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LAW AND SOCIETY

Bryan Schwartz comes to the defence of both lawyers and paralegals

LAWYERS have long held a state-sanctioned monopoly. Rules against the "unauthorized practice of law" have kept out potential competitors. For example, other paid agents have generally been barred from representing people in court.

The conventional defence of the monopoly goes like this: Lawyers admit to their ranks only highly trained people. Law societies will discipline, even expel, members who are dishonest or inept. So clients have some assurance of competent service. Third parties are protected too. A client's heirs will not have to fight about a badly drafted will. Even the client's adversaries can benefit. The professional ethics forbid a lawyer from helping a client destroy evidence or initiating a frivolous lawsuit.

Critics reply that monopolists are liable to deliver slim service for fat fees. In arenas like traffic court, non-lawyer specialists might perform capably at lower prices. The competition would spur lawyers to provide more user-friendly services at more affordable rates.

Of late, independent paralegals in Canada have been making inroads. The Pointts corporation, which acts in traffic cases, has been especially active and successful in fending off legal challenges to its presence. The government of Ontario has already received a study, the Ianni Report, calling for a much expanded role for paralegals.

In many areas, ending the lawyers' monopoly makes sense. Paralegals should themselves, however, be subject to some regulation.

An analogy. Not all vision difficulties need the attention of medical doctors. Optometrists can prescribe corrective lenses and opticians can manufacture them. We still need assurances that these allied professionals can recognize when a problem needs a physician's attention and make the appropriate referral.

The flip side of "paralegals in" is "lawyers out." Quebec has already excluded lawyers from most cases in its small-claims courts. A trend toward "lawyers out" would, I think, be a disservice to the public.

Not everyone has the skill or confidence to present his or her case to a tribunal. An inexperienced person may be facing a corporate employee who routinely participates in legal tussles. Many people do need paid help in appearing before tribunals. If that is admitted, why restrict the field to paralegals? Let them face competition from lawyers. There are around 4,000 unemployed lawyers in Canada. Perhaps some will move into areas that are not rich but offer a chance to help others and to develop professional skills.

If someone feels that his or her best helper would be a lawyer, who is to say that the matter is not "important enough"? The outcome of a small-claims case may matter intensely to a person, as a matter of principle or material welfare. Depending on the province, a small claim can be as high as \$10,000. Before a labour arbitrator, a professional career can hang in the balance; before a workers' compensation panel, an entire financial future can be at stake.

A person might want a lawyer in a "lesser" arena for a variety reasons.

A particular lawyer may have earned the client's trust in earlier dealings. A "lesser" dispute, even a traffic case, can have wide implications for an individual. A conviction could be damaging in other cases, as could a loss in a dispute with an auto insurer, or in a struggle over child custody. A client might want one trusted adviser to handle them all.

THE broad professional training of a lawyer may offer advantages when a matter should be actively pursued beyond the immediate context. A lawyer may recognize the need to take a problem to a human-rights commission or to a superior court charged with supervising lower tribunals.

In many fields, then, the best approach will be "paralegals come in, lawyers stay in."

Some concluding words in defence of the societal value of lawyers.

In places with few lawyers, people do not always turn to paralegals. On occasion, they may resort to downright illegals. In Japan, aggrieved parties sometimes enlist the persuasive power of Yakuza members of criminal organizations.

The rent-a-mobster approach is not unknown in North America. In our system, though, the main effect of excluding lawyers would be to increase the power of other elites. Many ordinary people might find themselves defenceless against abuses from members of established professions such as the police, judges, bureaucrats, doctors and journalists. Throughout history, individual lawyers have often been courageous and effective in resisting oppression from these quarters.

Let's not be in a rush to kick out all the lawyers; in our political ecosystem, they have a necessary role.

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