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A Developmental Market: Growth Rates, Competition and Professional Standards in the Ontario Legal Profession, 1881-1936

*by Curtis Cole**

I. INTRODUCTION

IN CONSIDERING THE question of numbers in the legal profession today, it is important to examine the problem in an historical perspective. The Ontario legal profession is, as much as any other institution, involved in a continuous evolutionary process of development. In order to better understand the current state of this development, it is necessary to understand some aspects of the process as they have occurred in the past. The period 1881-1936 has been chosen as a relevant time frame within which to examine the development of the profession as it relates to numbers. It is a particularly relevant period because of the accelerated pace of economic and social change which was taking place at the time, and because of the impact this change apparently had on the legal profession. The terminal dates of 1881 and 1936 were chosen for two reasons: the availability of census data and of sources providing information regarding the profession; and the availability of insights derived from comparable studies in other jurisdictions.

II. HISTORY AND THE PROBLEM OF SIZE

The problem of the size of the profession in Ontario at present, and the debate concerning the possible limitation of the number of annual entrants to practice, are questions of supply and demand. According to those who advocate limitation, the supply of lawyers has grown in recent years at a faster rate than the demand for legal services. The result has been a decline in professional standards of service among lawyers. Whether the solution of supply control is an attempt to arrest this decline or an attempt to increase the individual incomes of present members of the profession, the problem is that there is too much competition.

The shortcoming of this interpretation, its critics would argue, is that it is essentially uni-dimensional. It assumes that in the determination of supply and demand for legal services the size of the bar is the only variable. In the words of one prominent legal historian regarding the perennial complaints of overcrowding in the U.S. bar, "Discussion assumed that the pie was baked; the only question was, into how many pieces to cut it."

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The question the historian must ask; and, it is suggested, the question anyone grappling with the current problem must ask, is whether the interpretation that supply must be controlled is born out in an historical perspective.

In the past ten years the legal profession in Ontario has doubled in size, growing from some 7,000 lawyers in 1970 to over 14,000 in 1980. The staging of this conference is ample evidence of the concern this growth has fostered. At present there is within the practising bar substantial sentiment in favour of limiting the growth rate of the profession. In a recent survey of some 13,000 lawyers in the province conducted by the Law Society of Upper Canada, of the fifty-eight percent who responded, seventy-two percent believed that controls on the numbers of new lawyers would benefit the public, and eighty-five percent felt that such controls would benefit the profession. This sentiment seems to be based on a growing concern about increased competition for legal work and a perception of declining standards of professional conduct. It is submitted that our understanding of the present problem, as well as our ability to deal with it, would be considerably enhanced by its examination over an extended historical time period. Were similar concerns expressed, and similar periods of declining standards evident, during past years of growth in the profession?

III. GROWTH IN THE LEGAL PROFESSION: 1881-1936

Upon examination of the period 1881-1936 it appears that the answer to this question is no. During that period the growth rate of the profession relative to that of the provincial population fluctuated greatly. There were years in which relatively high growth was experienced, but at no time during the period was the profession concerned about this growth, or about the dangers of increased competition. There was considerable concern, however, over the problem of competition from outside the profession, but the pattern of this concern does not coincide with the pattern of growth. Similarly, there is evidence of a decline in professional standards during the period, but again, this pattern does not coincide with that of growth. The apparent conclusion is that the problem of numbers cannot be viewed in historical isolation. If the legal profession were a static institution, it would be possible to provide simple solutions to simple problems. The size of the profession, however, is a function of a complex developmental process. It would be useful to view the problem in this perspective in prior to attempting to solve it.

If we consider the growth of the profession in relation to that of the population (see Appendix A), it is apparent that during the fifty-five year period under study the legal profession in Ontario more than doubled in size, increasing from twelve hundred and one lawyers in 1881 to twenty-five hundred and fifty-six in 1936. During the same period the population of the province grew at a somewhat slower rate, from 1.9 mil-

lion in 1881 to 3.7 million in 1936.

The ratio between population and the profession did not, however, decrease at a steady rate during these years (see Appendix B). In 1881 there was one lawyer for every sixteen hundred persons in Ontario. Within ten years that figure had dropped to nearly fourteen hundred. The ratio reached its lowest point at the turn of the century when it stood at twelve hundred and thirty-three. The ratio then rose sharply, and by 1920 it had surpassed the 1881 level. Between that date and 1931 it declined once again. By 1936 however, it was beginning to rise again.

The fluctuating rate of growth of both the general population of the province and of the profession, represented by this inconsistent ratio, is more indicative of the changing level of competition within the profession (see appendix C). The average annual growth rate of the profession during each of the five decades between 1881 and 1931 ranged from 3.4 percent during the twenties to -.07 percent during the first decade of the century, while that of the general population ranged from 1.7 percent during the twenties to .32 percent during the 1890's.

What might be termed the 'real' rate of professional growth is most evident when one considers the growth rate of the profession relative to that of the general population (see appendix D).

Between 1881 and 1910 the profession was growing at a steady annual rate almost one and a quarter percent greater than the population as a whole. Between 1901 and 1911, however, the number of lawyers practising in the province actually declined. The provincial annual growth rate, although not as great as during the previous two decades, was more than two and a half percent greater than that of the profession.

Using the same basis of comparison as in the three previous decades, it would appear that between 1911 and 1921 the growth rate of the profession kept pace with that of the general population, trailing it by only .01 percent per year. However, considering the increase in the size of the profession in the year 1921, it is evident that this figure is misleading. In that year the number of practising barristers and solicitors in the province increased from 1760 to 1899 (see Appendix 1). This growth was primarily due to the influx of young lawyers whose training had been delayed by service during World War I. In his report to Convocation following the 1918-19 academic year, N.W. Hoyles, the Principal of the Law School, cited this as the reason for a substantial increase in the number of students enrolled. This increase of some 7.9 percent contrasts sharply with the average annual increase of 1.66 percent during the decade. The rate of growth between 1911 and 1920 is therefore a much more representative figure to relate to population growth. During this nine year period, the profession actually grew at an annual rate .9 percent slower than that of the general population.

Between 1921 and 1931 professional growth was high, but between 1931 and 1936 this trend was reversed. During the twenties the annual growth rate of the profession exceeded that of the population as a whole

by 1.26 percent, but during the Depression years it fell behind the population growth rate by 1.37 percent.

The reasons for these trends in the relative growth rate of the profession are not entirely clear. Economists in recent years have viewed factors such as the scale of government regulation of industry and growth in real GNP as influential. The latter would certainly be a convincing explanation for the contrast between the 1921-31 and 1931-36 periods, but does not explain why the lowest rate of annual relative growth is evident between 1901 and 1911. What is apparent is that more empirical research will be necessary before a general interpretation of the causes of these trends can be offered.

In contrast to what is apparently the case today, the problem of numbers did not concern the profession during the years of relatively high growth in the period under study. The size of the profession has been of considerable concern to its members during at least two periods in the past. In 1846, potential professional immigrants were warned, 'Lawyers are not wanted: Canada swarms with them; and they multiply in the province so fast, that the demand is not by any means equal to the supply. In 1855, Convocation decided to limit entry into the profession by substantially increasing the requirements for call. In the late 1940's the problem seemed to be one of under-supply, and in 1949 a survey of the profession in Canada was commissioned by the Canadian Bar Association to determine the extent of the problem.

IV. THE PROBLEM OF EXTERNAL COMPETITION

In the late nineteenth and early twentieth centuries, however, the problem of numbers seems to have been of no concern to lawyers in Ontario. One would assume that if the size of the profession was of interest to its members it would be discussed by the Benchers of the Law Society, the local law associations, or in the law journals. A thorough examination of the *Proceedings of Convocation* from 1881 to 1936, the Minute Books of the Middlesex Law Association from 1880 to 1930, and the *Canadian Law Times* from 1886 to 1922 reveals no mention of the question of growth and competition. What was evident in these sources, however, is a recurrent concern over the problem of external competition.

The fact that the only concern about competition evident during this period was directed at the threat from outside the profession seems to be a function of the stages of development in which both the profession and the province were involved. During this time Ontario was undergoing a process of rapid industrialization, urbanization, and commercialization. Although much research remains to be done it is apparent that at this juncture the legal profession in the province was involved in a substantial transformation in response to these changes.

The most important facet of this transformation when considering the problem of why concern within the profession was directed at exter-

nal rather than internal competition, is the change in practice which took place. It appears from preliminary research that the trend identified by Willard Hurst of a general shift among U.S. lawyers from an average practice centered primarily on the litigation process to one of a facilitative legal counsellor, seems also to have taken place in Ontario. In the U.S. at least, prior to this shift, counselling done by lawyers was judged by its ability to stand up under a challenge in the courts. During the shift, however, the law and lawyers began being used more for preventive purposes. Litigation was increasingly viewed as an expensive luxury. The definition of the term 'legal service' was therefore changing during this period. When a lawyer's work was centered in the courts, there was little likelihood of a non-lawyer presenting a realistically competitive threat. As the lawyer's role began to change to that of a consultant in legal matters, the threat of unauthorized encroachment on his practice became greater.

Since the completion of the shift, the term 'legal service' has become much more sharply defined. The lawyer today is much less likely to be concerned with competition from outside the profession. During a period in which the definition of the term is not yet agreed upon by professionals and non-professionals alike, the primary concern over competition would most likely involve one presented from outside the profession rather than from within it.

Even if we assume that the pressure of rapid growth in the profession would have found an outlet in the expression of concern over the threat of external competition, the pattern of this concern does not coincide with the pattern of growth during this period. Some degree of concern over competition is evident in the first two decades of the period under study, when relative growth in the profession was high. In February of 1881 a special committee of Convocation was struck by the Law Society ' . . . to consider some means of putting an end to performance of conveyancers' work by uncertified or unlicensed persons. The *Proceedings* give no hint as to the impetus for the formation of this committee, nor is there any information regarding its activity in the following eighteen months. In November of 1882 however, another special committee was formed

. . . to consider some means of putting an end to unlicensed persons acting as conveyancers and conducting proceedings for sale under powers contained in mortgages . . . and to consider means to prevent persons who are not barristers-at-law from appearing as agents or advocates in those cases in the Division Court which were not within the jurisdiction of such court prior to the Division Courts Act, 1880.

The act in question had extended the jurisdiction of the court in actions of recovery of debt in certain cases from one hundred to two hundred dollars.

During the winter of 1882-3 the committee lobbied the provincial Attorney-General and members of the legislature in the hope of having the offending legislation amended, but on February 6, 1883 it reported to the

Benchers that in the opinion of “. . . a number of members of the legal profession who are also members of the legislature representing both sides of politics . . . it would not be feasible to get any legislation during the session then being held and [they] would not advise that any attempt be made at present.” As a possible solution to the problem of unqualified agents practising in the Division Courts, the MPP’s suggested that “. . . a representation from Convocation to the County Court Judges against allowing fees to agents would be acted upon in many cases.”

On February 10, 1883, the Benchers apparently took the advice of the MPP’s and directed the Secretary of Convocation to,

. . . draw the attention of the Judges and Junior Judges of the County Courts to the practice under the Division Courts Act . . . of allowing fees to agents not being solicitors appearing before the Judges in Division Court and to represent to them that the allowance of such fees to such agents is very injurious to members of the profession, and to request their consideration of the question whether it is desirable that they should in every case exercise the discretion vested in them in favour of agents not being baristers or solicitors.

It is not known if this strategy was successful, but the problem of external competition in the Division Courts was not dealt with by Convocation during the period of study.

In November of 1889, a complaint was received by Convocation regarding an unlicensed person practising in the Surrogate Court. A special committee was formed to consider the matter and report to Convocation. The following September the committee presented its report, which recommended that the Law Society take action in such instances, noting that, ‘It is the right of the members of the Society to call upon it to protect the profession against the unlawful encroachments of those who, not belonging thereto, practise or assume to practise in legal matters. . . .’ The Benchers adopted the report but decided to take no action with regard to the complaint which had initiated it because the alleged encroachment had occurred before the adoption of the report.

In May of 1891 a similar problem was raised and the Benchers appointed another special committee to deal with the question of unlicensed conveyancing. In the report presented to Convocation the following December, the committee noted that it had considered, ‘. . . the complaint of a large proportion of the members of the profession in reference to unlicensed or uncertified conveyancers . . .’, and that the members of the committee were strongly of the opinion that,

there are ample grounds for the complaints made, and believe that the members of the profession . . . are entitled to protection in some form against the competition of persons outside the profession who without having been at any expense to qualify themselves for the work or paid any fees to government or Law Society prepare deeds and documents of various kinds and do other work strictly within the province of members

of the profession.

The report recommended that the provincial Attorney-General be lobbied to facilitate the passage of legislation to remedy this situation.

In June of 1892, however, the committee reported that its efforts in this direction had not met with success, '. . . by reason of the opponent feelings of such a large proportion of the members of the legislature and the strong influence now used by unlicensed conveyancers throughout the province. Its recommendation that copies of the report be sent to all members of the Society, together with a request that they use their influence with the local members of the legislature, was adopted by Convocation.

The activity of these committees does indicate a degree of concern over external competition during a period of high growth in the profession. Another special committee on the subject was active between 1901 and 1906, a period of extremely low relative growth. This committee was formed in June 1901. Its first report, presented to Convocation in September of that year, included draft legislation intended to limit conveyancing competition from outside of the profession. Under this proposed legislation, no person other than a licensed barister or solicitor of the province of Ontario, and those entitled to practice under An Act Respecting Notaries Public would be legally authorized to,

. . . have, use, or exercise the power of drawing, passing or issuing for another for hire or reward any will or bill of sale or transfer or assignment of mortgage relating to personal property, or any conveyance, transfer, deed, lease, mortgage, indenture, discharge of mortgage, cessation or charge or agreement relating in any way to real property, or of otherwise acting or performing the duties of a conveyancer.

An exception would be made, however, for those already carrying on such business prior to the passage of the proposed act upon the filing of a statutory declaration of such with the court registrar and the provincial Treasurer, and the payment of a fee of one dollar. The report was adopted and Convocation ordered that each county law association be contacted and requested to use every effort to assist in obtaining passage of the legislation at Queen's Park.

Continuous efforts appear to have been made over the next two and a half years to have the measure adopted, but in May 1904, the special committee reported that a bill entitled "The Conveyancers Act" had been defeated in the legislature. The committee was then instructed to continue its efforts and was authorized to arrange for the re-introduction of the bill with such amendments as would be required to obtain sufficient support to achieve its passage.

In May of 1905, the bill was re-introduced without the provision requiring payment of a fee by registered conveyancers who were not solicitors. In December, when it became evident that even in its amended form

the bill would not pass, it was withdrawn.

During the following twenty-five years the problem of external competition was not dealt with by the Benchers. It was not until the 1931-36 period, when growth was low, that concern over the threat of competition from outside the profession again reached the level that had been evident between 1901 and 1906.

In 1931, a special committee was formed to study the problem of wills being drawn by employees of trust companies. The following year the committee met with representatives of a number of these companies, and in its report to the Benchers, explained that it was apparent that a wide difference of opinion existed, ' . . . as to the concerned relative spheres of activity of the trust companies and the members of the profession. . . . ' The company representatives had very frankly explained that the drawing of wills was often incidental to their primary function as executors and administrators. The committee's report also contained an interesting parallel to the present interest in the recent limitation of enrollment in the Faculty of Law at the University of Manitoba. It recommended that a possible solution to the problem might lie in the example provided by a compromise reached between the Law Society of Manitoba and the trust companies operating in that province. The report was adopted but the following month Convocation ordered that,

. . . instead of asking the trust companies to reach an understanding with the Society along lines adopted or suggested in Manitoba that a letter . . . be written to each trust company carrying on business in Ontario referring to improper practices by trust companies and inviting their correction.

This strategy was apparently not successful, because in May the special committee was ordered to meet again with representatives of the trust companies in order to improve relations between the companies and the profession. The trust companies were not particularly cooperative however, and in November the committee reported that, "It was found that no real progress could be made and . . . [the trust companies] adhered to the view that they had a right to draw wills and similar documents for customers . . .," and that ". . . there seems but little chance of any real improvement being affected by mere discussion."

The final item indicative of concern over competition during the period under study was the establishment of a standing committee on encroachments in November of 1934. In its terms of reference the committee was required to, ". . . consider and report all matters relating to unfair competition and . . . make such recommendations as they think proper for the advancement of the interests of the barristers and solicitors of the province." The fact that this permanent committee was initially struck during a period of low relative growth in the profession is significant.

V. GROWTH AND THE PROBLEM OF COMPLAINTS

It is apparent that the pattern of concern over competition does not coincide with the pattern of growth. The special committees that were active during the 1880's and 1890's do provide evidence of concern during a period of high growth, but it must also be noted that similar committees were active between 1901 and 1906 and between 1931 and 1934, periods of low relative growth in the profession.

Similarly, a pattern of declining standards of professional service during periods of increased relative growth is not evident. Between 1881 and 1890, when the growth rate in the profession was relatively high, Convocation received an average of four complaints per year regarding the conduct of solicitors. Between 1881 and 1898, when the rate of growth remained high, this average rose to 7.75 per year.

Information regarding complaints was not available for the years 1899-1904 but between 1905 and 1910, a period during which relative growth in the profession had sharply declined, Convocation received an average of 9.16 complaints per year. Between 1911 and 1920, a period when growth in the profession remained below that of the general population, an average of 3.4 complaints per year were received. Between 1921 and 1925, a period during which relative growth in the profession was rising substantially, Convocation continued to receive complaints at a rate almost unchanged from that of the period 1911-1921. During this period the average number of complaints per year was 3.2.

Beginning in 1926, Convocation no longer recorded all of the complaints received but only noted those upon which disciplinary action had been taken. Between 1926 and 1930, while the profession maintained a high relative rate of growth, the Benchers took disciplinary action against an average of 5.2 practitioners per year. Of these there were eighteen disbarments, four suspensions, and four reprimands. Between 1931 and 1936 however, when the growth rate of the profession fell considerably below that of the population, the average number of disciplinary actions per year rose to fourteen. Of these there were fifty-one disbarments; two were voluntary withdrawals from practice, eight were suspensions, and only seven were reprimands.

VI. THE EFFECT OF GROWTH ON STANDARDS

A pattern of declining standards of professional service is not evident during periods of high relative growth in the profession. Between 1881 and 1898, growth in the profession was high and Convocation received a relatively high number of complaints regarding the conduct of solicitors. Between 1905 and 1910, however, when the rate of growth was considerably lower than that of the general population, the average annual number of complaints received by Convocation was even higher. Between 1911 and 1921, when the relative growth rate of the profession continued to be

low, the average number of complaints declined. Between 1921 and 1925, when the rate of growth in the profession was once again higher than that of the provincial population, the average number of complaints received by Convocation remained low.

The sharpest contrast showing the greatest deviation from the expected pattern is evident in the situation between 1926 and 1936. During the first five years of this period, when the relative rate of growth in the profession was as high as it had been at any other time during the period of study, the number of disciplinary actions taken by the Law Society against practitioners seems to have increased over that of preceding years. Between 1931 and 1936, when the growth rate of the profession fell well below that of the population as a whole, the average annual number of disciplinary actions taken by Convocation was almost three times that of the previous five year period.

Like the problem of growth itself, it is unclear why this pattern does not coincide with the pattern of growth. There seems to be some relation to the state of the economy in the contrast evident between the 1926-31 period and the 1931-36 period, but this analysis does not necessarily hold for the earlier years.

The fact that neither the decline in professional conduct nor the pattern of concern over external competition coincided with the pattern of growth, seems to be a function of the transitional nature of the profession during this time period. This is also true with respect to the complete lack of concern over growth itself. This transition came about in reaction to changing demands which the economy was placing on the profession.

VII. CONCLUSION

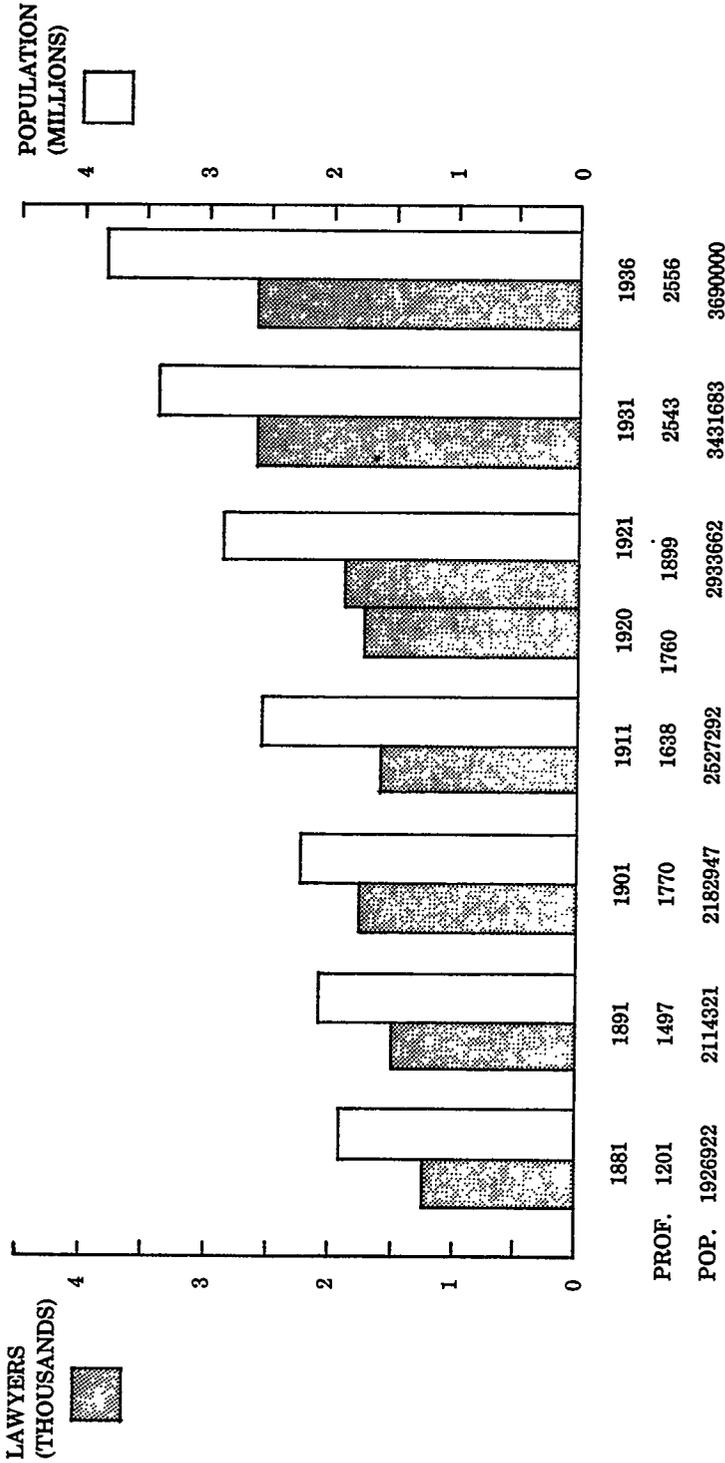
In considering the development of the relative size of the profession over a fifty-five year span, the reactions of its members to the growth pattern, and the pattern of decline in professional standards, it is evident that limited entry as a solution to increased competition is not born out in historical perspective. It fails to take into account either the historically developmental and organic natures of the profession, or its ability to adapt to the complex changes in the nature of the demand for legal services. It is not necessarily correct to assume that there is a definite causal connection between growth in the profession on the one hand, and concern over competition and declining standards of professional service on the other.

In considering the historical development of the supply of and demand for legal services, it is evident that supply is not the only variable. The degree and nature of the demand for such services has changed substantially, and the legal profession has shown considerable ability to adapt to this change. This ability to adapt should not be ignored today.

It is now within the power of legal educators, the governing body, and the government, all of whom were represented at the conference in

London, to determine the future development of the profession. They would be wise to do so with an awareness of its historical development.

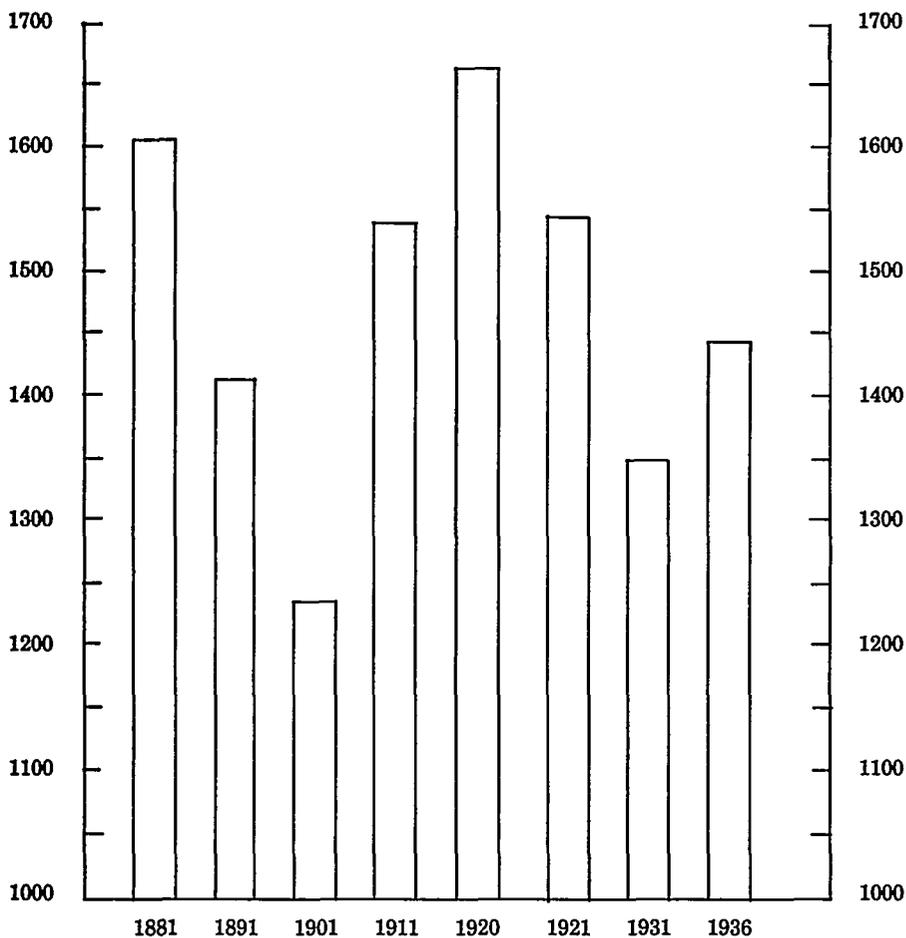
APPENDIX A
GROWTH: LEGAL PROFESSION AND POPULATION



SOURCES: *The Canada Year Book 1942* Ottawa 1942
The Ontario Law List Toronto 1880
The Canadian Law List (Hardy's) Toronto 1891-1936

APPENDIX B

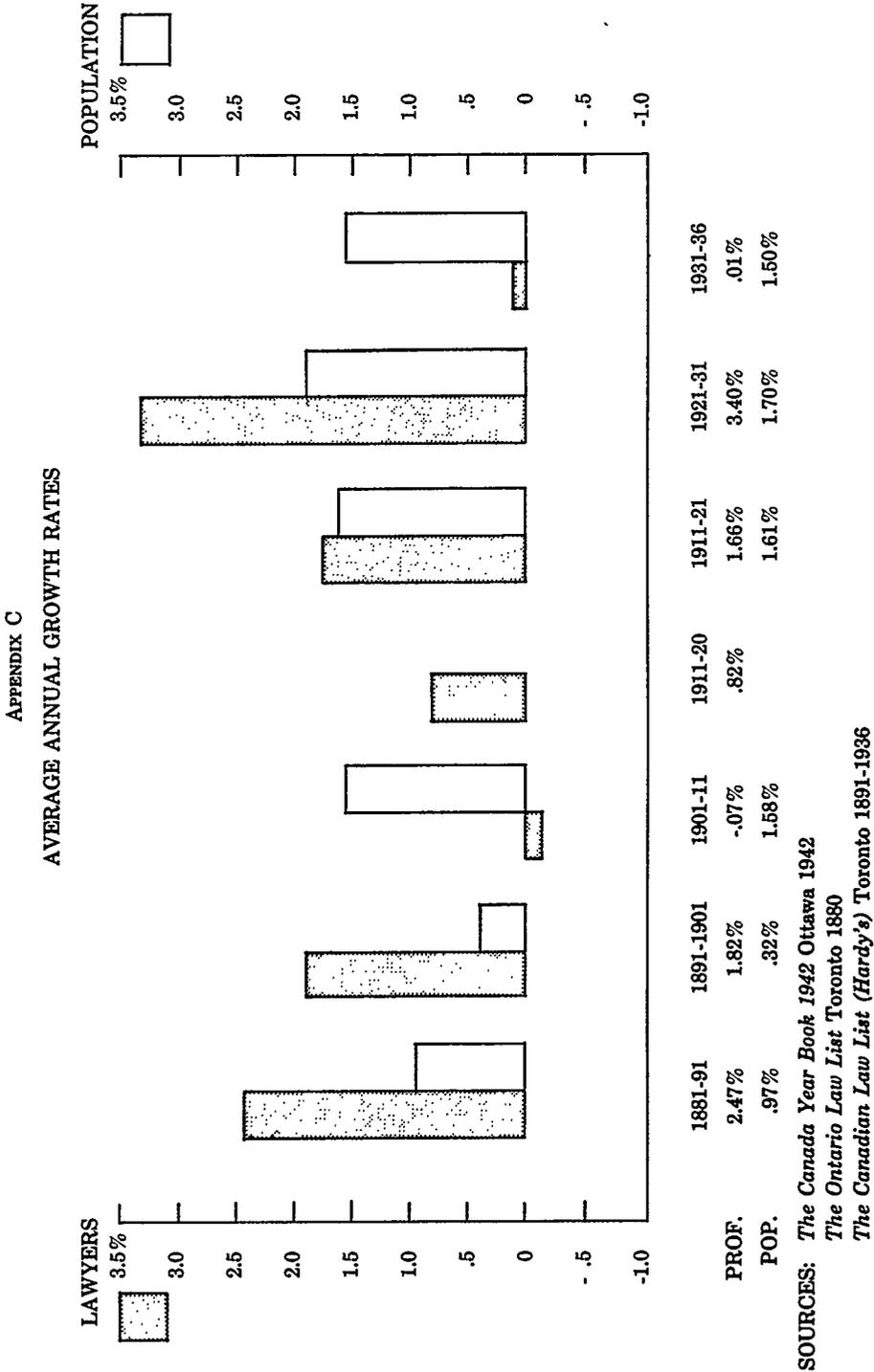
RATIO: POPULATION PER LAWYER



RATIO 1:1604 1412 1233 1543 1667* 1545 1350 1444

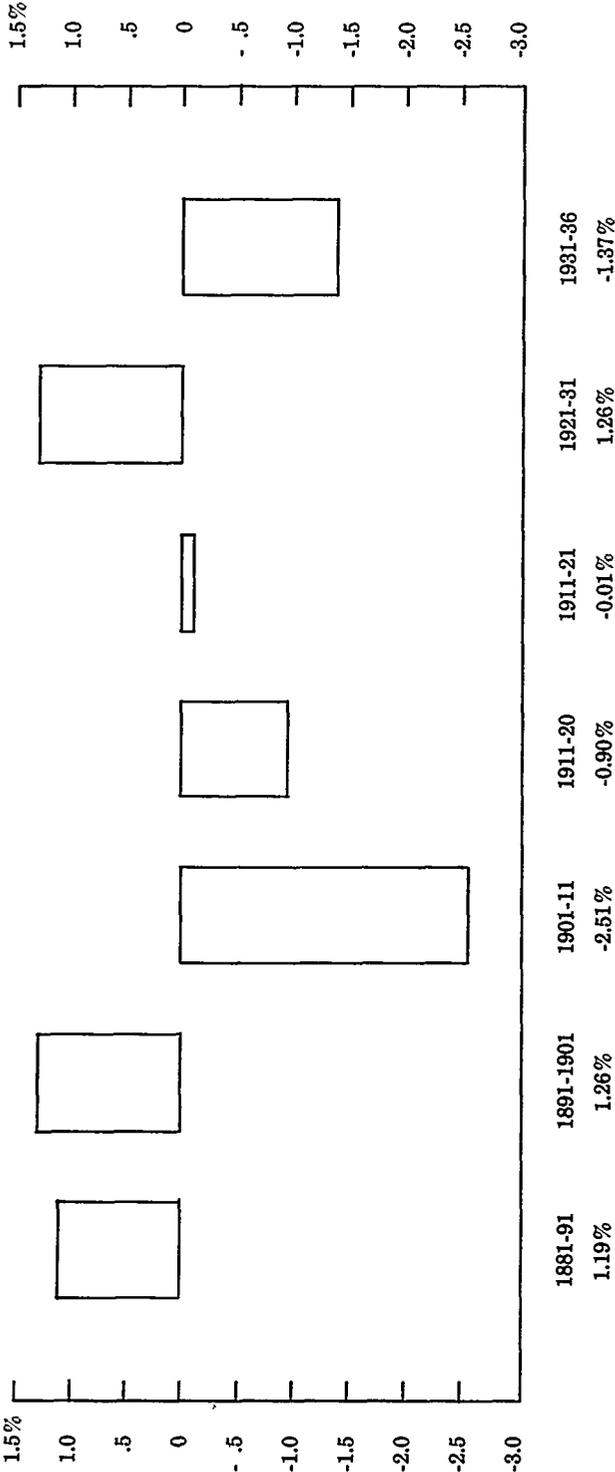
* 1920 ratio based on 1921 population data

SOURCES: *The Canada Year Book 1942* Ottawa 1942
The Ontario Law List Toronto 1880
The Canadian Law List (Hardy's) Toronto 1891-1936



A DEVELOPMENTAL MARKET

APPENDIX D
AVERAGE ANNUAL RELATIVE GROWTH RATE
ONTARIO LEGAL PROFESSION



SOURCES: *The Canada Year Book 1942* Ottawa 1942
The Ontario Law List Toronto 1880
The Canadian Law List (Hardy's) Toronto 1891-1936