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Paralegal proposals a recipe for havoc

Letting paralegals handle real estate sales could have unfortunate consequences.

Retired Supreme Court Justice Peter Cory released his report to the attorney-general on paralegal regulation last week and two of his recommendations, if implemented, could create havoc in the field of real estate conveyancing, exposing the public to unnecessary risk.

Overall, Cory proposed that independent paralegals - working without lawyer supervision - should be licensed, have a minimum of two years' experience or training, and be governed by an independent body.

They should develop a code of conduct, a discipline process, mandatory insurance and a compensation fund. This proposed framework has met with general approval among the various industry stakeholders.

In the real estate field, however, his proposals give rise to serious concerns about whether Cory actually understands how a real estate transaction is processed and how the public is protected.

Cory recommended that licensed paralegals should be authorized to act for a vendor on the sale of residential property that is either clear of any mortgage encumbrances or subject to only one mortgage. He also proposed that "grandfathered" paralegals who pass a qualifying examination be authorized to handle these transactions without any further educational requirements.

Neither of these recommendations was specifically proposed by any of the paralegal groups that made submissions to the commission.

As a lawyer for 28 years, I acknowledge a potential conflict of interest, but I have examined the issue in this column from the perspective of public protection and the continued smooth functioning of a system that has worked well in Ontario for the last 200 years.

Earlier this week I spoke to Paul McCarten, president of the Canadian Bar Association-Ontario, Real Property Section. McCarten is a senior lawyer at Borden Ladner Gervais in Toronto.

"Cory has made a breathtaking leap into an area without any sort of knowledge or foundation to support his argument," says McCarten.

"I'm astounded he would actually make those statements. This is most devastating from a public perspective."

Here are some of the issues Cory failed to address. Each involves a large measure of public protection.

TRUST FUND PROTECTION: Cory recommends that "paralegals should not have a trust fund and will not require one for their limited real estate practice."

He fails to suggest how a paralegal handling a client's sale transaction would receive the sale proceeds, pay off any mortgages, real estate commission and other liens or arrears, and deliver the balance to the vendor - all without a trust account.

When asked to comment on this proposal this week, Brenda Miller, president of the Institute of Law Clerks of Ontario, asked, "How can you not have some kind of trust fund (in acting for a vendor)?"

David Nancoff, president of the Paralegal Association of Ontario, admitted that "we might need the money to be handled by a lawyer."

ERRORS AND OMISSIONS INSURANCE: The legal activities of lawyers are protected by a well-funded insurance company owned by the Law Society. Over the years, the Lawyers Professional Indemnity Company has paid out hundreds of millions of dollars in claims to clients of Ontario lawyers in all fields. Who will insure independent paralegals in the traditionally risky real estate area? Cory doesn't say.

COMPENSATION FUND: Occasionally, a lawyer handling client trust funds will, unfortunately, misappropriate those funds. If and when that happens, the Law Society has a multi-million dollar compensation fund to reimburse the injured client. Who will protect the public if a paralegal disappears with the client's funds? Where will the compensation fund money come from?

Miller admitted that obtaining start-up funding for such a fund from perhaps 600 to 800 participating independent paralegals would be a serious problem.

PLANNING ACT REQUIREMENTS: Every standard form agreement of purchase and sale for non-condominium transactions in Ontario requires the vendor's lawyer to certify compliance with the land severance and subdivision control sections of the Planning Act. A contravention of this complex legislation by the vendor or a former owner renders the title completely worthless.

A failure to have a certificate in the deed signed by the vendor's lawyer is a breach of the agreement of purchase and sale. On the flip side, if lawyers for the vendor and purchaser both sign the certificates in the deed, any prior contravention of the Planning Act is automatically cured.

In Cory's new world, who will certify compliance with the Planning Act?

ELECTRONIC REGISTRATION: In London now, and soon in Brampton and elsewhere across the province, deeds, mortgages and discharges must be registered electronically without a paper document containing signatures. Under the legislation, only a lawyer can electronically certify compliance with the laws governing deeds under powers of sale, or from estates, or similar transactions. Cory fails to consider this issue.

TITLE PROBLEMS. Cory says in his report that there is "nothing" in a residential sale transaction "that demands the services of a lawyer."

But he also says, echoing a superb submission by Sidney Troister on behalf of the Canadian Bar Association-Ontario, that "there may be so many complex legal problems that arise prior to and on closing that only a lawyer should handle the transaction."

How then, would a member of the public know in advance whether his or her transaction will be a problem deal or a routine closing?

UNDERTAKING: Every standard form agreement of purchase and sale in Ontario requires the vendor's lawyer to undertake to pay off and register a discharge of the vendor's

mortgage after closing. Undertakings given by the vendors themselves or by any third party are not acceptable to purchasers since the standard form agreement does not permit it, and the Law Society, of course, will not stand behind undertakings given by non-lawyers.

Cory doesn't mention the undertaking problem

EDUCATION AND EXPERIENCE: According to the Canadian Bar Association-Ontario, submission to the Cory commission, handling a real estate transaction requires a thorough knowledge and appreciation of areas of law involving contracts, mortgages, easements, estates, powers of attorney, family rights and responsibilities, income tax, land transfer tax, construction liens, planning law and subdivision control, environmental and soil contamination, corporations, landlord and tenant, and civil litigation.

How, then, can Cory say "there is nothing in such a (residential sale) transaction that demands the services of a lawyer?"

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