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Are There Too Many Lawyers

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"Are There Too Many Lawyers?"

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I. Introduction

THE EARLY FIFTIES presented the legal community with a very different problem than is alleged to exist today. At present, law schools are asked to deal with the reverse situation, that of educating substantially increased numbers of law students. It was assumed that the legal profession was under-populated and that the increased number of law school graduates could be accommodated in legal practice. That in simple terms was the raison d'etre of the agreement entered into in 1957 between the representatives of the Law Society of Upper Canada, the governing body of the profession and the Osgoode Hall Law School, on the one hand, and the representatives of the Ontario universities on the other. This led immediately to full recognition of the only other law school in the province and the establishment of three new ones. Subsequently a sixth law school was established at the University of Windsor.

Another factor in the equation leading to large numbers of lawyers was that the agreement provided for the graduates of an approved law school anywhere in Canada to be admitted to the Bar Admission Course in Ontario on the same terms as the graduates of the Ontario schools. The terms of approval of these schools were part of the agreement and were easily met by all common law schools in the nation, and eventually by the common law graduates of the McGill faculty in Quebec as well.

Transfer regulations were also rewritten at that time rejecting the principle of exclusion, providing for minimum competence, but the number of transferees is not part of the currently perceived problem.

II. Establishing the Density of the Profession

Law Schools made a real effort in the middle fifties to ascertain some reliable criteria for establishing the optimum density for the population of the legal profession. This, of course, was highly relevant to the question of how big and how broad additional law school capacity should expand. R. J. Gray at Osgoode Hall was very active in pursuing this enquiry, and members of the faculty at the University of Western Ontario Law School visited the experts south of the border to get the benefit of their experience. They learned that, by and large, it required more lawyers to service the legal requirements of a densely populated, commercial, industrial and

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corporate community, than a sparsely populated agrarian rural community. The sources in Canada were less helpful. Planning progressed on the basis of providing accommodation for expected applications for admission discounted by some factor to turn away those whose qualifications based on performance on the LSAT and whose academic records were not up to standard, in that they were perceived as being poor risks for succeeding in the LL.B. programme.

The history of this policy is straightforward. As the number of applications flooded beyond that which had been anticipated, both the standard of performance on the LSAT and the academic performance of candidates were raised dramatically to limit enrollment at the six law schools to numbers that could be accommodated, with some increase in the original planned capacity. Although there is no formal central application service for law school applicants, an unofficial figure indicates that for 1981 the Faculty of Law, University of Toronto, received 1,900 applications for 160 first year spaces and Osgoode Hall Law School, York University, received 3,000 applications for 330 spaces. The acceptance rate, therefore, runs approximately 10 percent at these two institutions. These figures for applications ought to be discounted substantially to reflect the fact that most applicants file at more than one institution. Statistics giving net single application numbers remain unavailable. The possibility of further law schools being established to accommodate those rejected by the six was an idea generally frowned upon because, for a time, concern has been expressed that the legal profession is becoming over populated.

In the halcyon days of the 1960's and early 70's, financial resources appeared to present no real problem as increased levels of funding were made available to the universities from governmental sources, as well as student financial assistance under OSAP.

III. Recent Statistics

The experience with law school capacities, admissions policies, and available levels of funding, has produced a steady flow in law school enrollments over the last six years. The system has been operating under a full head of steam as indicated by the following statistics:

ENROLLMENT IN ONTARIO LAW SCHOOLS

INSTITUTION	1975-76	1976-77	1977-78	1978-79	1979-80	1980-81
OTTAWA	916	945	903	886	930	943
QUEEN'S	415	447	422	437	451	441
TORONTO	460	460	456	464	460	472
WESTERN	445	450	448	437	436	435
WINDSOR	520	495	473	445	437	446
YORK	906	917	921	933	935	944
TOTAL	3,662	3,714	3,623	3,602	3,649	3,681

The number of degrees granted for the same period were as follows:

DEGREES GRANTED

INSTITUTION	1976	1977	1978	1979
OTTAWA	243	302	293	248
QUEEN'S	130	143	145	141
TORONTO	146	154	143	147
WESTERN	144	149	142	147
WINDSOR	165	163	159	151
YORK	289	287	303	304
TOTAL	1,117	1,198	1,185	1,138

The number of graduates of Ontario Law Schools called to the Ontario Bar for the period 1975-81 (inclusive) is as follows:

Students Called to the Bar*

1975	1976	1977	1978	1979	1980	1981
816	850	896	995	1,060	1,067	1,040

* There are discrepancies between these numbers and those of the following chart.

The total number of law students admitted to the Ontario Bar subdivided by Province, where their LL.B. degree was completed for the years 1975-81 (inclusive) is as follows:

Students Admitted to Ontario Bar,
By Province Where LL.B. Completed
1975 to 1981

	1975	1976	1977	1978	1979	1980	1981	% change 1975/1981
Alberta	3	1	1	3		2	2	(33.3)
British Columbia	4	6	4	5	6	6	4	0.0
Manitoba	5	6	9	8	11	12	15	200.0
New Brunswick	7	4	3	2	1	1	4	(42.9)
Nova Scotia	13	21	20	24	27	19	24	84.6
Ontario	753	769	854	887	954	962	890	18.2
Other in Ontario	2		1			1	1	(50.0)
Quebec	32	26	27	62	62	58	69	115.6
Saskatchewan	2	4	3	3	4	4	4	100.0
Other in Canada	0	2	5	6	1	6	1	
Outside Canada	9	5	11	8	7	5	4	(55.5)
No University	1		1			1		
Total	831	844	939	1,008	1,073	1,077	1,018	22.5

IV. Explanation of the Data

The number of graduates from law schools in Manitoba, Nova Scotia and Quebec Provinces admitted to the Ontario Bar in 1981 was 108, or 10.5 percent of the 1,018 applications received. The total figure for graduates from outside Ontario was 127, or 12.5 percent of the 1,018 applications received. While these statistics indicate this to be an important source of law graduates moving into the legal profession in this Province, and to some extent indicates a free ride on behalf of the Ontario taxpayer, an important value judgment is involved in making any change in admission regulations which would reduce these numbers. The figure from the Province of Quebec is revealing and indicates a substantial in-

crease of those legally educated in Quebec who seek a qualification to practice common law in Ontario.

Experience with law school capacities, admissions policies and available levels of funding, including the provincial government subvention to the Law Society in aid of financing the clinical portion of the Bar Admission Course, has produced an impressive increase in the number of lawyers licensed to practice in Ontario from 10,000 in 1975 to the current 15,253.

The annual figures are as follows:

1975	1976	1977	1978	1979	1980	1981
9,999	10,705	11,533	12,407	13,345	14,203	15,253

These numbers represent year end figures for each year except 1981, where the figures are as of November 9, 1981. They include all licensed lawyers in good standing, those under suspension, and the 746 lawyers licensed to practice in Ontario but who reside outside the Province at the moment.

The latest statistics available dealing with population/lawyer ratios were compiled in June, 1981. Although their accuracy may be questionable, they are as follows:

Ontario	Canada	United States
560.1	646.1	379.1

A further survey was made by the Law Society, in conjunction with Ontario law schools in 1979, regarding graduates from 1975 to 1979 (only those graduates from 1975, 1976 and 1977 actually admitted to the Bar). Over the three year period, the percentage of students without jobs after completing the Bar Admission Course was stable: 41 percent in 1975, 41 percent in 1976 and 42 percent in 1977. However, these figures drop to less than 10 percent six months later. At the time of the survey in 1979 only 4 percent were not employed in the legal field, and only 2 percent were unemployed.

There appears to be an elasticity in the demand for legal services that has existed in this jurisdiction since the end of World War II. This elasticity on the demand side can be attributed to the substantial increase in the population of the Province, and more importantly, it can be attributed to the changing character of the society demanding legal services, again from an essentially less populated, agrarian rural society to a more densely populated, highly industrial, commercial and urban one.

In the same vein, there have been some remarkable changes in the things that lawyers do. Family law as a discrete subject matter was offered for the first time in any Canadian law school at Osgoode Hall in 1949. Labour law and administrative law and the practice before administrative tribunals was offered first at Osgoode Hall in 1945; the latter obviously to service a rapidly expanding number of these tribunals.

The advent of the legal aid plan added a new dimension to the demand for legal services. Furthermore, the increasing numbers of lawyers acting as in-house counsel for corporations and government has had a substantial impact on the demand side.

The presentation of statistics distinquishing between the numbers in private practice, on the one hand, and licensed practitioners in government and legal education, on the other, does present a difficulty. The bulk of the latter differ in no substantial way from their colleagues in private practice in terms of their formal education and qualifications to practice law.

There has been a decline in the number of members in private practice at a time when the number of total licensed lawyers is increasing. The answer to this paradox is, of course, the substantial increase in government lawyers, lawyers in education, and in-house counsel in industry and commerce. The Ontario Government has the largest law firm in Canada. Immediately following World War II there were approximately half a dozen in the Ministry of the Attorney General. There are now approximately 150 at the head office and a total approaching 500 including the crown attorneys system.

V. Future Projections

Recently, statistics have indicated that there were 12,450 lawyers in private law firms, government, and legal education in 1980. It has been said that demand-side employment in this occupation over the projected period from 1981 to 1985 is estimated to increase by only 1,200, reaching 13,650 in 1985. These employment projections are based on the projected growth in adult population (age 18+) in Ontario to the number of lawyers in 1981, and assumes that the rate of utilization of legal service will not increase significantly during these years. In addition, 560 lawyers will be required to replace those leaving the profession because of deaths and retirements between 1981 to 1985, giving a total requirement of 1,760 for the next five years, or 350 per year.

If these projections are even close to being accurate, one could advocate the shut down of five law schools, leaving Osgoode Hall to supply the required numbers, or a closing of four law schools, including Osgoode Hall, leaving the other two to do the job. As Dr. Stager's paper demonstrates, these projections would appear to be very wide off the mark.

VI. Analysis

It is a matter of regret that even at this stage of the deliberation of these important issues law schools appear to disagree on the hard data on which meaningful decisions can be made for the future; decisions that might be made by the governing body of the profession within the spheres that are open to them, decisions by the legal educational institutions, decisions by the government, chiefly in matters of funding, decisions by

students aspiring to become members of the legal profession, and decisions by the public concerning the nature and extent of the legal process required by them at prices they are willing to pay.

As a result of the convening of this Conference and the papers prepared for presentation here law schools can now launch themselves on the accumulation and analysis of these data. The impetus gained here should not be lost.

I do not wish in any way to disparage the views or question the motives of those members of the governing body of the legal profession and the executive officers of the local law associations. Indeed, the members of the profession who see a close causal connection between present problems of professional misconduct, bankruptcy of a number of solicitors, and assorted other ills of professional behaviour, and the fact that large numbers of practitioners have been licensed to practice in recent years are large in number. There is a yawning chasm, however, between a perception and a proven fact. In the view of many, the case has simply not been proven.

No one familiar with the profession and its governance would suggest that the assimilation of an annual accretion of 10 percent of membership into the profession can be accomplished without planning and without effort. The task of monitoring performance to detect and redress matters of professional misconduct, including continuing competence, is not an enviable task. The Law Society has made tremendous advances and initiated imaginative programs to do this since the end of World War II. The fact that many of these controls have been in place for the last thirty years confirms the fact that the problem is not recent, at least not only of the last six years, although undoubtedly the incidence of the problem has increased in this recent period. The matter is essentially one for action by the Society, but deserves the support of all both inside and outside the profession.

VII. Toward Solving the Problem

Assuming the case to have been made, although it has not yet been made clear that the legal profession is overpopulated and that current ills, economic and otherwise, in the profession are attributable to that fact, how would and should one go about ameliorating this condition? It is clear that historically lawyers have resorted to the functioning of relevant market factors. Important sectors of Canada's economy are based on this view. It is sometimes referred to as "muddling through", but to do nothing is to do something. Sometimes this can be a slow and even painful process, but the market does adjust.

In the event that the case is made overwhelmingly for some direct action to be taken, one may then ask: "What action?" Obviously there are a number of points of entry where controls might be asserted or supported, where necessary by legislative action. Reference must be made

here to enabling legislative action as this may be the only way at the provincial level to avoid the strictures of competition policy as expressed by legislative action at the federal level. Recent litigation reviewed by the Supreme Court of Canada may soon give us a definitive answer on whether provincial legislation may offer a shield against prosecution by the federal administration for breach of competition legislation at the federal level.

Assuming legality, the imposition of a conscious policy of more drastic control of numbers entering the Bar from the clinical portion of the Bar Admission Course is not without its perils. It is admitted that the failure rate experienced in the State Bar examinations in jurisdictions in the United States is substantial - as much as 50% in some jurisdictions. Candidates for those examinations are not required to take a course of clinical instruction prior to sitting the exams and, indeed, the State Bar finals cover a whole range of substantive and procedural law. This is in marked contrast to the Ontario system, and one wonders whether the credibility of the Bar Admission Course could withstand such a drastic failure rate in a course of instruction that is offered by the governing body of the profession itself. It would appear that if such a policy were implemented the Bar Admission Course would have to be substantially restructured.

Another point subject to possibly more stringent entry requirements is entry into the articling portion of the Bar Admission Course after graduation from an approved law school. This would be a complete reversal of present policy by which the LL.B. degree from an approved Canadian law school is accepted, proprio vigore, for entry into the final stages of qualification for the Bar in this jurisdiction.

The third point of entry subject to possible control is that of performance in the law schools themselves. There can be no doubt that in recent years the failure rate at the law schools has dropped substantially. This fact reflects the considerably higher standards of performance on the LSAT and in undergraduate academic work that is now required for admission to legal studies.

VIII. Conclusion

All the above methods would appear to be indefensible and unacceptable as a means of controlling entry into the profession at any stage. They are arbitrary in the extreme. What remains therefore is to leave the matter subject to the controls of market forces or to reduce government funding at the institutional level and limit financial assistance to prospective students. This obviously involves an acute political problem for government and institutions alike. It is an open secret, I suspect, that governments are loathe to apply financial constraints in specific terms, and much prefer to apply them across the board leaving the institutions to allocate their grants and aid in accordance with their internal ordering.

The hard decisions are left to the institutions themselves. Politicians are happy to attend the opening of new law schools. They are not favourably disposed to preside over their closing. If such drastic measures are to be countenanced, the case has to be made with such validity that stringent policies are politically possible. It is doubtful that we have arrived at this point.