Counsel, Clients and Community

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It has been suggested that "all professions seem to possess (1) systematic theory, (2) authority, (3) community sanction, (4) ethical codes, and (5) a culture". Other definitions, of course, might equally be used for discussion, but almost all of them would include the two elements I wish to consider: the authority of members of the legal profession in relation to their individual clients, and the community sanction of their corporate activities and policies. In particular, I want to explore the effect upon these aspects of legal professionalism of changes in Canadian society over the past twenty or thirty years. Urbanization, immigration, mass literacy and mass communications, heightened personal, political, economic and social self-awareness and self-assertiveness are amongst the most obvious changes in the social environment of the Canadian legal profession. Have they had any significant effect upon the profession?

Professionals are said to possess "authority" in their relationships with laymen. This authority is based on moral and intellectual claims. "Moral" claims are rooted in the notion that professionals put service to their clients above their personal convenience or financial gain. "Intellectual" claims, on the other hand, are those arising from the skills and knowledge which professionals possess and laymen do not. Of course, in practice both moral and intellectual claims sometimes prove to be unwarranted: some lawyers are self-seeking, some are incompetent. But there is enough truth in both claims to give them continuing validity in the minds of lawyers and clients alike. They serve to secure respect and authority for lawyers from their clients.

Respect and authority, in turn, are translated into specific beliefs which have traditionally been held by lawyers. Lawyers believe, for example, that they have the right to look "objectively" at matters in which others are emo-

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tionally involved,\(^4\) the right to make decisions for a client,\(^5\) the right to evaluate the correctness or appropriateness of the work of colleagues.\(^6\) Yet each of these traditional manifestations of authority is giving way — or at least being challenged and redefined.

Consider the right to look “objectively” at matters in which others are emotionally involved. This notion of a professional's detachment is so deeply rooted that, in common parlance, to be “professional” about something is to stand back and look at it dispassionately. The courtroom lawyer subscribes (at least in theory) to the proposition that he is an “officer of the court”, that he must not knowingly mislead the court, and that he must not express his personal belief in the guilt or innocence of his client. Although the lawyer is the paid partisan of one of the parties, he nonetheless should share the judge's commitment to objective decision-making. In our humour, we jokingly note that “the lawyer who acts for himself has a fool for a client” — presumably because he cannot be objective about himself. All of these things contribute to the myth of the lawyer’s objectivity, and hence, to his “authority”.

Yet today, the objectivity of lawyers, far from being universally respected, is seriously attacked both within and without the profession.

The attack from the public is not hard to understand:

In time of crisis, detachment appears the most perilous deviation of all, the one least to be tolerated. The professional mind, in such a case, appears as a perversion of the common sense of what is urgent and what is less urgent. The license to think in longer perspective thus may appear dangerous.\(^7\)

This observation is well illustrated by public hostility to lawyers (and others) who criticized the government’s handling of the F.L.Q. crisis because they believed that civil liberties were unjustifiably invaded.

But an attack by lawyers themselves on objectivity as a desideratum is more surprising. Objectivity, indeed, is enshrined in the Canons of Ethics, and buttressed by traditional rules against champerty and maintenance. This is not to suggest that lawyers have always been objective in fact. Sometimes, in the past, “objectivity” was achieved because lawyer and client happened to share beliefs and values as part of that group of “right thinking men” who constituted the ruling elite within the community. Growing awareness of this spurious claim to objectivity evoked the scornful reproach that such lawyers were merely “hired guns” for the establishment. They were admonished to

\(^4\) “...[The lawyer] should bear in mind that seldom are all the law and facts on the side of his client and that ‘audi alteram partem’ is a safe rule to follow”. Canadian Bar Association, Canons of Ethics, Canon 3(1) (Adopted September, 1920) in L.S.U.C., Professional Conduct Handbook (1971) at 5.

\(^5\) This is often couched in terms of presenting the client with the alternative of either following “advice” or terminating the relationship, see e.g. Martin, “Problems of Ethics and Advocacy” in Defending a Criminal Case, [1969] L.S.U.C. Spec. Lect. 279.


\(^7\) Hughes, supra, note 3 at 84.
assert their professional independence, to disassociate themselves from clients whose self-seeking, anti-social conduct they aided, abetted and often promoted. In this context, radical social critics could appeal to the profession's formal norms in order to indict the leaders of the bar.

Now, ironically, those same critics disparage objectivity and advocate close identification with the client as a positive virtue. Today, it is not primarily the establishment lawyer who identifies closely with his client; it is, first and foremost, the lawyer for the underdog.

"Committed advocacy" is, to be sure, not the invention of the contemporary civil rights or poverty lawyers. Clarence Darrow was a practitioner, par excellence, of this style of lawyering over 50 years ago. But it is only now that we are beginning to get some articulation of why detachment and objectivity are to be shunned in favour of "commitment". 8

First, there is the fact, already alluded to, that "objectivity" sometimes has been a euphemism for unthinking adherence to the status quo. Unfortunately, in much the same way, "commitment" may become a code-name for insurgency.

A more sophisticated argument rests on the premise that trust is an essential element in a lawyer-client relationship. Trust, it is urged, can only develop if the client is convinced that the lawyer is genuinely "committed" to his interests. Given the profession's historic failure to serve the poor, and the mistrust by all those outside the power elite of those associated with it, special dramatic proofs of commitment are needed. These proofs include the lawyer's overt acceptance of the client's values for his own: traditional forms of dress and address are symbolically replaced by modern clothes and vernacular speech; traditional arm's-length lawyer-client relationships are replaced by a commitment to common long-term goals; and from common goals, it is only a short step to common participation in methods of achieving them. The client's cause becomes the touch-stone of his lawyer's conduct.

A third explanation of "committed advocacy" is much simpler, and perhaps more plausible. In the 1960's, Canadian universities, like those all over the world, were populated by a generation of young people whose idealism and political consciousness was much greater than their predecessors'. Since they were members of the university community, it was inevitable that law students would come to share many of these attitudes. Likewise, it was inevitable that attitudes acquired at university should to a greater or lesser extent, survive into post-graduation professional activity. Thus, the new "committed advocates" are simply giving priority to the concerns which are foremost in their life.

The question that remains to be answered is whether, as lawyers, they are more likely to abandon such concerns in favour of traditional professional norms than they were, as students, to abandon them in favour of other com-

peting values. In part, the answer to this question will depend upon external considerations: the general political climate, the continued existence of a constituency of radical clients, the availability of at least minimal financial support for new forms of legal practice. In part, the question will be answered within the legal profession itself. Whether it chooses to tolerate, rather than suppress, committed advocacy will obviously be significant.

What will be the reaction of the profession? No doubt, to some lawyers the conduct of these young people will be anathema; they will seek to make them conform or to drive them out of the profession. However, such blood-mindedness will probably be the exception rather than the rule. I expect that what will gradually emerge is not mere tolerance for the different approach of this new breed of lawyers, but as well a growing recognition that lawyers must relate to their clients on an empathetic and compassionate basis, that they must modify their styles of practice at least to the extent of sloughing off needless formalism and false mannerisms. Perhaps even more significant in the long run, will be the increasing commitment of more lawyers to the eradication of the injustices which initially gave rise to discontent.

I hasten to add, however, that this prediction assumes that ways will be found to translate these new attitudes into useful and rewarding professional roles. Unless there is some development of new career possibilities for these young lawyers, many of them will have to revert to traditional types of legal work for a more conventional clientele. This would leave them cynical and embittered, and would leave society the poorer for being deprived of their talents and idealism. Whatever their future, it is clear that the Canadian bar presently contains a small but articulate and intelligent cadre of young lawyers whose relationships with courts, clients and colleagues does not conform to traditional patterns.\(^9\)

I turn next to the proposition that a lawyer has the authority to make decisions for his client and its corollary that the client's refusal to accept a decision will result in termination of the relationship. A classic illustration of this arises in the context of the criminal trial. One of Canada's foremost criminal lawyers has said,

\[\begin{align*}
&\text{I don't think any client has the right to compel a lawyer to act contrary to his best professional judgment.} \\
&\text{[If] the accused insisted on giving evidence contrary to my advice, I would ask the trial judge for permission to withdraw and to declare a mistrial, simply on the ground that I had lost the confidence of my client, and I was no longer able to follow his instructions.} \\
&\text{I must say that in more than 30 years of practice I have never had this occur...} \end{align*}\]

The lawyer's assertion of authority, and the lack of challenge thereto by the client, are both eloquently evidenced by this statement.

However, there has developed a small — but significant — body of opinion which assigns the dominant role in the lawyer-client relationship to the client, rather than the lawyer. This position is usually taken in the context of a discussion relating to the representation of those who have never


\(^10\) Martin, *supra*, note 5 at 284 passim.
enjoyed either power or professional services in the past. An example of such a group might well be tenants in a public housing project involved in a rent strike, or some similar concerted activity, to win what they conceive to be legitimate objectives. A lawyer acting for such a group would pretty clearly have to tell them that under present laws, their chances of winning any litigation to vindicate their position were negligible. Yet suppose, despite his advice, that they insisted upon litigating. The lawyer, so it is argued, should nonetheless act for them. To fail to do so would be to deprive the group of their chosen means of self-assertion and would in effect simply be assisting the opposition. The lawyer who persuades his clients to accept an unfavourable settlement is, in effect, securing their subjugation. By doing so, he further alienates such groups and reinforces their conviction that lawyers are allies of the powerful and the natural enemies of the weak. In sum, the argument runs, to win trust we must yield authority.\textsuperscript{11}

One would have thought that this increased deference towards the client's right of self-determination could have been supported on the traditional ground that it is the lawyer's function to represent, not judge, his client. Yet it is that very position which tends to excite the anger of those who are discontented with the conservative role of the profession as apologists for “polluters”, “exploiters” and other similarly unpleasant designations of its corporate clientele. If in Canada we have not yet reached a situation (as in the United States) where Wall Street law firms were boycotted by job-seeking graduates, because of their representation of reactionary foreign governments, or war industries, we nonetheless are beginning to see some fine young lawyers quietly turning away from modes of practice which demand that the lawyer share the moral burden of his anti-social clients. If it is impossible to divest lawyers of this burden, then the only solution is to avoid putting oneself in the position where the burden must be assumed.

I turn to a final example. A lawyer's “authority" vis-à-vis laymen includes the right to judge his own work and the work of his colleagues, rather than submit them to lay evaluation. This, perhaps, is inevitable since so much of a lawyer's work is technical, and so much rests upon tacit understandings, that judgments can only be made by those with an educated intuition — fellow professionals.

This is not to suggest that the layman is, in fact, without recourse against his lawyer. He can lay a criminal charge if he has been defrauded. He can sue civilly, for breach of trust\textsuperscript{12} or malpractice.\textsuperscript{13} He can have his bill taxed if he feels he has been overcharged. At the same time, it must be said that these remedies each has certain defects. A conviction for fraud does not result in any practical gain for the victim. A civil suit is expensive, involves problematic issues of proof and of doctrine, and may be worthless if the lawyer does not have sufficient funds to pay a judgment. While recently

\textsuperscript{12} McSweeney v. Wallace (1870), 8 N.S.R. 83.
\textsuperscript{13} Bastedo, \textit{A Note on Lawyers' Malpractice: Legal Boundaries and Judicial Regulations} (1970), 7 Osgoode Hall Law Journal 311.
the taxing master has shown considerable willingness to scrutinize professional billings, his very existence must be unknown to most clients. To an extent, these defects are overcome by two schemes mounted by the profession — a compensation fund for victims of fraud and compulsory insurance against negligent malpractice. And finally, of course, the profession does discipline its own. Disbarment for fraud or breach of trust is virtually automatic, although negligent malpractice and overcharging have not as yet been widely recognized as grounds for professional discipline.

What seems inescapable is that any forum selected by the layman will be controlled by law-trained professionals: the criminal and civil courts, the taxing master, the profession's disciplinary bodies. Any possibility of meaningful lay participation is foreclosed: civil juries are unavailable in cases of professional malpractice, lay representatives on professional governing bodies are expressly foreclosed from disciplinary proceedings, even an appeal from the profession's disciplinary bodies to the courts is denied to the lay complainant, although it is available to the accused lawyer, and payment from the profession's compensation fund is merely ex gratia, rather than an enforceable right of the lay victim.

The total control by the bar of the machinery of judgment is not to be construed as a sinister conspiracy to protect its prerogatives or to suppress criticism. Rather, it evidences the intensity of the honest conviction that only those who know can judge.

So long as lawyers acted within areas of technical competence peculiar to themselves, this was perhaps inevitable. But now, increasingly, lawyers are offering their clients advice not simply about their legal rights, but also about their personal problems, their business affairs, their civic responsibilities, and a host of other similar matters in which (at best) the lawyer is no more competent than a marriage counsellor, an accountant, a journalist, or the client himself. Is it not inevitable, then, that there should be considerable scepticism about the immunity of the professional from lay judgment? And if they have no other forum in which to translate scepticism into sanc-

14 See e.g. Re Solicitors, [1972] 3 O.R. 433 (Taxing Officer); Re Solicitors, [1970] 1 O.R. 407 (Taxing Officer).
15 See Orkin, supra, note 6, part IV.
21 Law Society Act, R.S.O. 1970, c.238, s.44; my own contrary reading of the statute would appear to be in error, see Arthurs, Authority, Accountability and Democracy in the Ontario Legal Profession (1971), 49 Can. Bar Rev. 1 at 6-7.
22 See e.g. Law Society Act, R.S.O. 1970, c.238, s.51(5).
tions, will not laymen turn to the marketplace? The client who feels he can get better advice elsewhere will take his work elsewhere, or make his own decisions. This possibility, in turn, makes more pressing the problem of whether the lawyer or the client is to have the last word in the case, and whether the client is to somehow judge or evaluate his lawyer’s conduct.

I have been emphasizing the challenge to the traditional assertion of a lawyer’s authority vis-à-vis his client. It would also be interesting to explore certain dangers we have come to perceive when the client becomes too submissive rather than too assertive, within the relationship. This may happen in situations where the client is particularly passive or inarticulate, or incompetent, or where the lawyer is particularly assertive, insightful or helpful. Sometimes the client becomes totally dependent upon the lawyer, and this dependency may tempt the lawyer to exploit the relationship for illicit purposes.

Of course, we have always recognized this danger insofar as it relates to the financial exploitation of the client by his lawyer. Consequently, we have rules forbidding the lawyer to act in situations in which there is a conflict of interest, and requiring him to observe the highest standards of trust in the handling of his client’s property. New circumstances, however, have provided us with new and more subtle temptations.

What of the lawyer on an “ego trip” who exploits his client for psychological rather than financial gain? How many times must lawyers be tempted to “play God” with their clients, to advise them omnisciently, but without a proper basis of fact or competence in a particular field of personal relationships or business policy? How often will lawyers use clients’ law suits as a convenient vehicle for expressing their own aggressive tendencies, pursuing a private vendetta against another lawyer, or riding a particular legal hobby horse? How often will lawyers, especially the most competent, become committed to a high level of technical excellence whose costs, in a particular situation, may well be excessive in relation to the gains to be made on behalf of the client?

I return to my starting point. Clients today tend to be better educated and informed or, at least, more self-assertive. There seems to have emerged a current of agnosticism about professional authority. My sense of the situation is that if the legal profession wishes to continue to assert its authority, and to reap its benefits in terms of income and prestige, it will have to find a new and sounder basis for its claims.
Perhaps such a basis cannot be persuasively articulated. Perhaps, on the other hand, there are good functional considerations which justify the traditional view of lawyer-client relations. My point is simply that changes in the environment have begun to set in motion either changes in the authority position of lawyers or, at a minimum, changes in the official ideology of the legal profession.

III

The other feature of the legal profession I wish to explore is the fact that it is sanctioned by the community. This sanction involves several aspects: a monopoly over certain kinds of work for the members of the profession; control by the profession over the education, admission and discipline of its members; and privileges for members of the profession not enjoyed by laymen. How do each of these aspects fare in the current crisis of Canadian legal professionalism?

In Canada, of course, lawyers alone enjoy the right to render legal services for reward.28 The apparent triteness of this observation, however, may mask its deeper implications.

First, what are “legal services”? It is fairly clear that advocacy in the superior courts comes within any definition of “legal services”.29 But what of advocacy before administrative tribunals and inferior courts? What of settlement negotiations preceding or following the commencement of a legal action? The preparation of many documents such as leases, simple wills, or applications for corporate charters is usually a routine clerical task. Does it properly fall within the monopoly sanctioned by the community?30

Second, is the decision that certain services are “legal” in effect a self-fulfilling prophecy? Some services, such as conveyancing, have traditionally been performed by lawyers in part because lawyers in times past invested them with many technicalities which are not “functional” today. It is sometimes suggested that lawyers therefore have an interest in not reforming the law and in not removing these non-functional qualities, so that there will be a justifiable basis for the asserted claim of monopoly. While there may be some truth in this suggestion, in all fairness it must also be said that there are many reform-minded lawyers who are committed to removing such anachronisms.

Third, does the bar’s assertion of its sole right to render legal services
for gain extend to the rendering of such services gratuitously? If so, are groups such as unions, cooperatives, churches, and ethnic associations, which wish to provide legal assistance to their members, bound to conform to rules of the legal profession which were designed to cover private practitioners?

It can fairly be predicted that the scope of the profession’s monopoly will be a subject of hot debate in the years to come. Two forces seem to be on a collision course. On the one side there is the bar, rapidly expanding in size and seeking occupational “lebensraum” for its new members. On the other side, there are many individuals and groups — some professional, mostly lay, all militant — who are anxious to stimulate community self-help through the use of “legal” weapons. These groups are reluctant to rely on conventional legal representation because it is expensive, and incompatible with their ideological commitment to self-help. They will surely try to disregard the boundaries that the profession has staked out around its monopoly.

Precedent and current experience both suggest that some compromise position will be reached.

Precedent can be found in the labour relations field. Labour unions, like today’s community groups, were often unable to afford legal representation, and were always suspicious of it. When Ontario enacted Canada’s first effective collective bargaining statute in 1943, its administration was entrusted to a division of the High Court, before which only lawyers could appear. By 1944, federal warfare labour laws had displaced the provincial statute, and an administrative board had displaced the court. Laymen and lawyers both had the right to appear before the board. In 1948, a new federal statute was introduced which sought to preclude the appearance of lawyers in conciliation proceedings. This provision was withdrawn under pressure from the bar, and the coexistence of laymen and lawyers continues in the labour relations field to the present time.

Current experience likewise suggests that professionals and lay representatives will both be permitted to represent community groups and their

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31 The organized bar appears to concede that the official Legal Aid Plan does not possess a monopoly over gratuitous legal services, see Report of the Subcommittee on Community Legal Services (1972), L.S.U.C. at 112. However, this concession does not warrant the conclusion that non-lawyers may render gratuitous legal services, see Re Letros, supra, note 29.

32 See L.S.U.C. Professional Conduct Handbook, Ruling 3, para. 2(h), which exempts from a general prohibition against “steering”, briefs referred to a lawyer by “a community social agency . . . providing legal advice or service on a gratuitous basis for persons falling within the scope of the agency’s activities”.


34 Labour Relations Board Act, Stat. Ont. 1944, c.29, and Judicature Act, Stat. Ont. 1944, c.27. (P.C. 1003, the federal wartime labour regulations, are found as an appendix to Stat. Ont. 1944, c.29).

members. At one end of the spectrum, there are statutes such as the new Quebec Small Claims Court Act which forbids the intervention of either lawyers or non-legal representatives. Here, in fact, the adversary process is intended to be suspended in favour of informal, inquisitorial procedures so that the poor, presumably, will not need either of the two competing groups. At the other end of the spectrum, we are seeing the emergence of a small group of qualified lawyers who are prepared to sacrifice both professional fees and professional prerogatives in order to serve community groups at a cost and in a manner they wish. By so doing, they obviate the need for a clear definition of the limits of the profession’s monopoly.

Between these two extremes, we find many areas of shared practice. The summary conviction provisions of the Criminal Code, which are incorporated by reference into many provincial statutes, provide that an accused person may appear by agent or counsel. The Ontario small claims court legislation has a similar provision. Here, there is an important field of practice for lay advocates. Other areas come to mind: in Quebec, “avocats populaires” are assuming responsibility for a broad spectrum of counselling functions in the area of welfare law; in Ontario, there is a modest proliferation of lay advocates specializing in workmen’s compensation and immigration matters. Since 1971, lay practitioners before administrative agencies in Ontario have operated under the protection of an “agent or counsel” provision, but had, in any event, been tolerated to the point where it would have been difficult to suppress them.

In the final analysis, it is probably recognition of the political realities which will prevent overreaching by either lay or professional groups. The ultimate justification for any professional monopoly must be the protection of the public against the potential harm of reliance on incompetent service rendered by unregulated lay practitioners. Any attempt to foreclose lay competition simply to protect the economic interests of lawyers must, and should, ultimately fail.

Thus, in areas where the profession does not in fact render service, it will probably not choose to, nor be permitted to, assert its monopoly. This includes most of the advice-giving and negotiating jobs in the area of “poverty law”. In other areas, such as conveyancing, the problem is more complicated. Although much of the actual work is done by clericals and para-professionals, a lawyer supervises and retains ultimate responsibility for the end result. Since the professional monopoly is rooted in antiquated substantive law relating to land titles, its retrenchment necessarily involves fundamental reform of the law. This has occurred already throughout much of Canada.

But unrestricted lay advocacy — for example, in superior court litigation — is not in the cards. Here the public interest in assuring basic competence

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37 Criminal Code, R.S.C. 1970, c.C-34, s.735(2); Summary Convictions Act, R.S.O. 1970, c.450, s. 3.
38 Small Claims Court Act, R.S.O. 1970, c.439, ss.91, 100
comes clearly to the fore. Here the profession would perceive a threat to its
very existence. I am not suggesting that the public would necessarily be
harmed greatly if lay experts were permitted to compete with lawyers in all
fields. This, in effect, is the situation in Sweden. However, I am suggesting
that at the core, where the tasks to be done potentially involve a high degree
of technical knowledge, lawyers are most likely to retain their monopoly.

One more question should be raised about the profession's monopoly.
Why did so many defendants in the FLQ trials refuse representation by
counsel in work which is classically identified with the profession: the defence
of persons charged with major criminal offences? At one level, it seems that
they must have made the calculation that there was more political capital to
be made if they appeared without counsel. However, at another level, this
calculation suggests that even the most sympathetic lawyers were regarded by
them as being unhelpful to the attainment of their political objectives. I sug-

gest that the legal profession, in their eyes, does not merely own a monopoly;
it is owned by its monopoly. Lawyers are perceived as the servants of the
system which is embodied in the laws which form the basis of their monopoly.
This simplistic and paranoid view of lawyers brushes aside the vast range of
attitudes and commitments within the profession. But in extreme form, it
does raise a problem which must be confronted: how are the powerless and
the poor to be assured sympathetic representation? Surely, the answer is that
the profession's monopoly must not be used to exact ideological conformity
from all of its members. Like all publicly sanctioned monopolies, it must be
neutral as between all qualified persons who come within its ambit. It must
permit pluralism in the politics and life styles of lawyers.40

The second major feature of community sanction is professional control
over admission to practice, discipline and expulsion. In Canada, this control
is exercised through a system of professional self-government: all lawyers
are statutorily obliged to be members of a provincial association whose gov-
erning body is elected by its members and has power to regulate the
profession.41

Until recently, the virtue of professional self-government was almost an
article of faith, at least within the profession. We tended to ignore the fact
that self-government is by no means a universal phenomenon. Lawyers in
many American states and in Sweden, to take but two examples, and even
English solicitors, have survived as "professionals" although membership in
their professional organizations is voluntary, and although courts or other
public agencies have power to regulate them.42

Now, however, the concept of public participation in the profession's
government is beginning to take root in Canada. It is the logical corollary

40 There is only a single reported instance of the enforcement of political con-
formity involving refusal to admit a Communist to the bar, see Martin v. Law Society

41 See e.g. Law Society Act, R.S.O. 1970, c.238, s.10, 15 ff., 50.

42 See generally, Arthurs, supra, note 21 at 2.
of the proposition that the profession's monopoly and privileges exist to advance the public interest.

Two styles of public participation appear to be emerging. One is typified by Ontario. There, the move towards public participation stems less from overt popular discontent than from recognition by the bar that accountability to the public is not merely inevitable, but is right in principle as well; this recognition was, of course, spurred by the McRuer Report. Because it was embraced, rather than opposed, by the Law Society, and because the Ontario bar has been somewhat responsive to its public responsibilities in such matters as the policing of lawyers' frauds and the provision of legal aid, public intervention is likely to be maintained at a fairly low level, for the present at least.

In 1970, Ontario began its experiment in public participation with the enactment of a new Law Society Act. In order to introduce a measure of outside influence into the processes of professional self-government, the Attorney General, a bencher ex officio of the Law Society, was expressly designated as "the guardian of the public interest in all matters ... having to do with the legal profession"; the Law Society's regulations were made subject to approval by the provincial cabinet and its disciplinary proceedings were made subject to judicial review; and a new Law Society Council with some lay representatives was established "to consider the manner in which [lawyers] are discharging their obligations to members of the public". By 1972, however, the Law Society Council had been discarded as unworkable (at least in the judgment of its own members and of the Law Society). On its own initiative, and without visible public pressure, the Law Society has now invited lay representatives to participate directly in Convocation, its governing body.

Quebec represents a contrasting style. Legislation in that province does seem to reflect popular resentment against the professions, and its reach is more ambitious. Following the Castonguay Report on Medical Services, Bill 250 was introduced in 1971 bringing all professions under the supervisory jurisdiction of a provincial agency, while establishing a uniform basic framework for the governance of individual professions, including law. This legislation evoked a violent reaction from the legal profession, both in Quebec

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45 See Arthurs, supra, note 21, for a discussion of these provisions.
46 See supra, note 20.
47 Quebec, Commission of Inquiry on Health and Social Welfare, see esp. vol. 1 at 131 et seq. (1969).
and in other provinces,\textsuperscript{49} and the ultimate shape of the new law remains in doubt.

What is not in doubt is the proposition that there will be a public presence of some kind within the governing councils of the Canadian legal profession. The desirability of this presence is hard to quarrel with in principle. However, in practice, I am not overly optimistic about the prospects it offers for the protection of the public interest.

First, laymen would not in fact likely possess the technical knowledge to make meaningful judgments about the way in which, for example, professional incompetence is policed. Secondly, there is the likelihood of co-optation. Familiarity breeds affection, understanding and ultimately acquiescence. There is a process, which has been observed in other spheres of public regulation, whereby the regulating agency becomes excessively sympathetic to the regulated industry. Regulation becomes merely symbolic.\textsuperscript{50}

Thirdly, it is important to remember that the public interest is not one and indivisible. One group of public interest advocates, the consumer spokesmen, tend to focus on the price and quality of professional services, and therefore, favour regulation of the professions by government or other extraprofessional agencies. But there is also a public interest in the dispersal of social, economic and political power throughout society. Political, social, economic and cultural pluralism all serve to inhibit centralized power — whether majoritarian or authoritarian. Independent labour unions, churches, cooperatives, newspapers, community organizations, universities, consumer groups, and professions all represent power centres with which governments must reckon. To the extent that these groups are brought under tighter and tighter control by government, the potential for rallying opposition to the prevailing political philosophy of the day is diminished. Of course, pluralism is purchased at a price. Such groups may mount resistance to governments which are forward-looking, as well as those which are reactionary, to those which favour a broad spectrum of public interests, as well as those which seek to protect private and parochial interests. Preserving the independence of the professions (and other groups) does help to assure the existence of a loyal opposition. But they cannot have a veto power. In a democracy, if the government has the votes, it must ultimately prevail.

Whatever their ultimate shapes, it must be assumed that these new institutional arrangements in Ontario and Quebec are harbingers of a more vigorous public scrutiny of the profession. What are likely to be the main areas of interest?


Surely the problems of the supply of, and demand for, legal services are first on the agenda.

At the moment, in certain sectors, demand exceeds supply. Some areas — the Maritime provinces generally and rural communities across the country — support fewer lawyers than they did a generation ago. Within the large cities, lawyers are located mainly in the downtown core, rather than the suburbs where the bulk of the population resides. For example, in Metropolitan Toronto, the five suburban boroughs contain 63% of the population, but less than 7% of the lawyers, while the city's downtown core has less than 1% of the population and 84% of the lawyers. For most Canadians, then, lawyers are physically "scarce". More importantly, legal services are beyond the financial means of large segments of our population. Of all the provinces, only Ontario has a broad civil and criminal legal aid plan and even Ontario's plan leaves largely untouched some legal problems commonly encountered by the poor.

In other sectors, however, it is feared that there is a glut of lawyers on the market. Between 1950 and 1970, the number of persons per lawyer dropped 38% in Alberta, 23% in British Columbia and 15% in Ontario. Much more drastic changes are now upon us, at least in Ontario. The provincial bar numbered about 7,000 in 1970. In that year, some 450 new recruits began practice. For 1972, the number of new recruits was 520, by 1976 this should rise to 850-900. Subject to certain contingencies, the intake will remain at this level, so that during the 1970's, as many new lawyers will have entered practice as were already in practice in 1970. By 1980, then, it seems likely that the Ontario bar will have increased from 7,000 to at least 12,000 or 13,000 — a much greater increase than any projected for the population at large.

The intake levels are basically determined by the number of persons entering and graduating from Ontario law schools each year, since there has been no attempt to restrict the number of LL.B. graduates called to the bar annually, and since the inter-provincial migration of lawyers is negligible. Thus, a change in law school population will automatically change the bar's annual intake. At the moment, Ontario law schools enrol about 1,000 students each year from (likely) 3,000-3,500 applicants with basic paper qualifications. The number enrolled could be greatly enlarged by any (or all) of three expedients: more intensive use of physical and staff resources; employment of existing resources at the same level of intensity, but on a shorter academic programme (say two, rather than three years); or by increasing

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52 Report of the Subcommittee on Community Legal Services, supra, note 31.
Counsel, Clients and Community

the number of law schools. If this were done, the “glut” on the market would quickly grow. Would this be sound public policy?

Assuming the reasonable mobility of lawyers, and the operation of a free pricing mechanism for their services, it might be thought that over-supply would gradually solve the problem of presently unmet demands. If there are too many lawyers in downtown areas, more will move to the suburbs; if there are too many lawyers in cities, more will move to rural areas; if there are too many lawyers to serve the rich, more will serve the poor at prices the poor can afford to pay.

However, the assumptions are questionable. The mobility of lawyers is inhibited by a host of personal and professional considerations: the difficulty of identifying a new location for practice and establishing a clientele there; the propensity of clients with important problems to take them to prestigious “downtown” metropolitan practitioners; the consequent routine nature of much locally-based practice, and its focus on less complex and less remunerative matters. In the result, lawyers are reluctant to move to underserviced areas. In terms of service to the poor, the normal pricing mechanisms are unlikely to produce results. Many people simply cannot afford any fees at all, no matter how modest. Even for the urban middle class client, there is little hope for gain in the present “oversupply” situation. Artificial restraints, requiring general adherence to established fee tariffs, preclude genuine competition for work based on price.

Thus, the deliberate creation of a large pool of underemployed lawyers, in and of itself, is unlikely to produce a solution to the problem of serving groups presently without legal advice. On the other hand, lawyers express considerable fear that an oversupply will create conditions of cut-throat competition for the traditional clientele — leading to fees which are somewhat lower, profit-margins which are paper-thin, and the consequent deterioration of the quality of service. This argument seems to be a transparent disguise for the fear that an oversupply of lawyers will lead to lower professional incomes. However, it is clear that so long as fees remain subject to a tariff structure, the major impact of oversupply will not be to decrease fees. The most likely short-run effects of a large intake into the profession will be, first, to lower salary scales for young lawyers hired by established firms, second, to force some of those who cannot find work in established firms to open up on their own, and third, to drive some new law graduates to seek the relative security of a position in industry or government, perhaps in a non-professional capacity.

None of these consequences is intrinsically bad, especially the last. But should the public not have the advantage of the lower fees which should theoretically flow from a situation of vigorous competition? The point was made by the Economic Council of Canada in its Interim Report on Competition Policy: if the profession is not to be subject to normal market mechanisms, its charges should be regulated by a public body, rather than by lawyer
groups. The new Competition Act is likely to do little in a practical way to implement this recommendation.

And what of the unmet demand for legal services? We stand at the crossroads. The Ontario fee-for-service Legal Aid scheme marked an enormous advance in bringing professional services within the financial reach of many citizens, but it was an expensive advance. The question is whether, to complete the job of making legal services available, the same costly arrangements should be followed in Ontario or emulated elsewhere. The presently unserviced clientele does differ, in many ways, from that which enjoys the benefit of the Legal Aid Plan. For example, the types of cases which are presently excluded from the coverage of the Ontario plan tend to involve a minimal gain for a maximum expenditure: the protection of a tenant on a month-to-month tenancy; a claim for welfare benefits; defending against payment of a small debt; a routine, uncontested divorce. But while each of these matters is fairly trivial in dollar terms, each tends to be highly important in emotional and personal terms to the individual concerned — and there are a great many such individuals.

To cope with this large number of small cases, the fee-for-service plan seems far less efficient than the provision of advice and assistance through clinics staffed by salaried lawyers.

The prospect of a group of salaried lawyers working for the poor also suggests a solution to the problems of providing service on a broader geographical base. Salaried lawyers do not need to worry about getting a practice off the ground, and the presence of a number of them in decentralized clinics would provide them with collegial supports and possibilities for specialization which have up to now existed only "downtown".

Finally, the unique advantage of local clinics is that they open up possibilities for winning the confidence of potential clients. When lawyers are visible in a community, and provide service in a modest and congenial setting, there is a much greater likelihood that poor people will overcome their traditional reluctance to seek legal advice.

It is clear, then, that the public is vitally interested in resolving issues relating to the supply of, and demand for, legal services. It is the public which stands to lose from any shortfall and gain from any surplus in the

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56 Legal Aid Act, R.S.O. 1970, c.239.
57 None of these types of cases is necessarily beyond the scope of the Act; exclusion results from limitations imposed by regulation or administrative decisions reflecting, in turn, financial pressures on the Plan, see e.g. L.S.U.C., Ontario Legal Aid Plan, [1971] Annual Report at 7.
58 This proposition has been challenged however, see Report of the Subcommittee on Community Legal Services, supra, note 31.
number of lawyers. It is the public which pays the basic costs of educating lawyers and of providing legal services for the poor. It is the public whose interests will be vindicated to a larger or lesser degree, depending on the methods devised for delivering legal services. And, finally, the governing bodies of the bar implicitly concede the public's right to determine issues of supply and demand; the profession has made no moves (at least in Ontario) either to bar the door or to encourage recruitment into the profession. Resolving the issues of supply and demand is thus a perfect example of why there must be, and will be, public participation in the process of professional self-government.

As has been suggested, it is by no means clear that such participation will effectively promote the public interest. But a public presence may trigger changes in traditional notions of professionalism. It is at least conceivable that carefully chosen, well-motivated public representatives could raise questions which would force members of the profession to address issues which they seldom canvass at the level of first principles.

Finally, there is the question of professional privileges. By way of example, consider the traditional solicitor-client privilege which enables a person to make full disclosure to his lawyer in order to obtain legal advice, with the assurance that his confidences will be preserved. This privilege is generally accepted, or at least not overtly disputed. But it is premised upon the existence of an arms-length relationship between lawyer and client which may have once existed, but does not always exist today. Should the privilege attach in a relationship in which the lawyer is, in effect, part of the client's organization, perhaps an essential element in his decision-making process? Now that lawyers are increasingly involved in planning business policies and tactics which may violate income tax, competition, or labour relations laws, it can be argued that they should not be allowed to throw the protective cloak of privilege around evidence which would otherwise be compellable. To some extent, for example in the area of income tax, the privilege has already been diminished. We can anticipate still more incursions.

I mention solicitor-client privilege not simply because it is intrinsically important, but also because it is symptomatic. With the greater range of activities undertaken by lawyers, there is a corresponding shrinkage in the area of what is sacrosanct. To render needed service to clients, and to survive economically, lawyers must undertake new tasks. But they cannot at the same time continue to assert privileges relevant to other types of professional work and other styles of practice.


Another example of professional privilege is the right to act for someone towards whom one is at best neutral, and often unsympathetic, to seek a result for him to which he is not entitled. “How can you defend a self-confessed criminal?”, lawyers are often asked. Of course, we have a variety of answers: the confession may be false, the product of a disturbed mind or of a desire to shield the true offender; lawyers work on the “cab rank” principle, and must carry any customer who can pay the fare; everyone is entitled to the benefit of vigorous advocacy because we determine cases through the adversary system, in which the truth emerges from the heat of the battle.

If a sophisticated layman might hesitate to accept these explanations, which lawyers have traditionally advanced, perhaps it is because lawyers have to be satisfied, while laymen can indulge themselves with the luxury of honest doubt. For are not lawyers defending this privilege of guilty knowledge not merely against public scepticism, but against their own inability to live with it? The lawyer, after all, does not cease to be a human being: he must often be distressed because he finds himself the unwilling servant of obnoxious interests. Can he continue to win his living on a daily basis by doing this kind of work, if he cannot dull his reactions, mask his distaste, and provide a rationalization to himself?

The former privilege, non-disclosure, is sanctioned by law, while the latter, neutrality toward the client, is sanctioned by convention. Both, however, must stand scrutiny by an increasingly sophisticated and agnostic public if they are to survive.

What is needed is more thoughtful articulation of the functional reasons for such privileges, which alone will justify their continuance. Without such reasons, professional privileges will come increasingly under attack, and ultimately give way. The professional will, increasingly, have to give an accounting to his community and his clients, a social audit of his position, equivalent to the financial audit now required to avoid the theft of trust funds.

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63 This is strongly suggested in the jury address of defence counsel for the assassin of D’Arcy McGee, see Stark, Barrister-at-Law, Osgoode Hall (1967), 1 L.S.U.C. Gaz. (no. 3) 15 at 18-19.