FOLA's POSITION ON LAW SOCIETY AMENDMENTS IN RESPONSE TO BILL C-75

Submitted to: Law Society Benchers
cc'ed to: Sheena Weir

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The Federation of Ontario Law Associations (FOLA), is an organization that represents the associations and members of the 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, we represent approximately 12,000 lawyers, most of who are in private practice in firms across the province. These lawyers are on the front lines of the justice system and see its triumphs and shortcomings every day.

The attached document serves as FOLA's position on The Law Society of Ontario's amendments in response to Bill C-75.

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It is well recognized that Bill C-75 has changed the landscape of who can act as agent for accused persons.

Section 802.1 of the Criminal Code of Canada prohibits attendance by agent on charges where the maximum sentence that can possibly be imposed on summary conviction is greater than six months. Exception is made where the defendant is a corporation or the agent is "authorized to do so under a program approved by the lieutenant governor in council of the province."

Bill C-75 increased most maximum penalties for summary conviction offences to two years less a day. The Bill also converted many formerly indictable offences into hybrid offences.

As a consequence of Bill C-75, effective Sept. 19, paralegals and law students will effectively be shut out of criminal courts unless the province authorizes a program in accordance with sec. 802.1.

In response to Bill C-75, Attorney General Doug Downey wrote to Treasurer Malcolm Mercer advising that the Law Society was best positioned to determine the scope of legal services to be provided by licensees, including paralegals. It was proposed that the Lieutenant Governor in Council of Ontario approve a program in accordance with section 802.1.

Attorney General Downey stated in his letter to Treasurer Mercer: "we would like to suggest that the Law Society ensure that agents can continue to represent clients in respect of summary conviction offences (including hybrid offences that proceed summarily) that, prior to the recent amendments, carried a maximum penalty of six months". FOLA believes that this suggestion needs to be viewed in the lens that it is not as simple as merely saying paralegals may represent clients on certain matters.

On Aug. 15, an Order in Council was signed to effectively allow the Law Society to determine the scope of services that paralegals and law students can provide in criminal matters.

FOLA is not aware of any other province contemplating permitting paralegals to act as agents on criminal matters where the accused could face a jail sentence of two years less a day. This may be due to the fact that Ontario is the only province that has paralegal regulation.

FOLA is deeply concerned with the prospect of expanding paralegals' scope of practice to allow them to attend as agents on matters that carry a potential penalty in excess of 6 months in jail.

While recognizing that the federal government through Bill C-75 has made virtually all criminal offences punishable on summary conviction to a jail sentence in excess of 6 months, no amendment to s. 802.1 was undertaken in Bill C-75. Certain other offences received increased penalties as a result of Bill C-46. Again, no amendment to s. 802.1 was considered appropriate by Parliament.

Because longer penalties are now possible in summary conviction offences, the Crown is more likely to elect summarily in hybrid matters. Certainly, matters that were previously too serious or too complex to proceed summarily will now see summary elections. As a result, it is expected that post September 19, 2019, more serious allegations will proceed through summary conviction.

If paralegals are to continue providing legal representation to people charged with summary conviction offences, they will be handling a broader range of offences and more serious matters, possibly without having additional training or competence checks. There have been no meaningful consultations regarding this change. The suggestion that this "maintains the status quo" is not correct. This is illusory. The public will not be protected through this change without adequate further training.

There are no concerns regarding paralegals losing the ability to appear on matters for which they are already retained. Those matters will maintain their lower penalty as a result of the operation of s. 11(i) of the Canadian Charter of Rights and Freedoms and as such paralegals will continue to be able to appear on such matters, even if charges are laid after the coming into force of Bill C-75.

There is no lack of lawyers willing to act on criminal matters. There is no "access to justice" issue that requires an immediate or imminent response. As low-income Ontarians access legal services though Legal Aid Ontario and the Legal Aid Services Act requires a lawyer to provide services, access to paralegals is not required. As well, lawyer and paralegal service costs are similar for most criminal matters.

There is a seeming lack of data on what criminal law void paralegals are currently filling. Despite the Committee's Report referencing that 100 paralegals practiced in the criminal law field for at least 25% of their work, our inquiries of defence lawyers, crown attorneys and OCJ judges would suggest that paralegal representation in criminal courts is a rarity. We question whether a significant amount of the work reported by the cohort of 100 actually represents non-Criminal Code charges, such as Highway Traffic matters. Lastly, it must be kept in mind that there are over 9,000 licensed paralegals in Ontario. A cohort of 100 is a mere 1% of paralegal licensees.

To the extent that paralegal licensees are attending on criminal matters, there is a further lack of data. On what types of charges are they acting? What percentage of those charges go to trial and what percentage of those charges end in a finding of guilt? What evidence is there that paralegals charge less than lawyers, particularly considering the large number of young lawyers who are trying to establish a practice and are more than willing to act for a modest rate?

A further matter we would ask Convocation to consider is the effect of the Supreme Court of Canada decision in Pintea v Johns [2017] SCC 23, where the court endorsed the Statement of Principles on Self-represented Litigants and Accused Persons (2006) of the Canadian Judicial Counsel. If a judge in a criminal proceeding follows the Statement of Principles, one might expect that an accused's interests will be better protected if they were self-represented than would be the case if represented by an inadequately trained, educated and supervised paralegal.

The comments of Justice Durno of the Ontario Superior Court in R. v. Bilinski, 2013 ONSC 2824 at paragraph 65 are instructive: "I am not persuaded that a person who retains a paralegal is now entitled to the effective assistance of counsel." Justice Durno continues:

"[66] The differences between paralegals and counsel remain. No doubt paralegals are now regulated, and some have professional legal training outside of on-the-job training in court. There is now a LSUC rule setting out the standard for a competent paralegal. However, that does not remove the main differences identified in Romanowicz. Neither is there any support for the appellant's submission in Hill. There remains a clear distinction between the representation that an accused person is entitled to when they retain a lawyer versus when they retain a paralegal.

[67] The LSUC draws such a distinction. The LSUC's advice in regard to choosing the right legal professional includes that a lawyer's qualifications comprise a Bachelor of Laws or juris doctor degree, or equivalent. The lawyer must have successfully completed the LSUC's licensing process, including licensing exams, articles of clerkship, and an online professional responsibility and practice course. On the other hand, paralegals' qualifications include completion of an approved legal services program and the licensing process, which also involves less substantive licensing examinations.

[68] The appellant has provided no evidence that the LSUC or any other regulatory body has now assured the public that the representation level is the same. Indeed, the record supports a contrary conclusion. The case-specific evidence on this appeal supports that conclusion. The appellant knew he was not retaining a lawyer. He knew the agent had less legal training than a lawyer, and he knew the agent would charge less than a lawyer.

[69] The fact the LSUC now regulates paralegals does not change any of those factors. Indeed, the appellant never suggested that the fact the paralegal was licensed played any role in his decision. There is a constitutional right to effective representation by counsel.

There is nothing to support the submission that there is a similar right where the appellant retained a paralegal. What the appellant seeks to do is to create a new, or expand an existing, constitutional right.

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[72] One of the appellant's submissions can be quickly disposed of. Assuming there should be a new middle ground test, it cannot simply be that the paralegal is entitled to make more mistakes than a lawyer. First, there is no set number of mistakes that lawyers can make before their conduct of the case reflects incompetence. Second, to succeed on an appeal, there still has to be a miscarriage of justice established. While at some point the number of errors may become a factor, any new test would have to nonetheless focus on the quality or results of the errors and not the quantity.

[73] There are several challenges to adopting a middle ground standard for paralegals in criminal court on this record. First, Libman J.'s proposed standard for appeals in cases under the Provincial Offences Act was that the defendant would be entitled to effective assistance commensurate with the training and licensing requirements that will govern this new class of paralegals. However, because the appellants' material was so deficient, His Honour had no need to examine the training and licensing requirements, nor the fact that there are two categories of paralegals: those who were grandfathered and those who were not.

[74] A brief examination of the requirements reveals there may be significant challenges in determining those requirements for, and the level of competence of, paralegals who were grandfathered. While they are clearly now regulated and a dissatisfied client has recourse to the LSUC, there was no requirement for any legal training.

[75] Even now, there is no assurance that a similarly situated paralegal would fulfill his or her yearly educational requirements by taking courses that would assist in representing persons in criminal court. At the time of this trial, the requirement for educational courses had not been in place for a year, so whether Mr. Chojnacki ever participated in any programs, and their nature, is unknown, since he provided no material in response to the appellant's allegations or any other aspect of this appeal."

At para. 85 Justice Durno sets out the following test:
"(i) Everyone is entitled to a fair trial whether they are represented by a lawyer, a paralegal, or him or herself;
(ii) Where an accused retains counsel, she or he is constitutionally entitled to competent representation by counsel. There is no constitutional right to the effective representation by a competent paralegal; (emphasis added)
(iii) Where an accused chooses to proceed without counsel, he or she forgoes the right to the effective assistance of counsel. They cannot be heard to complain that the conduct of the trial did not rise to the level of competent counsel after making an informed decision they did not want to retain counsel;

(iv) Where an appellant alleges his or her trial representation by a paralegal was deficient to the extent that a new trial is required, she or he must establish:
- First, the facts upon which the claim is based, if they are disputed, on a balance of probabilities, and
- Second, that the paralegal's conduct, perhaps combined with other events, produced a miscarriage of justice. The appellant must show that there is a real possibility that the incompetent representation produced an unfair trial, that a miscarriage of justice occurred because of the paralegal's representation. The test can also be described as the appellant establishing the reasonable possibility that the reliability of the judgment is compromised.
(v) Whether the trial judge (or the justice setting the trial date for the reasons indicated below) cautioned the accused that by retaining a paralegal, he or she was giving up their right to the effective representation of counsel as indicated in Romanowicz."

The 2012 LSUC Report to the Attorney General noted that public awareness has not kept pace with the differences between paralegals and lawyers and what work they can provide. The veiled expansion of scope of paralegals being proposed in the first step in the Paralegal Standing Committee's Report further blurs these lines and fails to protect the public.

FOLA supports the use of law students, students-at-law and paralegals in criminal matters where they are being supervised by a lawyer as in law school or legal aid clinics. We support the expansion of scope in these limited circumstances as it ensures protection of the public through the supervision of a properly trained lawyer.

Finally, FOLA notes the apparent haste with which the Bill C-75 issue is being addressed. The timeline has been extremely brief between the Attorney General's letter to Treasurer Mercer on July 11, the Order in Council on Aug. 15, the Standing Committee's Report released only a few days before the Sept. 11 convocation and Sept. 19, being the day Bill C-75 will take effect. Expanding an agent's scope of practice into matters that could attract a penal sentence of up to two years less a day is an issue that requires careful thought and attention. There are many aspects that need to be considered and many stakeholders who need to be consulted, including crown attorneys, judges (particularly judges in the Ontario Court of Justice who will see an increase in the number of cases before them) and defence counsel. FOLA would urge caution and careful deliberation before committing to a final vote.