GERALD J. LECOVIN, Q.C.

#560 – 1125 Howe Street
PO Box 193
Vancouver, BC V6Z 2K8
Telephone: 604-687-1721
Facsimile: 604-687-1799

October 18, 2018

Law Society of BC
845 Cambie Street
Vancouver, BC V6B 4Z9

Dear Sir/Madam:

Re: Family Law Legal Services Provider: Consultation Paper

I write in answer to your request for input with regard to the above noted.

Creating a new class of legal professionals. I disagree with this concept. I do not feel that non-lawyers should give legal advice. The practice of law requires not only knowledge of the law, but judgment. Such judgment is usually acquired by experience. I do not think that (for instance) a 20 year old person, unmarried, with no children, who has spent three to six months learning about family law documents, procedure and case law, has such judgment. Remember that a lawyer spends seven years at university before s/he is set loose on the public. Even then, s/he is obliged to article (and learn) for one year during which s/he must undergo a further period of training under PLTC. I do not say that education equals judgment, but added to it is the life experience which makes for judgment.

There is no area of law where the exercise of good judgment is as important as family law. That is because of the propensity by the client to make decisions based on emotion as opposed to dispassionate consideration of the facts. Consequently, we must look to the lawyer, who, hopefully, will act as a corrective influence. It is however a sad fact that the family law bar is renowned for its tendency to take on the emotion of its client.

Notably, no other jurisdiction referred to in Schedule B advocated the creation of a sub group of lawyers. In fact, most of them saw the problem being solved by the creation of paralegal organizations that mainly prepared documentation.

The cost inherent in the creation of a sub group of lawyers is monumental. It would involve educating, regulating, monitoring and insuring such an organization which would mandate the creating, staffing, and funding of a new

organization or if added to existing organizations, increasing their size. Who would pay for this?

In any event, I do not see that such is necessary. We already have the means to effect the ends your committee wishes to meet. There are organizations and personnel extant who are delivering legal aid, and could meet these needs of the public for reasons which I shall suggest below.

My first suggestion is that your committee meet with these parties, i.e. Legal Services Society, Access Pro Bono, Amici Curiae, Altira, Battered Women's Support Services, Paralegal Association and Law Courts Centre, to ascertain (a) where the needs are, (b) what programs are being offered, (c) how duplication can be avoided and whether a more efficient use of Legal Aid funds can be effected.

I propose first to deal with how the needs might be met and then methods of funding.

A. Simple Divorce

This could be done by a computer, similar to those used in banks and airports. They would be placed in courthouses. If necessary, a person could be made available to assist the client in accessing them. The divorce petition (I've given my age away) could be set up to elicit answers by checking boxes. The computer would produce four copies, one of which goes to the court registry; one to the client; and the other two for the purposes of service upon the respondent plus a tear away affidavit of service. When the affidavit has been signed, it would be photocopied by the computer, which by that time would also have a photocopy of the marriage certificate. After the requisite period of time, the clerk would examine the documentation, satisfy herself that the requirements have been met and prepare a court order for signature by the judge.

B. Simple Divorce With Child

After papers have been served and the period for reply passed, the client would be punted over to the Provincial Court who would make the proper order for maintenance or, if there is an agreement, ascertain whether the agreement met the Spousal Support Guidelines. If so, the court would sign a notice of satisfaction. The client would then take the notice of satisfaction or the court order and have it photocopied by the computer. Thereafter, a court clerk would arrange to have the divorce order signed.

C. Simple Divorce With Child Where Custody In Issue

The same process as above. The client would be punted to the Provincial Court which would hear the matter. The client would be referred to a Access – Pro Bono lawyer who would advise as to the efficacy of the client's claim and based

on his/her knowledge of the law, and what material needs to be filed. The client would then take this information to a paralegal (whose association presently offers this service) for the creation of an affidavit. This affidavit would be filed in Provincial Court. The client would appear self-represented or with a pro bono lawyer. The judge would make his decision on the affidavits filed, plus answers to any questions he wished to put to the self-represented client.

D. Simple Divorce With Property

Once again, the matter would be punted over to Provincial Court whose jurisdiction would be increased to hear property matters up to (say) $100,000.

E. Contested Interim Applications (i.e. Support, Custody, Possession of Matrimonial Home, Production of Documents)

These applications would be handled by Provincial Court. The client would be referred to an Access – Pro Bono lawyer who would dictate the supporting affidavits to a paralegal for filing in court by the client. Once again, the self-represented client would appear without counsel or, if possible, a legal aid lawyer.

F. All Other Contested Matters

The restrictions against taking a divorce action on a contingency basis would be removed and legal aid lawyers would be permitted to charge a percentage of the monies acquired for the client. This would funtion much like a personal injury bar and I am sure that lawyers would flock to do family law on this basis. Lawyers who take on files on this basis would be obliged to handle all corollary matters such as custody, maintenance, etc. Thus, a client who had no funds of her own but the possibility of a good property settlement, would be serviced.

G. Personnel

There are sufficient lawyers in British Columbia to perform the services required. However, they must be encouraged to do so.

1. Legal Aid must be regarded as an obligation of the profession.

2. Lawyers must be encouraged by various means to perform this obligation, e.g.:

    i. An hour of free legal aid service would equal an hour CPD credit and/or a discount towards the cost of CLE Courses.

    ii. Lawyers who perform legal aid for no remuneration would be put on a list of lawyers permitted to take family law cases on a contingency basis.

iii. Annually, the Law Society will put a list in the newspaper with the names of those lawyers who have contributed their time to legal aid. The Law Society would acknowledge legal aid services in other ways.

3. Paralegals would be encouraged to do legal aid by dint of the fact that their services would be performed during the day time and paid for by their employer. In other words, those law firms which have paralegals or senior family law support staff would donate their time. At present, one of the detriments of the paralegals having to perform legal aid, is that they must do it at night. Their services could also qualify the law firm under G(2)(i) above and H(2) below to receive credit.

H. Funding

1. Pressure will be maintained on the government to increase its legal aid funding.

2. Lawyers on the list of those eligible to do family matters on a contingency basis will bill similar to the personal injury bar, i.e. on a percentage basis and will share their fees with LSS or Access Pro Bono.

3. Clients who receive orders for maintenance will pay a small percentage of their maintenance payment for a year. This will be collected directly from the payor by FMEP.

4. The computer for providing uncontested divorces might be patentable and leased to other jurisdictions for a fee.

5. Better use of present funding. I suspect, but do not know, that there is duplication amongst the various legal aid providers. Lawyers acting for clients who qualify for family legal aid should be monitored to ensure that they do not overuse it.

In the hopes that some of the above suggestions may be of assistance to the committee, I am

Yours truly,

GERALD J. LECOVIN, Q.C.
GJL:als

From:	Dinyar Marzban
To:	Consultation 2018
Subject:	FW: Family Law Service Providers
Date:	October-24-18 12:00:38 PM
Attachments:	LSBC Submission.pdf

From: Dinyar Marzban
Sent: Wednesday, October 24, 2018 11:58 AM
To: 'mkresivo@ahbl.ca' <mkresivo@ahbl.ca>
Cc: 'consultatiion2018@lsbc.org' <consultatiion2018@lsbc.org>
Subject: Family Law Service Providers

I attach my written response to the consultation paper on Family Law Service Providers.

Dinyar Marzban, Q.C.
Jenkins Marzban Logan LLP
900-808 Nelson Street | Vancouver, BC V6Z 2H2
Phone: 604-895-3151 | Fax: 604-681-0766 | www.jml.ca

October 21, 2018

To: Miriam Kresivo, Q.C.

From: Dinyar Marzban, Q.C.

Re: LSBC Consultation Paper on Family Law Service Providers

Thank you for attending the Vancouver CBA subsection meeting to discuss the LSBC consultation paper (the "Paper") to allow non-lawyers to provide family law services. This is my response to your invitation for written commentary. I assume that it was apparent to you that the rest of the members present did not share the view expressed by one member that the proposal contained in the discussion paper was going to put family lawyers "out of business" or something similar to that. Speaking for myself, I would not be competing with the proposed non-lawyer service providers for clients and have no financial motivation to criticize the Benchers' proposal. Although my practice is largely limited to BCSC cases, I have been involved in access to justice law reform and have regularly provided *pro bono* familylaw services. I am very much alive to the prevalence of unrepresented family litigants in both courts.

My general comment is that the theory that some legal advice or representation is better than none is flawed and dangerous. Bad legal advice can be much worse than no legal advice.

I will address my specific comments to each section of the Paper, in order.

I. Purpose of the Consultation.

The consultation is unacceptably brief given the extent and importance of the proposed changes to family law practice.

Paragraph 4 refers to a training program and to codes of professional and ethical conduct and regulation by the Law Society. It is not reasonable to expect the Bar to respond to the substance of the Paper without details on the training program, codes of professional and ethical conduct, and the regulation of the new service providers. These elements are the most important considerations in this matter and the Benchers should not expect members to support or oppose the proposals without knowing the details of these aspects. Given that the proposal is to allow non-lawyers to, at least to some extent, practice law, does it not go without saying that they must be subject to the same codes and regulation as lawyers?

II. Background to the Initiative.

It is difficult to comment on much of this section as it is so vague. There is no empirical data cited to support the conclusions regarding the statistics or other data referred to in Paragraph 7.

Paragraph 8 refers to the earlier LSBC identification of areas where non-lawyers could provide legal services. Most recently, LSBC implemented the designated paralegal exception. It appears that this was based on an assumption that there was a demand for these services. Perhaps it was also based on the fact that there has been something similar in effect in Ontario. Whatever the reasons behind that initiative, which must have taken up a substantial amount of the Benchers' and LSBC staff's time, I understand that that there has been negligible engagement with this opportunity by firms and paralegals. I am concerned

that the proposals in the Paper will suffer a similar fate as they are based on unverified assumptions about the demand for the services in question. I do not think that it is the duty of the LSBC, nor is it in the public interest, to initiate projects that are not supported by sufficient research.

Paragraph 10 correctly identifies family law as an area "…in which there is a sizable segment of the population who have trouble accessing legal services". This is an understatement. The fact is that there is a large segment of the population that has essentially no money to pay anything for family legal services. 15 years ago, a large part of that segment would have accessed such services through provincially funded legal aid. As you know, legal aid funding was gutted a long time ago. The people who suffered the most were family law clients, because there is now very limited legal representation in family cases through legal aid, even for those who would qualify on a financial basis. In order for a family law applicant to qualify for a legal aid referral, one of the following would have to apply:

- Restraining order applications where safety is the issues
- The issue is serious denial of access/parenting time
- The issue is the actual or threatened removal of a child from the jurisdiction
- The case is referred because the Legal Services Society exercises its discretion to make some exceptions. This discretion is very limited (see LSS website link: https://legalaid.bc.ca/legal_aid/familyIssues.php)

So, while the government has recently significantly increased funding to LSS for family services, those funds are earmarked for projects and services other than referrals for legal representation. I point all this out because it is a fallacy to say that the large number of litigants who are currently unrepresented are made up, significantly, of people who do not qualify (financially) for legal aid but also do not earn enough to afford to pay for legal services. A large part of these litigants would qualify financially for family legal aid, but it is simply not available, except in the limited situations outlined above. My point is that the core problem has always been, and remains, chronic underfunding of legal aid, particularly in the area of family law.

III. Objective of creating a new class of legal professionals.

I must confess to not understanding the meaning of the last sentence: "The initiative aims to increase access to services by creating a group of legal professionals who, while trained and credentialed, will have lower costs of entry to the profession and will therefore be able to charge less than a lawyer would charge." Specifically, I do not know what is meant by "lower costs of entry to the profession". If it means not needing an undergraduate degree, a law degree, a year of articles and paying for PLTC, I do not understand why those factors would allow someone to charge less than a lawyer. Lawyers' hourly rate fees are affected by their overheads, not the sunk costs of years of previous education (even if they are still reflected in student loan balances). If the lower entry costs are intended to lower Law Society dues, insurance and the cost of maintaining the same financial and other records as lawyers, why does the law society not just relieve family lawyers of those requirements and allow them to do the work at a lower rate? Respectfully, this section of the Paper makes little sense.

IV. Developing a Framework for the Scope of Practice for the British Columbia.

No comment as I will address Schedule A below.

V. Education and Training.

As I have said earlier, if this proposal is implemented, the details of the education and training of the non-lawyers will be critical to the public interest and it is unreasonable for the members to be asked to endorse the general concept without those details. It appears that the LSBC is proposing to embark on a family law training program far more extensive than PLTC. Are the non-lawyers enrolling in the program going to be charged for this training and will those charges fully cover the cost of the program? If not, who is going to pay the shortfall, year after year?

VI. Examples from Other Jurisdictions.

See Schedule A comments below.

VII. What we are seeking from you.

I will begin with some general comments. This entire proposal is based on the unverified assumption that there is a vast group of currently unrepresented family litigants (the "Clients") who have the ability to pay for legal services if the cost of such services are substantially lower than what lawyers charge for the same services. There is no empirical evidence, only anecdotal evidence (at best) to support this assumption. I am not challenging the fact that there are a lot of unrepresented family law litigants. That is not the same issue. If the Clients do exist in such numbers, then they apparently cannot afford to pay $84 per hour because that is what LSS pays for referral lawyers in family matters. If those dedicated lawyers are prepared to work for $84, further limited by the number of hours allowed by LSS for each task and the administrative time and cost of billing through LSS, why have they not availed themselves of this vast client base? It is not possible to answer this question without research, but one obvious possibility is that the Clients cannot even afford to pay $84 per hour.

This is not the most troublesome aspect of the proposal. What would be more troublesome would be if the assumption was correct and a large portion of the Clients were able to pay $84 an hour or even $100. If that were the case, then when the proposal was implemented, only a legal aid lawyer acting against his own interests would continue to work for LSS clients at $84 per hour (with limits on the hours that can be billed for each task) when he or she could get the same amount or more per hour (without limits on hours). The legal aid lawyers would be accessing a large pool of cases not available through LSS because the LSS referrals are limited to the areas I identified earlier in this response. The non-lawyers would then be competing with the former legal aid lawyers and only the most vulnerable and unsophisticated of the Clients would agree to engage a non-lawyer over a lawyer to do the same work, at the same cost.

The worst effect of this possible scenario would not be that the non-lawyers would find themselves without clients after undergoing all their training and giving up their previous positions, it would be that the legal aid lawyers would no longer be dong the legal aid work. It is difficult to imagine anything worse for the public interest than that. The effect of the scheme would be to eliminate coverage for those who cannot afford to pay anything in order to benefit those who could pay something. Perhaps the LSBC has

in mind that LSS will also be required to make referrals to non-lawyers for family cases. That would raise a lot of other issues that are not addressed in the Paper. I have seen no mention of the anticipated hourly or other rate which the LSBC anticipates the non-lawyers will charge. In order to avoid the outcome above, the non-lawyers would have to charge substantially less than $84 per hour.

My responses to the specific questions in paragraph 21 of the Paper follow:

- ***What do you like or dislike about the framework outlined in Schedule A?***

  I will address Schedule A below.

- ***Is the framework likely to achieve the desired outcomes? If no, how might it be modified to achieve the outcomes?***

  I have set out on the previous page why I do not think it will be effective.

- ***Does the framework miss any types of legal services that you consider should be included?***

  The framework does not miss services which I think should be included.

- ***Does the framework include any legal services you think should be excluded?***

  No legal advice, of any kind, should be given by non-lawyers. That includes "completing forms" which require legal knowledge and training.

- ***Should the service providers be "officers of the court?"***

  If you propose to make them officers of the court, why not just make them lawyers without law degrees, articles or call to the Bar? There would not be much actual distinction left.

- ***Is there a broader possible scope of practice, not contained in the framework that is appropriate for alternate legal professionals who are engaged in collaborative or non-adversarial processes?***

  ADR is the most dangerous area for non-lawyers to be allowed to practice. Those situations allow them to advise clients to agree to outcomes (including bad ones) without the supervision of a lawyer or the oversight of a judge hearing the case in court. It takes more legal experience to settle a case properly (i.e. a good result for the client in keeping with his or her legal rights) than, for example, to appear on an interim support application.

- ***What services contained in the framework are the most complex and fraught with risk of significant and/or enduring harm to the client (or their children) if not performed by an experienced lawyer? How are these risks mitigated now where they are performed by less experienced lawyers?***

All aspects of family law can be difficult. The Paper begins by conceding at paragraph 12 that "… it is one of the more difficult areas of law to practice competently." The risks with junior lawyers are mitigated in a number of ways. Unlike the proposed non-lawyers, the junior lawyers:

- Have had three years of legal training;
- Have been supervised by a principal for at least one full year. The Paper does not propose any type of mandatory supervision at all;
- With few exceptions, continue to work with more experienced counsel after their call, for at least a while.

- ***Should the proposed new service providers be subject to the same (or similar) professional conduct/ethical responsibilities as lawyers? Should they be subject to the CBA Best Practice Guidelines for lawyers practicing family law?***

  If you are allowing them to give legal advice, that alone should require that they be regulated exactly as lawyers, in all respects. Why would you regulate fully trained professionals more than less trained ones?

- ***Are there any other reforms to the provision of family law legal services that could be addressed through the use of alternate legal service professionals?***

  If LSBC is serious about doing something positive for family law, it should abandon these band aid attempts and focus on:

  - Continuing to pressure the government to fund legal aid properly;
  - Pressuring both governments and both courts to reach an agreement to bring Unified Family Court to the last province that still does not have some form of it, British Columbia. This indicates how low a priority family law has been, and remains. Why is LSBC not showing leadership on this very important issue?

Comments Specific to Schedule A:

1. Comment on Permitted Services

- Other than establishing a contractual relationship with a client, the other activities all require sufficient professional competence to give legal advice. These should not be allowed to be practiced by non-lawyers. The worst suggestion is that non-lawyers be allowed to attend at mediations within the scope of permitted activities. I have explained above why incompetent representation at ADR can be more dangerous for the client than such representation in court. I include in ADR engaging in settlement negotiations and drafting agreements. I am particularly concerned about advice on legal options and completing forms. My concern is that some of these services are currently provided, for free, through the Family Duty Counsel project funded by the province through LSS and the province could eventually decide to offload this service as well. That would not be in the public interest.

- If non-lawyers are required to meet the same standards as lawyers in order to act as mediators, I see no basis for any objection. It does not raise the same concern as representing a client at mediation as the mediator does not give legal advice.
- I am less concerned about the preparation of orders as they have to be approved by both parties and, at least, the registrar. But I am concerned that this may lead to the court not providing the service for free any longer.
- I have already said why non-lawyers should not be involved in settlement negotiations, so undertakings are a moot point from my perspective.
- If a non-lawyer is going to be allowed to obtain retainers and charge and bill fees, of course he or she should have to operate a trust account and legal bills should be subject to taxation before the Registrar. This is a fundamental consumer protection issue.
- The non-lawyer should be allowed to assist in registering orders against land and with FMEP. These are little more than administrative functions and are subject to acceptance by the LTO and FMEP. He or she should not be allowed to bring contempt or other enforcement applications as this involves legal advice.

2. Comments on Excluded Services

Matters which *involve* relocation of a child, *raise* allegations of alienation of affection or *identify* child protection concerns (emphasis added).

Who is going to determine when each of these excluding conditions exists in a case? The non-lawyer? This is effectively a jurisdictional issue which should be subject to judicial oversight. I assume that "alienation of affection" refers to what is commonly known as parental alienation. If so, this should be clarified because alienation of affection was a civil tort related to adultery abolished in Canada many years ago. Parental alienation is a very controversial area of family law. There is no consensus on the test for determining whether parental alienation has occurred in a case. My point is that even determining if an allegation is one of parental alienation is complicated and would be beyond the professional competence of a non-lawyer.

It is not clear to me whether a non-lawyer will be allowed to advise a client generally on property issues. I assume the intent is that such activity is permitted as the only exclusion for property issues appears to be pensions. All property issues should be excluded, not just pensions. In fact, pension division is often the least difficult issue. Property division in family law is very complicated, requiring working knowledge of bankruptcy, tax and other specialties. It also requires a sound understanding of the rules of evidence. This entire area should be excluded for consumer protection reasons.

Domestic, sexual and substance abuse. The question posed in the Paper is based on the premise that exclusion of these issues would effectively eliminate many of the cases from the services of non-lawyers. This should not be a consideration. The only consideration should be whether the non-lawyer is competent to provide the service. Allowing incompetent advice because it would increase the scope of practice is not in the public interest. These issues are frequently in play in family cases and require a high level of competence. They should be excluded. I am unclear why sexual abuse is included in this category. If the allegation is one of sexual abuse of a child of the relationship, then the matter would be excluded already because it "identifies child protection concerns". Sexual abuse claims between spouses

are rare in family law and are usually framed as a civil tort. Did the working group mean to consider "family violence" as defined in the *Family Law Act*?

3. Appearances in Court

Once attendance with a party is permitted, it is impossible to "police" the extent of the non-lawyer's involvement in giving legal advice, both before and during the hearing. Is privilege going to apply to all communications between the non-lawyer and the client? The Paper includes, in the scope of McKenzie friend activities, "advising the client during the appearance". I have already stated my concerns regarding legal advice by non-lawyers.

Comments Specific to Schedule B

1. Ontario

It appears that the LSO has not actually implemented anything yet, so we cannot take any comfort from the success of any of the proposals in the Bonkalo report. I will nevertheless comment on the terms of reference reproduced in Schedule B of the Paper. There is nothing more important to the public interest than the proper determination of custody, access and restraining orders (protection orders, not property restraining orders). These should not be included.

I will not repeat my concerns about non-lawyers giving legal advice.

2. Washington

While this scheme is far more limited than any of the others, it still allows non-lawyers do things such as review and explain documents and exhibits from opposing parties. While this sounds reasonable, it will not be possible to police the extent of the "explaining" which could very easily turn into important legal advice.

I could not find any information indicating how long the program has been in place and any statistical results.

3. Utah

For economy, I will address the most objectionable suggestion: representing a client in mediated negotiations. At the risk of repeating myself, the worst and most dangerous proposal is allowing non-lawyers to attend mediations and actually advise the client in reaching a mediated settlement. I have explained earlier in this response why this can be more dangerous for a client than representation by a non-lawyer in court.

There is no track record for this endeavor as it is just getting off the ground.

4. Arizona

This program is more limited than the Washington model and prohibits any legal advice at all, so it does not support the vast majority of proposals in the Paper. Interestingly, this project has apparently been in place since 2003. Has the LSBC determined if any evaluation of this project has been undertaken by the Arizona authorities?

5. California

This is a restricted scheme similar to Arizona, with no legal advice permitted. It has been in place since 1998. Has the LSBC done any research into its evaluation?

6. Nevada

As implied by its title, this is little more than a document preparation service.

7. New York

This project does not apply to family law cases. It also prohibits any legal advice or getting "involved in negotiations and settlement conferences." It has been in place since 2014, but there is no reference to any evaluation or statistics, although that information may not be relevant given the areas of law it covers (landlord-tenant disputes and consumer debt cases at the City's Housing and Civil Courts.).

8. Colorado

This is a court navigator program and does not appear to be running yet. It does not appear to bear any resemblance to the range of proposals in the Paper.

General comment on other jurisdictions:

The designated paralegal program in Ontario was apparently a basis for the LSBC's recent authorization of expanded paralegal services, including court appearances, under the supervision of a lawyer. As we know, based on the lack of significant enrollment, there has been little interest shown in B.C. This was a waste of public and LSBC time and was not in the public interest. The same applies to schemes such as outlined in the Paper that are not even based on any reliable evidence of success in other jurisdictions.