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THE FUTURE OF LEGAL SERVICES IN CANADA

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This article is about the future of legal services to the poor and working class in Canada. After a brief consideration of the evolution of such services, we will consider the techniques for the delivery of legal services which, in our view, will come into existence in the not-too-distant future. It is our belief, however, that the significance of these developments transcends mere technique. We will therefore also attempt a more broadly-based analysis of the impending developments in delivery of legal services in our legal system.

I. *The Mechanics: The Past.*

Only the most persistent detractor would argue that our profession has failed utterly in its obligation to care for those unable to pay for its services. The vacuousness of an accusation of such breadth is, however, effortlessly matched by those who zealously trumpet the record of achievement and seek to apply the *de minimis* rule to proposals for change.

There can be no doubt that the profession has a proud heritage of public service. Many of its members have often acted selflessly on behalf of non-paying clients. Yet, as in any heritage, a disquieting gray zone hedges legend against fact. The evidence is clear, we think, that in neither the past nor the present have we been able to recognize and fulfill the unmet need for free or subsidized legal services.

Until very recently, the United States offered to the poor whatever legal services there were through a chaotic arrangement of public and private agencies. In Canada, organized legal services have always been administered by the Bar. In the early stages, the Bar provided both the human and financial resources on a voluntary basis as they were seen to be necessary. The premise was clearly one of charity. While there were, particularly in the West, precedents on a smaller scale, Ontario was the first of the provinces to underwrite substantially the profession's efforts. That support grew to the point where, as we entered the Seventies, the Ontario

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Plan was undeniably superior to any other Canadian programme. Some supporters have made even wider claims.

The Ontario programme became the Canadian model. When other provincial governments were urged to step up (or, in some cases, to begin) their spending in this area, they were usually enjoined to duplicate the Ontario product: lawyers paid by the government, through the Law Society, on a fee-for-service basis; a wide range of services available at the discretion of area directors; duty counsel in criminal courts; flexible financial eligibility criteria; and the whole plan administered and directed solely by the legal profession. Yet, as the other provinces finally began to recognize the need for legal services and to make more substantial financial commitments, the Ontario format and approach failed to dominate. A debate took place in which some, particularly in Quebec, propounded the superiority of a neighbourhood law office system: full-time salaried lawyers and a strong community base were the keynotes here, modelled on the American Office for Economic Opportunity offices. Whatever the reasons proffered in the behind-the-scenes debates may have been, recognition of the shortcomings of a pure *judicare* system were becoming more obvious and alternative methods of delivery of services became more acceptable.

Nova Scotia emerged with a system in which full-time lawyers, paid by the provincial government, work out of offices strategically placed throughout the province. They looked to an initial staff of approximately forty full-time lawyers in neighbourhood offices. Manitoba has recently initiated a plan which is a replica of the Ontario plan but which contains one large experimental neighbourhood law office in Winnipeg's North End. Presently staffed by four lawyers and an equal number of law students, it is being used as a laboratory for testing future directions. Manitoba has also rejected the Law Society as the administrator of the plan.

The most ambitious departure from the dominant theme came last year in Quebec. The plan was to employ over two hundred lawyers who, together with a large group of specially trained laymen, were to service the unmet legal needs of the province. As ultimately unfolded, the chief administrative organs, the Regional Boards, were to have not less than one-third and as much as two-third community representation. While the Boards would have their own local offices, provision was also made for the funding of local legal aid corporations which might be entirely controlled by local organizations of citizens. For all that, the most surprising development was the failure of the Quebec legal profession to gain control of the central co-ordinating and policy-making body. Quebec thus became the first province to operationalize with some vigour the view that more than legal expertise is needed to ad-

minister and develop a programme which, while law-oriented, is also a programme of social service and social change.

II. *The Mechanics: The Future.*

It seems likely that the immediate future will bring a more rational approach to the provision of legal services. The public is aware of the unmet needs and pressure is mounting for a commitment from both the federal and provincial governments to aid in the implementation of a more comprehensive system. A more serious effort will be made to articulate ends and more sophistication will be brought to the task of selecting instruments. This process and the interaction between the profession and the communities served will allow a better diagnosis of the malady and necessarily an attempt at realistic cures. In the short run at least, the ideological debate, or non-debate depending on your view, will probably give way to the lawyers' ever-abundant pragmatism and desire to compromise. The general direction, however, seems likely to be away from the fee-for-service model and towards the integration of *judicare* and the community-controlled clinic with its staff attorneys and commitment to change.

Community-centred operations will be the basis of a consequently much expanded programme in which more and more lawyers are publicly employed in an effort to service legal needs. Judging from recent trends in the social services, it is likely that many such centres will offer an integration of legal, health and social services. There is no doubt that the poor, while not the only group in need of legal services, have the most undeniable and politically palatable claim to assistance and that ultimately the community orientation will prove a more effective technique of delivering services to this group. Present trends at the level of government policy-making and attitudes towards professional monopolies lend credence to this view.

With respect to structure, we doubt that the ultimate control of legal services programmes will long remain with the law societies. It will become clearer that policy-making and administration of social assistance programmes, in which we include legal aid, require a good deal more input than legal expertise. This is quite apart from whatever desirability may be attached to community control. While we believe that the social perspectives of the profession will broaden considerably in the future, it is unlikely even in the short run that the profession will maintain its paramount position. The social interest in having the job done properly is simply too strong to long sustain the special interest of the legal profession. One need only ask why the College of Physicians and

Surgeons ought not to run a medicare programme to perceive the profession's conflict of interest.

We acknowledge that the impulse to insulate legal services programmes from government control and to preserve the "independence of the Bar" will be very strong. The profession will likely be joined by some of its individualistic clients and some traditional citizen groups in resisting such a move. A compromise comparable to the Quebec solution seems probable. An independent corporation would be created with guaranteed funding, directed by representatives of client groups, professionals including the legal profession and a number of lay people who might be expected to have a contribution to make.

The local legal services offices will ultimately be community-controlled. The development of this process will, of course, vary depending on time and place. The demands and tensions are already strongly articulated in some areas and incipient in most others. For reasons discussed later, the very existence of the neighbourhood law offices will itself tend to catalyze these developments. We may expect a diversity of approaches to the delivery of legal services as individual programmes are tailored by their constituencies to respond to specific problems and situations.

The diversity of approach is already seen in the introduction and utilization of lay advocates in legal services offices. It has been recognized that it is essential to train lay people to carry out some of the functions traditionally carried out by lawyers. This immediately involves the lawyer in his major task of community education and illuminating the legal system for citizens for whom it has remained largely impenetrable. We thus can expect the lawyers who work in such programmes to question sincerely the perspective of the traditional profession. The interaction and dynamics created between the lawyer, clients and paraprofessionals will inevitably lead him to question the legal system's approach to dispute settlement.

We anticipate that entirely new methods of settling disputes will arise. People in conflict situations, frustrated by the cumbersome procedure and delays in methods of resolving conflict, will attempt to resolve their differences without recourse to the traditional institutions. While usually dependent to some degree on the sanctions of the overall system, arbitration in the commercial context or trade union courts already removes certain conflicts from the direct influence of the conventional mechanisms. With an increase in access, sophistication and participation, we will see recipients bargaining collectively with welfare officials, tripartite arbitration boards for resolving landlord and tenant disputes, and community courts handling disputes among local residents. As time

passes, the lawyer will tend to play an increasingly insignificant role in dispute settlement and new devices created by the responsive community lawyer will replace many of the anachronistic aspects of the legal system. Speculations of this sort apply most directly to the urban poor. Different techniques will of necessity be developed for the rural poor who, at least in some parts of Canada, may be so dispersed as to make community based services a financial and administrative impossibility. Experimental approaches to this problem are underway in Western Canada. Updated versions of the old circuit riders are already with us and airborne legal services lawyers will soon be a reality in remote settlements.

In evaluating the unmet needs within our present system we must recognize that the very poor are not the only group in need of legal services. The costs involved in criminal proceedings, divorce and other matters are often barriers even to those sufficiently well off to meet day to day needs. A rational approach to the provision of services to working and middle class people may not demand (or even tolerate) the community based programme. The feature of the Ontario Plan which permits postponed payment of all or part of fees is likely to be incorporated into new plans wishing to meet the needs of more than just the poor.

A widening availability of legal services entails not only increasing costs but a rising consciousness of problems and awareness that their solution rests with legal mechanisms. The combination of these factors may ultimately give rise to demands for the socialization of legal services. Needless to say, the formidable political strength of the profession would be fully mobilized against such a move. Arguments springing from the need to preserve the integrity of the Bar as a buffer between the state and the individual assume, in a discussion of the socialization of the profession, a cogency clutched at by those who oppose any extension of state-supported services to the poor. Client groups and others would no doubt join the profession in demanding an arrangement which, at a minimum, could be expected to guarantee the independence of the lawyer to act in the clients' self-interest and free from government interference. A redoubtable array of administrative problems, such as the range of services to be provided under such a system would prove, if not insuperable, sufficiently intractable to deter all but the most zealous devotees and thereby retard the process. Still, it is a prospect likely to give the profession even more cause for thought than it has in the past.

III. *The Spin-Off Changes.*

The personnel of any system are the major determinant of its direction. Lawyers are, of course, central to the operation of the legal

system. They hold absolutely the positions of its operators (as practitioners and judges) and without them the mechanism would not function. They are a forceful presence in the legislative process. Moreover, they share a characteristic of all professionals in that they determine the types of individual who may enter the ranks and what they may do when they arrive. In the law, as in other professions, these controls provide on the one hand a measure of assurances to the public that service will be skillfully performed and on the other, a method of protecting and advancing the interests of the profession's present membership.

These controls are partly exercised through formal channels—regulations governing education, articling and admission qualifications or procedures for disbarment and citation for professional misconduct. At least as important are the informal controls, by which the bar as it exists at any one time is able to socialize the larger portion of its membership as to its role and value predispositions. The legal profession has prided itself on being a closely-knit and homogeneous group with admission to the Bar often being synonymous with admission to an exclusive club. Chief among these, and no doubt not of conscious origin, is the limitation of practice opportunities to mainly private, profit-making enterprises servicing paying clients.

We believe that the starting point in important changes spinning-off from the broadened availability of legal service will be the entry into the system of people who do not wish to work in traditional practice. This will mean that dissatisfied practitioners will see openings which may be more attractive than their present work. It will mean that law students, previously presented with a choice essentially of private practice or starvation, may be able to look forward to alternative opportunities. Indeed, to the extent that people decide to go into law on the basis of the kind of life that lies at the end of the education road, different kinds of people may be induced into law work. As the composition and aspirations of members of the profession develop, so will the new breed of lawyer attempt to bring radical change to the legal system. The new legal experts will demand new approaches from law reform commissions, bar associations, law societies and in judicial appointments.

Perhaps more important, opportunities will be opened up for the participation of people without formal legal training. Partly to conserve manpower and partly to encourage community involvement in community law offices, it is likely that paraprofessionals will become more numerous, more skilled and more comprehensive in the kinds of work they are able to undertake. It is trite to point out that there are many operations for which lawyers are well paid which could be performed by individuals who have not re-

ceived the fullness of a legal education. Indeed, in most law offices, many such operations are performed by specialist secretaries and others. At the same time, it is indicated that many operations are too complicated for the layman and will remain within the professionals' preserve.

The point often lost sight of is that there is a reciprocal relationship between the complexity of techniques and the skills and interests of the workman. The fact that most adversary proceedings involve subtle points not easily grasped by the untrained may mean the adversary system will never be accessible to laymen. It does not follow from this, however, that the highly complex proceedings we now know are the only ways available of resolving disputes, nor are they necessarily the most effective. However, when all the workmen in any system are highly trained, there is little incentive to construct mechanisms which are functional yet simple.

It is our contention that the changes in legal services and the interaction between the legal system and classes and groups previously excluded from the system will stimulate substantial changes in the legal system and a fundamental re-evaluation of its effectiveness. This process of change has already begun by a questioning of the rights and role of the profession and the validity of their claim to sole proprietorship of the system's operation. It is our observation that the legal system changes only when provoked. The system's vested interest and its ultimate priority of remaining free of government interference will provoke an accommodation of the new experts in its midst.

The ultimate responsibility of legal services will be to initiate educational and community development programmes that inform citizens both of their rights and the procedures necessary for dealing with the legal system. The new lawyer, aided by the paraprofessional, will assist the citizen in understanding and thereby effectively utilizing the various institutions within the legal system. As more citizens are encouraged to participate in settling their own disputes, they will become aware that our present legal system is unduly complicated and unresponsive to their needs. As the process of dispute settlement becomes more visible and less intimidating, the cult of expertise which surrounds the law will begin to erode. Citizens at all levels of society will recognize that the legal system was originally designed as a functional tool for society's benefit. In its most simplistic terms, the legal system was created to resolve conflicts. What has happened over a period of time is that this system, like many others, has become enmeshed in its own machinery. When we discuss changes in the profession during the next fifty years we are not in fact referring to lay people being required to operate that intricate machinery; lawyers must continue

to grapple with statutes, case law and procedure. We rather recognize that the tools must eventually be modified to make them accessible to the citizen of the twenty-first century. Rather than teaching the tenant to litigate his case through a cumbersome and non-responsive court, we anticipate that new systems and tools will be created to allow the tenant to settle his disputes with his landlord in a more responsive, expeditious and humane setting. We must devise solutions that respond to the realities of citizens' needs and do not merely perpetuate the existing system.

We believe that there will be an expansion of neighbourhood law offices and a concomitant expansion of practice opportunities for both professionals and paraprofessionals. The institutional support thus provided for these people will enable them to move the profession forward towards a new composition, new tools and, we hope, renewed dedication to its ideals.
