AARON
GORDON
DAYKIN
NORDLINGER
LLP
FAMILY LAW COUNSEL

1100 – 777 HORNBY STREET
VANCOUVER, BRITISH COLUMBIA
CANADA V6Z 1S4

TELEPHONE 604.689.7571
FACSIMILE 604.685.8563
WEBSITE www.agdnlaw.ca

December 6, 2018

The Law Society of British Columbia
845 Cambie St.
Vancouver, B.C.
V6B 4Z9

Dear Sirs/Madams:

Re: Submission to the Law Society Annual Meeting

I write in opposition to the Law Society's proposal to regulate non-lawyers in the area of family law.

The proposal ignores significant history that underscores the values that pertain, in particular, to family law, and is the lens through which I view the Law Society proposal:

(a) It was only 100 years ago, women got the vote in Canada;

(b) It was only 40 years ago, women got entrenched property division rights on marriage breakdown—although the Act was gender neutral, in reality it affected women disproportionately;

(c) Only 28 years ago, Canada ratified the U.N. Convention on the Rights of the Child,

(d) Only five years ago, others in marriage-like relationships, including gay couples and common law couples, got entrenched property division rights under the new *Family Law Act*.

I raise this because, in the scheme of things, these are new and fragile legal rights, hard won, and in need of protection by a strong independent Bar and by a strong independent Bench. Their fragility can be seen in the decimation of family law legal aid over the last 25 years, despite the fact that the government has collected billions of dollars from our clients in PST on their legal fees, Legal Aid has received a fraction of that.

The Legal Aid issue indicates an undervaluing of the importance of these rights of family law to the general public. Their fragility can be further seen in the Law

Society proposal, which seeks to have these important rights taken out of the hands of lawyers and placed in the hands of non-lawyers.

The rights I speak of were not given to us by benevolent governments. They were won by creative lawyers and brave clients like Mrs. Murdoch and Mrs. Rathwell who, in 1973 and 1978, took their cases for a division of the matrimonial property in their husband's name to the Supreme Court of Canada, not on the basis of any right that they had, but on the basis of the unjust enrichment of their husbands. Mrs. Murdoch lost, but ultimately, the Supreme Court of Canada recognized a constructive trust action in Mrs. Rathwell"s case, but limited it. The resulting fallout from these decisions eventually prompted all of the provincial governments of Canada to pass property division legislation.

It was the lawyers and the clients who put this pressure on by being creative and using existing law to press their cases. Family law is the area where women and children's rights get played out on a day-by-day basis. It is fundamentally important that those rights be protected. The point is that family law clients need advisors who are aware of the nuances in the law and the actual Court processes. Ultimately, the rule of law and the Court system are the only protections any of us have.

Family law is at the cutting edge of societal change because our clients are living that change. We see emergent issues in our offices sometimes long before they are being openly discussed in the public or in government, and we try to be creative to apply existing law as best we can. But you need to know that law and to have some idea of how Courts may react to your creative positions in order to properly advise clients.

In order to progress, we need a strong rule of law, a strong independent Bench and a strong independent Bar to protect the rights of women and children, gay couples and others who may form family relationships.

Societal change will continue inevitably and we need all aspects of the justice system to react to it appropriately for all people

So, on a philosophical basis, it worries me when I hear that it is proposed that non-lawyers who will work independently from lawyers may be recognized as family law professionals when, fundamentally, they are not sworn to uphold the rule of law as lawyers are. What creativity can they bring to unusual cases? Even in run-of-the-mill so-called simple family law cases, there are often unusual issues that crop up and that require legal experience and creativity.

That brings me to the Law Society's proposal. This proposal goes much further than any of the models from other jurisdictions cited in their paper. It is not a Court navigator model as found in most of the jurisdictions cited in which the non-lawyer service provider, who is associated with a Court, assists in the preparation of documents and the like.

Particularly worrying is the proposed ability of these non-lawyers to give legal advice and attend and advise clients at mediations and JCCs. It proposes that non-lawyers will be able to act in all family matters except in certain areas.

So, in effect, non-lawyers can give legal advice on custody, access, parenting rights, property division, child and spousal support and other family law issues. It also proposes such service providers will be able to appear in Court, subject to Court approval.

It is proposed that they will receive some sort of training, as yet unspecified, (may I suggest law school, PLTC and articles) and they will not be under the supervision of a lawyer. They will have the ability to move the file to a lawyer if they choose. Whether they will recognize the circumstances in which the file should be transferred to a lawyer is an issue. Whether they will use the fear of having to hire a lawyer, in order to obtain an inappropriate consent or agreement from the client is also an issue.

Family law is difficult in terms of client management and complex in its legal concepts. It requires some knowledge of many different areas of law: corporate, pension, insurance, real estate, tax, and criminal, to name a few. As well, it demands an appreciation of the complex emotional and psychological aspects of the clients and/or the dynamics of their relationship.

The critical time in a family law file is the beginning. One has to assess the need for interim orders, set the tone with the lawyer on the other side, and try to manage the client's expectations. A typical family law client does not know what they need or what they want. It is the lawyer's job to assess what fairness is in every case. The first few consultations are usually the hardest. I do not believe that someone who has no Court or trial experience can properly advise a family law client at all. Generally speaking, in a law firm, even newly called lawyers and young associates would not be given that responsibility, except under supervision of a more senior lawyer.

To suggest, as the proposal does, that a person, even with "some training" would be able to advise on the best alternatives, processes, or outcomes to a proposed settlement is, with respect, ludicrous, and not in the public interest. In order to give such advice, you need to understand the Court process, the law, both legislative and case law, the distinguishing factors between cases and the rules of evidence. This is a particularly troubling concept where one can conceive of a situation where a paralegal is acting for one client and a lawyer for the other. This inability to properly advise could be fatal to a client in a mediation or a JCC where agreements and consent orders can be made. Mediations are difficult even for lawyers. You have to constantly assess all of the evidence and law for and against your client in order to advise on a proposed agreement. You have to assess the economic consequences of progressing further along the litigation path and potentially to trial to advise the client, and all this is done under great time pressure. It cannot be in the public interest to allow non-lawyers to

participate in giving such legal advice. At the very least, it may lead to mistakes that will be costly for the client to fix, if they can be fixed.

Other considerations, such as insurance coverage, ethical standards and proposed funding for the establishment of non-lawyer service providers has not been addressed in the paper. It calls for further input from the profession. In my submission, any proposed funding should first go to legal services to address the very real access to justice issue, the underfunding of family law legal aid.

It is not clear what "access to justice" issue the proposal is addressing. Certainly, it is not Legal Aid as it is contemplated as a fee for service provider. As fees are driven by overhead, there will be no cost saving to clients. There is no meaningful data available on access to justice issues in this province that I am aware of. I know that the Access to Justice Centre for Excellence established by UVic is looking at perceived problem of diminishment of access to justice. Professor Jerry McHale, a Director of that program, wrote last month in the Advocate the following:

"Access reports and studies in recent years have emphasized the paucity of access to justice research and the poor state of metrics and data collection within Canadian civil justice systems, as well as potential for law schools to help rectify these issues. Observing that you can't manage what you can't measure, the Canadian Bar Association's *Reaching Equal Justice* Report of November, 2013 drew an explicit link between the system's lack of metrics and measurement capacity and the relative ineffectiveness of efforts over the last 20 years to enhance access to justice."

In my submission, the Law Society is putting the cart before the horse with its proposal, which is likely to be not only ineffective, but dangerous for individual clients, most particularly women and children. The Law Society and the profession as a whole should be redoubling its efforts to put pressure on the government to properly fund family law Legal Aid.

Yours very truly,

AARON GORDON DAYKIN NORDLINGER LLP

Per: 

KFN:cs

Karen F. Nordlinger, Q.C., C.Arb.

From:	Kristal Simpson
To:	Consultation 2018
Cc:	don kawano
Subject:	Family Law Consultation Paper
Date:	December-10-18 9:43:23 AM
Attachments:	image001.png Submissions in Response to Law Society Family Law Consultation Paper.pdf

---

Attached is Mr. Kawano's submission (he *is* still retired but asked us to send this to you)

Kristal Simpson | Legal Assistant

RELLA • PAOLINI • ROGERS
LAWYERS

2nd Floor, 6 -10th Avenue South
Cranbrook, BC V1C 2M8

Ph: 250-426-8981
Fx: 250-426-8987
Toll-free: 1-866-426-8981
corporate@rellapaolini.com
www.RellaPaolini.com

SUBMISSIONS IN RESPONSE TO LAW SOCIETY OF BRITISH COLUMBIA FAMILY LAW CONSULTATION PAPER: SEPTEMBER, 2018

FROM: Donald N.Kawano, Q.C.

DATED: December 10, 2018

TO: The Law Society Alternative Legal Service Providers Working Group

A. Introduction

I practised law for 40 years, between 1977 and 2017, and have been fully retired since December 31, 2017. I began my legal career in Dawson Creek, then practised in Kelowna, then in Richmond for 20 years, and the last 11 years of my career in Cranbrook. For most of my career, family law was a major part of my practise. Because of my experience around the province, I have dealt with all types of people, from small municipalities, to the Vancouver/Richmond metropolis. I understand the fear and frustrations of people who cannot afford to pay for legal services. The most affected are those with family law and criminal law matters. At the same time, lawyers in private practise, as I have been throughout all of my career, must charge for their services. This is no different than for plumbers, carpenters, mechanics, butchers and bakers. In this Response, I will set out my concerns about the proposals to create a "new class" of "less qualified" legal service providers but will also do my best to assist you with my suggestions as to how family legal services can be better provided to "underserved segments" and to "improve the ability for those whose legal needs are not currently being met because they are not able to afford the service". (para. 13, part III, Consultation Paper).

I make these Submissions with the utmost respect for the Working Group ("the Group") and the hard work that you and others have done to date. It is my hope that these comments, as well as those of others, will cause the Group and the Benchers to take a closer look at the assumptions, rationale, and suggestions in the Consultation Paper,

and to engage the legal profession to a much greater degree for their input and discussion.

I will reply to certain headings and paragraphs of the Consultation Paper and provide answers/responses to many of your specific questions that appear under Heading VII, paragraph #21.

B. Request for further input and consideration from the Bar

In paragraphs 1 and 2 of Heading 1, the Consultation Paper states that "the 'Working Group' was created to develop policy recommendations for consideration by the Benchers"...and that there has been "preliminary consultation with small groups of stakeholders in relation to an earlier draft". It is clearly stated that the Benchers, not the profession, have resolved to ask Government to amend the Legal Profession Act ("the LPA"). For such profound changes to how family law legal services are to be provided and the effect such changes will have on the livelihoods of all family lawyers, it is only fair and proper that such proposals have the support of the majority of family lawyers. I have been informed, while drafting these Submissions, that a motion asking the Benchers to postpone the request to Government to amend the LPA was passed at the latest Annual General Meeting. That is strong proof that a majority of B.C. lawyers, not just family lawyers, are most concerned about such request.

I have regularly read emails from CBABC throughout this past year, as a Retired Member of the Law Society. I did do not see any invitation for input from the profession before the Consultation Paper was publicized. I do acknowledge that lawyers, not only family lawyers, notoriously fail to provide feedback to proposals. During my terms as East Kootenay representative, Canadian Bar Association, BC Branch ("CBABC"), I was frustrated by the absence of, or the very small number of responses that I received to questions seeking input about such important topics as proposed changes to the Rules of Court, Supreme Court and Provincial Court suggested procedural changes, and the need for a full time sitting Justice for the East Kootenays. However, I believe that such failure/absence of responses are the

result, not of apathy or indifference, but of sheer exhaustion from busy practise demands. Therefore I commend the working family lawyers who have given much thought and consideration to the Consultation Paper, and have set aside remunerative work in order to provide their lengthy, detailed Submissions.

If Submissions from the following groups have been provided, I would appreciate being provided with them for my further consideration:

Regional family law subsections of CBABC
Vancouver/Richmond Family Law Advocacy Group
Collaborative family law groups, Vancouver, Okanagan, etc.
The Judiciary

Perhaps a comprehensive survey, seeking responses to specific questions and proposals, would assist in eliciting a larger number of responses from the profession.

C. My responses to headings of the Consultation Paper

1. Heading II "Background to the Initiative", paragraphs 7 and 10:

Paragraph 7 states that "People often identify cost as the main reason they do not seek legal assistance...", and, "...it is clear that a large unmet need for legal services exists because many people are unable or unwilling to pay the market rate for lawyers' services". I agree, but a large number of these people are involved in criminal law matters, not family law matters. The conclusion in paragraph 7 is that this need will be addressed by "the provision of legal services at a lower cost". The needs of those not able to afford to pay for criminal law advice and representation have been largely met by funding provided by legal aid.

The I manner in which both of our major political parties have abandoned the very reason for implementing the tax

on legal services, namely to provide legal aid funding, by providing a portion, but not all such revenue to legal aid, was wrong, and immoral. The Law Society should demand that all PST on legal services be used for legal aid and that funding for family legal aid matters equals that provided for criminal law matters. Lawyers who have been doing legal family law legal aid will then be able to AFFORD to provide legal services to family law clients. In the earlier years of my career, the small firm that hired me was able to have me do a fair degree of legal aid work, at greatly reduced rates, because the tariff then was still sufficient to pay a measure of their overhead.

The fundamental problem with the legal aid tariff for family law matters is that it excludes legal aid funding for most people in need of such services. That is most unfair. Cases involving domestic violence are far fewer than "the usual" type of family law case. Legal aid funding should be provided for all those in need. Those people are as "deserving" of such funding as those facing criminal charges. Many would argue that people desperately in need of legal aid should have priority over people charged with criminal offenses.

I take issue with the conclusion that "the provision of legal services at a lower cost aims at reaching at least a portion of those who are currently seeking no advice at all". At what "lower cost" will legal services be affordable? Figures such as $100 or $125 per hour are suggested as rates that might be charged by "alternative legal service providers ("ALSPs"). However, if, say, the time required to discuss, take instructions, participate in meetings/mediations, negotiate, draft, and finalize a separation agreement is, say, a total of 30 hours, that would result in a fee of $3,000.00 at $100 per hour plus taxes, and a fee of $5,250 at $175 per hour, plus taxes. The person who cannot afford to pay $175.00 per hour most likely cannot afford to pay $100 per hour. What is the

rate at which a client who cannot now afford to pay for legal services *will* be able to pay for them? In my view, there is no "minimum level" or hourly rate for impecunious family law clients.

There is no reason why should lawyers, not just family lawyers, should apologize for the years of expensive university training, articling, and hard work they have devoted to developing their professional expertise. It is not shameful to charge rates commensurate with one's expertise and proficiency. There is a very clear safeguard to "gouging", that being a taxation review. I am struck by the fact that most accounts presented by lawyers are upheld on taxation when the amount and nature of legal services have been properly explained by the lawyer. My observation of other family law lawyers is that most of their accounts are not taxed after complaints by clients. When there has been less than desirable service or outcome on a file, a large number of lawyers make adjustments to their fees, often resulting in drastically reduced hourly rates. In additionl many times lawyers will substantially discount a proposed account in order to assist a client to make a financial settlement. By doing so, the matter has been made much more affordable to the client.

The dental profession has not been "watered down" by the creation of "para-dentists". Dental insurance plans have provided funds for most people to obtain necessary and ongoing dental care. The manner of providing medical services to the general public, who cannot afford to pay the high costs of medical care is public medical insurance plans. Our society most likely will not find the prospect of government funded legal insurance plans to be palatable, but perhaps a large number of people would avail themselves of private legal insurance plans so that they can then afford to retain private family lawyers.

Paragraph 10. In my observations over the years, I have

seen many reasons, other than cost, why there are a large number of self represented litigants, especially in family law matters. I have litigated against many self-represented "fathers/payors" who most likely have not accepted the advice of family lawyers who they have consulted. They simply do not want to pay spousal or child support. There are many cases where the claiming spouse is represented by a lawyer (often funded by parents, family, etc.), and the self-represented party is the one refusing to acknowledge any obligation to pay support. In recent years, many self-represented litigants profess to know "more than the lawyer" because they have researched the Internet. They are self-represented not because they cannot afford to pay a lawyer, but because they don't see the need to do so. And, the corollary is that many people are self-represented because family lawyers will not take them as clients because of that person's unreasonable and unrealistic demands and expectations, and refusal to follow the lawyer's advice. When people change lawyers constantly, and then are self-represented, that is not because of their inability to pay for legal services.

2. Heading III "Objective of Creating a New Class of Legal Professionals", paragraph 13:

Paragraph 13 states, "...a new group of legal service providers who are credentialed and licensed by the Law Society (with much less education than lawyers, I add) will meet the needs of underserved segments of the population" and, this group "will have lower costs of entry to the profession and will therefore be able to charge less than a lawyer would charge". There is no logic in those conclusions.

Consider this situation: a number of ALSPs set up offices. They advertise rates of $100 per hour, where the next lowest rate charged by family lawyers might be, say, $250 per hour. Large numbers of clients flock to the ALSPs. That

takes family law work away from the family lawyers. Those who can't afford to pay $100 per hour will still not be able to afford family law advice or services. All this will result in is that family lawyers will abandon family law because they have far fewer clients, and the new ALSPs will be making a living doing what those family lawyers used to do.

I take issue with the second part of the conclusion above that because ALSPs have much lower costs of training and education they will charge lower fees. The cost of one's legal education has no bearing on the costs that have to be charged in private practise. Many lawyers were fortunate to have working spouses during undergraduate university or law school. Many had very good paying summer jobs or prior employment that greatly reduced their legal education costs. Many might have had large inheritances, wealthy parents/grandparents, scholarships, or savings from previous careers. Legal fees charged are a result of everyday ongoing costs such as lease/purchase costs, insurance, staff costs, etc. ALSPs will have to pay the exact same costs. Will there be a cap on the fees that they can charge (and I cannot see any way that there could be)? If not, the goal of providing "affordable" legal services will not be met. The best proof of this is conveyancing/mortgage fees charged by Notaries. Notaries charge as much **or more** than lawyers for such work. In my former firm, a former legal assistant who worked for the firm, became a Notary within a short period of time. She now charges more than what the firm charges.

There is reference in the Consultation Report to the necessity of ALSPs obtaining professional liability insurance. That will be a substantial part of their operating costs. In addition, licensing by the Law Society will, I assume, mean that they will be members of the Law Society and as such they will have to pay the same dues as lawyers. That will add to their overhead costs. If ALSPs are

not able to charge fees that cover their overhead and provide them with a decent living they simply will not be able to charge lower fees. Access to justice for those who cannot afford to pay for legal services will still not be provided.

3. Heading IV "Developing a Framework for Scope of Practice for British Columbia", paragraph 15:

   The Consultation Paper proposes that ALSPs would be permitted to provide family law advice and representation for a wide range of matters excluding "...complex matters of substantive or procedural law, or where there is a significant risk of harm to the client".

   My submission is that the number of complex matters is very large. They include:

   a) Calculations of the proper amount of Child Support Guideline support. This is not a simple matter of choosing numbers from tables. Proper use of the DivorceMate child support tables (and spousal support) demands careful review of tax returns. Where the payor is self-employed, detailed review of documented business expenses is necessary to determine what income should be attributed to that person instead of simple acceptance of tax returns. Where the payor is the principal of a company, even more diligence is required when reviewing corporate records, receipted expenses, and tax returns. Bonuses are not always included in income, but often in other situations they are. Where child rearing is shared, especially on a 50/50 basis, the manner in which proper child support is to be paid by the higher income earner demands further investigation. Where child rearing is at least 40% by the paying spouse, there are

many things to consider....it is not simply a pro-rated process. Where costs of visitation by the non-custodial parent are substantial, or where the custodial parent has moved the child to another jurisdiction there are many factors that will either vary what appears to be the proper Guideline amount, or will not vary such amount. Many factors must be considered to determine when child support should terminate, whether before, at, or after the child reaches the age of majority.

b) Entitlement to spousal support. It is not simply a matter of the higher earning spouse paying support to the lower earning spouse. There are a large number of factors that should be considered to determine if the marriage or spousal relationship has been negatively affected by the breakdown of the marriage. If not, spousal support might not be ordered even if there is disparity of income. There are many situations that require determination if there was a spousal relationship at all. This is often overlooked, even by family lawyers. The mere fact that two people have lived together, even for a length of time, does not automatically create a "marriage-like" relationship, which is of course the foundation upon which a claim to spousal support arises in the first place.

c) Contested applications for parental rights and obligations. These types of cases comprise a large portion of family law. Often expensive non-lawyer family law experts such as child psychologists are required to give detailed reports as neutral assessors to the Courts. Their costs of upwards of $20,000 are in themselves most often prohibitive. Most often, these issues are not resolved by one Court decision. Warring parents

often continually return to Court when circumstances change, when parents re-partner or remarry, when either parent wishes or needs to move elsewhere with or without the children. There are many cases where parents are litigating over child care issues from time of separation until the child or children reach the age of majority or become self-sufficient.

d) Cases involving mobility issues, where one parent seeks to remove a child or children from the place where they usually reside require consideration of a large number of factors to determine what is in the child's or children's best interests. Provincial Court Judges have written lengthy decisions, up to 50 pages or more, citing law and facts to explain the basis of their decisions.

e) Determination of what assets and liabilities *are* "family property" or "family debt" under the *Family Law Act*. Even though certain types of assets are statutorily identified as family property, and the legislation on its face excludes "prior acquired" assets as family property, there are still many factors to consider such as the market value of such assets at the start of the relationship, whether such value has increased or decreased during the relationship, and change of value after termination of the relationship. Trust funds require separate consideration as to whether they are or are not family property. Gifts from relatives or friends require careful consideration. Some are and some are not family property. Many debts in the name of one party are or are not family debts to be shared equally. An overriding aspect of the *Family Law Act* is the power of the Court to divide assets in whatever shares it determines to be fair, even taking assets

determined not to be family property into account.

f) Valuation of family property and family debt. What is the proper value of shares in a company? What tax should or should not be considered to reduce present day value? What future positive or negative contingencies should be considered and applied to increase or decrease the value of a business, held by a corporation, partnership, or individual? What tax obligations of the owning spouse, whether past, present, or future, should be considered to reduce the present day value of assets to be retained by the owning spouse? When a party intends to transfer property or shares to the other, what will be the future tax liability of that party if the property is not the residence of both parties? What values should be attributed to assets held outside the jurisdiction? When RRSPs are divided/transferred there are no tax consequences, but often tax aspects are overlooked if one spouse is to retain all of an RRSP in trade for a tax-free asset such as the family residence.

f) Pensions, private or government. Unless parties agree to divide pensions according to the statutory provisions of the *Family Law Act*, even experienced family lawyers are not capable of determining present day values for purposes of dividing assets. Only qualified pension valuators can do so, because such values depend upon the specific provisions of the specific pension plan to be valued, and application of actuarial tables to establish present day values.

g) Applications for divorces where there are minor children. Very often divorce applications by

unrepresented persons are rejected because there is insufficient information about the proper amount of child support. Often parents agree informally that there need not be any child support, where child support is clearly required. Parties then require legal assistance to determine the proper amount of child support and to make agreements or obtain Court orders to satisfy that requirement for a divorce.

h) Consideration, understanding, and application of relevant case law and applicable legislation are necessary for all of the above types of family law services. In my opinion there is no way that ALSPs can be adequately trained to carry out the most fundamental and critical tasks required of family lawyers.

h) What remains? Applications for a divorce where there are no dependent children, no outstanding spousal support claims, no outstanding property division or debt allocation claims. Creation of a program to create ALSPs for such a limited purpose is, in my view, not a solution to providing family law services to those who cannot afford to pay for family lawyers.

4. Heading V "Education and Training"

I do not believe it is in the public interest, nor is it necessary to create a "new class of legal service professionals" in order to address or alleviate the fact that many people cannot afford to pay for family law advice and representation from a family lawyer.

The Group posits that ALSPs can "fill the gap" if they are "fully trained and regulated". Not only does this devalue the hard work and training that family lawyers have

invested in their careers, but it devalues the knowledge and expertise that such lawyers provide to the public. Why should those who have not obtained an undergraduate and Law School degree be permitted to do the very same type of legal work as family lawyers, virtually all of which is now done by family lawyers, as listed at page 6 of the Consultation Paper?

It is the Law Society that has required lawyers to take 7 years of undergraduate and postgraduate university education to become a lawyer, and to practise law according to strict Rules and regulatory requirements. By creating a parallel program of much lesser duration, depth, and cost to those not having any post-secondary education, but enabling and permitting them to provide the same type of legal advice for most family law matters that are the realm of family lawyers undercuts the hard work and expense that family lawyers have devoted and invested in becoming lawyers. If the proposals are implemented, why would anyone spend 7 years to become a family lawyer? I believe the answer is clear...nobody.

Furthermore, there is no suggestion in the Consultation Paper that such family legal services should be or need to be under the supervision or review of a family lawyer. I will suggest this alternative in my suggestions for ways to address the Access to Justice issue.

I point out a huge irony in the fact that it is the Group, as Benchers of the Law Society, and not an "outside" party or government, that is recommending the creation of ALSPs. It was not that long ago that most of the family law bar spoke out strongly against a proposal to government by the B.C. Notaries that the *Legal Professions Act* definition of "legal services" be expanded to permit Notaries to provide family law advice to the public in "simple family law matters". Many family legal services suggested by the Notaries fall within the list at page 6 of

the Consultation Paper. The Law Society and CBABC spoke out strongly against such proposals, citing protection of the public as the most important consideration. As a result, their request was denied. I suspect that if government or any third party or public interest groups was advocating the passage of legislation to create ALSPs, family lawyers and the Law Society should and would be protesting such passage with indignation. Why is it now in the public interest to permit ALSPs when it is being proposed by the Group as a committee of the Benchers? There is, with respect, no difference between what was requested by the Notaries and what is now being recommended by the Consultation Paper.

I submit that it would be an insult to the public if the Law Society created a "second class" of lesser trained family law professionals. The public deserves no less than the high level of training and expertise provided by family lawyers, whether funded privately, or by legal aid, or pro bono. During my career, it always sounded offensive to me when lawyers who do Duty Counsel or legal aid work announced to the Court and to the public gallery that they were Duty Counsel or that their clients were legal aid clients. That is irrelevant. The fact is that such lawyers should and must devote the same care and attention to their clients legal aid clients and to the Court as if they were privately paid. Therefore, if a group of ALSPs were to be created by the Law Society, the message would be, "Here is a group of lesser trained family law professionals for you, who aren't as fully trained as family lawyers, but who will charge you less". That is "poverty shaming" to those individuals, and a message that their legal issues are not worth as much as or don't deserve as much work or skill as much as cases handled by family lawyers.

I believe that the way to move forward is to provide a measure of family law education and training to ALSPs but to require them to work in law firm environments, employed

by, and under the supervision of family lawyers. This would be analogous to what has been developed in dentistry, where Certified Dental Assistants ("CDAs") do a scope of work previously done by dentists, including dental examinations, Xrays, and cleanings, but at the end of each cleaning/examination session, the dentist checks the work done by the CDA and makes a careful inspection of the patient's condition, dental records, and X-rays if taken. The public is well served by this program. It is a "win-win-win" situation. The public still receives a high level of professional dental service, the CDA is able to provide a valuable dental service and make a living by working under the supervision of the dentist, and the dentist is able to devote her/his valuable time to other matters within that dentist's professional training and expertise. The prospect of CDAs being permitted to operate out of their own offices, with no supervision by a dentist is, in my opinion, a frighting one. Many "dental tourists" have suffered the drastic consequences of low cost, low training dentristry in Mexico. Extractions, fillings, or more extensive dental work by Mexican dentists provided at a fraction of cost to those who obtain such services has resulted in substantial problems due to infection, poor service, and other types of dental harm and wasted money.

The legal profession already recognizes the value of para-legal professional assistance work in areas other than family law. The cost of legal services in conveyancing/mortgage work is greatly reduced by conveyancing paralegals preparing documents and obtaining relevant information and documents from third parties and from clients. Expanding the scope of education, training and work by paralegal family law professionals working for and under the supervision of family lawyers would reduce the legal fees presently charged by family lawyers.

5. Heading VII "What We Are Seeking From You", paragraph 21:

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

I attach Schedule A, with my check marks as to the types of family law services (note delineations or expansions within certain descriptions) that I believe could be carried out by trained family law professionals **employed by and under the supervision of family lawyers.**

*"Is the framework likely to achieve the desired outcomes? If not, how might it be modified to achieve the outcomes?"

No. Suggestions in previous answer, to alleviate, not "solve" the fact that many people will still be unable to afford family law services, unless funding is provided by Legal Aid or by government or private insurance plans.

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

No.

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

Detailed responses/answers given previously under responses to Heading IV, section 3 of this Submission.

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

As above, previous question.

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

IF any ALSPs were to be created, permitted, "Yes".

*"Is there a broader scope...?"

No.

*"What services ...are most complex and fraught with risk of significant and/or enduring harm...?"

Detailed responses/answers given previously under responses to Heading IV, section 3 of this Submission.

*"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 practising family law?"

There should not be any such class of service providers working independently of family lawyers.

*"Are there any other reforms....?"

No responses/suggestions.

*Portion of paragraph 22 "provide practical suggestions...to increase access to cost-effective, competently delivered legal services to people who, at present, struggle to access the services of lawyers in the area of family law"

a. First and foremost, spend the PST on legal services for the purpose first intended, namely, funding of legal aid. Provide reasonable remuneration to family lawyers from legal aid funds. Greatly expand eligibility of cases for legal aid funding to all family law matters requiring legal fees that the client cannot obtain, not just where abuse/violence exists.

Recently, in October, the Alberta government allocated $70 million over the next year in additional funding for legal aid. According to Global News, $15 million was added to legal aid funding for this year, for a total of $104 million. This amount was even more than what Alberta legal aid lawyers had been demanding since the spring, when they threatened a strike if the government did not drastically increase funding. The total amount demanded by the lawyers was $60 million over 4 years. Kathleen Ganley, Minister of Justice and Solicitor General was quoted by Global News as stating, "By reversing decades of underfunding in Alberta's legal aid program, we are helping to ensure all Albertans can access legal services". In addition, the application process has been streamlined to make it much easier for those in need to obtain legal aid representation.

In her Submissions, Carla Lewis points out that in 2009, total PST collected was $144.8 million, of which $80 million was allocated to legal aid. The Liberals criticized the NDP for not allocating all PST to legal aid, but when they took power, they reduced legal aid funding by 40%. In her Submissions, Penny Paul states that PST is now $210.6 million, of which $75 million is allocated to legal aid. I agree with Ms. Lewis and Ms. Paul and many others that **the most important thing that the Group and the Law Society can and should do is place demands on government to apply all PST to legal aid funding AND remove the barriers to legal aid funding for family law matters.** There is no reason why family law legal aid should not be provided where there has not been family violence. That distinction has always been, in my view, an artificial one to grossly limit funding for family law legal aid representation. Furthermore, the total amount of family legal aid

funding should be as large as for criminal legal aid.

b. Allow family lawyers to take cases on contingency where total value of family assets is over a certain threshhold...$500,000? $1 million? Observation: most personal injury clients would not be able to obtain legal representation if they had to pay up front for their lawyers. There is a large segment of personal injury clients who are not able to pay for lawyers where liability is in issue. They are therefore denied Access to Justice. Are they "less deserving" than family law clients who cannot afford to pay for legal services?

c. Create limited training programs to enable ALSPs to work for and under the direction of family law professionals, as previously suggested in these Submissions.

d. There are suggestion being made, to mandate that family lawyers provide a minimal amount of pro bono legal services. I disagree with this suggestion. What other profession or occupation is mandated to work for nothing? "Leading by example", and encouragement by the Law Society and CBABC are strong initiatives, and should not be ignored or discounted. A large number of family lawyers already donate substantial amounts of their legal services in first interviews and give appropriate direction and legal advice without charge. They step forward in hallways prior to Court to give assistance to lay litigants with procedural questions or concerns. They often reduce their accounts depending on circumstances and outcomes.

e. Permit retired or part-time lawyers to give family law advice, without charge, but without necessity of paying full Law Society dues and full legal insurance

premiums.

As a retired lawyer, I simply cannot afford to pay such costs. However, I would be, and I am sure many retired family lawyers would be happy to provide preliminary advice and opinions to the general public, at no cost, if such personal expenses were not required. A requirement would be that the lawyer state in writing that such review and opinions are given on a preliminary basis only, without full benefit of all relevant facts and documents AND that the opinions given be reviewed by a family lawyer. In many situations, especially procedural ones, that level of service would be of substantial assistance.

f. Much more work needs to be done, to assess the factual basis of many assumptions stated in the Consultation Paper. What have the results been of the programs in the other jurisdictions listed in Schedule B? Have they provided greater Access to Justice? Why or why not? Perhaps limited pilot projects over defined periods of time need to be implemented. Perhaps more interviewing of people in locations across the provide needs to be done to determine if in fact non-affordability of family lawyers is the reason why many are self-represented. The Group has valuable resources not yet fully utilized, such as the wisdom of The Honourable Donna Martinson and the large number of sitting Judges who deal with self-represented people every day. There are many retirees of the legal profession and judiciary with years and years of legal experience who could and would contribute to more detailed discussions over the internet or otherwise, perhaps with payment of, or assistance with travel and accommodation costs for "outback" retirees to attend "in person" discussions.

D. Concluding Remarks

I have the utmost concern for the the public interest and for the integrity and recognition of the value of legal services being provided by family lawyers. The easiest path for me and for other retired legal professionals would have been to say, "Why should I bother? This doesn't affect me in any way." But, as clearly shown by hard working practising family lawyers who have given their submissions (at obvious financial cost to them), and by The Honourable Donna Martinson, those who are passionate about what they are doing and have done their whole professional lives, and who truly and deeply care about people and their situations, AND the lives and careers of family lawyers, have provided and will continue to provide their input and assistance.

It is my request that you provide a Consultation Paper #2 with responses to address the concerns expressed in the Submissions to the Consultation Paper.

Respectfully submitted,

Donald N. Kawano QC
Cranbrook, B.C.

email: kawanodon@gmail.com
telephone: 250-581-0054

Schedule A

Proposed Framework for Scope of Practice for Family Law Legal Service Providers in British Columbia

All new "family law legal service providers" will be members of the Law Society and authorized, within the scope of permitted activity, to "practice law" as that term is defined in the *Legal Profession Act* except as excluded in Part 2 below. They will be trained to standards set by the Law Society to ensure that they are qualified to provide the services contemplated in this proposed Framework.

The Law Society anticipates that this new category of legal professional will also be fully trained as "dispute resolution professionals" as defined by the *Family Law Act*.

1. **Family law legal service providers will be permitted to provide legal services relating to the following matters:**

The proposed new category of legal professional will be permitted to practise law in family law matters, including the preparation of documentation and proceedings and to act and advise on all areas of family law, **except with regard to matters or activities specifically excluded in Part 2 below.**

Within the scope of permitted services, professional family law legal service providers would be permitted generally to:

- Establish a contractual relationship with a client not represented by a lawyer or with a client who is represented by a lawyer where the lawyer consents;
- ✓ Conduct client interviews to understand client objectives and obtain relevant facts;
- Advise a client about available legal options (including about retaining a lawyer where the matter appears to be beyond the scope of permitted activities);
- Take instructions to begin legal processes, ~~including advising about~~ and deciding on which forms to use and completing forms and organizing service for the client;
- ✓ Communicate with another party's representative, or with another party where unrepresented; to obtain information, facts, and documents
- Advise about the anticipated course of legal proceedings, including where and when the client may need a lawyer to become involved;
- ✓ Attend at mediations within scope of permitted activities;

if properly trained

- Act as mediator;

> The Task Force's rationale for including this provision in this consultation is that non-lawyer mediators are permitted already to conduct mediations and are required to undertake stringent training requirements. Regulated service providers under the current proposal should be permitted to conduct mediations. As they will be, if the initiative is approved, members of the Law Society, they will be required to meet all of the training and practice requirements set for family law mediators by the Law Society.

- Prepare orders within scope of permitted activities; with lawyer's supervision

> Should service providers be allowed to draft orders?
>
> The Task Force recognizes that the Court now prepares orders where self-represented parties are before it. However, the Task Force has tentatively concluded that it nevertheless is advisable to permit service providers to prepare orders. While it is not contemplated that the service provider will be appearing as counsel (see section 3 below), he or she will have a representative role.

- Advise about how agreements or court orders may affect a client's rights and obligations;
- Refer matters beyond scope of permitted activities to a lawyer;
- Accept referrals within scope of permitted activities from a lawyer;
- ~~Represent a client in settlement discussions and~~ prepare settlement agreements and orders incorporating settlements within scope of permitted activities;

> Should a service provider be permitted to draft and finalize settlement agreements?
>
> The Task Force debated this at some length. It proposes for the purposes of this consultation that full representation of a client should include finalizing settlements. The model contemplated is therefore beyond that associated with that currently existing for non-lawyer mediators who are not allowed to draft settlement agreements. Service providers contemplated in this initiative are, however, representing clients, and it seems counterproductive to the access to legal services imperative to require a client, having been represented through the settlement negations by a service provider, to then have to retain a lawyer to finalize the agreement. The service provider will be educated and trained in preparing agreements and will be regulated for competence.

Others may have different views. What alternatives exist? Should a lawyer be required to vet a final agreement?

- Give and receive undertakings

Should service providers be permitted to give and receive undertakings?

The Task Force has included this provision because, if permitted to represent clients in settlements and at mediations, the service provider likely has to be able to give and receive undertakings. Education on the importance of undertakings to the legal system and the role of undertakings in litigation would have to be included, and the proposal would include regulation of conduct relating to undertakings to the same standard as lawyers. It is worth keeping in mind that the BC *Code* already permits the giving and receiving of undertakings by paralegals working under the supervision of lawyers provided certain processes are followed.

- Operate a trust account

Similarly, to be able to perform the services contemplated, a service provider will likely need to operate a trust account. Moreover, operation of a trust account better protects clients providing retainers. Again, it is contemplated that education on the operation of a trust account will be required, and the service provider should be regulated to the same standard as a lawyer in the operation of a trust account, including audit.

✓ Prepare documents to

- Enforce orders.

The Task Force considers that, having represented a client through a proceeding to obtain an order, it would be counterproductive to the initiative to require the client to then retain a lawyer to enforce the order. Should this include all orders, including through to an application for contempt?

2. **The following scope of practice will be excluded from the general provisions outlined above:**

   All matters where the involvement of third parties outside the spousal relationship is expected to raise claims within the proceedings;