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“Are There Too Many Lawyers?” A Consumer Perspective

*by Andrew J. Roman**

I. INTRODUCTION

ALTHOUGH THERE IS no shortage of professors teaching consumer law in Canada today, the full-time private practitioners of consumer law can be counted on the fingers of one hand. There are exactly five: two at the Consumers' Association of Canada, and three connected with the Public Interest Advocacy Centre (at PIAC offices in Vancouver, Toronto and Ottawa). With the exception of the Vancouver PIAC office, all of these lawyers are funded by the Federal Department of Consumer and Corporate Affairs. If there are too many lawyers, there are certainly not too many consumer lawyers. I could easily add a dozen of them to our staff, and still have to turn down cases.

II. MYTH NUMBER ONE - A GREATER NUMBER OF LAWYERS IN PRACTICE IS BETTER FOR THE CONSUMER

This theory assumes that more lawyers in practice will increase competition and drive down the price of legal services to the benefit of the consumer. A larger supply of lawyers, however, is not necessarily a benefit to consumers, for at least three reasons.

First, legal training is expensive. I would say that the total cost to all sectors of society to train a lawyer is roughly half a million dollars. If we train too many, so that a substantial number have to leave the profession, we will be wasting our money training half million dollar taxi drivers, waiters, insurance salesmen, or, if the recession improves, businessmen. Over time what we may save in legal fees would be offset by the cost of this dropout factor. Naturally this would be a serious misallocation of resources.

Second, law practice is not an occupation that one moves out of and into easily. Someone out of practice for a few years is likely to find it difficult to get back in at a comparable income level. Due to its linkage to the business cycle, the market for legal services is fairly volatile. If too many lawyers are forced to leave practice, a temporary surplus of lawyers during a recession may result in a shortage, with higher prices, during the recovery and boom phases of the cycle.

Last, downward pressure on prices may result in an invisible, but

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real, downward pressure on quality. A typical client may understand very little about the quality of legal services. To a client, law is a magic black box. He puts money in at one end, and sees mysterious papers or a divorce or a jail sentence emerging from the other. Subject only to the risk of a law suit, short cuts may be taken, telephone calls unreturned, drafting made more standardized with less attention to particular cases, and so forth. Because there are no written legal service quality standards, quality may be reduced without client detection. All this response to price pressures. It is unclear whether consumers would benefit.

III. MYTH NUMBER TWO - "CHEAPER" LEGAL SERVICES ARE BETTER VALUE

This myth is usually advanced by the proponents of law and economics programmes, wrapped in the Economics I jargon of efficiency and output. Unfortunately, they did not get as far as Economics II where the student learns what is wrong with Economics I. The unarticulated, and false major premise is that legal services are a standardized or homogeneous commodity like the widget factories described in elementary economics texts. If this were so, everything else being equal, the \$50 per hour lawyer should be a far better bargain than the \$100 per hour lawyer. For some kinds of legal services, the work may well be standardized, for others not - but who knows how much of each? Let us consider two hypothetical examples of the relationship between price and value.

Suppose a client asks lawyer A, whose fee is \$100 per hour, for a standard two-page will, leaving everything to his spouse. The lawyer could say dictate it in ten minutes and then charge 1/10 of an hour work. A real bargain! Lawyer B, whose hourly fee is the same, might talk to his client for half an hour about the size of his estate, the potential need for an estate plan, the need for considering other family members, etc., and charge the client \$50, but still draw up the identical will. How should the intangible benefit of the additional attention from lawyer B be valued? Is this particular client's self-diagnosis of his particular needs adequate? Is the longer discussion a waste of the client's time and money? What is better value for the consumer?

Now, consider another typical situation. Lawyer A, at \$50 per hour, takes eight hours to prepare for a trial. Lawyer B, at a \$100 per hour, takes two hours to prepare for the very same trial. There is no standard period of time to prepare; it depends on each case. Lawyer A's bill will be \$400 and lawyer B's \$200. If their preparation were equal, the higher hourly-rated lawyer would be the better bargain, despite charging twice the hourly rate. Presumably, this is because he is more efficient due to greater experience or perhaps, greater confidence in his reflexes. However, is the two-hour preparation really equal to eight hours?

Changing the facts a bit, assume that this time the \$100 per hour lawyer spends eight hours preparing and sends a bill for \$800 for this part

of the work, while the \$50 per hour lawyer spends only two hours preparing and bills a total of \$100. The senior lawyer ought to be more efficient and bill fewer hours because his higher billing rate ought to be justified by higher efficiency. Once again, though it is not necessarily the case, unless we make that unreal assumption that everything else is equal. Perhaps the lower hourly-rated lawyer is having trouble making ends meet this month, and can make more money doing real estate deals, or settling cases, so he cuts corners and hopes to "wing it" at trial. Perhaps, to be thorough, he should have spent at least eight hours preparing. Yet, perhaps the more experienced counsel has found some evidentiary or legal pitfalls he wants to cover, which the junior lawyer never noticed. Which lawyer's bill represents the better consumer value?

Obviously, these examples are all hypothetical, but they do reflect reality. The point is this: without looking at the facts of each case in detail, any generalization or assumption is likely to be wrong as often as it is right. In the absence of knowledge of other key facts, the application of simple economic theories of supply and demand to judge the value of legal services will lead to predictions of value about as good as those produced by tossing a coin.

IV. MYTH NUMBER THREE - BY PURSUING ECONOMIC SELF INTEREST, THE LEGAL PROFESSION RESTRICTS THE SUPPLY OF LAWYERS TO CREATE SCARCITY AND DRIVE UP PRICES

Economic theory would tell us that, because competition for leadership of the legal profession is imperfect, supply decisions made by the leaders of the profession will be sub-optimal. This means that membership in the Benchers of the Law Societies is heavily weighted toward lawyers who are senior partners of larger firms, or who are more likely to be employers than employees. It takes a lot of time to be a Bencher, and the economic support of a profitable firm helps to compensate for lost client billings. The campaigning and voting support of the larger firms is also of some assistance in Bencher elections. If the Law Societies are effectively controlled by employers and if their decisions should reflect their economic self-interest, one would expect them to favour a vast oversupply of lawyers, not a scarcity, for the economic theory to be consistent. Because it is very difficult to start a law practice today most employers are deluged with applicants for a relatively small number of positions. A larger number of keen applicants will drive down the wages that lawyer-employers must pay. This large army of inexperienced lawyers is unlikely to entice away any major clients, and the firm's billings will be unaffected. Therefore, the Benchers' profits would increase, not decrease, with a greater output from law schools.

Remember, though, all of this is economic theory. In fact, the Law Societies do not control supply. Their power is to approve law schools, and once this approval is given, it cannot readily be withdrawn. They

have no power to determine the enrollment in approved law schools. Moreover, with the possible exception of the Quebec Bar, bar exams are not used to control membership in the profession. In Ontario, the failure rate in the bar admission course is very low - 2% to 3%.

The principal variable affecting supply of lawyers is the vanity of university presidents. They use two basic arguments to push the Ministry of Colleges and Universities to build law schools at their universities. First, if the university already has a faculty of medicine, it should also have a law school to round out the professional faculties; second, if the university has not been given a medical school, it at least deserves a law school. The total lack of concern for balancing supply with demand is excused by arguing that "we don't certify lawyers, we only give academic degrees in law". That is not why most people go to law school; they want to be lawyers. Whose duty is it to inform them that they may not be able to realize their goals upon graduation? Or, to inform the government that a certain percentage may become very expensive trainees for the bureaucracy, for business, or, like Ph.D.s in other fields, for the taxi industry?

Anyone who believes there are too few or too many lawyers would be hard pressed to pin the fault on the Law Societies.

V. MYTH NUMBER FOUR - LAW IS A PROFESSION AND SHOULD NOT BE JUDGED BY THE SAME CRITERIA AS WE JUDGE MERE TRADESMEN

This is a myth propagated by some of the Benchers. Of course law is a profession, but it is also a business, as anyone who receives a lawyer's bill can attest. I have heard some of the speakers at lawyers' events describe us as closer to God than even the clergy and, by virtue of our devotion to excellence and nobility, immune to the crasser economic preoccupations of lesser mortals, who merely pursue wealth. Alas, these lesser mortals and some of the Philistines in our own profession do not share this lofty view of the practice of law. I would even go so far as to suggest that the Professional Conduct Handbook be amended to declare that making arguments based entirely on professional mystique is conduct unbecoming a barrister and solicitor.

As per diem rates of \$2,000 for senior litigation practitioners become more common, it becomes more difficult to explain such fees to the average man in the street by means of the argument that we are not businessmen but professionals. I am not questioning the value of the services, if that is what clients are willing to pay. I sincerely hope, however, that those who push on this professional angle so heavily are more sensitive to what is a persuasive argument in a court of law than they appear to be with regard to what is persuasive in the court of public opinion.

VI. CONCLUSION

There is nothing wrong with applying the principles of economics in making decisions about the extent to which the supply of lawyers meets

the demand at a reasonable price. Economic theory is not to be feared. What is objectionable are bad economics and incorrect theories. Even with our preoccupation with general principles, what can readily be seen as false, uncertain, or unprovable should not be assumed. Good theory is honest. It embraces all relevant facts, not merely those which are easily available, and it collects data and estimates numbers wherever possible. If too many important qualitative factors are unknown, rather than make assumptions one way or the other, based on little more than thinly-disguised ideological predispositions, good theory would dictate that we suspend judgement until we know much more.