From:	Donna Martinson
To:	Consultation 2018
Cc:	Doug Munro; "Donna Martinson"
Subject:	Donna Martinson - Submission to the Bencher"s Working Group on Alternate Legal Service Providers
Date:	November-26-18 2:28:24 PM
Attachments:	Donna Martinson - Submission to the Working Group on Alternate Legal Service Providers.pdf The Hon. Donna Martinson - British Columbia Legal Aid Consultation Comment.pdf

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Please find attached my comments, as well as the B.C. Legal Aid Consultation Comment referred to in them.

Respectfully submitted,

Donna Martinson

To: The Law Society Alternate Legal Service Provider Working Group

From: Donna Martinson

Date: November 26, 2018

Re: Consultation Paper – September 2018

Dear Members of the Law Society Alternate Legal Service Providers Working Group:

Thank you for personally inviting me to provide my views on your work in relation to family law. I was pleased that you thought my long time experience as a lawyer whose practice included family law, a law school teacher, Judge, and legal and judicial educator, together with my focus over the last nine years on access to justice and equality issues that arise for women and children, would be useful to you. I mistakenly thought that you were interested in my opinion on the merits of the creation of alternate legal service providers and its impact on the Law Society's mandate, existing since its inception, to uphold and maintain the public interest in the administration of justice by preserving and protecting the rights and freedom of all persons. Instead, the Consultation Paper makes it clear that a decision has been made – this will be done - and the Working Group only wants my views, and the views of others, on the scope of practice.

I would have valued being offered the opportunity to provide my perspectives earlier, before the decision was actually made. I have however read all of the Law Society Reports prepared in relation to it, and specifically the rationales provided for it, and the submissions made by members of the profession to the Working Group to date. It is my respectful opinion, after giving this matter a great deal of thought, that though the decision to create this new category is clearly well-intentioned, it is wrong. Moving forward with it creates significant inequality concerns generally. It also has a disproportionate adverse impact on the protection of and advancement of the constitutional rights, including the substantive equality rights, of women and children. It detracts from, rather than supports, the meaningful pursuit of justice, not just access, for all British Columbians.

I recently had the opportunity to describe my concerns in the attached B.C. Legal Aid Consultation Comment prepared for the provincial government's Legal Aid Review. The question of alternative legal service providers is directly connected to the overall issue of providing effective legal representation, including legal aid, leading to just outcomes, for women and children. My views on the issue are found at page 2 and pages 6-8. It says, by way of overview, that the Law Society

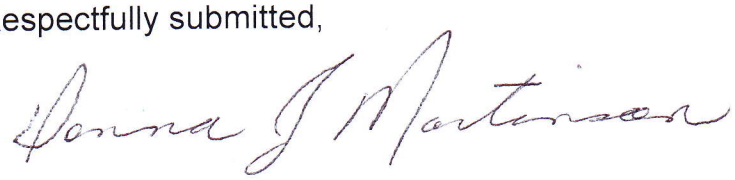
has relied on its mandate to act in the public interest in moving forward with its plan. Its public interest analysis, at its core, is that there is a significant gap between what many people can afford and the services lawyers offer and the gap is the greatest for family law matters. This gap, it says, creates the "moral imperative" to act. This public interest analysis is at best incomplete; it misses two very significant considerations.

First, until now, the Law Society has concluded that its public interest mandate is met by having legal advice and representation provided by lawyers with post graduate professional degrees, not by people with significantly less legal training. It has done so on the basis that such professionals have the in-depth knowledge and experience required to preserve and protect rights and freedoms, through the courts if necessary. The professional competency required includes a comprehensive understanding of complex constitutional principles, including the meaning of substantive equality, the identification of inequality, and the processes required to remedy it. As the Supreme Court of Canada has said, the ability to advance and protect legal rights through a lawyer is a fundamental aspect of our legal system. This has proven to be particularly true in family law cases where there have been significant legal challenges to protecting and advancing the constitutional rights of women and of children: see the Comment at pp. 3-5. The Law Society public interest analysis does not address why this long standing and important rationale relating to the provision of professional legal services now does not apply to family law.

The second is that the Law Society notes that there are two possible approaches to addressing the legal representation gap; one is for lawyers to improve the way they offer their services and the other is to create a new category of legal service providers. It has chosen option two without addressing what it could (and should) do, in its regulatory role, to assist all lawyers in meeting their ethical obligation to commit to the concept of equal justice for all. This is so even though the major access to justice work done by the National Action Committee on Access to justice, led by then Justice Tom Cromwell, made important suggestions on ways lawyers and law societies can do just that. Among the recommendations is this one, which I support: the provision of legal services should include service providers who are not lawyers but who are supervised by lawyers. Such a collaboration, one which includes lawyers in the pursuit of just outcomes, is very different from the model under discussion. Nor does the Law Society analysis consider how it can better advocate for more legal aid services and how it can advance and support pro bono work.

Finally, the Law Society analysis does not consider at all the important issue raised by the National Action Committee - the long time and inappropriate devaluing by some at law schools and in the profession of family law as a legitimate area of study, scholarship and other research, and practice. Though reference is rightly made to both the importance and complexity of family law, and to the very good work family lawyers do, the effect of the conclusion – to create a lesser level of service provider for family law - is that family law is viewed by the Law Society differently from other areas of law, minimizing its importance. Yet it is an area of law in which the rights and interests of women and children are most often at stake.

Respectfully submitted,



The Honourable Donna J. Martinson Q.C. LL.M.

Retired Justice of the British Columbia Supreme Court

BRITISH COLUMBIA LEGAL AID CONSULTATION COMMENT

The Honourable Donna J. Martinson Q.C., LL.M.[1]

November 23, 2018

Thank you very much for the opportunity to contribute to the discussion about the future of publicly funded legal advice and representation (legal aid) in our province. I will specifically consider legal aid for family law matters. Over the nine years since I retired from the British Columbia Supreme Court I have had the opportunity to both study and engage in the critically important access to justice discussions taking place in British Columbia and across Canada, led by the National Action Committee on Access to Justice, chaired by the Honourable Justice Thomas Cromwell, and the "equal justice" reports of the Canadian Bar Association.[2] These initiatives and the recommendations arising from them have a strong focus on equal justice for all, and the need for not just access to some legal advice, but access leading to just, equality based outcomes – justice, not just access. My work, often done in collaboration with others, has primarily dealt with a particular aspect of equal justice for all – ensuring equal justice for women and for children; that will be my focus here. The recommendations, particularly by the National Action Committee dealing with family law, provide a framework for discussing effective legal advice and representation for women and children.

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[1] Donna Martinson, a former Judge of the British Columbia Provincial Court and Justice of the British Columbia Supreme Court, has worked on issues relating to access to justice since the early 1970s. She practiced both family law and criminal law (as initially Crown counsel and then defence counsel) in Calgary, taught family law at the University of Calgary Faculty of Law and criminal law at UBC's Faculty of Law. She was appointed Queen's Counsel in Alberta in 1986 and obtained a Master of Laws Degree from Cambridge University, England, in 1987. While a judge of the Provincial Court she chaired the court's Equality Committee, and then co-chaired the National Judicial Institute's Social Context Initiative, focused on educating Canadian judges about inequality and discrimination, including gender inequality. She chaired the BC Supreme Court Family Law Committee and was the court's representative on the federal Department of Justice Family Law Advisory Committee as well as the B.C. Supreme Court Representative on the Canadian Network of Contact Judges, the group dealing with cross-border child abduction. Since leaving the Court she has worked on a volunteer basis on a number of legal and judicial education programs dealing with family law and the equality interests of women and children, as an Adjunct Professor at Simon Fraser University's School of Criminology FREDA Centre for Research on Violence against Women and Children and as a both a Visiting Scholar and a Research Associate with the Peter A. Allard School of Law Center for Feminist Legal Studies. She is the Founding Chair of the CBABC Children's Law Section, the Co-chair of the Steering Committee for the National Canadian Bar Association's Comprehensive On-line Child Rights Toolkit, serves on the Provincial Committee for the Coordination for Women's Safety, is on the Board of Rise Women's Legal Centre, and was invited to participate as a panel member in the Provincial Coroner's Office Review of Domestic Violence Homicides.

[2] Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice, A Roadmap for Change*, online: www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf [*A Roadmap for Change*]; Family Law Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* [*Beyond Wise Words*]; Canadian Bar Association, CBA Access to Justice Committee, *Equal Justice: Balancing the Scales: An Invitation to Envision and Act*, (Canada: Canadian Bar Association, December 2013).

Much good work has been done by many in addressing legal aid. I will focus on three areas that have received less attention but are directly related to the provision of both publicly funded legal services and, more broadly affordable legal services. The first is the justice concerns for women and children related to the devaluation by some in the profession of family law's worth as an important area of legal study, practice and scholarship. Both women and children have numerous constitutionally entrenched rights in the family law area, but this approach detracts from the ability of both to have those legal rights addressed effectively through legal advice and representation, using the courts if necessary.

The second is the professional obligations of lawyers generally, and the legal profession institutionally, through the Law Society of B.C., to address the significant concerns relating to the ability of British Columbians to access a lawyer in a timely, economical way. The National Action Committee made specific recommendations to the profession in this regard. I suggest, with respect, that, as an aspect of the Law Society's responsibility as a self-regulated profession with a monopoly on providing legal services, to act in the public interest, it has an obligation to make legal representation by lawyers more accessible to the public. It has not met that obligation. Instead, it has sidestepped its obligations by proposing to create an alternative legal practice model, one not requiring anywhere near the qualifications lawyers have, and doing so in only one area of law – family law. Doing this generally, and only focusing on family law in particular, creates significant equality and other access to justice concerns for women and children; an unintended side effect will no doubt be a further devaluation of family law as a legitimate area of study at law schools and as a desirable area of practice by lawyers. Finally I will consider the government's funding obligations to provide effective legal advice and representation for women and for children.

Implications of the Devaluing of Family Law as a Legitimate Area of Law

The National Action Committee, in *Meaningful Change for Family Justice: Beyond Wise Words*, described family law as the "poor cousin" in the justice system, one that is "regarded as an undesirable area of practice by some lawyers and law students";[3] that Committee notes that family law has lost its way in most Canadian law schools, stating that is has "been de-emphasized in favour of subjects more attractive to large law firms and global practice."[4] This devaluing, poor-cousin approach means fewer lawyers are interested in family law. It can also lead to the

[3] *Beyond Wise Words,* previous note, at p. 13.

[4] Previous note, at p. 28.

erroneous view that dealing with family law is not as challenging as dealing with other areas of law—which are seen as more sophisticated—and the related idea that particular specialized knowledge and skill is not required. Further, it can influence the concerning and discriminatory view seemingly held by some that legal representation, and especially legal aid, are not required in most family law cases or that just providing general legal information will suffice.

This devaluing of family law is difficult to understand. It deals with issues that profoundly affect Canadian families. It is perhaps the area of the justice system with which people come into contact the most and by which they form their views about whether the justice system is in fact fair and just. Though family law proceedings are private, in the sense that "the state" is not a party to the proceedings, as in criminal proceedings or child protection proceedings, there is a significant public interest in having both processes and outcomes that are fair and just and that effectively address the pressing issue of family violence and its impact. *Beyond Wise Words* contains important recommendations for law schools and law societies to enhance the reputation of family law.[5] Steps are being taken by law schools in the province to address these concerns.

It is helpful in this context to consider, at least by way of a brief overview, the constitutional rights of women and of children in family law cases that legal advice and representation address and the devaluing of family law undermines. Women have important constitutional rights which relate directly to all of the issues that arise in family law matters, rights which, historically were often breached rather than implemented. Dr. Margaret Jackson, Director of the FREDA Centre on Research on Violence Against Women and Children, and I have addressed historical discrimination women faced in family law cases, the equality rights they now have, continuing inequality they face, and barriers that exist in implementing their rights in our article published in 2017 *Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases*.[6]

When the *Charter* came into effect in the 1980s, women were to be afforded equal treatment; many of the rights found in it directly affect family law cases, particularly when dealing with child and spousal support, the valuation of and division of property, including pensions, and of course issues relating to the safety, security and well-being of children in parenting cases. Women have the right to the equal benefit of and protection of the law without discrimination found in section 15(1) and reinforced by section 28. Section 7 provides to everyone “the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice, a right that is particularly

[5] Previous note, Recommendations 1-3 at p. 5.
[6] (2017) 30 Can. J. Fam.L. 1 at pp. 27-39. *[Judges as Equality Guardians]*

relevant in cases involving allegations of family violence. Canada has ratified several international instruments which are relevant to the equality rights of women in Canada.

Women face significant economic disadvantages generally, and the economic impact of relationship breakdowns can be very significant. Women continue to earn less in the work place, in part because of gender-based divisions in the work force and the fact that care giving responsibilities for children and the elderly continue to disproportionately fall to women. Women may face multiple disadvantages that disproportionately impact them, poverty being only one of many. Violence against women is a women's inequality issue with profound implications. It remains a significant societal issue, one that highlights the equality concerns that can arise when women's credibility is being assessed; many myths and stereotypes continue to exist. Family law is an area in which such unfounded/unproven assumptions are more likely to arise than in some other areas of law.

Among the significant barriers to enforcing and enhancing women's equality rights through the courts is the inaccessibility of legal representation. B.C.'s Public Commission on Legal Aid, in 2011, rightly found that women are disproportionately affected by inadequate legal aid in family law cases because they are frequently in a situation of relative economic disadvantage and they often bear the lion's share of both the short-term and long-term consequences of our failures in this regard. The challenges are greatest for low-income women. The equality challenges that arise when violence against women by their male partners is in issue re-enforce the need for legal representation. Issues that engage women's equality can arise in all aspects of family law cases. Yet, women rarely obtain legal aid in family law cases – the cap is very low - and if they do, there are often limits on the number of hours a lawyer can spend.

It is not an answer to say, as many have tended to do, that women's equality concerns are addressed simply by making an exception to the legal aid restriction when there is "family violence". As I have just suggested, many other equality issues may be at play and a case by case analysis by a lawyer is required to determine what is at stake for the particular woman in question. Moreover, as we say in our article, requiring women to determine whether family violence exists and whether it is serious before they have personalized legal advice puts the cart before the horse. Family violence, because of its complexity, may be difficult to identify, not only for professionals, but for women themselves. Understanding, through an equality-based analysis, what impact family violence might have on both fair and just processes and outcomes is what lawyers are educated to do by attending law school. How to do so has been difficult to grapple with for lawyers themselves, let alone for women for whom family violence is a part of their lived

reality. Instead, women need effective legal representation at the outset to help them navigate the complexities involved.[7]

Similarly, children have significant legal rights to be safe, secure and well, and to participate in decisions that affect them, under our *Charter* and domestic and international human rights instruments such as the *UN Convention on the Rights of the Child*, that are too often overlooked or undermined. The UN Committee on the Rights of the Child states that children should have all appropriate legal representation when their best interests are being formally assessed by courts.[8] As long ago as 1974, the Law Reform Commission of Canada said, in its Family Court Working Paper, that where "the interests of a child will be directly or indirectly affected by a court proceeding, consideration should be given to the appointment of independent legal counsel to represent the child."

Yet, children in B.C. are rarely represented by a lawyer outside the youth criminal justice field. To use the words of our former Representative for Children and Youth, Bernard Richard, in 2017, "In B.C., lawyers are only ever rarely provided for children or youth in child protection or child custody maters – in complete violation of Canada's commitment to the principles of the Convention."[9] The exact same sentiment was expressed by our present Representative, Jennifer Charlesworth, speaking in honour of National Children's Day, on November 20, 2018.[10]

It is not possible to do this significant issue justice here. However, in our article published in 2018 Caterina Tempesta, a senior lawyer with the Office of the Children's Lawyer in Ontario, and I discussed the equality and other human rights issues that this lack of representation for children creates, in *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*.[11] In our view the lack of legal representation/legal aid for children is a major and pressing British Columbia access to justice issue that needs to be addressed by the legal profession and government.

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[7] *Judges as Equality Guardians*, previous note, at p. 37.
[8] UN Committee on the Rights of the Child General Comment 14, para. 96.
[9] Bernard Richard, Keynote Address, *The UNCRC as Foundational to Competency in Work with Children*, CLEBC, CBABC Children Law Section Access to Justice for Children: Child Rights in Action, Speaking Notes.
[10] The B.C. Society for Children and Youth Night for Rights. Her office is presently undertaking an investigative project expected to lead to a Special Report to the Legislature on legal representation for children and youth.
[11] (2018) 31 Can. J. Fam. L. 151.

Professional Obligations of Lawyers and the Law Society and the Alternative Legal Provider Model

The National Action Committee emphasized the need for a cultural shift for lawyers – a new, creative way of thinking about the practice of law and access to justice[12] and recommended that access to justice become a central aspect of legal professionalism for lawyers[13]. As part of this re-envisioning the Committee also recommended that jurisdictions expand reliance upon properly trained and supervised paralegals, law students, articling students and non-lawyer experts to provide a range of services to families with legal problems. The thrust of these recommendations is that the legal profession should look inward and consider how lawyers can serve the public – act in the public interest - more economically and effectively, addressing their professional responsibilities to ensure access to justice for all. Doing so is consistent with the ethical responsibilities of lawyers to have a basic commitment to the concept of equal justice for all.[14] It is also consistent with the overarching obligation of the Law Society of British Columbia found in the *Legal Profession Act* to uphold and maintain the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons.[15]

Until now, the legal profession in this province, through the Law Society, has steadfastly argued that it is in fact in the public interest to have legal advice and representation provided only by those with a post graduate professional degree in law. They have done so on the basis that such professionals have the in-depth knowledge and experience to uphold and advance rights, through the courts if necessary. The professional competence required includes a comprehensive understanding of complex constitutional principles, including the meaning of substantive equality, the identification of inequality and the processes required to remedy it. This view is justified and necessary to advance and enhance the equality rights of women and of children. As the Supreme Court of Canada has said, the ability to advance and protect legal rights through a lawyer (without interference) is a fundamental aspect of our legal system.[16]

Instead of taking an "inward look" at how legal services can be provided by lawyers, as recommended by the National Action Committee, the Law Society has chosen to create an alternative legal provider model, a lesser form of legal

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[12] *A Roadmap for Change*, above, note 2, at p. 06.
[13] Previous note, at p. 15.
[14] Code of Professional Conduct for British Columbia, 5.6-1 and Commentary {2}.
[15] The *Legal Profession Act*, [SBC 1998] Chapter 9, section 3.
[16] *Canada (AG) v. Federation of Law Societies of Canada*, 2015 SCC 7 at para. 101.

advice and representation, for family law only, one which is independent from, and does not require the oversight of, a lawyer. It has done so based on Task Force reports in 2013 and 2014, followed by a consultation focusing only on the scope of practice in 2018.[17] It says its public interest mandate requires this step. The 2014 Task Force Report states that the best approach to dealing with the fact that members of the public cannot afford the services of lawyers is to start by identifying what legal services the public needs but to which it does not currently have adequate access. "The identification of this gap creates the moral imperative to Act". It then suggests that the next stage will be to identify the qualifications necessary.[18] The Task Force also states that:[19] "If there is an unmet need for legal services, and lawyers are the only group that can provide legal services, then either lawyers have to review the way they offer services or some other group will need to be trained to provide services to meet those areas of unmet need…"

It does not, however, explain why, for family law, the public interest in having a lawyer with a professional degree, which has been at the core of our legal system since the Law Society's inception, no longer matters in family law cases. Nor does it explain why it has bypassed the option of, in its regulatory capacity, taking a serious and fresh look at how lawyers can better meet their professional obligations to work towards providing access to justice for all. I respectfully suggest that these are two critical omissions and that the rationale provided is inadequate.

If the approach described is truly in the public interest, then the Law Society should/must create alternative legal service providers in every area of the law; there are many people who cannot afford lawyers in every area of practice. Instead, they have focused on family law, an area where implementing and enhancing legal rights, especially substantive equality rights, is of particular concern to women and children. Family law has for years been referred to as a "pink ghetto" for two reasons. First, many women practice in the area, often already providing legal services at a low cost; Law Society
Reports show that women lawyers continue to face inequality within the profession itself. Second, more women and children require assistance in obtaining legal services. This decision to provide those who cannot afford a lawyer with a lesser quality of legal service, adds to the discrimination women

[17] See *Final Report of the Legal Service Providers Task Force,* December 6, 2013; *Report of the Legal Services Regulatory Framework Task Force,* December 5, 2014; and *Family Law Legal Service Providers: Consultation Paper, Alternate Legal Service Provider Working Group,* September 2018.
[18] 2014 Report, previous note, at para. 64.
[19] 2014 Report, previous note, at para. 51.

already face. It also detracts from the Law Society's responsibilities to advocate for more publically funded legal aid and to support and fund important pro bono work. More broadly, it will likely have the unintended consequence of further devaluing the study of and practice of family law. Many potential family law lawyers may chose other areas of study and practice in view of these developments. The much better approach is for lawyers to work collaboratively with others, including paralegals, legal assistants, community advocates, including family violence advocates, all of whom can and do make important justice contributions, to assist in achieving not just access, but accessible/affordable and just outcomes.

Funding for Effective Legal Representation

The National Action Committee recommends that "funding for family law legal aid be increased"[20] and that "funding be significantly enhanced for all family justice programs and services."[21] The government of British Columbia, while deserving credit for providing some additional funding for family law legal aid, has not provided anywhere near the kind of funding required to truly achieve just, equality based outcomes for women and has yet to provide such funding at all for legal representation for children. I will address two issues: the priority within the legal aid structure, favouring criminal law over family law; and the specific funding obligations governments have to children as a result of Canada's ratification of the *UN Convention on the Rights of the Child.*

Governments are constitutionally required to provide legal aid funding for many people charged with crimes. This obligation has been used as a reason why there is not sufficient funding for family law. People charged with crimes have, and should have, constitutionally protected rights to not be wrongfully convicted and to not inappropriately lose their liberty. The funding provided for lawyers has, over many years, been used to advance and enhance the Charter rights of accused people. But the significant public interest in ensuring the safety, security and well-being of women and children is often overlooked. Women and children also have constitutionally entrenched rights to be treated equally and to be protected from violence – to not be murdered or otherwise physically, psychologically or emotionally harmed. It is unjust and discriminatory that men charged criminally with assaulting or even murdering women or children are provided with legal aid to advance their constitutional rights, while efforts to protect such women and children through the family and child protection systems by advancing their constitutional rights are either not funded, or are significantly

[20] *Beyond Wise Words*, note 2, Recommendation 15
[21] Previous note, Recommendation 18.

underfunded. The restoring of the use of all of the money raised by way of the provincial sales tax on legal services to directly support such legal representation, the original intention of the tax, is, in my respectful view, essential to address this significant access to justice need. Taking that step must be a pressing government priority.

Finally, as Caterina Tempesta and I identify in *Young People as Humans in Family Court Processes,*[22] Canada has obligations to assess all government actions, including **all** budget decisions, not just those affecting children, to ensure that there are sufficient funds to implement its Convention obligations. Doing so is an important aspect of government's responsibility to provide services for children, and, for this purpose, to provide the legal representation to which they both require and are entitled. British Columbia's children deserve no less.

[22] Above, note 11, at pp. 158-159.

A matter of conscience: freeing those who live in legal purgatory

This submission will address in a broad scope some of the issues raised in the Law Society of British Columbia's (the "**LSBC**") "Family Law Legal Service Providers Consultation Paper" (the "**Paper**") with respect to Alternative Legal Service Providers ("**ALPs**"). It will do so not only through the lens of a family law paralegal, but as one of the many thousands of British Columbians who have faced the life-altering path of having to be a self-represented litigant, blindfolded and hamstrung through the labyrinth that is our complex legal system.

I came to be a family law paralegal as a direct result of my own arduous journey through the British Columbia family law system. Initially being the recipient of a legal education through the School of Hard Knox, I eventually enrolled in a paralegal program. I am now fortunate enough to be employed by a well-respected, senior Vancouver family law lawyer.

The tone of this submission may, at times, be informal; however, it is important to understand the current experience of the legal process through the eyes of a lay-litigant; otherwise we risk viewing it through a myopic lens.

The prohibitive cost of legal services

Many of the questions set out in the Paper, such as, should ALP's be allowed to draft orders, draft & finalize settlement agreements, etc., can be addressed under this one heading as a singular reason for the necessity of ALP's. To not permit ALP's to perform such functions will simply redirect thousands of people right back to the starting line of not being able to access services by virtue of their bank balance.

The difference between a $400 per hour lawyer and a $125 per hour ALP is the difference between accessing the legal system and being shut out[1].

To put this in practical terms, a simple application to obtain child support, which is a fundamental right of a child, can, through a lawyer, cost thousands of dollars. If the income of the parties involved is such that it does not make economic sense for a parent to seek child support, she is likely to abandon her claim. For example, if the child support entitlement is $200.00 per month, paying a lawyer, $5,000[2] for an application to obtain it, is not a realistic option for said claimant because:

1. the income bracket of said claimant is likely low and she will not have the means to pay the mandatory upfront lawyer's retainer[3]; and,

2. The benefit (even if costs are awarded and assuming they could be collected upon) will not be realized for some time and not indemnify the legal fees.

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[1] These figures, plus or minus, are ballpark, but I believe to be reflective of the realistic average difference between what an ALP and a lawyer will charge (and currently charges)

[2] Ballpark number which can go up or down on either side but I believe is reflective of the current market rate

[3] I could stand to be corrected, but I do not know of any family law lawyers or firms that act without a retainer unless pro bono. It isn't unusual for a retainer to be a minimum $2,000 and even then, work will stop when the retainer runs out.

In these situations, when someone is faced with having to come up with an upfront $5,000 retainer, she will walk away and it is, firstly, the child, and then herself, who suffers for it.

And $200 per month means, for many people, the difference between having to visit the food bank or not. Rights on paper, as set out below, without the means to attain them, have no meaning.

The requirement to exercise your parental responsibilities

Section 41 of the *Family Law Act* reads:

41 For the purposes of this Part, parental responsibilities with respect to a child are as follows:

...

(g) applying for a passport, licence, permit, **benefit**, privilege or other thing for the child;

...

(k) subject to any applicable provincial legislation,

(i) starting, defending, compromising or settling any proceeding relating to the child, and

(ii) **identifying, advancing and protecting the child's legal and financial interests;**

(l) exercising any other responsibilities reasonably necessary to nurture the child's development.

Under the law, a parent *is obligated* to obtain support for their children. If you are one of the thousands of British Columbians that do not have the financial means to pay for a lawyer, your alternative, self-representation, is often not a viable option.

Self-representation is a last resort

It can be argued the parent in the above example could represent themselves in court, but the reality is that court, for many people, is an extremely intimidating experience. The mere idea of a court appearance, even for those who have a lawyer, is anxiety inducing and causes loss of sleep, poor performance at work, less-than-ideal parenting, etc. I know this anecdotally from my day-to-day conversations with clients and my own personal experience. Without the shield of a lawyer or, the guidance of an ALP, the idea of appearing in court on one's own can be, and often is, insurmountable. An ALP will be able to "counsel" a self-rep, hold their hand so to speak and guide them through the process giving them the confidence they need to do such things as appear on an application for child support. This will be done by not only assisting with completing the necessary forms for filing, but by also minimizing the fear of the unknown: what happens in court? How does one address a judge? Who speaks first? It says the appearance is 9:45 AM, why do we have to wait?

The complexities of engaging court processes are tangled webs of mind-numbing rules, forms, filing deadlines, etc. Even how to properly craft an affidavit or attach an exhibit is a steep learning curve. This is why lawyers go to school: because law and procedure is complex and to expect a lay person to have a grasp on this with no prior experience is like asking someone who has never trained a day in their life to participate in a marathon: she might eventually finish, but she will do so walking, limping and in last

place. ALPs may not be able to offer the full suite of services of a lawyer, but in the Bencher's proposed model, ALPs will at least be able to encourage those who wouldn't even consider running a marathon to at least try a *half* marathon and further provide them with some rudimentary coaching before the race and along the way.

Legal education for ALP's

It has been argued that ALPs will provide a second-rate service. This is an ill-founded argument. The Bencher's have clearly indicated ALPs will go through a focused educational component. That, coupled with the substantial ***limitations*** that will be imposed upon them (no family trust matters, no third parties, "friend-of-the-court-roles" only, etc.), there is no valid reason to believe ALPs are incapable of delivering such services post licensing. It is an insult to the intelligence of current paralegals and the LSBC to suggest paralegals are somehow incapable of achieving an education standard *as designed by the LSBC*, and that ALPs will subsequently offer a sub-par service *under the governance of the LSBC*.

The dangers of "dabbling"

The current model allows for lawyers who have never taken a class in family-law[4] to take up the practice of family law. In my personal experience, being advised by my lawyer of the time that *I was not entitled to child support because we had a 50/50 parenting arrangement* resulted in me not receiving a penny in child support for 5 ½ years when the children had been entitled to it all along. This demonstrates that even a qualified lawyer in British Columbian can make errors. The disparity in income at that time was (as I had been a full-time stay-at-home mother with no means of income):

1. Me: $0 per annum;
2. Opposing party: $120,000 per annum.

Imagine my shock many years later when I discovered just how wrong this advice had been. Imagine the years of child support the children did not receive or benefit from as they had to watch their mother exhaust herself, scramble, cry, bend over backwards, do just about anything to make money just to keep a roof over their heads ***for fear of losing the children should I become homeless.***

With all due respect to the many learned lawyers I work with and know, this error likely would not have happened with an ALP whose primary education focus is family law.

Interestingly, when I tell lawyers this story, they typically respond by telling me I could have sued that lawyer. This comment demonstrates to me the disconnect this industry has with understanding what it is like to be self-represented person. In my case, I was a low-income, single parent of two (one with Autism), lay litigant already involved in a high-conflict family law matter and was in no position to fund or emotionally invest in yet another highly complex litigation. Which leads me to my next point: ***reducing lay-litigant complaints***.

[4] Save for PLTC which, in the 2016 manual was a 79 page document

ALPs would reduce Law Society complaints

It isn't to say that during my time as a self-rep that I didn't make complaints to the Law Society. I recall I made two. To a lay-litigant, *everything is unjust*. The mere fact that an opposing lawyer sends him correspondence (read and interpreted with a 'curt tone') demanding his bank statements *feels* unjust. Somehow, this standard request now calls into question the lawyer's professionalism. The lawyer is abusing the process. How dare they? And now, the lay litigant feels he needs to do something to call off the wolves because he feels attacked.

In time, particularly after going through a paralegal program, I was able to see how one of my complaints was ill-founded, and in hindsight, embarrassingly so. ALPs would *greatly reduce* Law Society complaints from lay-litigants as ALPs would have the opportunity to explain things such as process, procedure and law as to mitigate and clarify issues for them. ALPs would be able to help lay-litigants stay on track with the important issues in focus.

Are we truly equal? Voting your conscience

The underpinning of a free and democratic society as enshrined in the *Canadian Charter of Rights and Freedoms*, is that "every individual is equal before and under the law". However, without the means to obtain the rights, entitlements and benefits of law, the scales of justice tip to favour those with financial means while leaving others to languish in a legal purgatory.

ALPs will not, on their own, solve the access to justice crisis in British Columbia, but form a part of its solution. ALPs will relieve the pressure by addressing a large segment of the population whose needs are ***unmet***. These are people who are not accessing legal services at all and mostly due to the cost-prohibitive nature of retaining a lawyer.

As the Paper states: **"As many as 70% of those facing a problem seek no help at all"**.

These are the people who were like me: broke, frightened, confused and flailing. This 70% are people who are forgoing their own rights and often those of their children. Further, those who self-rep often take up valuable court resources with missteps and mistakes. Many make unfounded complaints about lawyers, judges and the legal system.

If there is a concern that creating a separate class of family law service providers will take money from the pockets of already practicing family law lawyers, this is a fallacy. These 70% are people who aren't even seeking services. They are shut out in the cold. I would suggest family law lawyers may experience an increase in their business as there will be instances when ALPs need to assign part parts of a file to a lawyer due to the limitations imposed upon them by the LSBC.

Royal Assent has now been given on the Attorney *General Statues Amendment Act*, 108, which includes the amendments to the *Legal Profession Act*. The amendments permit but not require the Benchers to license paralegals. The LSBC's Annual General Meeting is set for this December 4, 2018 and the matter to be voted upon which relates to ALPs is Resolution #3 which reads:

THEREFORE BE IT RESOLVED that the membership directs the Benchers to withdraw their application to the provincial government seeking legislative amendments to the Legal Profession Act, *S.B.C. 1998, c. 9, to enable the Law Society to create, credential and regulate new categories of non-lawyer legal service providers* ***and directs the Benchers to refrain from any further action to have non-lawyers practise law*** [Bold added for emphasis].

A vote against resolution #3 is a vote for helping to fill the gap of this currently ***unmet need*** which will ultimately translate into such things as thousands of British Columbian children benefitting from child support who otherwise go without. This *will* mean less people, such as myself at one time, not having to rely upon a food bank as a result of lack of access to justice.

A lawyer is an advocate. On one hand, to shut the door on a person because of her financial constraints, yet vote to block an initiative created and overseen by your very own governing body that will ultimately give her a life line, is not in the public's interest.

I cannot conclude without pointing out resolution #2 of the pending December 4, 2018 vote which reads:

THEREFORE BE IT RESOLVED that:

1) *The Benchers are directed to amend the Rules of the Law Society to include a professional obligation on all practising lawyers to perform a minimum level of pro bono Legal Services Society legal services.*

...

I suggest that if one is to vote in favour of resolution #3, then they must, in good conscience, also vote in favour of resolution #2 and be willing to provide pro-bono services. However, if the members do not wish to take on pro-bono work, they must then vote against #3 as there are no other options currently available to address the access to justice crisis. The government has made it very clear that further Legal Aid funding will not be made available. So if the LSBC members are not willing to shoulder the burden by providing pro-bono services, it is morally incumbent upon them to make way for the new initiative as proposed by the LSBC Benchers. This is clearly in the public interest.

I sincerely hope the members of the Law Society will vote to relieve this serious access to justice issue, enabling better support for spouses and children in need in British Columbia. Please vote with your conscience.

Sincerely and with hope,

Jillian M'Lennan

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November 29, 2018

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