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Does the Punishment Fit the Crime?

by *F. Murray Fraser**

I. INTRODUCTION

WITH RESPECT TO the question of numbers in the legal profession, analysed from a national perspective, representatives of the Law Society of Upper Canada may have diagnosed a number of diseases but have prescribed the wrong medicine. A problem of numbers does not exist; rather, "numbers" have brought about concern about competency, conduct and the economics of the practice of law.

There are serious problems in the practice of law at the present time. Of that, there is no doubt. The issues and their resolution affect the public, the legal profession as a corporate entity, and the individual practitioner. What are these problems? We are told that there are lawyers who are incompetent. There are lawyers who cut their fees and engage in unseemly competition. Lawyers declare bankruptcy. Lawyers indulge in unethical behaviour and dishonest dealings. There has been a dramatic increase in the numbers of claims of malpractice against lawyers and there are numerous instances of criminal activity by members of the legal profession which have resulted in direct financial loss to clients. Lawyers complain that their financial rewards are diminishing and that they fall far below their expectations and needs.

The cynic might ask, "What is new?" but, upon careful examination, one must conclude that by sheer numbers the concerns referred to have created complex problems in the government and administration of the legal profession in Canada. Ironically, positive results have also occurred in that the governing bodies have responded to these concerns in thoughtful and positive ways. For instance, it is now accepted that competence is not only the responsibility of the individual practitioner, but is a matter which must concern and involve the governing body on a regular basis.

There are many reasons for the present state of affairs. A more educated public, aware of its right to receive competent service from professionals, no longer hesitates to complain to the governing body or to sue the individual lawyer for malpractice. This is a sign of health insofar as the public interest is concerned. The legal profession should exist as a self-governing monopoly of professional services only so long as it acts in the public interest.

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II. THE QUESTION OF COMPETENCY

Courts have expanded the concept of liability for malpractice by creative judicial activity. Whether the judges have been motivated by concerns about the public interest, or by a continuing parade of incompetent lawyers, or simply because the "right cases" have appeared, cannot be determined. Judges have spoken out on a number of occasions about the apparent incompetency of counsel who appear before them, and it is not unreasonable to assume that in expanding liability, the judges have considered the right of the public to reasonable standards of service. The courts have recognized the role which Tort law, in particular, may play in achieving standards of professional competence.

Public awareness and judicial attitudes are not alone as factors which have influenced the growth of malpractice actions. Lawyers do not hesitate, fortunately, in taking meritorious cases against their professional colleagues. The existence of insurance makes the pursuit of a claim worthwhile and sometimes very attractive insofar as a plaintiff is concerned. The depressed economic situation emphasizes the importance of mistakes—they are costly; even more so in time of restraint. Damage awards are higher. Laws are more complex. There is greater access to lawyers by the public. There are more lawyers, and, consequently, more mistakes. The law of negligence is sufficiently flexible to deal with new situations and has become an effective force in the search for competency.

III. THE QUESTION OF UNETHICAL BEHAVIOR

Increasing evidence of unethical behaviour and dishonest conduct among members of the legal profession is a fact. What are the causes? That is a difficult question. Does the answer lie in the fact that one is bound to find more rotten apples in a larger barrel? Or, is the current situation a reflection of the failure to apply proper standards by the admissions committees of the profession or the faculties of law? Are there deeper causes at work, a frustration in dealing with increasing competition at a time of economic restraint? Is the lawyer who steals trust funds attempting to achieve a level of income which is denied to him by the practice of law? There is a greater awareness among the public of the existence of disciplinary procedures within the legal profession.

I submit that a large number of disciplinary hearings are brought about by the attitudes of lawyers with respect to the practice of law. There are those who are sloppy in their work habits, who fail to manage their time properly and who do not advise their clients of the progress or lack of it on a particular matter. There are also those who do not or will not appreciate the responsibilities of the professional, as is evidenced by their failure or refusal to recognize a conflict of interest. And, or course, in the more dramatic cases of defalcation, the governing bodies have recognized a public responsibility by providing a fund against which claims

can be made.

There has been very little analysis of the causes of criminal and unethical conduct among lawyers. There is nothing to indicate that a reduction in numbers entering the legal profession would be the simple solution to the problem.

IV. ECONOMIC EXPECTATIONS

Lawyers complain that they are unable to achieve or maintain the standard of living to which they aspire. The basis upon which the expected standard is arrived at is a mystery, but it may be tied to the public image of the legal profession in Canada as one of wealth, status and power. To be fair, the economic depression has had a heavy negative impact on many practices and the cost of support services and staff has brought overhead to a point well above 50% for many firms. It is also true that competition in the form of other lawyers who practise in the same location has reduced the financial return in many cases. It remains unclear whether the expectation of financial reward, etched upon the mind of the prospective lawyer many years before, is not the major factor which has led to the call for a reduction in numbers.

The governing bodies of the legal profession are responsible in law for insuring the adequacy of the educational and other qualifications of those who are permitted to practise law. These responsibilities include the maintenance of adequate professional standards and the enforcement of acceptable professional behaviour. The responsibilities are exercised in the public interest.

It is not suggested that the increasing number of lawyers is not a factor in the emergence of competency, conduct and economic expectation as concerns within the profession. The increase in numbers has brought these problems into focus as issues confronting not only the profession, but the public as well.

It cannot be argued seriously that the solution lies in a restriction of numbers by artificial means through actions, taken directly or otherwise, by the practising side of the profession. Such a position admits that the profession is incapable of self-government and such action would invite increased participation by government in the affairs of the profession.

The governing bodies have responded with creativity and energy in dealing with the problems in recent years. In all provinces, action has been taken to strengthen the quality of bar admission courses and continuing legal education programmes. New projects and programmes have been instituted to increase skills, knowledge and attitudes. Particular emphasis has been placed upon office management and accounting procedures. In some jurisdictions, legislative changes have followed the acceptance of reports of special committees. A sampling of topics indicates the breadth of concern and action: disciplinary procedures, review committees, remedial education, competency hearings, counselling on alcohol and

drug abuse, the use of paralegals, compulsory continuing legal education, specialization, advertising, and fee mediation. The profession reacted quickly and positively to respond with a comprehensive range of programmes and policies.

It is probably natural, therefore, that with many new programmes and policies in place, the members of the practising bar would look at other issues in their search for solutions. The number of lawyers entering the profession each year provides an ideal target.

The danger appears to be that the practising lawyer, impatient with the apparent failure of recent measures to produce an instant transformation of the professional standards and competence of his fellow practitioners, and under considerable pressure in these difficult economic times, reacts unreasonably and, in seeking an immediate solution to the problems, concludes that the reduction of numbers is the most obvious step.

V. THE QUESTION OF NUMBERS

The need and demand for adequate legal services in today's society remains a valid concern when considering seriously the numbers question. I would suggest that no jury of reasonable persons would conclude that a reduction of numbers is in the interest of the public. Simply put, the facts have not been proven.

To argue that the most effective solution is to reduce the numbers misses the point completely. It assumes that those who are practising are indeed competent to continue to do so. It casts a shadow over those who have been admitted recently—the straws upon the back of the camel—although a preliminary analysis of insurance claims and disciplinary matters indicates that serious problems do not arise with frequency until around the 10th year of practice. Any action to cut back the numbers reflects unfavourably and unfairly upon those who are presently involved in legal studies. To restrict numbers at this point in time would confirm the public perception of the legal profession as one of self-interest and protection.

Let us explore briefly the way in which controls might be imposed. The majority of those responding to the questionnaire of the Law Society of Upper Canada preferred reduction to take place through the action of the governing body. What do they have in mind? How would a quota be defined? How would it be enforced? Would there be an imposition of a predetermined failure rate in the bar admission course examinations? Would preference in admission be given to those who had graduated from Ontario law faculties? Upon what criteria would such a policy be implemented?

Others replied to the questionnaire by indicating a preference that action be taken by the universities. On what basis would a faculty of law recommend to the Senate and Board of Governors of a university that a

reduction of enrollment take place? What information would be sufficient to convince a university to make such a change in policy, particularly where one would hope that the university programme in law is respected as a broad, intellectual pursuit and not one which is designed simply as a service for the practising profession. Is this an example of an attitude which looks at the universities as producers of persons for the market place on a shortrun basis without regard to the longterm implications? Or will the legal profession use its power to lobby, directly or indirectly, in an attempt to convince government that there would be a great saving of taxpayers' money if places in law schools were to be reduced?

What is the other side of the coin? What are the facts with respect to the numbers of persons presently enrolled in law programmes at Canadian universities? The faculties of law are in a "no-growth" situation, and, in some cases, there have been modest reductions in enrollment in order to better meet the academic objectives of the programmes. For twenty years, the legal profession encouraged and actively participated in discussions which brought about increased enrollments at established law faculties and resulted in the creation of new faculties of law at a number of universities. Of course, self-interest was at work to some extent. There was a booming economy and hence a steady demand for legal services. But, the leaders of the legal profession at that time did not act simply on the basis of narrow economic motives. They were moved by a desire to increase opportunities for Canadians to pursue legal education in an academic setting and also by a desire to increase the quality and quantity of legal scholarship and research.

As is often the case in the political process, the decisions to provide expanded opportunities for the study of law were brought about by the existence of pressure and support from various groups: the legal profession, the universities, the citizens at large, and the many applicants who were unable to gain acceptance to law programs in spite of impressive academic credentials, due to the restricted number of places.

The legal profession seeks now to turn off the tap either at the university level or at the entry point to the practising profession. There is much more to the issue than a perceived problem of supply and demand. There are complex philosophical questions with respect to the relationships between and among governments, universities, the professions and the citizens. There are practical questions relating to the existence of data concerning opportunities and rewards. One must recognize the continuing numbers of qualified applicants for admission to all law faculties in Canada, many of whom are still unable to gain acceptance. There are other questions of like nature which require debate in the public arena before action is taken:

1. There is a continuing demand for a university education in law by a very large number of qualified applicants. A reduction would deprive individuals of opportunities to pursue education at a time when the partic-

ipation rate in university programmes in Canada is relatively low.

2. There is incomplete but convincing information with respect to the continuing need and demand for adequate legal services at reasonable fees in various parts of the country.

3. The faculties of law in Canada are reaching a point of maturity which will permit them to contribute substantially to the development of a Canadian tradition of legal scholarship. These objectives can be achieved more effectively with the strong and continuing support of the legal profession.

4. The imposition by a governing body of artificial controls at the point of entry to a bar admission programme would have a negative effect and would probably increase competition and unethical conduct within the profession.

5. Regulation of a monopoly by reduction of numbers raises issues which require full public debate.

VI. A WAY OUT OF THE DILEMMA

Incompetence and unethical behaviour cannot be eliminated or even reduced drastically by the introduction of new policies and programmes. Time should be taken to monitor and determine the effect of the programmes which have been instituted in recent years. At the same time, opportunities exist for cooperative ventures between the law faculties and their members, on the one hand, and the various institutions of the practising profession on the other. Cooperation and good will can bring about exciting projects and concrete accomplishments.

One of the most obvious needs is to produce, on a continuing basis, written material which will be of assistance to the person who contemplates the study of Law. At present, the applicant is faced with incomplete, inaccurate, vague and outdated information on very basic matters. What professional tasks does a lawyer carry out? How does the lawyer spend his or her time? What fields of specialization are developing? What trends are apparent in the practise of law? What are the financial rewards? What opportunities are available in certain geographical locations? What projections are probable over a five year period? These and many other simple, but important questions seek thoughtful, objective answers. With cooperation, such information might be made available to those who wish to arrive at academic and professional decisions by considering the facts as well as the opinions which are available to them.

It is also apparent that academic education in law equips a person for a great range of responsibilities. The university law faculty does not see itself as simply training a person for the practice of law. The curricula of many faculties reflect the broad range of opportunities which are available, but information and emphasis are sometimes lacking. It may be that a greater awareness of these opportunities can be developed with the assistance of those who apply their law degrees in journalism, business, government, administration, research or in public office.

There is a tremendous opportunity for cooperation between the academic and the practitioner in the development of programs of professional education. The Law Society of British Columbia, with the cooperation of the Continuing Legal Society, the Bar Admission program and the Faculties of Law at the Universities of Victoria and British Columbia, is presently producing a pilot project on professional education. The programme will start in the first year of law studies and will continue throughout the academic program and into the bar admission and continuing legal education program. The student will examine issues of professional responsibility at all stages of his legal education. In the first year, materials and discussions will permit the student to develop an appreciation of some of the major roles of the lawyer, the responsibilities of the profession, and the difficult concept of "conflict of interest". The second and third year curriculum will provide opportunities for re-examination of these and other issues at more sophisticated levels. The programme will also move progressively through the Bar Admission programme and into various segments of the Continuing Legal Education programme. In this way, a professional will have a greater appreciation of his responsibilities and will have a philosophical foundation upon which to build. By commencing the programme within the university curriculum, there will be an opportunity for critical analysis, intellectual reflection, comparative studies, research, writing and the sharing of views without pressure to accept the status quo. It is recognized that it may be too late to affect the value system of the student, but the programme will permit an appreciation and understanding of some of the basic problems of professionalism in a very broad setting.

A more difficult question is whether joint efforts could or should be undertaken with a more specific objective in mind - to attempt to weed out, or at least identify, those who are likely to pose problems of an ethical or criminal nature in the practice of law. Universities have traditionally taken the position that the existence of a criminal record or the commission of "unethical acts" are irrelevant insofar as the institution is concerned. The objective of the university, a public institution, is to permit its students and faculty to pursue learning and research. Concern with criminal or ethical conduct arises only with respect to the safety of others or the protection of university property. Of course, there have been exceptions where criminal acts have taken place with respect to university persons or property but, for the most part, universities have not become involved in attempting to pass judgments on their students. This position is not likely to change. The answer lies in the development and application of more effective criteria and procedures by the Law Society in dealing with applications for admission.

If the law faculties are to retain the trust and good will of the governing bodies, the faculties must continue to monitor the qualifications of those who are accepted into the study of law. In spite of the requirements of the law societies, it is true that entrance to the law faculty and gradua-

tion from it are the major assessments of qualification. The law faculty must ensure that appropriate academic criteria are applied rigorously in admissions procedures and that academic standards are of the highest order. The economic recession may well reduce the number of applicants for admission to law faculties and this will place the law faculties in the position where they must determine minimum qualifications for admission, a policy which has not concerned them for almost twenty years.

The law professor is in a unique position to contribute to a greater understanding of the problems and solutions facing the profession through his writing and research activities. The problems facing the legal profession offer a gold mine to the professor who wishes to undertake an intellectual examination of the issues. It is likely that research and scholarship on professional responsibility will become a high priority within the academic world in the next few years.

The governing bodies have recognized that professional education is a continuing process. The development of continuing legal education programmes and the increasing demand for sophistication in the delivery of these programmes is recognition of the role of the legal educator as a professional in his own right. The law professor and the practitioner have an opportunity to discharge these responsibilities jointly and in cooperation with one another. The academic must move regularly from the university to the real world and must bring to bear upon the programme of continuing education his knowledge and perceptions.

VII. CONCLUSION

The increase in the number of practising lawyers in Canada has brought into public view the existence of problems of incompetence, unethical conduct, and unmet economic expectations. The legal profession has responded by designing a great range of programmes, revising policies, changing procedures and providing support services to fulfil the corporate responsibility of the governing body in serving the public and the individual lawyer. A proposal to reduce artificially the numbers entering the legal profession at this point in time is ill-conceived and fails to address the deeper issues involved in the government of a profession in today's society.

Through a partnership, the faculties of law at the universities and the governing bodies of the legal profession have opportunities and tremendous scope for cooperative efforts in solving some of these problems in the years ahead.