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November 14, 2008

Sophia Sperdakos
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Dear Sophia:

On behalf of the Ontario Bar Association (OBA) I am pleased to provide you with our submission on the Federation of Law Societies of Canada Consultation Paper on The Canadian Common Law Degree.

The OBA represents more than 18,000 lawyers from every region across Ontario making us well positioned to offer advice on this important issue.

I trust you will find the enclosed submission both informative and helpful.

Yours truly,

Jamie Trimble
President
Ontario Bar Association



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**RESPONSE TO
THE FEDERATION OF LAW SOCIETIES OF
CANADA
CONSULTATION PAPER ON THE CANADIAN
COMMON LAW DEGREE**

Submitted on *November 14, 2008*

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About the Ontario Bar Association

The Ontario Bar Association (OBA) is the voice of the legal profession in Ontario. As a branch of the Canadian Bar Association, the OBA represents more than 18,000 lawyers, judges, law professors and law students across the province. The OBA is a voluntary association which provides a broad range of services to its membership, including education and representation in relations with government on matter of importance to OBA members and the public. The OBA advances reasoned positions to governments, the public and the Law Society of Upper Canada for the benefit of our members and to improve the law and the administration of justice in Ontario.

Introduction

The OBA commends the Federation of Law Societies of Canada for turning its attention to the important topic of the Canadian common law degree. Maintaining the quality and integrity of common law degrees conferred by Canadian law schools, the fairness and transparency of the qualification process for lawyers and the mobility of lawyers across Canada are essential objectives and worthy of serious discussion.

As a basis for further discussion, we see a need for factual and statistical information about the current programs at Canadian common law schools, including core courses and electives, joint degree programs, admissions procedures and student demographics.

Below, we respond to the Questions for Comment, as listed at paragraph 101 of the Consultation Paper. In some instances, we have answered two related questions together.

Responses to the questions posed in the Consultation Paper

1. Does the suggested list of foundational competencies encompass those that candidates for entry to bar admission programs should possess?

2. Is it over or under inclusive?

Generally, the suggested list of foundational competencies does encompass those that candidates for entry to bar admission program should possess. It is, however, not an exhaustive list of courses. The desired outcome is to have candidates go through a program that helps develop the skill to process and apply legal information. This outcome can be achieved with a combination of core courses and diverse electives.

We understand that there is some variation in the number of requirements and the precise courses required at the various law schools. We also understand that curricula may be differently organized and core competencies may be conveyed in different arrays of courses. In responding to these questions, it would have been useful to have specific and concrete information, perhaps in the form of a comparison chart, about the required or core courses at each of the Canadian law schools.

We concur that the foundational competencies must include the foundations of the common law. The foundations should include legal history, which is crucial to the understanding of common law doctrines because their development is intrinsically historical.

Common law in Canada exists in a different context than in England, where the common law originated. Quebec private law is civil law. Aboriginal peoples had systems of governance, law and dispute resolution before European contact, some elements of which continue into the present. We suggest that there should be a component that will enable students to gain some appreciation of civil law and Aboriginal law.

Further, we recommend that the teaching of constitutional and human rights principles and Charter values should be done in a way that equips students to critically analyze the law and the legal system from an equality and equity perspective.

We concur that competence in statutory analysis and regulatory and administrative law is fundamental. Beyond that, many of the specialty areas of practice, such as labour law and immigration law, involve an application of the procedural provisions of the statutes and a knowledge of the regulatory bodies' procedures and practices. This is broader than administrative law and encompasses a huge area of substantive law.

Competence in principles of professional responsibility is unquestionably fundamental, and should include all aspects of professional conduct, including civility.

We note that the principles of family law are not mentioned among the foundational or framework competencies. We believe that they should be included.

In sum, we believe the list is underinclusive, and remedying the underinclusiveness would not be burdensome.

3. Is a stand-alone course on professional responsibility an appropriate requirement for candidates seeking entry to bar admission programs?

Our understanding of students' sentiment is that learning about professional responsibility criteria is of utmost importance at an early stage in a prospective lawyer's career. Students want to know about potential ethical scenarios, what the rules of professional conduct say about how to react to these scenarios and the potential consequences of falling short ethically.

There needs to be consistency across the provinces and territories in what students learn about their professional responsibilities. However, we are aware of a feeling among students that if bar admission courses are going to evaluate students on professional responsibility criteria as well teaching the substantive content of professional obligations, the law schools do not need to replicate this material. If the feeling is that the law school curriculum provides a more effective forum for learning about professional responsibility, then that is where it should take place. Students have expressed dissatisfaction with the possibility that law school required courses on professional responsibility would merely be duplicating what is already taught by provincial law societies' licensing process.

We understand the students' aversion to duplication. However, the development of professional responsibility is (or should be) an aspect of a person's overall moral development. As moral agents, people develop over a lifetime through experience and reflection (or should do so). Professional responsibility is not something that one learns about once and for all. It is a career-long, lifetime project. We believe that it should be taught in law school, both as a stand-alone course and a component of each substantive course. It should also be taught in the bar admission program on a more sophisticated level, reflecting the students' experience in practice during articles.

Our view is that other legal associations, such as the Advocates' Society and the Canadian Bar Association and its provincial and territorial branches, could and should have a role in the delivery of practical professional responsibility courses and programs.

4. Should the existing prerequisite for entry into Canadian common law faculties of two years of post-secondary education in a university setting be maintained or should it be changed to reflect the de facto requirement of an undergraduate university degree?

The prerequisite should be changed to reflect the reality that few law school applicants lacking a university degree are admitted to law school. The two-year prerequisite not only creates a false expectation of admission in students applying without a degree but it creates inefficiency for law school admissions programs who must still consider the application, despite the unwritten policy that such students won't be admitted. In addition, that application process costs applicants a considerable amount. For example, the *Ontario Law School Application Fee* is \$185.00 plus a law school application service fee of \$75.00 for each law school selection.

Furthermore, additional post-secondary education is extremely helpful for future law students in terms of preparing them to weather three years of law school plus articling. Not only does an undergraduate experience shape future law students' analytical and written skills; it acclimates them to a lengthy and rigorous educational experience they will be sure to face upon entering law school.

Our response to this question should be read in conjunction with our response to Question 6 on exceptions to the undergraduate degree requirement.

5. Should McGill's tradition of admitting students following completion of a two-year CEGEP program be accommodated as an exception to the general prerequisite?

Yes. Given Quebec's different post-secondary education structure, which they consider integral to their distinctive culture, McGill should be allowed to retain its policy of admitting students from CEGEP. The CEGEP program provides for a greater rate of post-secondary education for Quebecois students as their generous subsidization of education allows increased access. If McGill's tradition was abolished there would likely be a backlash, given that it would potentially force some academically motivated Quebecois students into university settings only.

For consistent and fair treatment of students within the same law school, we recommend that McGill be permitted to retain the prerequisite of two years of university studies for students applying to law school from a university rather than a CEGEP background. While the *de facto* reality may be that students who wish to practise in a common law jurisdiction will apply with a university degree, the *de jure* requirements for entry to law school at McGill from CEGEP or from university should be parallel.

6. Are there other exceptions that should be recognized and accommodated?

We agree in principle with the Task Force’s proposal that special admission programs, including those for Aboriginal and mature students, which may allow for less than a full undergraduate degree, should continue to exist. Allowing such exceptions recognizes the barriers to legal education that some groups experience and makes law school admission accessible to these groups. At the same time, we note that admitting students under special classifications can have a marginalizing and isolating effect.

We note that life and work experience can enable a person to gain knowledge and develop skills that equip them well for law school. Therefore, we recommend that all law schools should have a flexible admission policy that recognizes a wide range of qualifications for the study of law, rather than a “regular” admissions path and “special” admission programs. While an undergraduate degree would be a standard requirement, students who could demonstrate other relevant and satisfactory intellectual and practical achievements could also gain admission without being separately streamed.

Under such flexible admissions policies, young students who have not yet completed an undergraduate degree would understand that their application was premature, but the lack of a degree would not deter students with relevant experience from applying.

7. Should the standard length of the Common Law Degree be expressed in terms of credit hours rather than years of study?

8. If so, is 90 credit hours the appropriate standard?

The function of the 90 credit hour standard appears to be to accommodate students who would like to learn on a more flexible schedule, be it through a joint degree program or through summer schooling. A change to defining the degree in terms of credit hours, rather than in terms of years, would theoretically make possible both compressed programs (by establishing summer terms) and part-time law degrees earned over more than three years. Defining the degree in terms of credit hours and allowing students to spread their studies over more than three years would improve access to legal education for students with limited financial resources, those with young families, and others for whom full-time study is not possible.

While it is desirable that students be able to obtain flexible schooling, there should be a minimum duration, expressed in years, for law school education. This would ensure that, like other professional schools, future lawyers are giving sufficient time to absorb the culture and mode of analysis necessary to be an effective lawyer. Law students require acculturation, and this takes time.

There should also be a maximum duration, to ensure that the common law degree is earned through an integrated educational experience and not piecemeal. We suggest, tentatively, a minimum of three years and a maximum of six years to obtain a common law degree in Canada.

Law students in the United States have long been able to study law part time and take a degree over more than three years. It would be useful to know whether and how the quality of legal education is affected by part-time study. While we do not believe Canadian law schools and regulatory bodies should simply take the United States as a model, we think it would be useful to examine studies, if any exist, of the effect of flexible study options.

9. Should in person learning be required for all or part of the law school program?

It is next to impossible to achieve any student/student or teacher/student interaction absent in-person teaching. An integral part of the law-school experience is the challenging dynamic between peers and peers and their teachers. It is this interaction that forces students to think and speak on their feet, particularly important for future litigators, but a desirable asset for any future lawyer. While the full range of interactions that lawyers engage in is not reflected in law school, the in-person learning experience is a crucial foundation.

What requires more attention, it would seem, is the manner in which legal education is delivered in the last two years of law school. At present it seems to be a more content-focused education as opposed to a more outcome-focused education. Assessment is also more summative (ranking) rather than formative (supportive). This is in contrast to the delivery of education in other professional schools such as medical schools. A shift toward a more integrated model of law school in which the first year may be more content-focused and the next two years more outcome-focused (what graduates should know, what they should be able to do and how they should do it), would more fully complement the teaching and learning of legal doctrine with the teaching and learning of practice. Thus, in-person learning should be required throughout the law school program, with more emphasis in the last two years.

10. Are there other delivery systems that should be taken into account?

We understand “other delivery systems” to mean electronic delivery systems such as webcasting of actual law classes to distance learners and self-study modules. Electronic delivery could potentially address access problems for students whose home is far from any law school.

While a small part of a student's program might be delivered electronically, we are strongly of the view that in-person learning must predominate, for the reasons stated under Question 9.

It would be useful to have the results of research on outcomes of electronic delivery systems in other professional disciplines.

We would also like to suggest, from another perspective on alternative delivery, the concept of shadowing practicing lawyers for a given number of hours or weeks per semester, or periodically throughout the last two years, as part of the overall law school experience. Shadowing would be the equivalent of integrated electives in medical school, which provide students with the opportunity to get exposure and hands on experience in different areas of medicine.

11. How should joint degree programs be treated for the recognition of the common law degree?

Our view is that if the law component of a joint degree program includes 90 credit hours of law courses, the law degree should be recognized.

A joint degree program must ensure that the students gain the foundational competencies in law. If the number of credit hours of law within a joint degree program is less than 90, the question arises: to what extent can courses in another discipline replace elective law courses without diluting the law degree?

In responding to this question, it would have been helpful to have information in the Consultation Paper about what joint degree programs exist at present and the requirements for each.

12. Should a national body monitor joint degree programs?

If the law component of a joint degree program consists of 90 credit hours and includes the same requirements as the "pure" law program, there is no need for any special monitoring. If the law component is different from the requirements for a stand-alone law degree, monitoring may be required. We cannot comment further, as the Consultation Paper does not provide information about the requirements of any existing joint degree programs.

13. Should a national body be established to develop the components for recognition of law degrees from new law school programs?

While this question is posed in terms of new law school programs, we note that the Consultation Paper envisions that the standard articulated for the NCA to use when assessing recognition requests by new law schools would be applicable to existing law schools as well (see paragraph 14).

We do not think that a national body should be established; at least, not at this time. In the absence of a national body, Canadian common law schools have organically developed an array of high-quality programs. On the basis of the maxim “If it’s not broken, don’t fix it”, we think that creating a national body is not necessary and could be counter-productive.

The number of law schools in Canada is small and all the schools are well able to be aware of what each is doing. The situation in Canada is very different from that in the United States, where a national gatekeeper is necessary because of the large number of schools and the fact that many law schools are not connected with a university and therefore not subject to the same reviews as a university law school.

The Canadian common law schools are able to be responsive to the character and concerns of the regions where they are located. They are each able to be flexible, to innovate and to develop a special focus. A national body prescribing national standards could have a chilling effect on innovation and flexibility. While legal education in Canada is of high quality, the documents attached to the Task Force paper point out the need for improvements in all dimensions. There is a danger that a national body would institutionalize existing practices and approaches and reduce the room for innovation and empirical development of better practices and approaches, just at a time when the need for serious rethinking of legal education is urgent.

The portability of Canadian common law degrees is offered as a reason why a national body is needed. On the other hand, the portability of law degrees, the national mobility of lawyers and the establishment of national law firms could be seen as factors that tend to develop and support an informal national common law standard from the ground up. Law schools, knowing that their graduates may attend the bar admission course in another province or practice in another province, will want to make sure that their students are indeed prepared for interprovincial movement, even while educating them in a program that reflects and responds to the character and concerns of the region or offers a focus on one or more special areas of interest.

New law schools should enjoy the same autonomy that the existing law schools have enjoyed. New programs are likely to be established through consultation with existing law schools if mutual respect is being sought.

The need for transparent, objective, impartial and fair requirements for entry into the profession does not necessarily translate into a need for a national body. There are other ways to maintain such requirements.

14. Are there alternatives to this approach?

If and when a new common law school is to be established in Canada, a process of consultation with the law society, the bar and the judiciary of the jurisdiction where the new school will be located, with the existing Canadian common law schools (including faculty, administration and students), and with other law societies would enable the new school to develop the appropriate components, while leaving room for creativity and innovation. A new law school offers the possibility of creatively addressing the shortcomings of existing legal education in ways that are less possible for existing institutions with established ways of doing things. There is a risk that the potential for creativity and for modelling the directions in which other law schools can move could be stifled by a national standard based on existing practices.

15. The Task Force has identified three possible compliance models. Please provide comments on these models.

(a) The “Status Quo” Option

We agree with the statement of advantages of the *status quo* as set out in the Consultation Paper.

The question is how the regulatory concerns of the law societies can be met. This issue requires fuller exploration of the history, current status and appropriate future development of the relationship between the law societies and the law schools.

(b) The Examination Option

A national examination is not a desirable option, for all the reasons raised by the Task Force. It would not serve the objectives stated in the Consultation Paper.

In particular, written examinations, if they effectively test anything, test only a narrow sliver of the spectrum of intellectual, moral and social acquisitions with which a student should emerge from law school. We agree that “what examination passage denotes primarily is the ability to pass an examination, rather than proof of the acquisition of the knowledge, skills and abilities that a lawyer requires to practise law”. The examination option can also create an additional barrier for those groups of individuals who already face barriers in entry to law schools.

(c) The Approved Law Degree Option

In response to Question 13, we have stated our misgivings about a national body to develop the components for recognition of law degrees from new law school programs —

a national body that would articulate a standard that would be applicable to existing law schools as well as new ones (see paragraph 14 of the Consultation Paper).

If the *status quo* is considered inadequate to address the law societies' regulatory concerns, a national body to approve and monitor the common law degree *must*, not should, "include significant participation of law faculty and administrators so that the expertise of legal educators can be brought to bear on the issues" (Consultation Paper, paragraph 94). Without significant and effective participation of law faculty and administrators (and, we suggest, representation from students), a national body to approve and monitor the common law degree would risk a lack of credibility. Some sort of combination of the *status quo* model and the approved law degree option should be explored.

16. Are there other models that should be considered and if so, what are they?

We agree that it is not necessary or desirable to adopt the American Bar Association structure, which exists in a very different context. The Canadian common law jurisdictions can learn from other common law jurisdictions, which at times may mean learning what *not* to do, but should not take any other jurisdiction as a model.

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