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# The Tree of Knowledge/The Axe of Power: Gerald Le Dain and the Transformation of Canadian Legal Education

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## **The Tree of Knowledge / The Axe of Power: Gerald Le Dain and the Transformation of Canadian Legal Education**

H.W. Arthurs

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*Oh save, oh save, in this eventful hour /  
The tree of knowledge from the axe of Power*

**Abstract:** Upon assuming the deanship of Osgoode Hall Law School in 1967, Gerald Le Dain became a leading advocate of important innovations in Canadian legal education. He did much to persuade the Law Society of Upper Canada to relax its control of Ontario legal education. The autonomy gained by law faculties — both *de jure* and *de facto* — in turn enabled them to initiate a protracted period of experimentation in curricular architecture, in pedagogy and in research, which has lasted almost to the present. Ironically in 2007, just prior to Le Dain's death, the Federation of Law Societies of Canada launched an initiative to reassert the profession's control over law faculties that he had done so much to persuade it to relinquish. This essay explores the fate of Canadian legal education in light of recent developments.

## 1. A MEMOIR

Gerald Le Dain became dean of Osgoode Hall Law School on 1 July 1967, an “eventful hour” in the evolution of Canadian legal education. Osgoode, Canada’s largest common law faculty, had been established by the Law Society of Upper Canada in 1889. In 1949, following years of conflict over the form and content of legal education, its entire (but miniscule) full-time faculty complement resigned. Three members — Dean Cecil Wright and Professors Bora Laskin and John Willis — moved to the University of Toronto, reconstituted its undergraduate law program as a three-year post-BA course, challenged the Law Society’s monopoly of legal education in Ontario and by doing so provoked “the fiercest debate” in the history of Canadian legal education. That debate was concluded (or so it seemed) in 1957 when the Law Society entered into an agreement with representatives of Toronto and other interested Ontario universities by which graduates of their “approved” law faculties would be admitted (along with Osgoode graduates) to the Society’s articling program and Bar Admission Course and, ultimately, to practice.

The Law Society’s motives for entering into the 1957 agreement were fairly clear: it could no longer accommodate the increasing numbers of students seeking admission to its law school. Somewhat less so was the way in which the agreement was formulated. The Law Society had (and still has) no statutory power to accredit or regulate law faculties; universities were free to offer law degrees without its permission, and indeed had done so intermittently from the mid 19<sup>th</sup> century onwards. However, the Society’s control over admission to practice enabled it to exclude graduates of any law school save its own – a

power it notoriously used during the 1950s to force University of Toronto law graduates to graduate a second time from Osgoode.

In effect, the 1957 agreement squared this circle. It acknowledged both the right of university law faculties to control their own curricula and the right of the Law Society to control admission to practice. Under the agreement, law faculties would be “approved” if they admitted students after at least two years of undergraduate education; required them to complete a “law school course [of] ... not less than three years”; and offered a curriculum including “certain basic subjects which would be compulsory” and “additional subjects ... at the discretion of each law school”. However, no doubt wishing to put the “fiercest debate” behind it, the Law Society agreed that the “basic elements of these courses” were to “be settled by agreement of the law faculties of the universities concerned and of the Osgoode Hall Law School.” By doing so, the Society explicitly acknowledged the academy’s right to determine the content of the law curriculum; and it accepted that its own residual role in curricular matters would be as an academic governing body — responsible only for Osgoode, its own law school — and not as the regulator responsible for admission to professional practice.

The law faculties ultimately agreed amongst themselves that students would be required to take eleven “core” subjects and identified some fifteen additional subjects that law faculties would offer on an optional basis. No attempt was made to define the actual content of courses in either category; nor were graduates with approved degrees

subjected to further testing on their substantive legal knowledge prior to their admission to practice; nor were procedures established for monitoring compliance or punishing non-compliance with the terms of approval. Thus, the competing claims of the profession and the academy were resolved by agreement between them, rather than by the invocation of statutory powers. And because many law graduates wished ultimately to practice in Ontario, its effects extended to other provinces as well.

However, the 1957 agreement did not resolve the underlying controversies over the character and content of legal education that had provoked the resignation of the Osgoode faculty a decade earlier. This was not initially a matter of concern at Osgoode both because the law school continued to operate under the direct control and close scrutiny of the Law Society's Legal Education Committee, and because the law school's leadership and senior faculty favoured a relatively conservative approach to legal education. But "the fiercest debate" was to be reignited at Osgoode during the 1960s.

In its second iteration, that debate was not simply — and certainly not primarily — about whether the profession would control admission to practice. It was about whether law faculties ought to provide a liberal education in law or occupational training for legal practice; about competing theories of pedagogy and how to implement them; about the critical challenge posed by legal scholarship to conventional views of law and legal institutions; and ultimately about whether replication of existing models of legal professionalism was in the best interests of the bar and the public. These issues were being hotly debated in law faculties across North America — not surprisingly given the

upheaval in most political, social, educational and legal institutions during “the sixties”. At Osgoode, while the debate was initially muted, by 1965 it had effectively split the faculty into two factions with younger, mostly American-trained and academically-inclined members challenging the intellectual and pedagogic approaches of their more senior, often British- or colonially-trained and practice-oriented colleagues.

Somewhat surprisingly, the tragedy of 1949 did not repeat itself as farce. In March 1965, the Law Society — increasingly preoccupied with administering its new Bar Admission Course and no doubt anxious to avoid rehearsing “the fiercest debate” — unexpectedly announced its intention to transfer its law school to York University, a recently-established institution with two campuses in suburban Toronto. This decision, however, not only made the debate fiercer; it placed the older, conservative wing of the faculty in conflict with its presumptive ally, the governing body, and ironically cast the younger, progressive wing of the faculty as champion of the Law Society’s initiative. The outcome was inevitable. The Law Society and York formally agreed that the law school was to affiliate with the university as of 1 July 1968; the dean resigned shortly thereafter, along with several senior faculty members opposed to the move; and the latter were quickly replaced by an expanding cohort of newly-hired faculty members willing to support it. This shift in the internal balance of faculty personnel, power and opinion made it almost certain that Osgoode Hall Law School would not only move to a new location under new auspices, but that it would also adopt a new approach to legal education.

It was at this “eventful hour” that Le Dain became dean. His situation was somewhat awkward. He was accountable both to the Law Society and to York for effecting a smooth transition in the year remaining before the affiliation formally took effect and thereafter to the university alone for ensuring the quality and reputation of its new law school. But he had also to respond to the expectations of the Osgoode faculty. It had been working on the transition for some two years prior to Le Dain’s arrival; its membership and mindset had been transformed over that time; and its commitment to progressive change had deepened, broadened and gained momentum. Le Dain, however, did not arrive with an established reputation as an innovative legal educator, though no doubt his inclinations lay in that direction; he had therefore to win the trust of the faculty.

Nonetheless, in many ways Le Dain was well suited for the deanship. He had practised law briefly before joining the McGill law faculty in 1953, returned to practice in 1959, and resumed his teaching career at McGill only in 1966, a year before coming to Osgoode. This unusual combination of academic and practise experience made him a particularly attractive decanal candidate to the Law Society and the University; and his compelling personality immediately won over Osgoode’s faculty and students. Still, the question remained: where would he lead the new law school? As things turned out, he led Osgoode pretty much where it wanted to go. By 1968, its academic policy committee had produced a comprehensive report recommending the restructuring of the upper year curriculum, and more modest changes in the first year. Implementation of this report required a significant reduction in the 1957 agreed list of compulsory courses, which Le



Dain persuaded his fellow Ontario deans and the Law Society to accept the following year, 1969.

Le Dain was a persuasive, passionate and intelligent advocate; he was someone the profession was inclined to trust because of his experience in practice; and having so recently appointed Le Dain as dean, the Law Society could hardly do otherwise. Rather than advocating specific curriculum changes on the merits, or contesting the Law Society's right to veto them, he was therefore able to convince the Society to develop a relationship of trust not only with himself, but with all of Ontario's law faculties. Very much in the spirit of the 1957 agreement, Le Dain argued, law faculties should be free to use their best judgment about how to deliver legal education to their students. The success of this strategy is evident in both the form and substance of the Law Society's 1969 "regulations". In fact, in formal terms, these were not regulations at all. They were simply the Law Society's endorsement of an agreement under which "the University Faculties of Law undertake to offer instruction" in specified "areas of instruction"; they contained no prescriptive language other than that of the "undertaking" itself; and they explicitly acknowledged that "the academic planning authority of each University Faculty of Law" enjoyed full discretion in connection with the title, content, sequencing and length of courses. Thus, despite an attempt by Law Society officials at the time to build a record that supported its claim to unilateral control of all aspects of legal education, the 1969 so-called "regulations" (like the 1957 accord) testify to the emergence of a symbiotic or cooperative relationship between university law faculties and the profession's governing

body: each possesses plenary powers within its sphere of responsibility, but each adjusts its conduct to accommodate the other's. This formulation doubtless reflected the desire of both parties to avoid a third iteration of the "fiercest debate" of the 1950s rather than a conscious decision to constitutionalize their relationship. However, whatever their motivation, the 1969 understanding effectively confirmed the existence of a regime under which law faculties created their own curricula, the Law Society determined criteria for admission to practice and the parties engaged in respectful consultation.

Le Dain's strategy produced substantive results as well. The long list of required subjects agreed in 1957 between the universities and the Law Society was reduced essentially to the traditional (and current) first year curriculum; students were afforded the opportunity to study a number of subjects that had previously been compulsory; and the way was open for Osgoode to move forward with the curriculum reforms that it had launched the previous year.

However, subsequent developments, at Osgoode and elsewhere, exacerbated the tensions between the academy and the profession over the purpose, values and modalities of legal education that had been building through the 1960s.

One such development was the establishment in 1971 of Osgoode's Parkdale Community Legal Services project, whose objectives were to expose students to clinical pedagogy, to develop poverty law as a field of legal research and practice, and to initiate a new approach to the delivery of legal services for the poor. The Parkdale project was strongly resisted by some elements within the Law Society. However, this resistance was

overcome partly because of the latitude that Le Dain and his decanal colleagues had secured for law faculties in 1969, partly because of the assurances he provided concerning staff supervision of student activities, and partly because of growing acceptance of the clinical model of delivering legal services within the Law Society and the legal aid plan that it then administered. Other changes in law school pedagogy, academic culture, governance and intellectual perspectives provoked equally intense — though less overt — reactions in professional circles; but they were defused by Le Dain in similar fashion. Thus, from the perspective of Osgoode's faculty and like-minded legal academics across the country, Le Dain had indeed done much to "save the tree of knowledge from the axe of power."

However, Le Dain's further efforts on behalf of progressive legal education were to some extent overtaken by his preoccupations as Chair of the Royal Commission on the Non-Medical Use of Drugs — an assignment he accepted in 1969 and completed only in 1972, after retiring as dean. Moreover, his own conception of how to move legal education forward did not always coincide with that of his colleagues. In 1969, for example, he initially resisted the precedent-setting appointment of a social scientist to the Osgoode faculty (but later relented). In 1971, he expressed reservations about the introduction of clinical education (but again relented). In 1974 — by now no longer dean— he argued against (but ultimately acquiesced in) proposed changes to the first year curriculum intended to reduce the hours devoted to so-called foundational courses.

I mention Le Dain's other preoccupations and his reservations about the direction and pace of changes in legal education because in a way it makes his achievement all the more impressive. His intense involvement in the Royal Commission meant that he had not always been centrally involved in debates over policies he was then asked to advocate. His fairly cautious initial reaction to progressive change may well have been the result of his absence from legal academe throughout most of the 1960s, a decade when change was very much in the air. However, as his decanal record suggests and his path-breaking Commission recommendations confirm, he was remarkably open to changing his views even on highly contentious issues. Whatever his personal predilections, and perhaps because of them, Le Dain became the indispensable man of Canadian legal education. He arrived at a moment of crisis in Canada's largest (and once most conservative) common law school; he inherited, then augmented and inspired, a faculty that included many of Canada's leading young scholars; he allowed those scholars to transform the law school's program, culture and governance; he skilfully made the case for the "new" Osgoode and ensured that its ambitions would not be thwarted by a hostile profession or a nervous university; and by doing all those things, he created precedents that other law faculties could follow if they chose to.

Le Dain's very presence as an experienced practitioner who personified and advocated the highest values of legal professionalism, and his strategy of asking that the law school be trusted to act sensibly under his leadership, often carried the day when the merits of the arguments he advanced might not have. Controversial positions espoused by law teachers as academic critics or public intellectuals outraged some elements of the profession. The

devaluing of lawyers' intellectual capital by new approaches to legal knowledge stimulated resentments, especially amongst older lawyers. Individual members of the governing body continued to express concern at the proliferation and interdisciplinary character of optional courses, and at the omission from the list of required courses of some that they perceived as having professional salience. And new patterns of law school enrolment — more highly qualified students, changing gender ratios, greater ethnic diversity, larger graduating classes — led to inter-generational tensions around issues of professional culture, discrimination and competition.

However, thanks to Le Dain, most of these potentially incendiary controversies were resolved without overt conflict. In effect, the Law Society adopted a policy of pretending to regulate, and the law faculties of pretending to comply.

Law faculties thus became masters of their own fate while the Law Society allowed its own regulatory powers (whatever they might have been) to atrophy. But while this arrangement allowed for much greater experimentation in legal education, and in the end ensured that the profession's new recruits would be better prepared for legal and other careers than ever before, it did have one serious disadvantage: the boundary line between academic autonomy and the profession's regulatory jurisdiction remained undefined and the machinery for resolving boundary disputes under-developed.

## 2. A MANIFESTO

By an odd and unhappy coincidence in 2007, shortly before Le Dain's death, the Federation of Law Societies of Canada (FLSC) appointed a Task Force on the Accreditation of Common Law Degrees whose Final Report has now been approved by the FLSC and adopted by a number of provincial law societies. Its ostensible purpose was to address several emerging issues of concern to the governing bodies: the recognition of foreign law degrees as the basis for admission to practice in Canada; the possible establishment of several new law faculties (the first in almost 30 years); arrangements to facilitate the national mobility of lawyers; and the possible characterization of current bar admissions practices as anti-competitive. However, the Final Report hardly mentions these issues. Instead, it proposes a new regulatory regime that, when fully implemented, has the potential to control the admissions policies, curricula, pedagogy, staffing models, resource allocation and governance processes of both new and existing law faculties. During the consultation process, as the Task Force notes, a number of parties "...raise[d] directly or indirectly, the question of whether the Task Force intends some fundamental change to Canadian law schools."

*That is neither our intention nor what we consider to be our mandate. The Task Force fully appreciates the richness of legal education offered in Canadian law schools and the importance to the law schools of preserving their ability to deliver a rich and diverse legal education to students.*

But that disclaimer is misleading in two senses. First, while perhaps the Task Force did not “intend” to bring about any such “fundamental change”, that is the clearly foreseeable consequence of its recommendations. And second, the Task Force has devised a mechanism whereby the profession’s governing bodies can intervene in legal education whenever they cease to “fully appreciate [its] richness”. In other words, the Final Report amounts to nothing less than a manifesto by the profession’s governing bodies of their intention to reassert the direct control over legal education that was explicitly abandoned in 1957 in Ontario, and gradually over the years in other provinces.

Central to the new scheme is an apparently innocuous arrangement whereby graduates of “approved” law faculties will qualify for admission to practice in any Canadian common law jurisdiction. Faculties will be “approved” if they limit admission to students with at least two years of post-secondary education (“subject to special circumstances”); provide instruction “primarily ... in-person”; and offer a teaching program that consists of “three academic years or its equivalent in course credits”. They must also possess certain minimal “learning resources” including “appropriate numbers of properly qualified academic staff”, “adequate physical resources”, “adequate information and communications technology” and “a law library... sufficient in quality and quantity” to permit the law school to “attain its teaching, learning and research objectives”.

These academic and resource requirements apparently pose no threat to existing Canadian law faculties. However, they represent potential pressure points for future

professional intervention. Three examples: mature students may or may not be admitted to law studies depending on how the profession defines “special circumstances”; in the profession’s discretion, “course credits” given for study abroad, clinical experiences or non-law courses may or may not be accepted; and staff may or may not be deemed “properly qualified” depending on what credentials the profession finds appropriate. Start-up law faculties may also find the new regime problematic, as they seek to persuade the proposed accrediting agency — in the face of opposition from existing law faculties and powerful professional constituencies seeking to curtail competition — that they have “appropriate”, “adequate” or “sufficient” academic resources.

By far the most radical recommendations, however, relate to the ability of law faculties to control their own curricula, pedagogy, resource allocation and governance. Their “approved” status depends on their willingness to require students to acquire:

- three “skills competencies” (in problem solving, legal research and oral and written legal communication);
- “awareness and understanding” of legal ethics and professionalism (in a course dedicated to that subject); and
- “a general understanding of the core legal concepts applicable to the practice of law in Canada” (principles of common law and equity; statutory construction and analysis; the administration of justice); “the core principles of public law in Canada” (constitutional law including the Charter and the rights of Aboriginal peoples; criminal law; administrative law); and “foundational legal principles that apply to



private relationships” (contracts, torts, property and “legal and fiduciary concepts in commercial relationships”).

These requirements are somewhat more detailed than those that emerged from the 1957 settlement in Ontario; far more extensive than those agreed in 1969 and actually applied over the next forty years in most provinces; infinitely more intrusive than would be justified given the total absence of evidence concerning deficiencies in the present system; and at odds with the current practice in virtually every Canadian law school.

Law schools do not exist merely to enable the profession to reproduce itself. They create and systematize knowledge about law, educate both future legal practitioners and students destined for other careers, train future generations of legal scholars, provide service and disseminate knowledge to general, legal and policy communities, and contribute to law reform and the administration of justice by providing a critique of the law, the profession and the legal system. But even if the education of practitioners were their only function, the new requirements would not be justified — nor does the Report attempt to justify them. In recommending that law students must acquire three “skills competencies” and be required to demonstrate “a general understanding of the core legal concepts applicable to the practice of law in Canada”, the Task Force crucially neglects to explain why some competencies and concepts are identified as “core” and others not, or indeed on what basis it concludes that all (most? some?) lawyers share a common core of knowledge. In fact, the scant available evidence — a few Canadian academic studies, a

somewhat larger American literature — suggests that, to the contrary, lawyers serve very different clienteles, for whom they perform very different kinds of professional tasks, which almost certainly require very different legal and non-legal competencies and knowledge.

Specialists in, say, intellectual property or taxation will obviously require deep knowledge of the law in these fields but often did not study these subjects at law school and are seldom involved with supposedly “core” fields (such as criminal law or the law of Aboriginal peoples). General practitioners, by contrast, deal with a broader range of issues and subject areas. However, they typically perform quotidian tasks for clients of relatively modest means who seldom need, or can afford, professional advice requiring sophisticated knowledge of either “core” or “non-core” fields. Consequently, the economics of general practice force them to depend not on raw substantive legal knowledge, but on knowledge that has been distilled into standard forms (mortgages, partnership agreements, simple wills) and codified into routine procedures (uncontested divorces, corporate filings, debt collection); to delegate many functions to paralegals and support personnel; and to refer complex files to specialists. Nor is it likely that lawyers employed in corporations, the public service and NGOs (35% of all members of the bar) often utilize “core” knowledge. They generally work in compartmentalized settings requiring job-specific legal and non-legal knowledge; they typically concentrate on specific areas of substantive law; and they too tend to seek specialist assistance as required.

However, whatever their line of work, one “competency” is indispensable for all lawyers: the ability to handle unfamiliar problems, to build one’s own conceptual vocabulary and repertoire of skills – legal or not – and to re-educate oneself repeatedly over the course of one’s career, as the legal system adapts to rapid and fundamental social and economic change. Developing this particular competency is the prime goal of contemporary legal education. Perhaps that is why the Task Force overlooked it.

Everyone knows (and a senior law society official cited in the Report affirms) that lawyers are not “omni-competent”. The governing bodies themselves clearly agree. They neither regularly test practitioners to ensure that they possess the competencies and knowledge required of new graduates, nor force them to acquire, say, facility in oral expression or knowledge of constitutional law, nor discipline them for any deficiencies. There can be no more telling rebuttal of the Task Force’s assertion that all lawyers should possess the same “skills competencies” and “core” of “substantive legal knowledge”.

But perhaps I misunderstand the Task Force. Its insistence that students “must have an understanding of the foundations of law” may rest not so much on its desire to prepare lawyers for practice, as on some theory of how legal knowledge is constructed. However, if the “foundations” mentioned by the Task Force were meant to be historical, it would surely have mandated the study of legal history; and if they were meant to be conceptual, it would have required the study of legal theory, the sociology of law or law and economics; but it mentions none of these. Or perhaps the Task Force believes that

because certain subjects have long been compulsory for first year students, they are inherently “foundational”. This is clearly true in the temporal sense that students must master some of those subjects in first year before being allowed to proceed to second year. But they are not necessarily foundational in the functional sense. Indeed, much of the upper year curriculum is devoted to studying fields of law in which the “foundational” common law doctrines identified by the Task Force are displaced by legislation.

Absent a plausible rationale, then, it is difficult to understand why a 21<sup>st</sup> century Task Force would chisel the traditional, 19<sup>th</sup> century first year curriculum in regulatory stone, ignore the fact that leading American law faculties have long since abandoned this approach, and expand the list of compulsory fields of study by over one-half by adding not only “ethics and professionalism” but also administrative and commercial law, a regression to pre-1969 arrangements.

Ultimately, however, my concern is not just that the selection of compulsory subjects is indefensible on the merits. It is that the Task Force recommendations place law faculties at the top of a slippery slope down which they are almost certain to be pushed by future regulators. Why, for example, should students be required to “demonstrate an understanding of the fundamental legal principles that apply to private (sic)... commercial relationships” but not to pension plans, spousal relationships or holders of public offices? Why should they have to demonstrate the ability to “conduct legal research ... [and] use techniques of legal reasoning and argument” but not the ability to use the literature of the social sciences that both underpins and challenges legal rules and institutions? Why, in this global age, should students be immersed in Canadian law and not international or

transnational law? Why should they be obliged to acquire competency in “well-reasoned and accurate legal argument, analysis, advice and submissions” but not in dispute resolution or client counselling? And why should law faculties be required to certify that their students have achieved acceptable levels of literacy, but not numeracy?

These are logical questions, and future regulators will almost certainly conclude that the logical answer to them is that indeed, more substantive fields and skills competencies should be added to the list of “requirements”. “Logical” that is, so long as one accepts the following premises: that the list can be compiled without empirical evidence of what lawyers do and know today and are likely to do and know in the future; that what lawyers do and know is and will hereafter be based on skills and knowledge common to all lawyers, regardless of the nature of their practice; that absent adherence to this common core in the LL.B./J.D. program, lawyers are and will be incapable of serving their clients competently and ethically; and that given adherence to the common core by law faculties, governing bodies need not ensure that practitioners continue to meet the same standards as applicants for admission will be required to do.

What will be the consequences? First, resources will have to be allocated differently. Faculties that do not already require all students to study professional responsibility, problem-solving, communication or “commercial relationships” will have to either hire new members to teach these competencies and concepts, or redeploy members from their present functions. Second, pedagogy will have to change. Teaching “skills competency” requires a different methodology from, say, teaching courses in gender relations,

environmental law or jurisprudence. With this shift in pedagogy will come a shift in the academic reward system: less for scholarly productivity and graduate supervision, more for teaching the required curriculum. And third, academic planning will have to change. Faculties will have to use their scarce (now dwindling) resources not to respond to what they perceive to be public needs, student preferences, scholarly priorities or equity commitments, but to ensure that they can provide the kind of education on which their “approved” status depends.

Moreover the choices forced on law schools by the new requirement are likely to become self-reinforcing. To place the acquisition of competencies and “core” knowledge at the centre of a law faculty’s educational mission is to marginalize and devalue other approaches to legal education. To cite but one example, McGill’s much-admired “trans-systemic” curriculum is not primarily designed to ensure that students acquire skills competencies and knowledge of core subjects, though no doubt both of these things occur; it is meant to transmit a uniquely broad and deep understanding of law’s many manifestations in a pluralistic society and a globalized world. Students considering whether to attend McGill or what courses to take there, and McGill’s faculty considering whom to hire and what contributions to value in awarding promotions will have to choose between the “competencies” approach of the Task Force and its own “broad understanding” approach. If they make “wrong” choices, faculty and students alike will be penalized by the loss of “approval” for McGill degrees. That prospect will surely dampen enthusiasm for everything that is most distinctive about McGill’s program.

Similar constraints will impair the willingness and ability of all law faculties to address the particular goals they espouse and functions they perform other than those valorized by the Report. The result will be to diminish or eliminate the innovative tendencies of legal education and scholarship. However, as its Consultation Paper made clear, the Task Force is unrepentant:

The concern has been expressed that a curriculum-based standard puts too much weight on prescribed courses and may constrain innovative developments in legal education .... The Task Force is sensitive to this concern, but has a corresponding concern that innovation should not interfere with graduates receiving an education in the essential concepts of the law necessary for practice.

Similarly, in its Final Report, the Task Force reiterates its determination to ensure that all law graduates are trained in accordance with the vision of legal education that it essentially plucked from thin air:

... [T]he most important consideration is that the law school be adequately resourced to fulfill its educational mission. At a time when all public resources are subject to financial pressures, the Task Force is reluctant to be too prescriptive ... but has concluded that there are certain irreducible minima that must be maintained if law societies are to accept the law degree as evidence that the competency requirements are being achieved....

The Task Force, then, claims the right to elevate the “educational mission” of law faculties over their other missions including the production and dissemination of knowledge and informed critique of the legal system; assigns pre-emptive priority within the educational mission to the achievement of “competency requirements” rather than other educational goals such as liberal education in law or graduate study; and presumes to insist that what it acknowledges to be “public resources” are devoted first and foremost to ensuring professional competence, a task assigned by statute to the profession’s governing bodies themselves, and until recently funded by them.

Finally, the Report specifically repudiates the mutually respectful, *laissez faire* relationships that have generally prevailed between law faculties and provincial governing bodies. It mandates deans to submit an annual report confirming that their law school “has conformed to the academic program and learning resources requirements” and to “explain how the program of study ensures that each graduate of the law school has met the competency requirements”. This requirement — unilaterally conceived, imposed without consultation, likely illegal — has no precedent in the recent history of Canadian legal education.

Why would the Task Force be so determined to nudge law faculties towards a more conservative pre-1969 (even pre-1957) conception of legal education? And why would the governing bodies — for no apparent cause — repudiate the decades-long truce between the profession and the academy? What logic could possibly inform these



initiatives? Only one: the logic of power. The point of the Task Force recommendations, it seems clear, was not to enhance the quality of legal practise; it was to subordinate law faculties to the control of the profession. It was, in other words, to reassert the position which the Law Society initially abandoned in 1957 and — thanks to Le Dain — from which it further retreated in 1969 and thereafter.

This is a serious charge to levy. What evidence can I tender in support?

First, the Task Force was established unilaterally by the FLSC. It neither invited law faculties to collaborate in a project of crucial importance to legal education, nor consulted them on the terms of its mandate, nor asked them to nominate members, nor sought their *post facto* endorsement of its recommendations, as it did that of the profession's governing bodies.

The second is that while the Task Force invited submissions at large, and dealt directly with representatives of the Council of Canadian Law Deans (CCLD), its consultation processes was remarkably unsuccessful in promoting dialogue with Canada's legal academic community. And understandably so: its Consultation Paper was couched in language that strongly suggested that the Task Force had become firmly fixed in its views before seeking the opinions of others.

The third is that if the Task Force recommendations are implemented, law faculties will be under great pressure to comply, though they clearly retain the legal right to refuse to do so. The proposed compliance mechanism, which is to be established unilaterally by the FLSC, imposes on the law faculties (and especially on their deans) the obligation to certify annually that they have conformed to academic requirements they did not adopt, participated in pedagogic practices they did not endorse, adhered to an academic program established by non-academic bodies and left themselves vulnerable to the exercise of the accrediting power for illicit reasons.

As the Task Force notes in its Final Report:

... [T]he creation of requirements represents a change in current practices and any compliance mechanism, however modest, will require some adjustment....[T]he recommendation for a stand-alone course relating to ethics and professionalism and the requirements to address competencies may require adjustments by some law schools....

However, neither the “compliance mechanism” nor the “requirements” nor the ensuing “adjustments” can properly be described as “modest”. The compliance mechanism requires that law faculties (and arguably the governing bodies and the FLSC itself) violate their governing statutes; the requirements to teach ethics and address competencies involves the appointment of new faculty personnel, almost unthinkable in these difficult times; and a profound adjustment of law school priorities is likely to be necessary unless

deans are prepared to mislead the governing body, on an annual basis, concerning their faculty's compliance with the new requirements.

Finally, the Task Force signalled from the outset that it was determined to wield (or at least brandish) the "axe of power". Its Consultation Paper observed ominously that universities — and presumably their law faculties — "have a different mandate from law societies and define their mission differently" and it noted that the existing *laissez faire* arrangements "do not give weight to the responsibility of law societies to determine the academic requirements that are necessary to practice law". And while its Final Report could easily have disavowed any intention to disrupt the long-standing, if informal, *modus vivendi* between the profession and the academy, the Task Force pointedly declined to adopt a proposed set of "constitutional" principles that would have guaranteed its continuation. By doing so, and by introducing a coercive compliance mechanism, the Final Report adheres rigorously to the logic of power and signals clearly the profession's intent to impose its will on Canada's law faculties.

### **3. A MORAL (OR POSSIBLY TWO)**

One can draw at least one moral from this narrative of the efforts of Canada's legal professions to regulate the education of their new members from the initiation of "the fiercest debate" in 1949 through Le Dain's deanship in the late 1960s down to the present. The moral is this: Law Societies should not make or implement policies concerning legal

education in an evidentiary and analytical vacuum and without clearly demonstrating the need for enhanced regulation, Still less should they do so unilaterally, without the consent or participation of those closest to the enterprise and with primary legal responsibility for conducting it. And most assuredly, they should not adopt an approach which puts at risk the great advances in legal education achieved during the four or five decades when Law Societies acknowledged the limits of their own powers and capacities, honoured their commitment to the legal academy not to act unilaterally, and allowed the axe of power to become blunt and rusted.

And there is a second moral as well. If law faculties do not vigorously defend their autonomy — as they and their universities have belatedly begun to do — they are very likely to lose it. Taking the most optimistic view of the matter, the FLSC, the Task Force and the governing bodies have all acted in good faith; they have re-asserted their formal ownership of legal education only as a precautionary measure, in order to forestall claims by law schools to have acquired a prescriptive easement over their own governance; and they intend only to provide general guidance to law faculties while leaving them free in practice to conduct themselves as they deem appropriate. But this optimistic scenario is unlikely to survive changes in personnel, attitudes or circumstances within the FLSC or the governing bodies. Indeed, by refusing to accede to constitutional principles governing future developments, the FLSC and its affiliates have served notice of their intention to act unilaterally and, if necessary, intrusively; and by introducing a new compliance mechanism, they have forewarned the law faculties of the means they will use to carry out that intention.

Law faculties therefore have good reason to defend their autonomy and protect what they value most in legal education. Thanks to Gerald Le Dain they have forty years of accumulated experience to demonstrate that autonomy produces better results than regulation. They have strong legal and principled grounds on which to reject the Task Force recommendations and the practical means to defeat them, by a collective refusal to comply. In this new “eventful hour”, law faculties have a choice: either to defend the tree of knowledge, or to live hereafter with the axe of power poised to chop it down.

**APPENDIX A****PROPOSED PRINCIPLES TO ACCOMPANY  
THE FLSC STANDARDS FOR APPROVED COMMON LAW DEGREES**

- *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.*