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The Views of the Practising Bar

by Roger D. Yachetti, Q.C.*

I. RECENT HISTORY

THE ISSUE OF numbers in the profession is not a new one, but rather one whose periodic emergence coincides generally with slumps in the economy. There is a recent and traceable history which is worthy of comment.

In July, 1979, a research company known as Earl Berger Limited conducted a national demographic survey for the Canadian Bar Association which was concerned about the apparent lack of employment opportunities for young lawyers.

In Ontario, the Berger Survey received 5,905 responses from a profession which then numbered 12,303, a 48 percent return. The survey made significant findings with respect to the profession in Ontario:

1. In 1979, 45 percent of the lawyers in Ontario were between the ages of 25 and 35 and 25 percent were between the ages of 35 and 44, i.e. 70 percent of all lawyers in the province were under the age of 44 years;
2. In 1979, Ontario had the highest percentage (16 percent) of lawyers with less than five years experience, practising as sole practitioners.

This report reached the following important conclusion:

In general, however, it seems to us—and this is set out as a suggestion rather than a conclusion—that the data indicate there is a significant under-employment among lawyers in some parts of the country. In support of this suggestion we note the substantial proportions of inexperienced and experienced lawyers in some provinces spending a significant amount of their time on Legal Aid. We also note the substantial proportions of inexperienced lawyers in some provinces who are in sole practices as well the proportion of experienced lawyers who are associates rather than partners or in sole practice.

The report suggests that the under-employment referred to may have been due, in part, to a poor geographic distribution of graduates or the failure of the general practitioner to adapt to changing conditions.

The *Marie P. Huxter Report*, submitted to a Joint Committee of Ontario Law Deans and The Law Society of Upper Canada in December, 1980, resulted from a survey of employment opportunities for law school graduates in 1978 and 1979 and graduates of the Bar Admission Course for 1977, 1978 and 1979. Although it dealt substantially with the question

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of discrimination on the basis of sex, it contains some interesting findings with respect to both articling positions and permanent legal employment. With respect to articling positions, the report makes the following findings:

1. There is a perception on the part of law students that it is becoming increasingly more difficult to find articling positions;
2. Students are less successful now than they were five years ago in obtaining articling positions with the kind (or size) of firm preferred.

With respect to permanent legal employment the report comes to the following conclusion:

A substantial number of people are looking for positions even after they have qualified to practice.

The unemployment rate on completion of the Bar Admission Course for the 1975, 1976 and 1977 law school graduates was approximately 41 percent. That is, 41 percent of the respondents did not have positions when they completed the Bar Admission Course. Thirty days after the Bar Admission Course, 24 percent of the 1975 graduates, 26 percent of the 1976 graduates and 29 percent of the 1977 graduates did not have positions. Six months after the Bar Admission Course 9.3 percent of the 1975 graduates and 7.9 percent of the 1976 graduates did not have positions. This unemployment rate could not be calculated for the 1977 graduates since they could not have completed the Bar Admission Course before March 1979 and had not had six months to search for positions by the time of the survey.

Four percent of the 1975, 1976 and 1977 law school graduates were still not employed in the legal field at the time of the survey—and half of these had no jobs at all.

The success rate in obtaining positions with the kind (or size) of firm preferred has risen—from 67 percent for 1975 and 1976 graduates to 74 percent for the 1977 graduates. The respondents were more successful in finding employment in the geographical location preferred—overall success rate was 92 percent. Seventy-four percent of the respondents found employment in their preferred area of practice. The percentage of 1977 graduates who said they wanted to practice alone has doubled when compared to the 1975 graduates—9 percent and 4 percent respectively.

This survey was conducted in 1979 and there were still 4 percent of the 1975, 1976 and 1977 law school graduates—approximately 130 lawyers—who were as yet not employed in the legal field.

In the fall of 1980 the then, newly-elected, Treasurer of the Special Committee on Numbers in the Profession, visited almost every county and district Law Association in the province to try to determine the status of the profession in each locale. The Treasurer reported to Convocation that the single most worrisome matter was that of the annual influx of Bar Admission graduates. The Treasurer concluded that the increases in numbers were unwarranted by any upsurge in the demand for legal services and that the local Bars saw as a result that the standards of pro-

fessional service were being threatened.

At about the same time, the Treasurer asked the forty-four benchers of The Law Society of Upper Canada (forty elected and four appointed lay benchers) to list their priorities in terms of the problems facing the profession. The benchers themselves gave top billing to the problem of numbers in the profession.

A questionnaire was then sent to all members of the profession in Ontario, obtaining their views on such matters as: the numbers entering the profession, advertising, legal education, professional income, overhead expenses and employment opportunities. Although the questionnaire was not prepared by a professional polster and, for that reason, may be subject to some criticism, it did elicit 7,673 responses from 13,296 recipients, a 58 percent response rate. There were then 10,483 members of the profession engaged in private practice and the Society received responses from 6,402 of them. Responses to the questions dealing with numbers in the profession demonstrated an almost overwhelming concern. With respect to the numbers entering the profession, 72 percent of the respondents were of the belief that controls on the numbers entering the profession would be beneficial to the *public* and 85 percent of the respondents felt that controls would also be beneficial to the *profession*. On the question of who should impose the controls, 73 percent of the respondents felt that it should be the Society rather than the universities.

The results were analyzed to determine whether the view amongst the profession as to controls on entry varied according to date of call to the Bar. There was not a significant difference in the views on controls to entry amongst the senior and junior members of the profession. Both groups felt controls would benefit both the public and the profession. Generally, the majority for all call years felt the Society should impose the controls on entry although the most recently called members (1979-1980) were not as strong in their support of this proposition as were the older members.

I hasten to point out that the present policy of the Law Society is that there should be no artificial restrictions on entry to the profession.

In April of 1981, Convocation approved the formation of the Special Committee on Numbers in the Profession.

Finally, in June 1981 there was a meeting of the Presidents of the County and District Law Associations with the Benchers. Once again, the message from across this province was clear. The stability of the profession is being threatened by too many lawyers choosing too few clients.

II. THE NUMBERS IN ONTARIO

Just what have the increases in numbers been over the past thirty years? According to the records of the Law Society they have been as follows:

1951—1961	3,932—5,316
1961—1971	5,316—7,610
1971—1981	7,610—15,294

Of the 7,610 lawyers in the province in 1971 approximately 6,602 (86 per cent) were engaged in private practice. Of the 15,294 lawyers in the province in 1981, 10,803 (72 percent) were engaged in private practice.

On the local level, the ratio of lawyers in private practice to the population has increased in almost every county or district of the province in the three years from 1977 to 1980. In some cases the increases are rather substantial. For example, in February, 1977, using a 1975 population for Essex County of 310,342, there were 221 lawyers; a ratio of one lawyer for every 1,404 persons. In July of 1980, using a 1978 population figure of 316,363, there were 292 lawyers; a ratio of one lawyer for every 1,083 people.

In February of 1977, using a 1975 population figure of 304,824 persons for Middlesex County, there were 315 lawyers in private practice; a ratio of one lawyer for every 968 persons. In July, 1980, using a 1978 population figure of 317,365 for the same county, there were 428 lawyers; a ratio of one lawyer for every 742 people.

In February of 1977, using a 1975 population figure of 286,281 persons for the Regional Municipality of Waterloo, there were 237 lawyers in private practice; a ratio of one lawyer for every 1,208 persons. In July of 1980, using a 1978 population figure of 303,492 persons for the same region, there were 313 lawyers in private practice; a ratio of one lawyer for every 970 persons.

Because the profession in Ontario is so heavily concentrated in Metropolitan Toronto due to the concentration there of business, offices, and courts, it may not provide a very helpful barometer. But even there, the ratio has risen from one lawyer for every 518 persons to one lawyer for every 408 persons. Of the forty-seven counties and districts reviewed, I could find only three in which the ratio had actually decreased (Dufferin County, Kenora District and Parry Sound District) and then only by a modest extent.

III. ECONOMICS AND THE LIKE

In the face of these dramatic increases in the numbers of lawyers in Ontario there are many economists including some very well-established lawyers, who say that the market place will eventually correct any imbalance between the supply of lawyers and the demand for legal services.

In practice, it is difficult to comprehend the theory that the market place will correct an imbalance between the supply of lawyers and the demand for legal services when, in fact, the supply side of the equation remains constant at approximately 1,050 lawyers per year. In business, it is generally felt that one attempts to regulate his production of mouse traps or widgets, or whatever, on the basis of the anticipated demand for

the product. Unless the businessman is being subsidized or stockpiling for some good reason, a manufacturer or a farmer will soon cutback on his production if his products are not being sold, profitably.

There has never been any real study of the demand for legal services in the Province of Ontario. The law schools simply pump out a relatively fixed number of graduates and the Bar Admission Course pumps out a relatively fixed number of lawyers.

It has been said that fewer and fewer lawyers will enter private practice as the squeeze becomes more and more apparent. What justification is there for that belief? Where are they going to go? Where is the evidence of the willingness of business and commerce to absorb the overflow? Where is the evidence of the willingness of Bar graduates to pursue careers other than in private practice? More importantly, when the fate of this entire profession is at stake, why should we even think of proceeding on the basis of a hope and a prayer?

It is clear that there is no anticipation of a drop in the number of law school seats in the next five years. The number of students called to the Bar in the years from 1978 to 1981 have been relatively stable and averages 1,052. The average annual attrition rate produced by death, retirement, judicial appointment or disbarment, over the past four years, has been approximately 120. Accordingly, we have ample evidence that there will be a net average increase in the membership of the Law Society of approximately 930 per year. This will result in a total lawyer population of approximately 20,000 by the year 1986.

Currently, there are approximately 10,800 lawyers engaged in private practice—72 percent of the total Law Society membership. Even if the percentage drops to 70 percent by 1986, that will give us approximately 14,000 lawyers in private practice by that year. That is an increase of 3,200 private practitioners in a period of five years. If we think we have a glut now, imagine what it will be like in just five years.

What is it that is going to happen in Ontario over the next five years that will so increase the demand for legal services that these 3,200 additional practising lawyers will be gainfully employed? The fact is that in the past decade or so we have actually observed a loss of a number of functions traditionally carried on by lawyers. The abolition of succession duties coupled with the expansion of trust company activities have cut deeply into what was for many private practitioners a mainstay—estates. Conveyancers and divorce packagers continue to create the illusion for some members of the public that they can have services performed in those two very important areas by persons other than lawyers and at cut-rates. Larger firms, particularly in Toronto, are making more and more extensive use of paralegals, at the expense of junior solicitors. I suspect that it is only a matter of time before some politician or other opportunist will decide that it is time for a true no-fault insurance system in Ontario.

IV. PRACTICAL EFFECTS ON THE PROFESSION AND THE PUBLIC

The most significant effect which the over population of the practising Bar has had upon its members is a sense of loss of professionalism and with it a loss of worth. To put it colloquially, "lawyers are a dime a dozen." Or, to put it in the words of a young and obviously disillusioned lawyer who recently wrote to the Treasurer, ". . . most street corners have more members of the world's second oldest profession than they do of its first".

These are losses which cannot be measured by statistics or graphs or curves and they adversely affect the public as well as the profession. A well-trained, enlightened and independent Bar is a public asset, particularly in these days when the rights of the individual are constantly threatened by big business, big government and big bureaucracy.

Although this sense of loss of professionalism affects all of the members of our profession whether they wish to admit it or not, I believe that it is mostly keenly felt by the graduates of the last seven or eight years; nearly one-half of the profession in this province. There are a number of factors which, in my opinion, contribute to this sense of loss of professionalism.

A. *The Quality of Legal Services*

There is an apprehension among the practising Bar that the reality of too many lawyers chasing too few dollars is resulting in a deterioration in the quality of legal services being rendered to the public. The Law Society is, of course, very concerned about any such development, from a disciplinary point of view. There is a difficulty in obtaining facts to substantiate the apprehension. Benchers receive information that many lawyers are being forced, because of rising costs and increased competition, to perform tasks such as representation in reasonably complicated real estate transactions or representation of persons charged with routine criminal matters, such as impaired driving, for ridiculously low fees. The predictable consequence of such practices is shoddy work. Recently, the Law Society disbarred a young lawyer of six years standing for stealing relatively petty sums from his clients by falsifying and exaggerating disbursements in real estate matters. The Benchers noted that he was probably trying to compensate for the low fees which the investigation revealed.

B. *A General Decline in Income Levels and Expectations*

In 1973 the profession experienced a 10 percent annual increase in relative earnings. In 1974 there was a decline of 1 percent. In 1975 there was a massive decline of 16 percent. There are no statistics readily available for the years since 1975, the years in which the impact of the numbers has been greatest. At a time when the earnings of just about every other

group in the economy are on the increase I suspect that the earnings of lawyers in both absolute and relative terms are on the decrease. In Hamilton, for example, a young lawyer starts out at a salary which is slightly more than one-half of the salary commanded by a starting police constable.

C. Rampant Accusations of Incompetence

In the October 31, 1981 edition of *The Toronto Star* there is an article on the Conference of Criminal Justice held in Halifax but attended and staffed by largely Ontario lawyers. It was headed: "New Lawyers Accused of Court Incompetence". It featured comments by several leading Ontario lawyers and the Chief Justice of the High Court.

On the cover of the September edition of a local magazine called "Hamilton" there appeared typically, unflattering caricatures as well as the following description of what was inside: "Fear and Lawyering in Hamilton. SHYSTER. An Indispensable Every Man's Guide to Dealing with Barristers and Solicitors and Other Assorted Characters". The featured article concluded with the following paragraph:

Why, then, do struggling lawyers remain in an overcrowded profession with a diminished public image? And why do they accept mediocre wages for frustrating work? "After spending seven years to become a lawyer, after acquiring highly specialized skills, I think I owe it to myself to try and make a go of it in spite of the market," explains Grant (a young lawyer). Or, as another young lawyer said, "This profession still provides the occasional opportunity to confront wrong and by applying your skills to see that right is finally done. This potential to do good is what keeps law a noble profession, and makes it a tremendously gratifying way to make a living; but it's amazing sometimes how much crap one will put up with for a chance at a little gratification.

D. The Loss of Senior—Junior Relationships and Training

Because of financial constraints, medium-size firms and particularly those outside of Metropolitan Toronto are no longer hiring junior solicitors. The young lawyers who seek these positions are forced to form partnerships with those of equal or less experience or to commence practising as sole practitioners. For many, the new direction is premature and unrealistic. The result is unseemly and unprofitable competition, fee-cutting and poorly represented clientele. These undesirable results reflect upon the entire profession.

E. Errors and Omissions Levies

According to figures obtained from the Law Society staff, in 1972 when there were 8,061 lawyers in the province, 88 percent of whom were in private practice, there were 29.2 claims per 1,000 lawyers. In 1980 when

there were 14,303 lawyers in the province, 75 percent of whom were in private practice, there were 96.4 claims per 1,000 lawyers. The pressure of numbers permeates the entire profession.

F. Discipline and Compensation Fund

The previous all-time high for disbarments since 1950 was in 1970 when there were fourteen. Since that year, the record is as follows:

1971—3
 1972—1
 1973—4
 1974—7
 1975—2
 1976—11
 1977—3
 1978—10
 1979—5
 1980—12

In 1981, to date, there have been *seventeen disbarments* and there are two further Convocations scheduled for the remainder of this year. One would have to do an in-depth analysis of each individual case before reaching any reliable conclusions as to the cause of this rapid increase in the rate of disbarments; however, it currently stands as another factor to be considered within the context of this debate.

Currently, claims against the Law Society's Compensation Fund total in excess of \$16,000,000.00. Even applying the discretionary limits, the net total would be approximately \$5.8 million dollars. Admittedly, there are some claims which are spurious and others which are duplicated. However, these figures do represent all-time highs and are probably indicative of more than the simple increase in the number of private practitioners.

V. THE REMEDY

I noted with some interest that the flyer for this conference described it as "a conference to examine the number of persons entering the legal profession, the impact upon the public and the profession, and proposed admission controls".

I hope that those who have planned this conference don't harbour the suspicion that the Law Society has already formulated a plan for the imposition of controls and is simply waiting for the opportune time to unveil its proposals, because that simply is not the case. In fact, the current policy of the Law Society is one opposed to the imposition of any controls which could be said to be artificial.

It is astonishing how the suggestion of controls within the legal profession raises abnormally loud hues and cries when almost every other

profession or trade, for that matter, appears to control its numbers in some very obvious ways.

Those who oppose the imposition of any form of control on the numbers entering the profession fall into two camps:

1. Those who are opposed on ideological grounds—"every person in Ontario should have the right to become a lawyer if he so chooses";
2. Those who are opposed because they believe that any imposition of controls by the Law Society would result in political retaliation.

The ideological argument is more impressive than its political counterpart. With respect to the ideological argument, the lesser of the two evils is to be preferred the greater evil being the destruction of the profession through glut.

With respect to the political argument, one cannot conceive of any responsible government retaliating against a professional body for doing what is not only in the best interests of the profession which it represents but in the best interests of the public which it also represents.

What is envisaged is not unilateral action by the Law Society or the law schools or the government, but co-operative action by all three bodies in the best interests of all. If, for example, the law schools were to voluntarily impose a cutback of 25 percent on first year enrolments, with the approval and financial assistance of the government, the problem would likely be solved in a few short years. If an imbalance on the demand side were to develop, it would be a relatively simple matter to increase enrollment.

Another approach might be to limit entry to the Bar Admission Course, thus leaving the right to acquire the LL.B. degree unfettered. Under such a proposal there would have to be sufficient lead time so that there would be no unfairness to any one who is already in the legal education stream.

Yet another approach which avoids deliberate cutbacks or controls would be an approach combining the following measures:

1. Vocational guidance at the high school and undergraduate levels so that young aspirants are fully aware of the advantages and disadvantages of a career in the law;
2. The altering of law school curricula so that more courses geared to the business and commercial world are offered;
3. Institution of a program, jointly sponsored by the law schools and the Law Society, to better inform the business and commercial world of the attributes and usefulness of a law school graduate in their activities;
4. Amendment of the Law Society's regulations so that the requirement that law students who complete their LL.B. proceed immediately to the Bar Admission Course will be relaxed.

Those of us who follow stock markets, predictions with regard to increases or decreases in the Gross National Product, inflation and the like know how tricky and erroneous statistics can be, particularly when they

lead to projections. In World War II a bomber pilot going on a raid was told that he had a 96 percent chance of survival. This was reassuring. However, as he had to do it a minimum of thirty times, he had a 120 percent chance of being dead. Take the case of 419 Squadron which never had more than 140 air crew at top strength. It suffered over 1,500 dead in two years.

The problem is surely manifest and it must be solved if we are to restore and maintain the very high standards which the legal profession demands.