offer continuing education programs so that members can keep current with legal developments. Some also monitor their members to ensure that clients' interests are protected by proper accounting, scheduling and filing systems. But to the best of my knowledge, none test their

members “competencies” and none discipline members for want of competency or indeed for any other behaviour except misappropriation of clients’ funds, “ungovernability” (non-compliance with regulatory requirements) and criminal conduct. If governing bodies insist on law schools taking professional conduct seriously they must themselves be prepared:

- to take steps to secure compliance and punish non-compliance with the full spectrum of professional conduct rules
- to submit themselves to justifiable criticism for failing to do so.

Finally, governing bodies will surely wish instruction in this subject to be of high quality which in turn will depend on the availability of an extensive body of empirical and normative studies for teaching purposes. However governing bodies are apparently not themselves prepared to either offer instruction or generate research in the field. Accordingly if the Task Force recommendation is accepted, governing bodies should undertake to:

- provide funding for research and publications in the field
- make their records available for researchers
- financially support the training of the significant additional teaching complement required to provide the instruction mandated by the Task Force.

**6. Articulation of a list of required “competencies” will not in fact facilitate the assessment of foreign graduates**

One of the major justifications advanced for instituting this new set of requirements is to ensure fair treatment of applicants with foreign credentials. These applicants may well present evidence that they have been exposed to education in some of the “competencies” (i.e. fields of study) proposed for Canadian law students. However, there are several important exceptions:

- few will have any prior exposure to Canadian constitutional law (they will share this deficiency with Canada's leading constitutional scholar, Peter Hogg)
- some graduates of leading American, British and civil law schools will not have received instruction in some of the competencies specified (e.g. equitable principles, statutory analysis)
- a significant proportion will not be able to present evidence of their "competency" to resolve disputes, advocate causes, conduct research or engage in oral or written communication; nor are these "competencies" easy to test
- because of growing demands on the dwindling resources of Canadian law schools, few will be willing or able to offer instruction to students with foreign credentials to assist them in acquiring missing "competencies"; this will be increasingly true as the number of these students grows, as competition for access to existing Canadian law schools becomes more intense, and as those schools are increasingly pressed to provide clinical and other resource-intensive instruction to their own students, and to meet their other teaching and research obligations
- since the requirement for instruction for entrants with foreign credentials originates in the Task Force recommendations, it should identify how it proposes to organize and fund such instruction.

In addition, although many holders of foreign credentials will present evidence that they have taken courses related to the specified "competencies", national and provincial accrediting bodies will still have to decide whether to:

- take such evidence at face value in all cases, or
- to do so only if the student has graduated from a law school whose standards have been identified as meeting Canadian standards and offering instruction relevant to practice in Canada, or
- to look behind evidence of the courses taken by testing all applicants.

Whichever option is chosen with regard to holders of foreign credentials, accrediting bodies will be under sustained pressure to do likewise for graduates of Canadian law schools. This may well lead to increased professional intervention in legal education by the back door — the very outcome the Task Force has itself rejected.

## **7. The need for innovation.**

While the Task Force seeks to be “sensitive” to the need for innovation, what it proposes is in fact likely to “constrain innovative developments in legal education”.

Law faculties operate in an economy of scarcity. Resources invested in, facilities committed to, and time spent on the required “competencies” will not be available for other purposes including:

- the acquisition of different “competencies” deemed more relevant by some students and the faculty
- the development of new competencies to train lawyers for a changing society and the new patterns of professional and non-legal careers that will emerge in the future
- professorial attention to research and graduate supervision.

Law faculties are influenced by the opinion of “relevant others” including the profession and students:

- official identification of some subjects as “framework” competencies will privilege them in debates over the future of legal education (and did privilege them for years when the list was longer - to the prejudice of innovation)

- students will tend to opt (as they now do) for courses or “competencies” that bear the profession’s imprimatur; as “empowered consumers”, students will be able to skew the actual program of the law school in the direction implied by the content of the list, despite the contrary views of legal educators concerning what is appropriate for them to study.

In short, the “competencies” approach will destabilize the political economy of law schools and set in motion forces that will dis-favour innovation.

### **8. Future threats to the autonomy of law schools**

The Task Force “considers that specific curriculum development should be left to the law schools”. Nonetheless, it is possible that governing and accrediting bodies will take a different view in the future. Indeed, the approach outlined in the Task Force recommendations constitutes an approach that virtually assures that this will happen.

Ever since the “understandings” of the late 1960s, individual members of governing bodies have argued strenuously in favour of greater control over the curricula of law schools, the syllabi of individual courses and even the non-teaching activities of individual law teachers:

- many have argued that “every lawyer should *surely* know....” the academic counterpart of specific domains of practice (taxation, accounting, family law etc.) — in effect a longer list of “competencies”
- others have contended that existing courses devoted to the named “competencies” are deficient because they do not include particular elements supposedly necessary for professional practice (“where is the courthouse?”)
- some have contended that particular subjects on law school curricula should be denied credit towards a recognized law degree and that

- particular pedagogic approaches should not be permitted (interdisciplinary courses, international placements, clinic participation)
- in a few instances, members of governing bodies have threatened sanctions against law schools because of statements made by law teachers either in their scholarly publications or in public fora (examples provided on request)
  - on a very few occasions, governing bodies have considered using their leverage with law faculties — withholding approval of their degrees as qualifications for entry — for illicit purposes such as controlling the suitability and numbers of entrants to the profession.

Not all future decision-makers are likely to show the same deference to law schools as the members of the present Task Force. As they have in the past, governing bodies will be importuned and may be tempted to use their control over “framework competencies” as the lever to open the door to greater professional control over academic decision-making.

## **9. The Task Force ought to adopt a different approach.**

The most obvious alternative approach — one that has brought undoubted benefits to law schools, law students, the practising bar and the legal system — is to formalize and legitimate the *status quo*.

- despite the settlement of the late 1960s, many governing bodies have tacitly allowed law schools the freedom to develop their curricula, teaching methods, periods of instruction and other aspects of their education programs as they deemed appropriate
- in the absence of any hard evidence that current graduates are more poorly trained or more prone to professional misconduct or incompetence than their predecessors, it is difficult to see why a more prescriptive approach should be adopted.

Governing bodies should therefore support greater autonomy for law faculties — not less. At most, suggestions to reduce autonomy should be evidence-based, and should be directly related to the prevention of harm to the public by inadequately-educated graduates.

An alternative or complementary approach would be to concentrate on ensuring the existence of strong law faculties that:

- have adequate faculty resources, library holdings and information technology, and classrooms
- have defined their own specific “mission” and developed a strategic approach to achieving it
- offer adequate opportunities for students to acquire the so-called “framework competencies” along with others
- are subject to periodic quality assessments conducted by peer reviewers with or without professional participation.

## **10. Looking ahead**

If the Task Force is determined to recommend that law schools must adhere to a prescribed list of “framework competencies”, it should at the same time recommend that certain principles and institutional arrangements be adopted to ensure that its recommendations will not in the future operate to the prejudice of legal education and law schools.

Because of the history, and especially the future potential, of governing bodies intruding into the domain of academic decision-making, the following principles should be adopted as the basis for any process by which law schools or their graduates are “approved”:

- *Governing and accrediting bodies will not adopt, implement or amend the proposed list of competencies without the participation and approval of the legal academy.*
- *Governing and accrediting bodies will commit themselves to respecting the intellectual freedom of individual professorial and student members of law faculties and the autonomy of law faculties to adopt the scholarly and pedagogic approaches they deem best.*
- *Governing and accrediting bodies will respect the decision-making and resource allocation processes established within the university system.*
- *Governing and accrediting bodies will ensure that their practising members possess and maintain the same competencies as law schools are to be required to impart and students to acquire.*
- *Governing and accrediting bodies will assist law faculties to acquire any additional human and material resources they need to implement the new requirements.*
- *Governing bodies will undertake not to use their accrediting authority for any purpose except the protection of the public against demonstrated harms attributable to shortcomings in the education of entrants.*