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CANADIAN ASSOCIATION OF LAW TEACHERS
ASSOCIATION CANADIENNE DES PROFESSEURS DE DROIT

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National Requirement Review Committee
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To the National Requirement Review Committee

Further to the letter of the Federation dated September 23, 2022, we are writing to provide our comments about identifying and prioritizing issues for the review of the National Requirement.

We have a number of preliminary concerns about both the process and the substance of the review. We will first summarize our positions and then explain the concerns and considerations that underlie them.

In terms of the process for undertaking a review of the National Requirement, it is our position that it must be structured so that it is meaningfully collaborative, adequately evidence-based and aimed at generating consensus among key stakeholders. In the absence of such a process, we are reluctant to contribute to the review.

In terms of substance, we take three main positions: first, with the exception of the need to integrate the Calls to Action of the Truth and Reconciliation Commission, any effort to expand the breadth, depth or specificity of the competencies that are currently articulated in the National Requirement as mandatory criteria for approved Canadian law degrees ought to be framed as an effort to articulate *supplementary guidelines*, rather than added

requirements; second, the National Requirement review must embrace an approach to articulating competencies appropriate to 'whole lawyers', to 'diverse professional practise contexts' and for the 'whole continuum' of legal education and competence development, thus rejecting the undesirably narrow, 'technical' and 'one-size-fits-all' vision of competence for legal education and legal practise that was articulated in the initial work of the NCA Assessment Modernization Committee; third, the National Requirement review must not pre-emptively or prematurely adopt starting ideas that lack evidence-based credibility or that have not been subjected to appropriate critical assessment. In what follows of this letter, we explain the concerns and considerations underlying these positions.

1. A meaningfully collaborative, adequately evidence-based and consensus-seeking process.

The current process being used by the FLSC for the review of the National Requirement has been entirely defined and implemented by the FLSC, with no attempt to engage other stakeholders in legal education in the process design or the ultimate decision-making. As far as we are aware, the members of the NRRC are serving at the invitation of the FLSC and in their individual professional capacities. Moreover, the FLSC appears to have dictated that the NRRC must use a classically 'consultative' process that in its previous iterations for addressing issues of fundamental importance to law faculties, legal education, the legal profession, the justice system and the public interest, has been found wanting.

For many years, stakeholders outside the FLSC have been calling for a meaningfully collaborative approach, that is adequately evidence-based and aims to generate and enable consensus decision making. Law teachers, in particular, bring unique knowledge about the context of learning in JD programs and the position of novices who enter law school. We can speak about the variety of starting points and the possibilities in terms of both teaching and learning within the three year J.D. To the extent that we are talking about what future lawyers both should and can - capacity wise - learn in law school programs, engaging across our institutional boundaries is important. As is developing a rigorously researched evidence base around the question of what future lawyers should learn.

The FLSC, representing the regulators from across Canada, clearly has a difficult task. Regulating in the public interest is a heavy role, and coping with the changes of the last few decades, including especially an influx of foreign trained lawyers in some provinces, has created significant challenges given fair practices legislation. However, recognition of how Federation decisions will affect future lawyers, current lawyers, and university based legal education strongly suggests that coming together to work at meaningful discussion about entry to licensing and our respective concerns, as well as about the evidence of needs and boundaries, is the best way to engage in this process.

2. Supplementary Guidelines on competency framing for the whole continuum of legal education, not added competency requirements in the National Requirement

We believe that an effort to collaboratively generate supplementary competency *guidelines*, rather than added competence requirements, except in relation to the specific need to integrate the Calls to Action of the Truth & Reconciliation Commission into the National Requirement, would be the most productive approach to this review. This is especially so given that the present review seems to be already quite limited. For instance, there are no indications that this review includes empirical consideration of how the NR has functioned in terms of its ultimate "public interest" goal.

As the current National Requirement reflects, a competency-based approach to entry to licensing is not new to legal education in Canada. At the same time though, and as the review of the National Requirement implicitly recognizes, there are differences in how such approaches define the meaning and elements of competency. In particular, there are ongoing efforts in the legal academy, the legal profession and beyond to develop broader understandings of competence and competency-based trainings. Most competency-based approaches would a) define competencies for lawyers as including more than technical knowledge and practical skill, and b) would understand that learning and competency achievement continue across the whole continuum of legal education (from law school through transitional licencing and throughout professional practise). These broader understandings have been apparent in most of the significant interventions in lawyer training of the last 15 years, both inside and outside law faculties, and they transcend the current content of the National Requirement. The ongoing development and application of these broader understandings of competence, across the whole continuum and involving a variety of entities involved in legal education and training, is both important and constructive. But there is a danger in attempting to freeze them into 'one-size-fits-all' program requirements at a particular moment in time. It would be of greater benefit to aim to explore the current state of knowledge and activity on competence-based approaches in law and legal education (and other relevant fields) and to create a resource for supporting competence-based approaches in legal education into the future. A set of supplementary guidelines for voluntary implementation, as appropriate, would be a more useful outcome than added mandatory requirements.

3. Articulating competencies appropriate to 'whole lawyers', to 'diverse professional practise contexts' and for the 'whole continuum' of legal education and competence development using relevant, credible and critically assessed ideas and information.

We note the clarification that the competency profile being developed by the NCA Assessment Modernization Committee (NCA AMC) will not be directly imported into the National Requirement. However, we remain concerned about the potential for the NRRC to seek to follow the lead of the NCA AMC in the sense of articulating an undesirably narrow and technical vision of competence in legal education and legal practise.

We have already spelled out this part of our concern in a letter to the FLSC at the time of consultation on the work of the NCA AMC and we attach that letter below, for your information.

Here we would add that the National Requirement review must remain vigilant in ensuring the relevance and credibility of all ideas and information it considers and must encourage robust

critical assessment of all sources. Obviously, the legal academy is well-placed to assist with this. But we are alarmed by signs that ideas and information that lack evidence-based credibility and that have not been subjected to appropriate critical assessment are broadly circulating in FLSC discussion, while robust, directly relevant research is not being discussed. We briefly illustrate our concerns about critical assessment, credibility and relevance below.

First, consultant Jordan Furlong's report to the Law Society of British Columbia, *A Competence-Based System For Lawyer Licensing in British Columbia: Interim Report Submitted to the Law Society of British Columbia* (May 10, 2022). In this Report, the author argues that licensing should be decoupled from law schools. In particular, we are concerned by his suggestion that this approach would make legal education more accessible by allowing more training programs to develop in public and private institutions that would exist solely to train people to pass the regulatory licensing examinations.

Mr. Furlong assumes that these training programs would be significantly cheaper than law school, thus increasing access to the profession, and would provide the same levels of competence that are currently seen in candidates for licensure: "[t]he answer is that it's in the very act of dropping the law degree requirement that a thousand flowers of legal knowledge acquisition could bloom," he writes.[1] This is a possible outcome. However, it is not a certain outcome. It is an outcome which will create a host of new concerns and challenges some of which will attach to the regulator. At present, Canada's university-based law schools determine whether students have acquired an initial set of legal competencies through the mechanism of their degree programs. The Furlong proposal is that an examination run by the provincial law societies would do that work. The notion that the role of the regulator within this system of 'legal knowledge acquisition' would somehow be simpler is, in our view, unrealistic.[2]

Mr. Furlong justifies his idea in a variety of ways, including pointing to the cost of tuition. He posits that the market his proposal would create would make the legal profession more accessible. We agree that, especially in certain provinces, the cost of legal education has become extremely high. We believe that taking access to quality legal education seriously involves recommitting to our public systems. This will necessarily include attention from provincial governments to the cost of legal education. Tuition, in a public system of training, is not merely a matter of markets and decisions taken by law schools. It is a question of government policy, which differs between provinces. There were complex political shift and concomitant defunding of higher education in some provinces leading to the increases in tuition which now constitute such a bar to access. Recognizing the complex antecedents of this problem illustrates that bypassing law schools is unlikely to constitute a solution to the underlying problem of unequal access.

[1] Jordan Furlong, "Why competence-based licensure would make the law degree unnecessary" (October 5 2022) here.
[2] Training options for the SQE listed on the SRA website include the following: "Candidates should make their own enquiries to satisfy themselves as to the quality and suitability of training, and the products and services that organisations on the list offer." If the FLSC is concerned about access to the profession and fairness to students, we believe that regulators should provide more attention to the question of quality and suitability of training. See here.

Mr. Furlong takes the position that those who benefit from the current situation, the status quo, will fight ferociously to maintain it. He presupposes that law schools and law teachers have nothing useful or creative to say. In fact, there have been many efforts over time to overhaul legal education at various schools. Curriculum options at most if not all of Canada's law schools have changed considerably over the last 20 years. So have teaching methods and evaluation. Cumulative examinations are a much smaller part of legal education than they were. Experiential learning is much more common. These are incremental changes that came about because of attention to pedagogical good practice and because of the connections between law schools and the legal profession. As we in the academy recognize the very real challenges facing the profession and its regulatory bodies, we hope that our contemporary context and practices are carefully considered.

We know that it is frustrating to many – regulators, legal educators, lawyers and students (and no doubt clients, if they knew) - how slowly the system which creates access to the legal profession changes, and how new problems – including tuition rises over the past 20 years – have not been addressed. We know that the complexities of our current system can also create frustration. However, we urge caution in taking an axe to our existing model. If we cannot confirm that changes will improve the competence of future lawyers and therefore service to the public – that they will solve the problems already identified *and* that they will not create serious new problems besides – we should not proceed.

Oversimplification of the issues is not helpful and we urge the Review Committee to resist or at least carefully critically assess framings which assume that law school can and should be simply set to the side as "merely academic", so to speak. We are especially surprised to see a proposal seriously floated and then discussed which would do this only to then immediately imagine another, much less unregulated, set of institutions providing training towards professional licensing examinations.

Second, we note that there may be interest in the ongoing transition in the UK Solicitors Regulation Authority and the relatively new Solicitor's Qualifying Examination. We think that both the structure of the new system and the outcome of the first few examinations warrant clear caution if the FLSC is interested in this model. In its first two writings, the SQE has produced a gulf in pass rates between white and non-white candidates.[3] The SQE data does not include information about the precise SQE preparation undertaken by candidates, which seems quite relevant to our previous point. The data does include information about whether or not they have a degree, and significant other information about their age, degree, results in their degree, family educational and socio-economic background etc. All of this data suggests that neither diversification of training nor standardized testing is likely to reduce the inequality which is embedded in our society. We think that the SQE is a useful place to watch to consider options in

[3] The statistical report produced by Kaplan, the provider of the examination, here, shows that the July 2022 sitting of the SQE 1 (which tests functional legal knowledge) of the 7% of the candidates who identified as British/Black British, the pass rate was 23%. The overall pass rate was 53%. For the 44% of candidates identifying as "white" (8% of candidates preferred not to answer this question), the pass rate was 63%. These rates refer to first attempt candidates. In the first run of the SQE, the gap between British/Black British candidates and white candidates pass rates was not quite so wide, at 39% and 66% respectively (https://sqe.sra.org.uk/docs/default-source/pdfs/reports/sqe1-november-2021-statistical-report.pdf?sfvrsn=8792d39d_2).

terms of licensing. At this moment, however, the SQE results are not promising. In addition, there is as yet no data which turns to the main question: whether the introduction of the SQE is assisting with solicitor competence in provision of services.

Third and finally, we see repeated interest in the training and licensing systems for doctors in discussions about lawyer regulation and we are not quite sure how these discussions reflect thinking within the Federation about solving the challenges of ensuring competence in licensed lawyers. We want to point to some critical differences which make the analogies between these two professions difficult to sustain. First, medical training for doctors in Canada involves years of post-M.D. paid training towards specialization. Second, post-M.D. paid training towards specialization takes place primarily in large teaching hospitals connected to university Faculties of Medicine. These large teaching hospitals are significantly publicly funded under Canada's approach to universal health care. They have no analog in the legal profession, and cannot be analogized to legal clinics which are far smaller, lack public funding in many provinces and serve a much smaller and more specialised client base than the hospital system.

We appreciate the attraction of the medical model of training. It is a compelling and important vision of how a profession commits to bringing along the next generation in terms of skills, knowledge and attitudes. We continue to believe that this is a critical part of legal training, and a critical part of building a profession that can shoulder the expectations and responsibilities placed on the legal profession in Canadian governance. Likewise, the Canadian medical profession took a broad approach to what competencies might look like. They also recommitted to the role of senior professionals in hands-on training towards graduated licensing.

In conclusion, we urge the NRRC to be cautious about framing a lawyer's skills as merely technical. This approach is at odds both with the breadth of the roles that lawyers play in Canada and in the lives of their clients, and with contemporary empirical research into the legal profession. The purely technical approach discounts the significance of lawyers as a professional group much relied upon in maintaining, changing and holding accountable institutions of the state. Fulfilling that role requires skills which extend beyond the technical and that are often highly context dependent. Lawyers are not mere technicians and we caution that it is a misunderstanding of the profession to take that approach – a misunderstanding which will have consequences. We suggest that the FLSC consider drawing upon or conducting robust empirical studies of the competencies that lawyers require to provide quality service across the range of areas in which lawyers work. Existing studies tend to take a much broader approach to competencies, and to the role of the lawyer, as suggested by the Institute for the Advancement of the American Legal System (IAALS). They eschew a dichotomy between trade school and intellectual exercise, and they urge consideration of what the IAALS calls "the whole lawyer".[4] Moreover, Canadian empirical studies have highlighted the importance of considering practise context in identifying lawyer competencies, especially contexts where lawyers engage with disadvantaged communities to ameliorate lack of access to justice.[5]

[4] See, for instance, here.
[5] See Marsden & Buhler "Lawyer Competencies for Access to Justice: Two Empirical Studies" (2017) 34 *Windsor Yearbook of Access to Justice* 186-208, here

We suggest an approach to education which recognizes the lifelong learning journey of lawyers, one which starts in law school but continues beyond. We hope that the Review Committee will understand that many law professors are deeply committed to our role in preparing students for their future careers, and that it is unhelpful to caricature law professors otherwise. Law schools and law teachers could all do better according to our individual and institutional goals in terms of teaching and learning. We also know that some of those goals may shift over time and with discussion. But we urge regulators to be frank in terms of how concerns about the costs of being involved in lawyer training are prompting some regulators to exit the field.[6] We think that more open and granular discussion about the precise way that fairness legislation drives change in terms of access to articling would also be helpful in framing the challenge.

Our effort with this letter is not to justify existing practice at law school or in licensing. It is to promote dialogue about legal education and training between stakeholders in the course of this review and to urge against unstudied, if exciting, proposals which aim to solve particular problems but which threaten to create new and different forms of harm. We understand that this area is complex and that the current state of access to the profession in Canada needs attention. Our comments here are intended to communicate some thoughts about the process, substance and context of the review from the point of view of law teachers in Canada. We hope our thoughts are helpful to you in the next phase of your work.

Sincerely

Professors Sonia Lawrence, Richard Devlin, Graham Reynolds & David Wiseman
for the Executive Directors, Canadian Association of Law Teachers

Attachment:
Letter from CALT dated December 23, 2021

[6] Law Society of Ontario, Fair Registration Practices Report 2020 found here, at 9.

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CANADIAN ASSOCIATION OF LAW TEACHERS
ASSOCIATION CANADIENNE DES PROFESSEURS DE DROIT

December 23, 2021

Dear Ms. Villeneuve,

Thank you for inviting representatives of CALT to participate in the focus group on the FLSC's Competency Profile Development project on November 12, 2021. We shared some initial thoughts at the meeting and promised we would follow up by the end of the year.

As you are aware, we have concerns about the Competency Profile and the process that has been adopted to this point.

We are very much aware of, and in agreement with, the need for the renewal of the NCA process. We recognize that the increasing number of entrants to the practice of law who have not received a legal education in Canada is a regulatory challenge for all law societies. However, our concern, as the representative organization for Canadian law professors, is that the solution that you are proposing will inevitably have an impact on the National Requirement for Canadian law schools. While we question the presumption that the NCA process should necessarily impact the National Requirement, the facilitator in the focus group explicitly posited this inter-relationship. Our concerns, which we detail below, focus on what we see as deficiencies in content and process of developing the Competency Profile from the perspective of how it may impact Canadian law schools.

First, CALT is committed to the idea of life-long learning for lawyers, as are most law societies. For us this means there are at least three stages of legal education: academic training, pre-call bar admissions processes or their equivalent, and post-call continuing professional development. For each of these stages to work, there must be respectful collaboration between the law societies and the legal academy. Regrettably, the process that has been adopted to develop the Competency Profile for NCA students falls short of respectful collaboration. From what you have shared with us, it has been ongoing for at least two years without any formal communications with Canadian law schools or bodies representing the legal academy. Moreover, you have indicated that your hope is to complete the profile by February or March 2022, thereby indicating that you believe that most of the work has now been done. Our concern is that any consultations at this stage are too little and too late to be meaningful. This is especially so given the potential impact on the National Requirement. In our view, Canadian law schools, individual law professors with subject-matter expertise, and relevant associations of law teachers ought to have been integrated into this process in a more substantial way at a much earlier time. We are also concerned that the current work on the competency profile appears to have overlooked the need to consult with clients and communities, especially justice-seeking communities, about what competencies lawyers ought to have. As we will indicate in our final paragraph what is required is a fundamental rethink and reset of both the process and the aspirations of the project.

Second, our core concern is that by identifying an extremely detailed list of level one competencies, in effect the FLSC is presuming to dictate to law schools, whether they are in Canada or elsewhere, what to teach law students. Law schools have an academic mission that is distinct from the mission of law societies. One of the fundamental responsibilities of law schools, among others, is to help our students, through a variety of

perspectives and pedagogical approaches, to think critically about both law and the legal system. However, the idea of critical thinking barely appears in your list of competencies. Rather, the goal seems to be to ensure that students are 'practice ready' in a highly technical sense. In keeping with the idea of a continuum of learning, law schools acknowledge that their programs lay an important foundation for legal practice across the range of knowledge, skills and values required for competent lawyering. But law schools do not confine themselves to that foundation and can only go so far in that direction. The foundation laid in law schools enables graduates to be ready to transition to practice, but it does not seek to make them practice ready in the narrow and limited sense spelled out in the draft Competency Profile. In our opinion this is an attempt to unilaterally change the objectives and operations of law schools, specifically by downloading the long-standing responsibilities of the legal profession for transitional practical training to them.

Third, the outlining of 11 domains, each with multiple sub-competencies, will generate numerous problems:

A) If the profile, and all its details, is applied to law schools, it will dictate nearly the entirety of law school course offerings. Students will have to enroll in a substantial number of mandatory courses in all years of study. As such, the profile will limit student choice vis-à-vis their course selections. If students have to fulfill these competencies, there will be little room for them to explore the wide variety of offerings, both substantive and pedagogical, currently available at Canadian law schools. For example, in recent years, in response to student demands, many law schools have begun offering specializations/certificates in certain areas of law. To attain such a certificate, students are required to take a designated number of credits in a given field. This will be impossible to achieve if they must comply with the competency profile as it is currently designed.

B) The competency profile itself presumes a uni-dimensional lawyer, because the focus seems to be to prepare lawyers for a traditional vision of generalized solo practice. Solo practitioners are an extremely important part of the legal profession and are often on the front lines of access to justice. However, even solo practise is highly heterogenous and increasingly specialized, and of course many law school graduates do not pursue this practice route at all. They join larger firms, become government lawyers, work in-house, and so on. Moreover, in all of those practise environments there is constant change in legal substance, processes and approaches – which are the focus of the competencies – whereas the deeper capacity for critical thinking, to which law schools are oriented, is an enduring requirement.

   We agree that there should be support for lawyers who seek solo practice, and that law schools can play an important role in establishing foundations for solo practice. But law schools must limit themselves to that foundational role, while also providing a foundation for a broader spectrum of practise environments and in relation to the broader range of contexts in which our graduates may engage.

C) The competency profile will stymie innovation and modernization of law school curricula. Law schools are very much aware that law and the legal profession are in transition locally, nationally, and internationally. We constantly assess and rework our course offerings to ensure that our students have a legal education that is relevant to a rapidly changing world. The micromanagement and inherent rigidity embedded in the competency profile is ill-suited to such a fluid and forward-looking understanding of the nature and function of university-based legal education.

D) The competency profile will result in a cookie-cutter approach to legal education, whereby each law school will have to offer a roughly similar curriculum. In recent years we have witnessed the increasing diversification of Canadian law schools, as each has pursued its own vision. Rather than embracing this diversity, the profile promotes uniformity and demands conformity.

E) The channeling of students into a significant number of mandatory courses will dramatically impair joint academic programs between law and other disciplines such as computer science, Indigenous

studies, social work, the humanities, engineering and business administration. It will also negatively affect the potential for students to spend a term on exchange at a university in another country. Both joint programs and exchanges depend on students having a reasonable amount of flexibility in their choice of courses.

As we have noted earlier, we envision the relationship between the law societies and universities to be collaborative and co-operative. To this end we suggest that the next steps should be 1) to create a new level one profile that better encapsulates the objectives of academic legal education and is the product of a partnership between law schools and the law societies and 2) to merge what is currently level 1 with level 2 and ensure that the law societies provide adequate transitional education opportunities prior to the call to the Bar, including, where appropriate, through collaboration with interested law schools (such as through the integrated practise program available in Ontario). Furthermore, in pursuit of the goal of life-long learning, we would also encourage for law societies, perhaps in partnership with law schools where appropriate, to design and deliver robust mandatory continuing professional development programmes.

We trust that this submission will provide a more specific articulation of the concerns of CALT and look forward to further consultation with the FLSC.

Richard Devlin & David Wiseman,

On behalf of the Executive of CALT/ACPD