There is also a new dimension of legal training developing in the United States which is an outgrowth of attention being given to the legal problems of the poor. There are neighborhood legal clinics being established in many areas of the United States, and they are being manned by young lawyers, youthful graduates, who are prepared to develop their skills in this practice. It is fair to say that the traditional legal education which many American law schools have supplied is not terribly good training for such practice. There is a level of legal problem, a kind of legal problem which in the past has often been ignored because of the poverty of the claimant, which is now being pursued with considerable vigor. Traditional law of landlord-tenant, or of debtor-creditor is being re-examined with a kind of intensity that has not been known for some time. And lawyers are being asked to treat these problems with the same attention that one gives to areas which in the past have been deemed more significant. There is a need to find ways to achieve legal representation for the poor, and it may require a form of group practice somewhat unfamiliar to our profession. And, it must be done in a way which will preserve the sanctity and the personal nature of the lawyer-client relationship. Law schools are surely destined to provide the required training and the leadership in developing the modes of practice which will be needed.

Let me conclude, then, as I started. The "Quest for Justice" is a never-ending search, and there is a continuous call for lawyers, for legal educators, and law students to join the search. The new facilities for a faculty of law here at the University of New Brunswick will surely bring together those who will play their part in carrying on that quest.

THE QUEST FOR JUSTICE: THE ROLE OF THE PROFESSION

Gerald E. Le Dain†

Our corporate responsibility for justice is a reflection of the scope and relative importance of our role in society. It is not a narrow responsibility, confined to a particular area, such as the adversary process. It is the general responsibility of citizens having critical influence as advisers and decision-makers throughout the legal order. Undoubtedly, we have a special responsibility for the quality of what may be called judicial justice—that is, the justice dispensed in our adjudicative processes. The philosophical basis of

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judicial justice may be older than the legal profession, but the elaboration and refinement of procedural due process is in many ways our distinctive contribution to human knowledge and experience. In other respects, we are mainly applying our techniques to making the knowledge and insights of other disciplines legally operative and effective. Yet in the employment of these techniques we are inevitably and inextricably involved in the substantive choices that are made. We cannot escape responsibility for the quality of what I propose to refer to here as social justice: the standards of justice reflected in our laws, our agreements, our exercises of authority, and our human relations and social conditions generally. In a word, we must be concerned with justice in its broadest sense and deepest implications: with the concept of justice as an ideal relation among men.

There is, moreover, an intimate relation between social justice and public confidence in the integrity of our judicial processes. It is impossible to erect a satisfactory system of judicial justice—that is, one which not only works justly but is felt to work justly—upon a foundation of widespread social injustice. Our legal procedures will be assumed to reflect the inequalities arising from gross disparity in the financial means and general capacity to defend one's interests.

Accordingly, I do not feel that I can properly confront this subject without saying something about social justice, but I shall confine my observations to what I believe should be the main objective and criterion of social justice: equality of opportunity. Not all questions of social justice can be related to equality of opportunity—for example, it does not answer the problems of the aged and others who, for one reason or another, are incapable of working—but when we begin to examine its implications in relation to our youth and our hopes for the future, we find it to be a helpful standard for identifying our deficiencies and ordering our priorities.

It is unnecessary to emphasize that the objective is not equality—that can never be, even if it were desirable—but rather equality of opportunity to make the most of one's self. It is trite to say that there will always be inequalities in physical and mental capacity and the moral attributes necessary for successful living, but we should strive to achieve the minimum conditions required to offer each individual a reasonably equal opportunity to develop his potential and to express himself in work suited to his temperament and capacities. This is not only a moral imperative but a matter of enlightened self interest. Justice is an end in itself, but like other aspects of the moral law, it has its utilitarian value as well. Through social injustice we waste valuable human resources and, in the end, the whole country loses. As a learned profession competing with many other disciplines and vocational attractions for young people

of character and ability, we have a special interest in doing everything we can to assure equality of opportunity. To sustain itself and to discharge its very heavy responsibility of public service and leadership, our profession requires a steady flow of young people of distinctly above-average ability, judgment and strength of character. As we know, it is a profession that is very exacting in its intellectual and moral demands. The raw material that goes into it must be of fine and sturdy composition. We cannot leave this supply to the accidents of heredity, wealth, privilege or nepotism.

The conditions which affect opportunity extend back, of course, to childhood and, indeed, beyond into the mysteries of heredity. There are limits to what we can do by legislation. We cannot legislate domestic happiness or even domestic tranquillity. We can only do what we can to make it possible for parents, if they will, to provide a reasonably secure, decent and healthful home atmosphere. A child does not start out in life with an equal opportunity to make the most of himself if his physical, mental or emotional development has been seriously impaired by the conditions of his early environment. As a profession having great influence on public and private decisions, we must try to exert that influence wherever we can to assure that it is possible for parents in Canada to provide reasonably adequate standards of housing, clothing and nutrition for their children.

With respect to the other things that go into the total home environment, both physical and psychological, we can only hope that more enlightened policies in our legislation and procedures governing domestic relations, as well as the increasing availability of counselling and other family services, will promote greater stability and confidence in family life. Where there is a greater sense of freedom, dignity and equality, there may hopefully be a more mature view of the nature of the family and the need for compromise and adjustment. Certainly, we cannot put too much effort into the task of strengthening the foundations of family life. Our professional activities and attitudes in this field have an important educational effect. Our conception of the family and the variety of personal relations involved in it is necessarily reflected in the laws that we draft and the manner in which we administer them. The values implicit in these laws and procedures have a profound influence upon public and private opinions and attitudes.

Together with the home environment, education is the single most important factor bearing on equality of opportunity. Indeed, it may overcome many of the disadvantages of the home environment. Equality of educational opportunity is an issue which confronts the legal profession in a particularly acute form because of the long period of training required to become a lawyer. Does the

cost of this long route today mean that the legal profession is drawing too heavily from a relatively small group in the population with a particular social perspective and bias? The effective adaptation of law to a society in rapid process of change requires a variety of social experience and concern. It is highly desirable that the legal profession be as representative as possible of all classes of society.

Studies have shown that there is a definite correlation between social status and educational opportunity in Canada. The less fortunate in our society face psychological as well as financial obstacles. We have reason to believe that we are losing many young people of ability. Because of the negative factors operating in their situation, they need moral encouragement as well as financial assistance to help them continue with their education. This is particularly true at the upper levels of the secondary system and at the level of higher education.

I know it is often said that with the necessary ability and will, a young man or woman can always find a way to get to university. There may be a good deal of truth in this. A person of exceptional ability and ambition has a way of surmounting all obstacles; but if the obstacles are too great, there will be many below this high level of achievement and determination (yet potentially very valuable members of society) who must drop into the labour market with under-developed capacities. The cost of maintaining a young person in university today is becoming a very heavy burden. I am afraid that it is making university education increasingly the privilege of the affluent. The fact that there are more of the affluent than there used to be may obscure not only the social injustice but the country's loss.

There is no doubt that considerable progress has been made in reducing the financial obstacles to university education. There is now much more available in the way of financial assistance, but we may be expecting our young people to carry too great a burden of debt into the beginning of their careers. And there are serious problems arising from regional economic disparities and the limitations of provincial capacity. I do not know whether the country as a whole can afford free university education for those qualified to take it, but if it cannot, I believe there may be something radically wrong with our order of priorities and the way we are spending our gross national product. (I cannot help reflecting on what might have happened in my own case if I had not benefited from the veterans' program after the last war. It is too bad that we only seem to be able to justify some of these more imaginative measures when we fight a war.) I would go further, and say that it is in the interests of our development, and in the interests particularly of Canadian unity, that students should be able to take their university

education (or at least some part of it) away from their home town so that they can learn something about other parts of the country and acquire a broader outlook as Canadians. This would require financial assistance to help them pay for residential accommodation. The money for all this, if it is to be available at all, would have to come from redistribution and re-allocation of national income. I do not see how we can approximate to equality of educational opportunity in this country without recognizing that the federal government must play an important financial role in this field.

Equality of educational opportunity will not bear its fruit unless it is accompanied by equality of vocational opportunity. This is, of course, a complex question because abilities and the requirements of different vocations vary so much. We must leave considerable scope for judgment as to the personal qualities which make for success in a particular vocation. What may appear in some cases as prejudice or discrimination may be a conscientious belief that a certain background guarantees personal qualities which are thought to be essential—as long as it is personal qualities and not personal prejudices that we are looking for in these situations. As I understand it, the sense of security that is inspired by the sight of a particular school tie is a feeling that you may count on how the wearer will react to certain standard issues or situations. In other words, you will be able to rely on his general assumptions and outlook. No doubt this is one of the principal considerations behind the various forms of social cohesion (clubs, fraternities and the like) by which we attempt to preserve and further our interests and privileges. But there is growing resentment against this sort of thing—and its ultimate fruition in what is referred to as the "establishment"—insofar as it may prevent able young people who do not have the immediately recognizable marks of reliability from having a reasonable opportunity to show what they can do.

Apart from the physical and mental handicaps created by adverse social conditions, and the financial difficulties of obtaining a higher education, the main obstacle to equality of opportunity in Canada today is the amount of discrimination that is still practised against ethnic and racial minorities of all kinds. The full extent of it cannot be determined statistically or established beyond a reasonable doubt, but what is significant is that members of these groups still feel that it exists. I like to think that it is on the decrease, but it is something we cannot afford to be complacent about, because discrimination is a weapon which it is only too easy, and perhaps too human, to resort to in the highly competitive struggle of life. As a profession, we must support public and private efforts to eliminate discrimination, particularly from the areas of life where it affects equality of opportunity.

It is sometimes assumed by young men starting out in our profession that if you do not have connections which can bring business it is difficult to gain admission to a good firm. I do not know how true that is today. Well established firms generally have enough "business-getters" or they would not be well established. What they always need are competent lawyers able to do the work for the clients whom the leaders bring back to the office after lunch. It is my impression that good offices are always on the lookout for ability. The ability to give service can be a very potent business-getter, whether one starts out with connections or not. Nevertheless, it is in our interests, as individuals, and as a profession, to make sure that prejudices do not cut us off from access to ability. How many young people today do not apply to certain firms because, for a variety of reasons not related to their ability, they do not think they have a chance of acceptance? I do not know, but I think we are well to ask ourselves the question and to ask ourselves how we may rectify that impression, insofar as it may exist. Needless to say, enlargement of opportunity will increase competition and in some cases eliminate the advantage which some derive today from the accidents of birth or social condition, but I do not see how a country in this modern age of complexity can safely pursue any other course.

I have dwelt at some length on equality of opportunity as an essential aspect of social justice because I desire to emphasize my conviction that our professional concern must be increasingly with the standards of justice reflected by our acts and relationships outside the judicial process, as well as by those within it. There is increasing evidence of a healing of the divided self in law: expertise and social conscience are beginning to find each other. In our thinking about taxation, for example, questions of justice are being brought to the level of expert concern. Similarly, the attempt to give organized and effective expression to the concern for consumer protection reflects a growing awareness of the degree to which the individual is becoming relatively powerless in a controlled and managed market. The quest for justice in the years ahead will increasingly involve an examination of the ethical implications of relationships and procedures in areas which we have come to think of as dominated by technical considerations of expediency.

It is my impression that the revolution which we are passing through is one which, although marked at times by violence, is fundamentally concerned with human dignity, personal integrity and justice. It is a protest against authority, but it is above all a protest against the assumption that technological achievement and material well-being are an answer to everything: that they validate or sanctify everything that is done in society. I believe that the revolution is at

bottom an effort to restore the individual to his rightful place in society, and that it is a renewal of ethical concern. Walter Lippmann has said that we are "living in a time when the central institutions of the traditional life of man are increasingly unable to command his allegiance and his obedience." No doubt this is true, but I believe there is more than merely disillusionment, disbelief or indifference. There is a profound stirring of the conscience—not the puritan conscience which seems to have collapsed but a humanist conscience concerned with man's personality as well as his achievements. This revolution has been a long time in the making, and it is important for lawyers to realize that it carries with it a search for intellectual honesty as well as a great deal of impatience with the authority of tradition. The law is going to have to modernize its idiom, purify its thought processes and enlarge the range of its relevant concerns. For the law is one of the voices of authority and will increasingly come to be the object of critical evaluation by a generation that is emancipating itself from awe.

The spell has been broken. Our political and social institutions are being shaken out of a long period of relative stability and complacency, and are now in a period of rapid transformation, which corresponds, if it is not comparable, to the pace of change in technology. Everything is being questioned or challenged. Nothing is considered sacred or inviolable. The new generation is fighting off the thrall of alienation. It is handling the things we have created, and in some cases, handling them roughly. The implications of all this for our profession, and particularly for legal education and training, are profound, although the outline can as yet be only dimly perceived. An increasing proportion of our professional time will be devoted to guiding change, as distinct from operating what is known and established: change in our institutions and fundamental relationships, change in our ways of ordering relations and resolving conflicts. There is all the difference in the world between the background required to identify the causes of institutional breakdown and to prescribe and implement constructive change, and that which is required to perform technical tasks within a framework of familiar institutions, relationships and assumptions.

To cope with change in a truly conservative and, yet, constructive manner the lawyer must have a jurisprudential understanding of law—that is, a firm grasp of fundamentals in their various relations. He must also have a vivid and intimate understanding of the dynamics of political and social institutions and of how the law operates in relation to other methods of social control. These are perceptions that can only be developed by concentration on the basic themes or concerns of law and on the relation between law and other branches of human activity and knowledge. The changes

that are called for are changes in the role and methods of law, in the relationships of power, in the substitution of other processes for power or conflict.

We are witnessing this challenge to our capacity for adaptation in many areas of life today: industrial relations, the university, the maintenance of public order, to name but a few. One of the most difficult questions ahead of us, for example, is how to fit the business corporation, which is exercising governmental power, into a polity that continues to pay lip service to the fiction that business is in the private or non-governmental sector of society. Our political theory takes practically no account of the business corporation as an instrument of government policy—both as influencing government rules and making rules of its own which effect governmental purposes. The quest for justice will be somewhat unsophisticated unless we recognize modern corporate power for what it is—not merely entrepreneurial and productive, but profoundly governmental and regulatory in its character—and attempt to relate this power to the processes by which governmental authority is subjected to public scrutiny and evaluation and is surrounded by procedural safeguards and controls to assure the protection of individual rights. This process inevitably involves much greater visibility of corporate purposes and procedures, as well as representation of public interests.

Because of the great confidence which our profession has in the judicial process as the safeguard of individual rights we tend to view the quest for justice as involving the judicialization of power wherever that is possible. This is our distinctive point of view and the area of our distinctive contribution. It has, of course, its drawbacks and dangers, particularly where it interferes with administrative freedom and efficiency. A good deal of our reforming energy in the years ahead will be devoted to extending the application of the judicial process and improving the quality of it. For it is the chief means by which power is disciplined by law. The tendency to judicialization will be directed to two main objectives: the substitution of arbitral process for conflict and the elaboration of fair procedures where individual rights and obligations are being effectively determined. One of our most presssing needs is to put the right to a fair hearing in administrative law on a rational basis, in respect both of application and content.

It is astonishing that we have managed to surround this whole question with uncertainty and confusion. It is not only a bad advertisement for our intellectual resources but might even raise a question as to our seriousness of purpose. We have allowed the right to a hearing to turn on highly abstract and artificial considerations and distinctions which cannot possibly satisfy the individual sense of justice and fair play. For this is what is at issue here: not merely an

objective analysis of the precise legal effect of a particular exercise of power, or whether, as a practical matter, that exercise of power is likely to be influenced by representations from the person affected, but satisfaction of the individual sense of justice—and this, not merely as a good in itself, but as maintaining confidence in the process and inducing cheerful compliance with it.

In some cases we have denied a hearing on the ground that an exercise of power, although involving a decision determinative of rights and obligations, is so governed by policy considerations as to make it an administrative rather than a judicial function. In other cases, we have denied a hearing, or some specific right of representation or intervention ordinarily associated with judicial process, on the ground that the particular administrative act, although obviously going to have an important effect on the result, is not technically determinative of rights and obligations. In neither type of case has the result flowed from a realistically functional analysis of the power in question, but rather from a highly conceptual approach which bears the marks of the development of law by assertions of jurisdiction, tentative and restrained in their scope and justification. We see here the limitations of the development of law by analogy. On the one hand, it obliges us to strain similarity; on the other hand, it may unnecessarily restrict the scope of an important principle. It is here that conceptualism may conflict with realism, and if the judicial process is incapable of further advance, it may have to be rescued by legislation.

The McRuer Report on civil rights has demonstrated the uncertainty concerning the right to a hearing at common law and recommends that the requirement of fair hearing should apply to all powers of decision, whether administrative or judicial. The Report goes further and recommends that any person substantially and directly interested in the subject matter of an inquiry should have an opportunity to be heard and a right to cross-examine witnesses with respect to relevant matters. These recommendations recognize certain essential facts about powers of decision which are characterized as administrative rather than judicial, as well as investigatory powers which do not involve a decision, strictly speaking.

It is essential that a person affected by an administrative decision should have an opportunity to know the mind of the administrator and to attempt to influence the result. To say that a decision is to be based on policy, or that it is essentially discretionary, is not to say that it is not governed by any criteria of relevance or that it it not susceptible of rational and critical evaluation. To meet the test of justice, every decision must meet the test of reason, whether it is based on specific, concrete criteria or broad policy standards. It must find its ultimate justification and acceptance in a rational

process. That process is not complete unless the person affected has had an opportunity to participate in it, to bring facts, reason, and his own views of policy to bear in an attempt to persuade the mind of the administrator. The administration may well benefit from the views of others as to what the policy should be. There is no reason why it should not justify its own views of policy. There is no basis for the view that policy or discretion are matters which the administrator may keep to himself. A person affected by a decision is entitled to know why the administrator has taken the view he has and to make the case against this view.

The denial of a hearing, in the case of a so-called administrative decision, is based on a completely unrealistic view of the nature of decision-making, whether administrative or judicial, and of the function of representations by the person affected. The recognition of the right to a hearing in the case of a judicial decision is apparently based on the notion that it is worth allowing representations in such a case because the person or body who decides is bound and circumscribed by rules of law. The object of the representations in such a case is to demonstrate that the facts and law require or dictate a certain decision. At least this is the theory. The denial of the right to a hearing in the case of administrative or non-judicial decisions is apparently based on the notion that since the person who decides has a discretion based on policy, he cannot be obliged by the facts and law to make any particular decision. The conclusion is that any representations by the person affected are therefore useless since the administrator can ignore them. This overlooks the point that he may in fact be influenced by them (and that such influence may conduce to better administration), and that, in any event, and most important of all, an opportunity to make such representations will satisfy the sense of justice and fair play of the person affected.

The second fact or aspect of reality which the McRuer Report recognizes in its recommendations concerning fair procedures in administrative law is that whether an investigation or inquiry is, strictly speaking, determinative of rights and liabilities, it will often have an important effect upon the result, and may cause irreparable damage or injury, regardless of the formal decision. How can the ordinary citizen accept as just a process of judicial reasoning that would deny him the right to counsel, to call witnesses, to cross-examine and to make representations, in any inquiry or investigation that may cause irreparable injury to his reputation or compromise his legal position in subsequent proceedings? He surely cannot be impressed by abstract and artificial distinctions between the decision which has immediate legal consequences or effects and the opinion which constitutes a mere report on which others may or may not act. What really matters—the "reality of the situation" as one judge

called it—is that the opinion of the investigator is bound to have an important influence on subsequent official action. What is more, the publicity given to the inquiry and report may form a public opinion which is effectively determinative of rights and obligations. Finally, as another judge, taking a realistic view of the matter, has observed, confrontation by the person affected and his counsel can have a salutary effect on the conduct of the investigator.

The difficulties in this branch of the law point up as well as any other the path which the legal profession must pursue in the quest for justice: conceptualization will always be an indispensable instrument in classifying and ordering the substance of law and in applying it to concrete cases, but it must not be an imperious source of rules and solutions that deflect us from the discovery of functional reality. The kind of skill and sophistication in law that we have to develop is that which does not mistake the conceptual apparatus of the law for the end of law, but is able to handle it as a flexible instrument for the pursuit of rational and just results.

Finally, I should like to touch on three areas in which I think it is essential for our profession to pursue values closely related to justice and public respect for law and legal processes despite the serious problems and risks which contemporary social conditions may suggest. The first is protection of persons under suspicion or accusation, not only as a safeguard of justice in the particular case, but as influencing attitudes on such matters as violence, integrity of the person, and personal freedom. Over against insistence on the rights of the individual in criminal law, there is mounting and well-founded concern over the increase in crime, particularly crime accompanied by violence. It is a difficult choice, but all our history shows that abuse of police power will brutalize feelings and subvert our judicial processes. Our official attitudes towards human dignity, which in their turn influence individual attitudes, are best reflected in the way that we treat the unfortunate, the unloved and the despised.

The second area, in which we are already embarked upon controversial measures of reform, is the withdrawal of law and legal repression from the domain of personal morality. The issues here are very complex—in particular, the determination of what is socially harmful and what is not—but I agree with the general concern behind this development, which I take to be the proper function and application of law. It is a question which we as a profession must always keep before us. It is fundamental to the sense of justice as well as to personal freedom. In some cases the issue is whether a matter should be subject to legal regulation at all; in others, the kind of regulation that is appropriate. Our constitutional difficulties sometimes force us into unavoidable choices, as

in our criminal law treatment of restrictive trade practices, but our law exhibits many marks of being unreasoningly punitive. Imprisonment for non-support is an example.

A third area in which we must press forward with reform despite certain problems and risks is the need to make our judicial process less costly, more expeditious, and generally more accessible. An adequate system of legal aid is an obvious necessity, although there should be no illusions about the cost. A more serious problem perhaps than the public expense of making justice accessible to all is that if we reduce the risks of litigation and generally make it too easy and inviting, we may defeat the purpose of trying to make it more expeditious. I suppose an equilibrium is inevitably established. Nevertheless, a prime objective of the legal order must be to encourage adjustment and compromise and what the business man calls "cutting your losses". How did someone describe law a few years back? "Law, the science of inefficiency"? It is not something for us to boast about, but it is profoundly true that we must minimize the amount of time and social energy that we are obliged to spend in the orderly resolution of conflicts. We all know the man who becomes absorbed in his case to the neglect of his business. A society so absorbed must inevitably pay a price in productive enterprise. I think what I mean to say here—and this serves me as conclusion—is that in our continuing concern with the development of a more just legal order, we must be careful not to exaggerate the place and role of law in society. It is only one of the forces making for social order, and we must never forget that it is regulative rather than creative. Its chief aim must always be to clear the field so that the creative purposes of man can be carried on in an atmosphere of ordered freedom.

THE ROLE OF LAW REFORM IN THE QUEST FOR JUSTICE

Richard Gosse†

Two years ago, at the opening of debate in the House of Lords on the first Annual Report of the Law Commission, it was said:

> True it is that law reform is generally regarded as a dull, dry subject which does not stir much heat or passion, at any rate unless it happens to touch upon such topics as capital punishment, homosexual offences, abortion or perhaps divorce.

As I do not intend to regale you on those particular topics, brace yourselves!

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