# WHY THE LAW SOCIETY SHOULD NOT BE REGULATING PARALEGALS

## Competition Bureau Expresses Fear

The Deputy Commissioner of Competition for civil matters for the Competition Bureau—Richard Taylor—expressed his concerns about the Law Society takeover of paralegals on January 25, 2007 in a letter to Mr. Paul Dray, then Chair of the Paralegal Standing Committee of the Law Society of Upper Canada (LSUC).

The federal Competition Bureau was established to ensure a competitive environment for the provision of services, including professional services. This includes the market for professionals providing legal advice and services.

Taylor's expressed concern was that lawyers were competitors to paralegals and logically would place their interests above those of a competitive marketplace. Unsurprisingly, his concerns turned out to be very real.

In his letter to Paul Dray, Mr. Taylor made it clear that the Competition Bureau appreciated the necessity for regulation including education, training requirements, examinations and fee payments. The issue confronting the Competition Bureau, however, was that the LSUC would limit the right to practice by paralegals to such an extent that it would eliminate them as competitors of lawyers. This remains the central contradiction of the mishmash of reforms that were rushed through the Ontario legislature under the ironically named Access to Justice Act in 2006.

In the same letter to Mr. Dray, Mr. Taylor asserted that regulation should not restrict competition any more than needed to achieve the desired objectives. In particular, he warned that problems could arise if the governing body of the profession imposed restrictions on the normal competitive process such as the right to practice, which he felt should be regarded as "an extreme response justified only by the most compelling circumstances."

The Deputy Commissioner expressed the Bureau's opinion that open and effective competition provides the most effective means to promote an efficient, low cost and innovative supply of products and services meeting consumers' tastes and needs. The Competition Bureau argued that there would always be some businesses which are more effective competitors then others. In its view, a regulatory environment should not try to offset these differences nor in any way try to establish equality among competitors. Rather, it should provide a market framework within which all firms thrive or fail on the basis of their ability to meet consumers' demands at the best combination of price and equality.

Here comes the zinger. Mr. Taylor said that "When one group of professionals is reliant upon another group of competing professionals for the ability to practice its profession and the scope of authorized activities, the Bureau is concerned that unfounded quality of service arguments may be used to artificially restrict access to the market in which the professionals compete." Mr. Taylor's warnings were an ominous and accurate portent of what has happened. The Bureau in fact, had no choice but to question the LSUC's conduct which fell clearly within the definition of anti-competitive act contained in s. 78(1) of the Competition Act.

The main rationale that the LSUC has given for its takeover of paralegals is the fact that "the public interest" requires it to ensure that incompetent paralegals are not foisted on the public market. What the LSUC has done (and what is not apparent to the public) is that, as a result of bylaws passed by it immediately after the takeover – the Law Society has basically *eliminated* paralegals as a profession able to provide a wide variety of services in competition with lawyers. This is manifestly in breach of the Competition Act.

## Bylaws Demolish Scope of Practice

The devil is in the details. Prior to the enactment of the Access to Justice Act and the amendments to the Law Society Act, paralegals provided a wide range of services to the public. They did so effectively and, according to former High Court Judge Peter Cory, at "significantly lower fees" then charged by lawyers. In fact, within about 30 years, the number of paralegals working in Ontario flourished from a few hundred to an estimated 4,000. Many paralegals prepared wills, prepared incorporations, prepared leases, acted in undefended divorces, did simple real estate transactions and engaged in Family Court representation – subject to prior approval. Some of their work was in "gray" areas, but unauthorized practice prosecutions were few and successful ones were even fewer.

Lawyers felt the squeeze on their fees. Indeed, the Ontario Bar Association (OBA) which represented many lawyers working on their own ("sole practitioners"), repeatedly pressured the Law Society to restrict the scope of practice of competing paralegals so that they could maintain a monopoly over the provision of legal services. Its half-hearted effort to force paralegals out of lucrative Workers' Safety and Insurance Board cases only failed because of the Board's policy to remit the payment of awards directly to workers and not to their legal representatives. It is quite a different matter when it comes to the practice of monetary remuneration by the Courts where lawyers carve out their usually excessive fees first out of settlements and have awards deposited in their trust accounts.

Efforts to restrict paralegals' scope of practice failed. In a landmark case, the LSUC suffered a major blow (Regina v Lawrie and Pointts Ltd., 1987 59 O.R. (2nd) 161) when the LSUC failed to block agents from representing clients on traffic ticket offences by privately prosecuting the defendants for unauthorized practice of law. The Ontario Court of Appeal rebuffed the Law Society's efforts to monopolize traffic ticket representation and concluded that its efforts were neither sensible nor workable. However, upon passage of the Access to Justice Act, the LSUC finally usurped legal authority to determine the scope of paralegal practice through bylaws that could be changed with a snap of fingers. The new restrictive bylaws limit paralegals' domain of practice to certain defined areas and prohibit them from providing legal advice or services in *all* other *unspecified* areas. This means in practice that lawyers have the *exclusive* and unconstrained legal right to provide all legal services other than those specifically permitted to paralegals as well. The LSUC has accepted holus bolus the recommendations made to it by the Canadian Bar Association acting as lobbyists for the business interests of lawyers.

What do the bylaws say? Specifically, they restrict paralegals to provide legal advice only with respect to Small Claims Court, provincial offences, 6 months maximum criminal court matters and federal and provincial tribunals. That's it. No more. Everything else is *verboten*. The bylaws thus further entrench lawyers' fixed-price justice monopoly. An example? While permitting paralegals to negotiate motor vehicle accident claims, the bylaws ban them from cases involving "catastrophic injuries" where large fees are to be earned.

No rationale is given for preserving this lucrative turf for lawyers alone.

## Greed Trumps Public Interest

Lawyers' greed trumps affordable justice when lawyers control the game and hold all the aces. The LSUC has tried to masquerade its dictatorial control over their twenty-first century serfs. In reality, paralegals have been disenfranchised inasmuch as they are "members" of the LSUC who can't vote for benchers. The much-touted elections of paralegals to their LSUC Paralegal Standing Committee is a joke: the Committee is only administrative. Similarly, the LSUC's appointment of two paralegals to Convocation where they are outnumbered by 83 to 2 is a coup d'oeil, an illusion of democracy.

As the Competition Bureau points out in its letter to Paul Dray, regulations should clearly address legitimate concerns about paralegals' practices without unnecessarily restricting competition. The evidence that the LSUC has come up with in order to justify its sweeping restrictions on the scope of practice of paralegals has been at best anecdotal. There is no systematic, empirical evidence that horror stories about paralegals have been more numerous or worse then horror stories about *regulated* lawyers with respect to incompetence and dishonesty. Complaints about lawyers' services are fast approaching 10,000 annually. Given an estimated 4,000 practicing paralegals in Ontario as of the date of the Law Society takeover, it is actually surprising how well paralegals were able to supply legal services to the public without compulsory regulation. The elephant in the room? Regulation doesn't eliminate dishonest practitioners – it merely forces them to be craftier.

The issue is not yes or no to regulation. Of course, regulation is in the public interest. But regulation by whom? Regulation for what purpose? Regulation in whose interest? And why regulation by a competing profession? The Law Society has been successful in doing what no other similar organization has been able to do at any time in recorded history anywhere across the globe: assume total control over a *competing* profession; restrict its scope of practice by bylaws; and pretend that it is doing so in the "public interest". Are the comrades heading the LSUC trying to prove Lenin's theory of monopoly capitalism true?

The phrase "public interest" is merely a figleaf. The LSUC "in the public interest" almost demolished the Ontario Legal Aid Plan when it took over its administration several years ago. Later, it caved in to pressure from the influential insurance bar by backing off prosecuting lawyers who accessed private hospital patients' records in breach of the privacy laws. Senior discipline counsel resigned years earlier alleging improper interference by LSUC overlords. Its discipline department is both hated and feared by lawyers for being imperious, selective, harassing and characterized by tunnel vision in its prosecutions. The elite Benchers and their hangers-on feed at the LawPro Insurance trough which stuffs them with lucrative agency fees for protecting and defending incompetent lawyers and thereby forces lawyers' insurance rates–paid for ultimately by the clients – sky high. And, oh yes, the famous Osgoode Hall wine cellars where rare bottles of wine worth hundreds of dollars each are quaffed regularly in the dark recesses hidden from public eyes. All this and more – in the public interest?

## Coalition Needed to Repeal Takeover

An accounting is on the horizon. Last December's LSUC Convocation exhibited deep fissures as "progressive" Benchers pushed through modest reforms designed to revitalize the LSUC's decaying reputation. Two thirds of lawyers don't even vote in Bencher elections. Some benchers castigated the LSUC at the meeting using words like "bloated, opaque, disconnected" and, more cryptically, accused the LSUC of being dominated by old, white men. "While we may have a monopoly on legal services in this province, it is a fragile one," a senior respected bencher, Paul Schabos stated, warning of the possibility of a government takeover.

In order to truly serve the public interest, the Access to Justice Act provisions that place paralegals under the governance of the LSUC must be repealed. A review is scheduled in a couple of years by the Ontario government. A coalition must be built which will achieve the goal of repeal. The Access to Justice Act was buried in an omnibus bill. Every single paralegal and public organization that appeared at numerous Justice Policy hearings opposed the takeover except for the LSUC and two of its sychophantic fans within paralegal ranks, of whom one was a pliant Paul Dray. The Act was passed at lightning speed in the Ontario Legislature thereby truncating any real debate. NDP justice critic Peter Kormos' call for a clause by clause review of the law was outvoted.

The masquerade is over. The masks are off. Self-interest, not public interest, is the leit-motif for the LSUC takeover. The Law Society has knowingly exacerbated the major crisis of the legal system in this country: the inaccessibility of legal services.

There is no reason why paralegals cannot be governed in a myriad of other ways including a combination of self-regulation and public supervision. Similar alternate proposals were recommended by two public Commissions of Inquiry, one headed by a retired university president, Ron Ianni, and the other by a high court judge, Peter Cory. The Law Society itself had waffled over the takeover for over 20 years, implicitly recognizing the inherent contradiction of lawyers ruling paralegals and recalling what happened to the Roman Empire when it overextended itself. Memories are short, however. Monopolistic self-interest eventually prevailed at the expense of affordable justice.

Professor Ianni and former Justice Cory made it very clear in their two official reports commissioned over the past two decades on this issue that conflict existed between the LSUC and paralegals, that paralegals' service was more affordable, that lawyers were full of antipathy to paralegals and that the administration of the paralegal profession should not be placed in the hands of their competitors. In their opinions, paralegals could be regulated in the public interest easily by their own professional body in conjunction with public oversight. Although public interest may justify regulation, it doesn't justify regulation by competitors.

The legislation is ripe for challenge.

Fortunately, it is being challenged. A Toronto paralegal, Harry Kopyto, who is the subject of a "good character" hearing before the Law Society in his application to be grandfathered, has challenged the LSUC's authority to govern paralegals on the basis that it conflicts with section 78 of the Competition Act which defines an anti-competitive act and on the basis that it reduces access to justice. This case is likely to wind its way through the courts with growing support. The inaccessibility of justice for financial reasons is a chronic condition in Canada. Kopyto's challenge to the takeover has already received sympathetic coverage from the Law Times, was featured on the Paralegal Society of Canada blog and has even won support from legal circles in the United States. The issue will not go away. No justice? No peace!

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