

From: [Carolyn Lefebvre](#)
To: [Consultation 2018](#)
Cc: [Kerry Simmons](#); [CBABC Committees](#)
Subject: CBABC Access to Justice Committee submission to Law Society of BC
Date: December-21-18 11:31:12 AM
Attachments: [CBABC A2J Submission Law Society Alt Legal Service Providers 2018-12-21.pdf](#)

Hello,

Please find attached a submission from the Access to Justice Committee of the Canadian Bar Association BC Branch to the Law Society with respect to Alternative Legal Service Providers.

Our office is closed this afternoon until Jan 2, but if you have any questions about this submission in the interim, please contact our Executive Director, Kerry Simmons, at ksimmons@cbabc.org.

Carolyn Lefebvre

Carolyn Lefebvre

Director, Communications & Strategic Initiatives
Canadian Bar Association, BC Branch
604.646.7850 | 1.888.687.3404, x304

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**SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION
(BRITISH COLUMBIA BRANCH)
ACCESS TO JUSTICE COMMITTEE**

TO THE

LAW SOCIETY OF BC

REGARDING THE

**FAMILY LAW LEGAL SERVICE PROVIDERS:
CONSULTATION PAPER**

Issued by:

Canadian Bar Association
British Columbia Branch
Access to Justice Committee
December 21, 2018

PREFACE

Formed in 1896, the purpose of the Canadian Bar Association (British Columbia Branch) (the “CBABC”) is to:

- Enhance the professional and commercial interests of our members;
- Provide personal and professional development and support for our members;
- Protect the independence of the judiciary and the Bar;
- Promote access to justice;
- Promote fair justice systems and practical and effective law reform; and
- Promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 33,000 members and the British Columbia Branch itself has nearly 7,000 members. Our members include lawyers, law students, judges, academics and others involved in the legal profession. Our lawyer members practice law in many different areas. Among our members are a number who accept legal aid referrals. Many others practice in the courts and see regularly those who struggle to represent themselves. The CBABC has been strongly advocating for improved access to justice for decades.

The CBABC has established 76 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBABC has also established standing committees and special committees from time to time.

This submission was prepared by the CBABC Access to Justice Committee (the “A2J Committee”), which is a standing committee of the CBABC. The A2J Committee works to improve and promote access to justice for the poor and middle classes in BC. The A2J Committee stresses government responsibility for a sufficiently publicly funded legal aid system as an essential foundation, promotes pro bono services in the legal profession, and supports innovative legal system reform and delivery options for greater access to legal services.

The A2J Committee’s submissions reflect the views of the members of the A2J Committee only and do not necessarily reflect the views of the CBABC as a whole.

SUBMISSIONS

The A2J Committee welcomes the opportunity to provide submissions to the Law Society of BC regarding the Family Law Legal Service Providers: Consultation Paper (the “Consultation Paper”).

The present consultation arises from the work of the Law Society’s Legal Service Providers Task Force in 2013 and the Legal Services Regulatory Framework Task Force in 2014. The 2013 Task Force concluded that:

- 1) It is in the public interest that legal service providers other than lawyers and notaries should be regulated unless operating under the supervision of a lawyer or other regulated legal service provider such as a notary public;
- 2) A single regulator of legal services is the preferred model (rather than distinct regulators for different groups of legal service providers);
- 3) If there is to be a single regulator of legal service providers, the Law Society is the logical regulatory body;
- 4) . . . [T]he regulation of non-lawyer, non-notary legal service providers of limited scope legal services should be included in the purview of a single regulator of legal services and the Law Society should move to create a process by which that can take place;
- 5) There is no certainty that a single-model regulator of a number of different groups of legal service providers will improve access to justice, and it is uncertain that one would be able to create empirical evidence to prove this end. There is no way to find the answer without trying it, and the Task Force therefore concludes that it should be tried.

The 2014 Task Force made certain recommendations as to the initial areas of practice in which new classes of legal service providers could be permitted to practice – at the top of that list was family law. Following its report, the Law Society wrote to the provincial government in December 2014 seeking amendments to the *Legal Professions Act* that would allow the Law Society to regulate additional classes of legal professionals.

As all of this was going on, two important Access to Justice projects were working toward their final reports. The CBA's national report on *Reaching Equal Justice* and the *Roadmap for Change* report of the National Action Committee on Access to Justice in Civil and Family Matters –the action committee established by Chief Justice McLachlin – were both released in the second half of 2013 and both recognized the value of a continuum of legal services approach, including increased opportunities for other legal service providers like paralegals, and encouraged the legal profession to “take a leadership role in this important innovation process”. Both of these keystone reports point in the direction of considering alternative legal service providers to provide a range of services – and both referenced family law as an area where this was a particular need.

Unfortunately, little was done to advance the work done by these task forces from December 2014 until 2018.

It is clear from all of this work done in previous years that there continue to be significant problems in access to justice in British Columbia – including but not limited to the area of family law.

We have seen a dramatic increase in the number of self-represented litigants over the past two decades, especially in the area of family law. In our provincial court, there are over 24,000 in-person appearances per year in family law cases alone, constituting over

40% of appearances in that division. That is the tip of the iceberg, as many thousands of other British Columbians struggle to resolve their family law and other problems without ever making it to Court. People are simply not getting the help they need from lawyers to resolve their family law problems.

This is not simply an issue for those who would otherwise qualify for legal aid. This is a middle class issue. There are thousands of British Columbians caught up in legal issues every year who earn modest incomes but would struggle to afford to pay a lawyer to guide them through their problems. The most dramatic evidence of that is in our courtrooms – and the urgent need is well established by the available data.

We believe that all justice system participants must take action to address this problem, and that lawyers have a significant role to play in bringing about change.

The CBABC made submissions to the 2013 Task Force. Those submissions identified four foundational values that needed to be at the heart of any decision-making about changes to the regulation of service providers:

- 1) Independence of the Bar – the importance of the independence of the bar as a fundamental feature of a free and democratic society; the role that a strong independent self-regulatory agency plays in the independence of the bar; and the importance of preserving values that are at the core of legal profession including independence, loyalty to client and confidentiality;
- 2) Access to Justice – the bar has an important leadership role to play in supporting innovations and improvements that increase the capacity of legal service providers to supply comprehensive, cost-efficient and innovative services. Coordinated steps involving other legal service providers could also play a significant role;
- 3) Effective Regulation – the importance of ensuring an effective regulator that properly protects the public interest by setting and enforcing standards of professional conduct, mandating adequate insurance programs, and ensuring the independence, integrity, honour and competence of lawyers serving the public within British Columbia;
- 4) Clarity of Roles – any changes to regulatory structure must protect against public confusion about the types and limitations of services provided by any particular legal service provider.

Those values continue to be foundational to any analysis of proposed changes to legal service providers. The CBABC submission to the 2013 Task Force concluded that:

“A uniform and consistent approach by one regulator could provide a model that ensures the quality of legal services and reduces the risk of liability. The disadvantages would require mitigation, and any resulting single regulator structure would need to ensure preservation of an independent bar. Further consultation is required as the potential model is developed.”

The 2014 Task Force discussed the potential for alternate service providers in the area of family law at paras. 75-78 of its report. It is worth repeating what is said there:

75. Family law is frequently identified as an area of need in legal need surveys and this was consistent with the perceptions of Task Force members. While questions may exist as to the propriety of having non-lawyers represent family law clients in court, the reality is there are many services that can be provided preparatory to a court appearance or to help people resolve matters outside of court. The government has been engaged in comprehensive reform of family law in the past decade, attempting to modernize this important area of law.

76. Family law is an area of practice in which non-lawyers already play an important role, and there is a growing appreciation that the traditional adversarial approach to conflict resolution is harmful in many family disputes. Due to the underlying emotional, financial and non-legal issues that can exist in family disputes, there is a growing acceptance of the utility of non-lawyer professional services. Part of what has to be considered, therefore, is whether it makes sense to supplement the training of these professionals with targeted legal training in order to enable them to provide a broader suite of services to people experiencing family disputes. It has been observed that “The growing gap of family law practitioners fundamentally impacts the right of those that already have little to no access to legal representation when faced with complex family law matters.” This gap can have particularly adverse impact on women and children as well as people of modest means.

77. Family law has seen the rise of mediation, collaborative family law practitioners, changes to the rules of court, best practice guidelines for family law lawyers, the need for training in screening for family violence and a recalibration of the policy objectives in this area. During this time of reform it is appropriate to consider how to train people to best serve the public and consider what new services can be established to meet these objectives.

78. Family law is complex and can have a profound impact on current and future generations of families. If family law is to be considered as an area to establish new classes of legal service providers, it will require careful consideration as to the education and training requirements. There are a range of services that fall within the scope of family law, and they range in complexity. The scope of services that will be permitted must be carefully aligned with the training and regulation in order to ensure the public is well served.

(emphasis added)

The focus of these comments on the importance of training, the harnessing of existing skills of others providing services to people experiencing family disputes, and the idea of

at least starting with work outside of the courts is not as clear in the present consultation report.

We note the submission made in the course of the present consultation by Mr. Jerry McHale, QC, Director, University of Victoria Faculty of Law Access to Justice Centre of Excellence, which raises important questions to consider before further steps are taken by the Law Society.

The A2J Committee's concerns, some of which are raised by the submission of Mr. McHale QC, include the following:

- The proposal does not address or discuss how a new class of legal service providers will improve the justice system nor does it provide any indication or assurance that they will not add to the complexity of an already complex system. Affordability is but one of the many factors that have contributed to the access to justice crisis, any contemplated solution must also consider the impact of other factors, including complexity.
- In terms of affordability, there is no discussion as to how the fees of alternative legal service providers will be regulated, if at all, to make sure their fees are not also as prohibitive as the fees of lawyers. This a critical consideration, given that affordability is one of the driving factors in creating this class of legal service providers.
- There is very little information about the required training, including the required time and associated costs. As a result, it is not possible to comment on the scope of the services to be provided by the alternative legal service providers.
- There is no discussion about how the public will be protected. Will the alternative service providers be held to the same standard as lawyers? In the interest of protecting the public and ensuring that those who cannot afford a lawyer are not exposed to additional risks, all legal service providers should be held to a high and similar standard, otherwise vulnerable individuals and groups will be put at greater risk. The creation of a two tiered system will only create additional risks and built in systemic discrimination.
- There is no consideration of whether those seeking the assistance of these alternate providers, regulated by the Law Society but not lawyers per se, will have their communications protected by the law of privilege.
- While some information is given as to steps being taken in other jurisdictions, the report contains no analysis of lessons that may be learned from those other jurisdictions, nor does it tie the proposals on which input is sought to any similar programs in other jurisdictions.
- The use of alternative legal service providers cannot be divorced from the issue of providing effective legal representation, particularly for vulnerable populations.

Without meaningful and extensive consultation on the appropriate approach, including the training and competency requirements, the public may be put at risk. Rather than alleviate concerns, the move to create and regulate a new class of legal service providers, without thoughtful consideration, may create new concerns where members of the public are at risk of receiving services from incompetent providers.

There are many outstanding questions that require research and consideration. As noted by Mr. McHale QC, while the Consultation Paper is premised on alternative legal service providers receiving adequate training, little is said in the document about the training that would be required. It is very difficult to respond meaningfully when such a fundamental aspect of the new service providers remains undeveloped.

We would encourage the Law Society – should it decide to proceed further with consideration of alternative legal service providers – to treat the current consultation as stage 1 of a multi-step process. That consultation should include careful consideration of the questions noted above, as well as the foundational values from the CBABC's 2013 submission. The goal should be to develop a model with detailed analysis of all of these points which can then be the subject matter of a new consultation paper that can be circulated amongst the Bar and other interested parties for further consultation.

We note that the 2013 and 2014 task forces included not only benchers and Law Society staff, but also representatives of the CBABC, paralegal organizations and others with an interest in the subject matter. We would commend that approach to the Law Society, and would invite the Law Society to seek participants from the CBABC among other organizations.

CONCLUSION

On behalf of the Access to Justice Committee of the CBABC, we thank you for this opportunity to respond to the Consultation Paper. We are pleased to discuss our submissions further in order to provide any clarification or additional information that may be of assistance.

All of which is respectfully submitted,

ZAHRA H. JIMALE

Chair of the CBABC Access to Justice Committee

Tel.: (604) 343-1100

Email: zahra@jimalelawcorp.com

From: [Roussy, Karen](#)
To: [Consultation 2018](#)
Subject: Legal Service Providers
Date: December-21-18 3:07:29 PM
Attachments: [image002.png](#)
[Family Law Legal Service Providers.pdf](#)

Karen Roussy

Paralegal, Watson Goepel LLP

604 609 3079 (Office) | 604 688 8193 (Fax) | kroussy@watsongoepel.com

1200 – 1075 West Georgia St. Vancouver, BC V6E 3C9



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December 21, 2018

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

Re: Family Law Legal Service Providers: Consultation Paper

Thank you for the opportunity to provide input into this important topic for fair access to justice in family law matters in BC.

I will give you some information about my background so that you can understand the context from which I make my comments.

I am a family law paralegal at a law firm. I have a Bachelor's degree in Criminology and a Paralegal Diploma from Capilano University. In addition, I completed a Certificate in Conflict Resolution (Family Mediation) at the Justice Institute of BC. I am a member of the BC Paralegal Association and Family Mediation Canada. I have conducted family law mediations as a mediator. I have volunteered for several years as a paralegal at the many clinics operated by Amici Curiae (AC). I would likely become one of the alternative service providers contemplated in your paper.

In general, I don't think this proposal on its own will solve the current challenges of the delivery of family law legal services. In my view, two main challenges need to be addressed: the access to justice problem and the adversarial based system. Your proposal may in a limited way assist with access issues, but does not change the system which is not appropriate for the dynamics of family relationships.

In 2013, the Action Committee on Access to Justice in Civil and Family Matters published "A Roadmap for Change". It noted that the system was

...too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve.

This report concluded that a shift in culture is needed, and set out six guiding principles for change. The need for a shift in the culture was echoed in the Supreme Court of Canada decision *Hryniak v Mauldin*, 2014 SCC 7.

In my view, family matters are not typical court matters. The parties are not strangers to each other and in many cases must have an ongoing relationship. Given this, an adversarial approach is not beneficial.

It is time for the Province of BC to create a unified family court. We need to look to the initiatives in the provinces of Saskatchewan and Manitoba. A new family court must adopt a multi-disciplinary approach and be alternative dispute resolution focused. The "system" must be updated to reflect the social research on what is really in the best interests of children and former partners. Of course, some matters

will need to be decided at trials or have interim orders made, but those should be fewer and the judges presiding would have the benefit of a single focus and increased training in family law.

I am curious about how many members of the law society understand the difference in education and training of paralegals and legal assistants. It seems to me that alternative service providers already exist, to some degree, in the work done by paralegals, designated paralegals, and family justice counsellors and others.

I wish to make clear that any steps to promote a greater access to justice, and decrease the numbers of persons forced by circumstance to self-represent in court, I am in favor of. The consultation paper has asked for responses to several questions, here are my replies:

1. What do you like or dislike about the framework outline in Schedule A?

I like that a professional standard of training and accreditation will exist. It is important to ensure that persons seeking more affordable services can still have confidence in the quality of the services they will receive.

I do not like the court appearance rules. I think they are too restrictive and will not meet the goals of increasing access to justice. The parties will still be self-represented and the problems of court delay associated self-represented litigants (SRL) will persist. Many persons fear going to court and even with a support person they will not be adequately represented.

I would propose that the new service providers be able to appear in court like articulated students as set out in Law Society Rule 2-71 as it relates to family law. This would increase the affordable access to justice and court representation. If the new service provider is an officer of the court they should be given voice and able to represent clients in these restrictive circumstances.

I do not think the restriction on dealing with pensions is necessary and indeed would lessen the scope of who could be assisted. If the pension matter is too complex, it could, and should, be referred to a lawyer. There are currently non-lawyer mediators who divide pensions at mediations.

Finalizing agreement is a tricky area. How will the courts respond and uphold to these agreements? Has independent legal advice been given? Can the service provider sign an ILA?

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

Cost is a motivating factor for many clients. Offering services at a reduced cost will be attractive. I am confident that the new service providers will cost less per hour than lawyers. This is currently true for non-lawyer mediators and non-lawyer parenting coordinators.

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

The new service providers should be commissioners for taking oaths so that they can swear affidavits with clients.

I think limited court appearance needs to be added so that they can provide a more “start to finish” service and address the SRL dilemma.

More information is needed about not being able to assist in child protection concerns. Violence screening often has some positive responses. How will child protection concerns be defined? Or is this just meant to refer to MCFD involved files?

In my volunteer work (AC) family violence is a common occurrence. These persons are unrepresented. If the goal is to have better access and representation, family violence screening needs to be carefully defined or a significant vulnerable population will not be able to access the new service provider and they will remain unrepresented.

Will legal aid apply to the work of the new service provider? It should, as this will increase the access to justice at a more affordable price. The legal aid dollars will go further when the billable rate being charged is less. However, legal aid needs to be increased so that persons can hire and be represented by lawyers regardless of whether or not these new service providers are in place.

4. Does the framework include any legal services you think should be excluded?

N/A

5. Should the service providers be “officer of the court?”

Absolutely. A high standard of education, training and conduct should be required. In order to be able to appear in court as described above the new service provider should be an officer of the court. Again, I would allow the service provider to be the same as articulated students in terms of court appearance.

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

As the alternative service providers become mediators and perhaps even parenting coordinators this will increase the affordability and availability of these services.

The Family Justice Counsellors are not able to keep up with demand and are unable to mediate all family law issues (i.e., property). The alternative service providers should be more affordable than lawyers performing these tasks. I strongly believe that there is a need for more affordable mediation services across the province. If alternative dispute resolution is to be encouraged as a better option for the health of families, mediation and other ADR services must be more readily available and at an affordable prices in all areas for the province.

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

Training is the key. The service provider must understand their limitations and rely on advice from lawyers and other experts. They must know when to refer or seek assistance. I work with senior lawyers and respect their knowledge and expertise and would not hesitate to get assistance or refer out.

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

Yes and ongoing professional training.

9. *Are there any reforms to the provision of family law services that could be addressed through the use of alternative legal service professionals?*

What the “system” needs is less cases going to court and a multi-disciplinary approach. It is not a solution to just make some of the billable costs less but not increase the fairness and efficiency of the overall system. Simply adding WHO can provide services will not assist in a substantial way until WHAT and HOW services are being provided is truly addressed.

Respectfully submitted for discussion,

Karen Roussy

From: rhonda@meadowridgelaw.com
To: [Consultation 2018](#)
Cc: nora@meadowridgelaw.com
Subject: Proposed Alternative Legal Service Providers
Date: December-21-18 4:14:46 PM

To whom it may concern,

On behalf of Nora Radac and Rhonda Murray of Meadowridge Law LLP, we wish to strongly object to parcelling out the ability to provide family law services for family clients. We have extensive family law experience and we have a deep appreciation for what a lawyer brings to the table. We would much prefer that Legal Aid was financed appropriately and that lawyers would be able to service clients regarding such an important area of law.

Rather than creating a whole new structure and mechanism for such a sensitive and complicated area of law, we should focus on enriching the practice that we have in place, and financing it appropriately with the mechanism that currently exists. It is our view that the government should be lobbied more stringently by the Law Society to subsidise the provision of legal services.

We do not agree with allowing lesser trained and educated individuals to take away much of our legal practice. We are dedicated professionals and we value what we have worked so hard to refine and provide to our clients. We have only our skills, knowledge and compassion to sell. For the Law Society to consider giving this away we feel betrayed.

Clients will also be disadvantaged. Surely the “alternative legal service providers” cannot provide the experience and knowledge of a seasoned family lawyer. Alternatively, if you plan on training these “alternative legal service providers” to be of the same competence as the current family lawyers, then what is the point of this exercise. There is no shortage of family lawyers, many of which are settlement focused. People who wish to provide legal services should go to law school, just as we did. There should be no shortcut. The term “alternative legal service providers” implies that they do something special or different than family lawyers, however that is not true, and it can put lawyers at a disadvantage in the public eye.

In closing, we wish to strongly discourage you from slicing off parts of our career or from demeaning us in the public eye. We wish to have family lawyers continue to provide the high level of legal service to the public and not to go through a long arduous, bumpy and confusing road with half-trained people being thrown into the mix, who can never know as much family lawyers.

Rhonda Murray and Nora Radac | Partners



650-22470 Dewdney Trunk Rd, Maple Ridge, BC V2X 5Z6

Tel: 604-477-1077 Fax: 604-477-1078

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From: [Stuart Rennie](#)
To: [Consultation 2018](#)
Subject: CBABC Family Law Working Group: Submissions to Law Society Alternate Legal Service Provider Consultation
Date: December-21-18 5:14:42 PM
Attachments: [CBABC Family Law Working Group to LSBC submissions Dec 21 2018.pdf](#)
[ATT00001.htm](#)

Dear Sir/Madam,

On behalf of the CBABC Canadian Bar Association, BC Branch (CBABC) Family Law Working Group, I attach the Working Group's submissions for the Law Society Alternate Legal Service Provider Consultation.

Any questions can be directed to:

Angela Dunn
Co-Chair, CBABC Family Law Working Group
Tel.: (604) 669-1106 Ext. 219
Email: dunn@mhmlaw.org

Stephen McPhee, Q.C.
Co-Chair, CBABC Family Law Working Group
Tel.: (250) 754-3321
Email: smcphee@rlr-law.com

Stuart

Stuart Rennie
Legislation and Law Reform Officer
Canadian Bar Association (British Columbia Branch)
Tel.: (604) 944-4545
E-mail: Stuart_Rennie@telus.net or srennie@cbabc.org

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**SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION
(BRITISH COLUMBIA BRANCH)**

TO THE

LAW SOCIETY OF BC

REGARDING THE

**FAMILY LAW LEGAL SERVICE PROVIDERS:
CONSULTATION PAPER**

Issued By:

Canadian Bar Association
British Columbia Branch
Family Law Working Group
December 21, 2018

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PREFACE

Formed in 1896, the purpose of the Canadian Bar Association (British Columbia Branch) (the “CBABC”) is to:

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The CBA nationally represents approximately 35,000 members and the British Columbia Branch itself has over 7,000 members. Our members practice law in many different areas. The CBABC has established 76 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBABC has also established standing committees and special committees from time to time.

This submission was prepared by a special committee: the CBABC Family Law Working Group (the “CBABC Family Law Working Group”).

The CBABC Family Law Working Group was composed of the following members of all 7 of the Family Law Sections. Members of the CBABC Family Law Working Group are experts in all aspects of family law: divorce, adoption, child protection, common law and same-sex marriages. Their expertise extends to all areas of family rights and responsibilities: property division, child custody, guardianship and access, mobility (moving away), child, spousal, and parental support. Finally, their expertise also encompasses new methods of resolving such issues: family law mediation and collaborative law.

CBABC Family Law Working Group members are:

Fraser Valley

- Cristen Gleeson, Co-chair
- David Hart, Co-chair
- Jessie Ramsay, Vice-Chair
- Benjamin Lorimer, Legislative Liaison

Kamloops

- David Dundee, Chair

Nanaimo

- Erin Brook, Chair

Okanagan

- Scott Murray, Co-chair
- Jake Van Allen, Co-chair

Vancouver

- Angela Dunn, Co-chair
- Josephine Wong, Legislative Liaison

Victoria

- Erin Shaw, Chair
- Samantha de Wit, Legislative Liaison

Westminster

- Celina Meghji, Chair
- Chandan Sabharwal, Legislative Liaison.

The other members of the CBABC Family Law Working Group are:

- Stephen McPhee, QC, former CBABC President and lawyer practicing family law in Nanaimo; and
- Zahra Jenab, Chair of the CBABC Unbundled Legal Services Section.

The CBABC Family Law Working Group was assisted by Stuart Rennie, CBABC Legislation and Law Reform Officer.

The CBABC Family Law Working Group's submissions reflect the views of the members of the CBABC Family Law Working Group only and do not necessarily reflect the views of the CBABC as a whole.

EXECUTIVE SUMMARY

From the outset of our submissions, the CBABC Family Law Working Group wishes to emphasize that unlike other areas of law, family law is complex, interdisciplinary and emotional for clients and is not just about monetary disputes. As such, family law requires specific legal skills/training/knowledge and care, sensitivity and professionalism to ensure access to justice for the client while at the same time protecting the public.

The CBABC Family Law Working Group agrees with the Law Society that access to justice is a priority as is protection of the public, but submits that the real solution is not creating a new class of Law Society members, essentially practicing law as family law alternate legal service providers, since, based on the empirical evidence to date, those alternate service providers will not increase access to justice and will not protect the public. The real solution is how to provide the public with access to quality legal services at an affordable rate while still protecting the public.

The CBABC Family Law Working Group is convinced that restoration of a fully funded family legal aid program administered by the Legal Services Society would be the single most significant initiative to improve access to justice for family law litigants in this province. Among the many advantages of such a step would be the fact that it could be implemented much more rapidly than the Law Society's licensed paralegal plan.

There is no compelling evidence supporting the need for change to create a new class of non-lawyer family law legal service providers. The CBABC Family Law Working Group's position is that alternate legal service providers should not be giving legal advice, and that alternate legal service providers should work under the supervision of lawyers.

The CBABC Family Law Working Group recommends that, if the Law Society decides to move forward with the BC government to license alternate legal service providers, the Law Society should first conduct a business case justifying the need for such providers. The CBABC Family Law Working Group has created a detailed list of questions in Appendix A of these submissions that it recommends the Law Society use in developing its business case.

The Consultation Paper is underdeveloped in showing how the Law Society's proposed initiative will protect the public. The CBABC Family Law Working Group is concerned that non-lawyer representation would create a false sense of security for clients and cause unintended harm to the public and the legal system.

It is an unproven assumption of the Consultation Paper that non-lawyer family law service providers, after being trained and licenced by the Law Society, will provide their services at a sufficiently lower cost so as to enable people who could not otherwise access legal services to obtain legal advice and assistance. The evidence from the

CBABC Family Law Working Group and other legal stakeholders is that these providers may in fact charge clients the same or more than family lawyers.

Another unproven assumption of the Law Society's initiative is that there are simple family law files that could be managed by non-lawyer family law legal service providers.

CBABC Family Law Working Group believes that, without lawyer supervision, it may be better for clients to have no representation at all than to have some representation from a family law alternate legal service provider, who does not have the level of experience or legal skills/training/knowledge the client expects from their representative.

The CBABC Family Law Working Group is concerned that alternate legal service providers would not be able to effectively screen for family violence and effectively manage such a high risk file.

The CBABC Family Law Working Group agrees with The Honourable Donna Martinson, QC, that the use of having family law alternate legal service providers devalues family law.

The Law Society's proposal suggests a wider scope of practice for paraprofessionals than other jurisdictions in Canada and the United States.

CBABC Family Law Working Group believes that the restoration of adequate funding for family legal aid is the most important access to justice initiative available to government, the Bar, and other stakeholders at this time. The CBABC Family Law Working Group recommends that the Law Society review the research detailed in our submissions to provide more use of unbundled legal services. Further, the CBABC Family Law Working Group recommends that the Law Society can encourage greater use of unbundling by family lawyers by making necessary amendments to the Code of Professional Conduct for British Columbia and ask the BC government to amend the *Legal Profession Act* to

make sure that unbundled legal services do not create unreasonable liability for lawyers.

One fundamental flaw of the Law Society's Consultation Paper is the untried assumption that family law alternate legal service providers can do triage at the early stage of a family law file. It is the consensus of the CBABC Family Law Working Group that triage is key to success in a family law file and only lawyers have the training, skill and experience to do triage and not family law alternate legal service providers.

The CBABC Family Law Working Group recommends that the Law Society create a new category, the Early Neutral Case Evaluation roster, similar to the current roster for mediators, where family law clients could go for legal advice from an experienced family lawyer. The CBABC Family Law Working Group recommends that financial disclosure be required at this early evaluation stage because no agreement can be made without disclosure of finances as between the parties. Under this model, family law paralegals would assist clients to fill in financial statements and then book an appointment with a family lawyer from the Early Neutral Case Evaluation roster.

Finally, the CBABC Family Law Working Group urges the Benchers and the Law Society to respond to the overwhelming vote at the recent annual general meeting of the Law Society membership regarding Resolution 3. The CBABC Family Law Working Group also urges the Law Society to take a hard look at the evidence and the alternatives and to work with the family Bar to come up with creative solutions that will truly serve families going through separation and divorce.

SUBMISSIONS

The CBABC Family Law Working Group is pleased to respond to the request for submissions from the Law Society of BC regarding Family Law Legal Service Providers: Consultation Paper (the “Consultation Paper”). From the outset of our submissions, the CBABC Family Law Working Group wishes to emphasize that unlike other areas of law, family law is complex, interdisciplinary and emotional for clients and is just not about monetary disputes. As such, family law requires specific legal skills/training/knowledge and care, sensitivity and professionalism to ensure access to justice for the client while at the same time protecting the public.

In its Consultation Paper, released in September 2018, the Law Society proposes to seek amendments to the *Legal Profession Act* to permit the Law Society to create categories of members who are not lawyers and to permit them to provide family law legal services directly to clients as regulated alternate legal service providers. The stated goal of these amendments is to improve access to legal services.

Schedule A to the Consultation Paper sets out a proposed framework for scope of practice for family law legal service providers in BC. The Law Society expects that these new members will be trained to standards set by the Law Society so as to ensure that they are qualified. The Law Society also expects that these new members will also be fully trained as “dispute resolution professionals” as defined by the *Family Law Act*.

The Law Society set a deadline for comments by November 16, 2018 but in October 2018 extended the deadline for comments to December 31, 2018. The CBABC Family Law Working Group appreciates the extension and wishes to engage on an ongoing basis with the Law Society to work to find solutions to these justice system problems.

The CBABC Family Law Working Group does not support the Law Society's initiative in its current form for the reasons we state below. The CBABC Family Law Working Group offers proactive positive alternatives to the Law Society's initiative.

Access to Justice

The main goal of the Law Society's initiative is to improve access to justice by improving access to legal services and to protect the public. The CBABC Family Law Working Group agrees that access to justice is a priority as is protection of the public.

The CBABC has proven its willingness to engage in an open and responsive dialogue on the issue of access to justice. The CBABC's funding and administrative support of the Public Commission on Legal Aid is a good example of the CBABC's commitment. In addition, the CBABC established and continues the Rural Education and Access to Lawyers (REAL) initiative to address the impending problem of the lack of lawyers in some rural areas of BC. This program has been very successful in matching law students with rural lawyers and law firms, thereby developing a pool of law students and young lawyers who have been exposed to the benefits of rural practice and are more likely to practice outside of urban areas.

The CBABC Family Law Working Group is willing to assess the relationship between lawyers and non-lawyer family law legal service providers and how best to protect the needs and interests of the people of BC and provide public access to appropriate, cost-effective and timely justice.

Over the last few decades, there has been extensive research and evidence of a serious access to justice problem, particularly in the area of family law. For example, the work done by the National Self-Represented Litigants Project has helped us gain

greater insight into the needs of self-representing people and their experience of the justice system.¹

The CBABC Family Law Working Group believes all justice system participants must take action to address this problem and that lawyers have a significant role to play in bringing about change. Here is what the Action Committee on Access to Justice said:

According to a wide range of justice system indicators and stakeholders, Canada is facing major access to justice challenges. For example, in the area of access to civil justice Canada ranked 13th out of 29 high-income countries in 2012-2013 and 16th out of 23 high-income countries in 2011. According to the 2011 study, Canada's ranking was "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases."²

These international indicators tell us that improvement to our civil justice system is urgently needed.

What is the Solution?

The CBABC Family Law Working Group does not believe the solution to the barriers to access to justice is the one proposed by the Law Society. Based on the evidence to date, alternate service providers will not increase access to justice and will not protect the public. We do not believe that adding another level of legal service providers will make any significant contribution to helping families going through separation and divorce to find timely and enduring solutions to their problems.

¹ See <https://representingyourselfcanada.com/>

² Action Committee on Access to Justice in Civil and Family Matters, Access To Civil & Family Justice A Roadmap For Change (October 2013) at page 3, http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf (Access To Civil & Family Justice A Roadmap For Change).

The CBABC Family Law Working Group finds itself in total agreement with the views expressed by The Honourable Donna Martinson, QC:

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 woman and children. It detracts from, rather than supports, the meaningful pursuit of justice, not just access, for all British Columbians.³

Legal Aid

The CBABC Family Law Working Group believes that a primary root of access to justice problems in family law in British Columbia is the woefully inadequate legal aid provisions for family law litigants. In 2002, the former Liberal government reduced legal aid funding by 40%. This resulted in the closing of most community legal aid offices, the termination of legal aid for poverty law, significant reduction in Legal Services Society staff and, importantly, very severe reductions in legal aid for family law. For practical purposes, legal aid for family litigants is only provided where there is physical family violence or Ministry removal of children from their parents. Even when legal aid in family law is provided, there are severe limitations on the number of hours approved for legal counsel.

It should be noted that the current BC government provided some extra funding to the Legal Services Society for pilot projects in family law. The CBABC Family Law Working

³ “Consultation Paper - September 2018: Law Society Alternate Legal Service Providers Working Group” (November 26, 2018), page 1, https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/Consultation-feedback_2018-11-30.pdf

Group congratulates the government for these initiatives, but recommends that much more is needed.

The CBABC Family Law Working Group is convinced that restoration of a fully funded family legal aid program administered by the Legal Services Society would be the single most significant initiative to improve access to justice for family law litigants in this province. Among the many advantages of such a step would be the fact that it could be implemented much more rapidly than the Law Society's licensed paralegal plan.

No Compelling Evidence to Support the Law Society's Proposal

The Law Society's initiative in its Consultation Paper has no compelling evidence supporting the need for change to create a new class of non-lawyer family law legal service providers. The Consultation Paper has no research, study or survey to justify its expansion to include a new class of members who are non-lawyer family law legal service providers.

Two papers are on the Law Society's website which summarized the studies that the Law Society has done, but these studies do not have empirical evidence justifying the need for family law legal service providers.⁴

⁴ Legal Service Provider Task Force Final Report (December 6, 2013), <https://bit.ly/2GjaYix> and Report of the Legal Services Regulatory Framework Task Force (December 5, 2014), <https://bit.ly/2QY2dOS>

From 2012 to 2015, the CBABC made recommendations to the BC government against expanding the notary's scope of practice in BC.⁵

Regarding notaries, the CBABC's position regarding providing access to justice by providing increased access to legal services can be achieved while protecting the public interest by ensuring all of the following conditions are met:

1. There is a proven gap in access and/or demand.
2. The change will achieve the objective of filling that gap.
3. Adverse implications of the change are known and protected against.

To the extent that gaps are established for which proper protections can be devised, the CBABC is of the view that notaries should not be giving legal advice, and that any expansion of notarial services should be work that is done by notaries under the supervision of lawyers and that notaries should be regulated by the Law Society.

To date, the BC government has not expanded the notary's scope of practice.

Like the notaries, to the extent that gaps are established for which proper protections can be devised, the CBABC Family Law Working Group's position is that alternate legal service providers should not be giving legal advice, and that alternate legal service providers should work under the supervision of lawyers.

Regarding alternate legal service providers, the Law Society's proposal presents no evidence that its proposal will address the gaps in legal service. The Law Society has

⁵ CBABC Position Paper Regarding Access To Justice (June 19, 2015), <https://cbabc.org/Our-Work/Advocacy/Notaries-Update-Expanded-Scope-of-Practice>. See also, Notaries Update (September 2015), https://cbabc.org/CBAMediaLibrary/cba_bc/pdf/Advocacy/CBABC_Notaries_Update_Sept_2015.pdf and Notaries Submission (April 3, 2012), <https://bit.ly/2Li2BTh>

not conducted a comprehensive business case justifying the need for alternate legal service providers. A business case would look at the available evidence so see if the Law Society's proposal would help to narrow the gaps in access to justice. In the past, the Law Society has conducted a comprehensive business case for retaining and advancing women lawyers in private practice.⁶

The CBABC Family Law Working Group recommends that, prior to moving forward with the BC government to license alternate legal service providers, the Law Society first conduct a business case justifying the need for alternate legal service providers, with both quantitative and qualitative measurements to prove a gap in access to justice and a demand for family law alternate legal service providers. Further, that adverse implications of having family law alternate legal service providers be identified and protected against.

The CBABC Family Law Working Group recommends that in the Law Society's business case for alternate legal service providers, the Law Society consider the questions set out in Appendix A attached to these submissions.

⁶ July 2009, see <https://bit.ly/2zYgbH8>

Impact on the Public

The Consultation Paper is underdeveloped in showing how the Law Society's proposed initiative will protect the public in cases such as:

- a. The increased likelihood of public harm due to misperception that legal services provided by non-lawyer family law legal service providers are as good as those legal services provided by family lawyers;
- b. The public being vulnerable to erroneous categorization of their legal issues as "simple";
- c. The inherent conflict of interest issue that it is in a non-lawyer family law legal service provider's financial interest to categorize a case as simple;
- d. The fact that there is no proof of cost savings realized for the public, as licensed paralegals will have office overheads and training expenses, their billing rates are unlikely to be lower than that of articling students and junior lawyers.

Furthermore, the Law Society's initiative may in fact lead to increased costs when legal issues move from simple to complex and require a lawyer to take over a case.

Alternate Legal Service Providers Will Give Public a False Sense of Security

The CBABC Family Law Working Group is concerned that non-lawyer representation would create a false sense of security for clients. If clients believe they have legal representation, it is doubtful that they will readily differentiate between the limited services of a non-lawyer family law legal service provider and those of a lawyer. This gives the client a false sense of security including that their rights are being protected during a very difficult time. Legal education includes a specific skill set such as identification of issues, research, analysis and problem solving, and written and oral advocacy. Lawyers are trained to assess the legal merits of a case by applying the facts

to the law, and these skills are obtained and maintained through law school, articles, Law Society's Professional Legal Training Course and ongoing legal education. Having non-lawyers involved in family law cases may actually encourage litigation if these non-lawyer providers take inappropriate and unsupportable legal positions. For example, if litigants settle or resolve their dispute based on inadequate advice provided by a non-lawyer family law service provider, it is much more difficult and costly to overturn or remedy such an inadequate resolution when it was based on some form of "legal advice". As the Advocates' Society views this issue:

No matter the training or requirements that might be put in place for paralegals, there is no substitute to the legal education and training a lawyer undergoes before being admitted to the Bar. To suggest otherwise simply undermines the legal profession and the legal system, and would risk bringing the administration of justice into disrepute.⁷

Another concern of the CBABC Family Law Working Group is the protection of family law litigants and vulnerable persons in BC. The rights of people involved in family law matters, in particular the most vulnerable children and support recipients, can be jeopardized and permanently affected through missing time limitations, underpayment or waiver of support, failure to identify and value family property and family debt, lack of disclosure and enforcement issues. The end result of having non-lawyers represent family law clients is likely to create more work for lawyers, or additional time spent in court by self-represented litigants, as these individuals seek to set aside or vary an unfair agreement or order. This is already often the case with clients who did not first obtain independent legal advice. Those clients who are shown to have relied upon a non-lawyer legal service provider to assist them with such an agreement or order are likely to find additional barriers to overturning these.

⁷ Response to Public Consultation: Expanding Legal Services Options for Ontario Families (April 29, 2016), page 5, https://advocates.ca/Upload/Files/PDF/Advocacy/Submissions/FamilyLaw/Letter_from_TAS_to_Justice_Bonkalo-April_29_2016.pdf

Non-lawyers Do Not Provide Services at Lower Costs Than Lawyers

Another unproven assumption of the Consultation Paper is that non-lawyer family law service providers, after being trained and licenced by the Law Society, will provide their services at a sufficiently lower cost so as to enable people who could not otherwise access legal services to obtain legal advice and assistance. A survey of the CBABC Family Law Section Executives show these data for legal fees charged and charges for specific family law work:

Fees Charged

Lawyer	\$125 - \$500/hour
Articled Student	\$120 - \$160/hour
Paralegal	\$75 - \$175/hour

Charges for Specific Family Law Work

Separation Agreement	\$1,700 - \$3,000 fees
Divorce, no children	\$1,200 - \$1,500 fees, plus tax & disbursements
Divorce, with children	\$1,500 - \$3,000 fees, plus tax & disbursements
Separation Agreement + Divorce	\$1,500 - \$3,000 fees, plus tax & disbursements

These rates charged by family paralegals currently working under the supervision of family lawyers are not significantly less than that charged for articulated students and first year associate family lawyers. An individual who cannot afford these fees is unlikely to be able to afford the fees of a licenced, non-lawyer legal advisor.

It is common practice amongst members of the CBABC Family Law Working Group to have paralegals or junior employees do the work and then pass the savings on to the client. They are able to do the work very inexpensively under the lawyer's supervision and advice, with the lawyer responsible for the outcomes.

Recent research on the cost of paralegals suggests that paralegals are not cheaper than lawyers. In a case study, the use of paralegals in the Ontario residential tenancy dispute resolution system was analyzed, including their impact on the cost of justice and access to justice, especially for low-income tenants. The research reported that:

Paralegals, who purportedly offer more affordable and accessible legal services than lawyers, are making a significant contribution to the resolution of residential tenancy disputes in Ottawa, but only for landlords and, increasingly, for corporate landlords. That is the conclusion indicated by a preliminary quantitative analysis of a sub-set of residential tenancy disputes. This tentative conclusion suggests not only that *who* provides more affordable/accessible legal services can have an impact on *whose* legal needs are serviced but also, and more fundamentally, *whether* access to justice is really being improved in this context at all.⁸

In the BC context, the CBABC Family Law Working Group states that it is accepted in the Family Bar across BC that mediators and parenting coordinators—who do not need to be lawyers—charge the same or similar rates for the same work as lawyers.

A CBABC member practicing law in Kelowna advises that a local mediation company in Kelowna has recently delved into drafting separation agreements in breach of the *Legal Profession Act*. The Law Society investigated and advised this lawyer that the mediation

⁸ Professor David Wiseman for the Canadian Forum on Civil Justice, “Research Update: Paralegals, the Cost of Justice and Access to Justice: A Case Study of Residential Tenancy Disputes in Ottawa” (2015), <https://bit.ly/2NQJWh4>

company charges the public between \$3,000 to \$5,000 for separation agreements. This cost range is also the range of what a lawyer in Kelowna may charge.

Data from other jurisdictions are similar to that experienced in BC. The Advocates' Society, in its submission to the Ontario government's Family Legal Services Review, stated that its members reported that they regularly see paralegals and law clerks billing at a rate well over \$75 - \$100 per hour and upwards of \$250+ per hour, with some charging even higher rates for overtime work.⁹

While no one at this time knows what the non-lawyer family law service providers could charge, these examples make clear there is a risk to the public that fees charged by the non-lawyer family law service providers will not necessarily be lower than lawyers, may be same or may be higher than fees charged by lawyers.

Further, the CBABC Family Law Working Group questions, based on the above analysis, will non-lawyer legal advisors, who are licensed, pay insurance, and are regulated to the same standards as lawyers to protect the public interest be able to charge less than lawyers?

There are No "Simple" Family Law Files

Another unproven assumption of the Law Society's initiative is that there are simple family law files that could be managed by non-lawyer family law legal service providers. This assumption is simply not true. There are no "simple" family law files. Family law is complicated and the parties to a family law dispute are in a highly charged emotional

⁹ Response to Public Consultation: Expanding Legal Services Options for Ontario Families (April 29, 2016), page 5, https://advocates.ca/Upload/Files/PDF/Advocacy/Submissions/FamilyLaw/Letter_from_TAS_to_Justice_Bonkalo-April_29_2016.pdf

state, often for extended periods of time. Family law is fraught with complexities that may not be readily apparent and it requires knowledge of many other areas of law including:

- Bankruptcy and insolvency;
- Corporate law;
- Criminal law;
- Employment law;
- Estates planning;
- Pensions;
- Personal injury;
- Property law;
- Real estate law;
- Tax;
- Trusts; and
- Wills.

Division of Property

For instance, the Law Society initiative would have non-lawyer family law legal service providers being able to provide legal services regarding division of property and other interests. Division of property requires knowledge of the statutory and case law and experience to provide competent answers to questions like these:

- a. What is the property and who has title at the date of marriage? Were there contributions only by 1 spouse or by both spouses? Was the property, or part of it, sold during the marriage?
- b. Was there evidence of unjust enrichment with a resulting trust in favour of 1 spouse?
- c. Was there inherited property? If so, how is that traced? Was inherited property co-mingled with other property owned by 1 or more spouses during the marriage?

- d. What is the value of other assets such as mortgages from institutional lenders, contingent assets and liabilities, assets located outside of Canada?

Specifically, the case law as it relates to property division, is notoriously complicated – especially determining what is or is not family property under the *Family Law Act*. Similarly, whenever there is any personal injury settlement in issue, there are fairly complicated formulas required to ensure that an appropriate amount of money is allocated to income for support purposes.

It is not clear from the Consultation Paper that alternate legal service providers would have the adequate legal training and experience to competently answer these questions and interpret the relevant case law to provide access to justice while protecting the public.

Forms and Pleadings

Another example from the Law Society initiative would have non-lawyer family law legal service providers “advising about and deciding on which forms to use and completing forms and organizing service for the client”.¹⁰ The Provincial Court (Family) Rules (B.C. Reg. 417/98) have 34 forms. The Supreme Court Family Rules (B.C. Reg. 169/2009) have 101 forms. The *Family Law Act* has no forms. Many of the forms referred to in the family law rules are pleadings.

For example, in Supreme Court, the common pleadings are:

- Notice of Family Claim (F3);
- Response to Family Claim (F4);
- Counterclaim (F5);
- Response to Counterclaim (F6); and

¹⁰ Consultation Paper, page 9.

- Financial Statement (F8).

Not all of these Supreme Court forms simply have boxes to be ticked. Family law litigants may make claims, allegations and counterclaims. The content of these forms needs to be drafted with care, with knowledge of the family matter and the law. If a non-lawyer family law legal service provider improperly drafts these pleadings, the effect may be difficult to remedy.

The court forms are also not “plug and play”. Members of the CBABC Family Law Working Group are finding that, even in desk order submissions, they are getting “rejections” for clarification or technical reasons. The result is that these forms need to be resubmitted – sometimes more than once.

Child support

Another example is child support. The Law Society's initiative does not exclude alternate legal service providers from practicing in the area of child support.¹¹

The Law Society of Ontario excludes family law paralegals from the area of “[c]omplex child support in which discretionary determinations are necessary to arrive at an income amount (e.g. self-employment, undue hardship)”.¹²

It is a reasonable assumption that family law alternate legal service providers would be permitted to give advice regarding the Federal Child Support Guidelines from the parents' employment incomes. This can be complex and is not simple. For example, it is now common for BC parents to not just have 1 source of income from 1 employer. How is part-time income, temporary income, cash or barter in return for employment services, employment bonuses calculated for child support purposes? For parents with

¹¹ *Supra*, pages 11-12.

¹² *Supra*, page 15.

higher income at or above the \$150,000 threshold, the analysis is more complicated. How is income determined from: dividends from corporate shares, stock options, allocation of retained earnings for working capital, non-recurring capital or business investment losses, partnership income, management fees, pension or RRSP income? How to get the wording just right for shared parenting support to ensure that the appropriate government credits or dependent credits can be shared? Determination of income is not simply a technical “tick the boxes” exercise, it requires professional analysis, judgement and advice that family lawyers commonly provide to clients.

Further, judges in both Provincial and Supreme Courts commonly rely on legal counsel’s skill and experience to determine what is fair child support in the circumstances. From the Law Society’s Consultation Paper, there is no evidence that alternate legal service providers would be able to fulfill this function as do lawyers; this would deprive the courts of a valuable perspective and put more unwanted pressure on judges.

Lack of knowledge by the non-lawyer family law legal service providers in these areas can have catastrophic impacts on clients. It is not realistic to expect non-lawyers to be in a position to identify all legal issues involved in a file and provide legal advice on such issues or to know when to refer the matter to a lawyer. Clients may have to pay more money to resolve the matter. Clients may have to engage an experienced lawyer to fix the errors made by the non-lawyer family law legal service provider. Clients may suffer a loss of rights.

Who determines if the family matter is “simple” and thus within the non-lawyer family law legal service providers’ proposed expansion of powers? Certainly, not these non-lawyer providers themselves since that would be a conflict of interest and not in the public interest.

As a result, of these impacts, clients will experience increased costs, waste of time and frustration: that is not access to justice.

The recent case *Nikolaev v Fakhredinov*, out of Ontario, is an instructive case study of what bad can happen when a husband and wife retain a non-lawyer family law legal service provider.¹³ As Justice Myers summarized the case:

To save money, the parties jointly retained a paralegal to draft the formal agreement for them. They did not obtain independent legal advice before they signed their separation agreement. This is an unfortunate example of the adage “penny wise and pound foolish.” The parties have since realized that the separation agreement, as drafted and signed, was, at minimum, incomplete and, perhaps, so unfair to the children and the parties as to be unenforceable. They have terminated the agreement and are left to litigate the issues that they had hoped to resolve. They saved the cost of negotiating an agreement. Instead they incurred far greater financial and emotional costs of litigation.¹⁴

In the end, the parties had to retain lawyers to resolve their family law dispute. This sad scenario could be repeated time and again in BC if non-lawyer family law legal service providers are permitted to practice.

The Law Society’s proposal does not provide information on when a family law matter moves from being “simple” to “complex” so that an alternate legal service provider would be required to refer the matter to a lawyer. This raises concerns about increased costs to the public who start with an alternate legal service provider, only to have the matter referred to a lawyer with the attendant extra costs, lost time, not to mention the client’s frustration.

¹³ 2015 ONSC 6267 (CanLII), <http://canlii.ca/t/gllxb>

¹⁴ *Supra* at para. 1.

Is It Better To Have Some Representation Instead Of Nothing At All?

The Law Society's Consultation Paper seeks to create "options for 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."¹⁵ The implication from this statement raises the question: is it better to have some representation from a family law alternate legal service provider instead of no representation at all? The Advocates' Society, in its submission to the Ontario government's Family Legal Services Review, considered this question and responded with a resounding no. The Advocates' Society's reasons are applicable to the Law Society's Consultation Paper.¹⁶

First, oral and written communications between a family law alternate legal service provider and clients are not protected by solicitor-client privilege as with lawyers and their clients. The consequence is that:

[t]his places the client in the impossible position of having to choose whether to exchange information willingly and candidly at the risk of this information being disclosed to the opposite party, or withholding information that is essential to his or her case.¹⁷

Second, family law alternate legal service providers may encourage more litigation because these providers do not have the skill and experience like family lawyers to keep cases out of court. Similarly, family law alternate legal service providers would increase the court backlogs instead of decreasing backlogs.

Third, family law alternate legal service providers will give clients a false sense of security; clients will wrongly think they are getting the same level and quality of legal advice as from family lawyers.

¹⁵ Consultation Paper, page 3.

¹⁶ Response to Public Consultation: Expanding Legal Services Options for Ontario Families (April 29, 2016), pages 8 to 11, https://advocates.ca/Upload/Files/PDF/Advocacy/Submissions/FamilyLaw/Letter_from_TAS_to_Justice_Bonkalo-April_29_2016.pdf

¹⁷ *Supra* at page 9.

Fourth, this false sense of security would apply to the court as well. Judges in Provincial Court and justices in Supreme Court work to ensure that a self-represented or unrepresented litigant understands the process. But, if a party is represented by a family law alternate legal service provider, the court will likely not exercise the same degree of concern, because the litigant is “represented” and this would make the self-represented or unrepresented litigant vulnerable.

Fifth, inadequate representation by the family law alternate legal service provider would create a secondary legal market where cases that have gone off the rails are referred to lawyers, adding again to an already overburdened civil justice system.

The CBABC Family Law Working Group agrees with the Advocates’ Society’s reasons noted above. CBABC Family Law Working Group believes that, without lawyer supervision, it may be better for clients to have no representation at all than to have some representation from a family law alternate legal service provider, who does not have the level of experience or training the client expects from their representative.

Family Violence

The *Family Law Act* defines family violence broadly in section 1:

“family violence” includes

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including

- (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
- (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
- (iii) stalking or following of the family member, and
- (iv) intention damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;.

Whenever there is any family violence, there are complicated analyses that have to be made to determine how to proceed and what relief to seek. It is a very nuanced analysis because, as a practitioner, one is trying to balance protection with a “lowering of the temperature” in the dispute. Also, protection orders are complicated and not formulaic. The CBABC Family Law Working Group is concerned that alternate legal service providers would not be able to effectively screen for family violence and effectively manage such a high risk file.

Use Of The Family Law Alternate Legal Service Providers Devalues Family Law

The Honourable Donna Martinson, QC, retired Justice of the Supreme Court of BC, makes inspiring arguments that having family law alternate legal service providers devalues family law. First, for the Law Society 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.¹⁸

¹⁸ “Consultation Paper - September 2018: Law Society Alternate Legal Service Providers Working Group” (November 26, 2018), page 3, https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/Consultation-feedback_2018-11-30.pdf

Second, this lesser level of family law service provider also:

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.¹⁹

The CBABC Family Law Working Group agrees with The Honourable Donna Martinson, QC, that the use of having family law alternate legal service providers devalues family law.

Family Law Paralegals in Other Jurisdictions

The Law Society Consultation Paper provides information about 8 other paralegal programs in jurisdictions other than BC:

1. Ontario.
2. Washington State.
3. Utah.
4. Arizona.
5. California.
6. Nevada.
7. New York.
8. Colorado.

The Law Society's proposal is broader than the programs in any of these other jurisdictions, especially where alternate legal service providers would practice without being supervised by a lawyer.

¹⁹ "British Columbia Legal Aid Consultation Comment (November 26, 2018), page 6, https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/Consultation-feedback_2018-11-30.pdf

Generally speaking, the initiatives in these other jurisdictions can be summarized as follows:

1. **Paraprofessionals who give limited advice on procedures, forms and documents, and in one jurisdiction court orders and settlement:** Ontario, Washington State, Utah, and Oregon have considered and approved qualifying non-lawyers to provide certain types of family law services. Only Washington State has implemented the program. Utah and Ontario have approved a program in principle, and are in the designing stage. The CBABC Family Law Working Group is not sure of the status of the initiative in Oregon. Illinois, Montana and Virginia have declined to implement a similar program after studying Washington State's program.
2. **Document preparers who do not give legal advice:** Arizona, California and Nevada have implemented programs to allow non-lawyers to assist with completing court forms in family law matters without providing legal advice.
3. **Navigators or McKenzie Friends who do not give legal advice:** New York City has implemented a court navigators program that assists litigants in landlord-tenant and consumer debt cases, but not family law. It appears that Colorado is implementing a similar navigator program, but the CBABC Family Law Working Group does not know if it includes navigator in family law.

The Law Society's Consultation Paper refers to paralegal in-court support as being a "McKenzie Friend". A "McKenzie Friend" refers to a practice developed in England arising from *McKenzie v McKenzie* [1971] P33, [1970] 3 All ER 1034 (C.A.). As summarized in *Children's Aid Society of the Niagara Region v. P.(D.)*, in *McKenzie*, the English Court of Appeal considered a situation where the trial judge had refused the request of a husband in a matrimonial action to have an Australian barrister sit with

him.²⁰ The barrister was there voluntarily in order to assist the husband in conducting his case. In holding that the trial judge erred, the Court stated:

Mr. Hanger was not there to take part in the proceedings in any sort of way. He was merely there to prompt and to make suggestions to the husband in the conduct of his case, the calling of his witnesses and, perhaps more importantly, on the very critical and difficult questions of fact in this case, to assist him by making suggestions as to the cross-examination of the wife and her witnesses.²¹

McKenzie confirms the ability of a self-represented litigant to have a “friend” who could take notes, make suggestions and give advice.²² As summarized by the Manitoba Court of Queen’s Bench, the role of the McKenzie Friend was limited to assisting the litigant and giving advice to the litigant, not advancing argument, cross-examining or performing any other functions that counsel usually do. The ability to have a McKenzie Friend appointed is left to the discretion of the Court on a case by case basis. It appears that a McKenzie Friend is unpaid.²³

The Newfoundland and Labrador Court of Appeal Rules²⁴ and the Alberta Rules of Court²⁵ contemplate McKenzie Friends providing passive assistance to litigants.

²⁰ 2002 CanLII 2862 (ON SC), at paras. 18-19, <http://canlii.ca/t/1hll3>

²¹ *Supra* at para 19.

²² *The Law Society of Manitoba v. Pollock*, 2007 MBQB 51 (CanLII) at para. 121, <http://canlii.ca/t/1qtxv>

²³ *Supra* at para. 122.

²⁴ See Rule 22(2), N.L.R. 38/16, <http://canlii.ca/t/5330s>

²⁵ See Rule 2.23, Alta. Reg. 124/2010, <http://canlii.ca/t/52rh9>

Further, the BC Provincial Court's Notice to the Profession and Public Use Of A Support Person In Civil And Family Proceedings (NP 11) sets the guidelines for using a McKenzie Friend or support person in our Provincial Court.²⁶

In NP11, a McKenzie Friend is not permitted for small claims settlement, trial or family case conferences, unless the judge approves and usually only with the agreement of the opposing party. A McKenzie Friend must not be a witness, must not be paid, and must not address the Court, except in exceptional circumstances and with the advance permission of the judge. The McKenzie Friend is allowed in NP 11 to help by taking notes, organizing documents, making quiet suggestions to the litigant, providing emotional support and any other task approved of by the judge. There is no similar directive from the BC Supreme Court.

Jurisdictions that have Rejected the Washington State Limited License Legal Technicians (LLLT) Model

Illinois, Montana and Virginia are jurisdictions that have rejected the Washington State LLLT model.

In Illinois, the Illinois State Bar Association's Task Force on the Future of Legal Services studied the Washington State LLLT Program, and in its October 2016 report, rejected the implementation of such a program in Illinois.

²⁶ Effective April 10, 2017, <https://bit.ly/2QZB26F>

Among other things, the Report stated:

Moreover, the LLLT program does not appear to be a good solution to the challenges facing the legal profession or legal marketplace. There appears little empirical support at this time to believe that adding another “low cost,” nonlawyer layer of legal services will achieve the intended goal of providing greater access to legal services to an underserved population. The needs of the underserved who cannot afford to pay for legal services are likely not going to benefit from the implementation of a for-profit LLLT program. It also appears that the impetus behind the Washington State program is in part due to the absence of lawyers in more remote parts of the state. Illinois does not share that issue to the same extent given the geographic diversity of population centers with large legal communities and even law schools. In addition, given the rise of internet based alternative legal services that provide forms and do-it-yourself services (both for-profit and non-profit), the economic viability of LLLT’s may be in doubt. Finally, the Task Force believes there is a real possibility for consumers to be misled by unsupervised LLLT’s attempting to perform services they are neither qualified nor authorized to perform. As such, the resources of the Association *can* (sic) best be used to concentrate on improving already-existing types of legal services delivery methods, rather than supporting new for-profit and unsupervised programs such as LLLT’s.²⁷

In Montana, the Supreme Court of the State of Montana issued an Order by request of the State Bar, its Paralegal Section, and the Access to Justice Commission appointing a working group to explore an alternative legal service model for LLLTs. The Limited License Legal Technicians Working Group (the “Montana Working Group”) provided a report in October 2017. The Montana Working Group unanimously concluded that the LLLT model is not the answer to the challenges Montana litigants and courts face with the increased number of self-represented litigants.²⁸

²⁷ Illinois State Bar Association’s Task Force on the Future of Legal Services, Report and Recommendations (2016), at pages 26-27, <https://bit.ly/2BnSZ4D>

²⁸ Access to Justice Commission Order, “Working Group Limited Licensed Legal Technician (LLL) Report to the Court” (2017), at page 1, <https://bit.ly/2Lg5K69>

Among other observations, the Report notes:

1. Anecdotally, the LLLT certification does not move more paraprofessionals into the world of self-represented litigants.²⁹
2. The LLLT program is very complicated to organize and implement.³⁰
3. Although LLLTs may inform clients about legal procedures and possible implications of the law, and advise them how best to manage their legal actions, the LLLT is precluded under rules of conduct from giving actual legal advice to clients, negotiating with other litigants or lawyers, and appearing in court on behalf of a client. Given these constraints, it is not clear whether an LLLT could substantially relieve either the challenges self-represented litigants themselves face or the challenges faced by courts when dealing with self-represented litigants.³¹
4. It is generally assumed that in order to earn an income sufficient to support self and office and repay student loans, an LLLT must charge a minimum of \$75 to \$100 per hour, and/or work for a firm. These factors may be a deterrent for many low and moderate-income persons.³²

²⁹ *Supra* at page 6.

³⁰ *Ibid.*

³¹ *Supra* at page 7.

³² *Ibid.*

In Virginia, the Virginia State Bar (VSB) has also rejected the paralegal model.

The VSB's rationale was that:

[w]hile these new initiatives allowing the provision of discrete legal services by nonlawyers have the promise of providing more access to more consumers at lower cost, the programs are new. There is little data to measure the programs' impact on access to legal services. Additionally, there is no data regarding any adverse consequences to clients of non-lawyer supplied services or the costs of the additional licensing apparatus.³³

The VSB opted instead to recommend:

1. That the VSB focus on broadening access to justice through traditional programs of legal aid and pro bono work, as well as efforts to make legal services more affordable and attainable through limited-scope representation and programs to enhance assistance to pro se litigants.
2. That this Committee continue to study the evolving issues surrounding alternative business structures.³⁴

Key Differences Between Law Society's Proposal and Other Jurisdictions

The key differences between the Law Society's proposal and the initiatives in other jurisdictions are:

1. The Law Society's proposal suggests a wider scope of practice for non-lawyer family law legal service providers than paraprofessionals in other jurisdictions.

³³ Virginia State Bar, Report: The Study Committee on the Future of Law Practice (August 2017), page 17, <https://bit.ly/2CcNOpU>

³⁴ *Supra* at page 22.

2. Family law legal service providers in the Law Society's proposal can provide more legal advice to clients, including about their rights and obligations. While the Utah initiative allows paraprofessionals to provide similar legal advice, the scope of issues in Utah that paraprofessionals can advise on is more limited.
3. The Law Society's proposal suggests that family law legal service providers can act as both paraprofessionals and McKenzie Friends, except that the family law legal service providers would be able to charge for providing support in court. No other jurisdiction has adopted both initiatives.
4. Other jurisdictions have started with a narrower scope and are considering expanding that scope, including to allow appearances in court.
5. The Law Society's proposal lists the concepts the family law legal service providers will receive training on, but is silent on other educational requirements. Those jurisdictions that allow or have proposed to allow the paraprofessional to provide procedural or other legal advice have significant educational requirements. Even the legal document preparers in some jurisdictions are required to have at least 1 year of law-related experience under the supervision of a lawyer or certified legal document preparer.

CBABC Family Law Working Group's Recommendations

The CBABC Family Law Working Group makes recommendations in these areas:

- a) Legal Aid;
- b) Unbundled Services; and
- c) Neutral Case Evaluation.

a) Legal Aid

As discussed earlier in these submissions, the CBABC Family Law Working Group believes that restoration of adequate funding for family legal aid is the most important access to justice initiative available to government, the Bar, and other stakeholders at this time. Of course, this step would not directly address the needs of family litigants whose income is above legal aid eligibility requirements. The CBABC Family Law Working Group recommends raising the eligibility ceiling but at some point there will be litigants too “rich” for legal aid and too “poor” to retain counsel. The CBABC Family Law Working Group has other suggestions to assist this client group. These suggestions are set out below. However, there is one further refinement to legal aid worth considering – a sliding scale for cost-sharing between government funding through the Legal Services Society and contributions from the litigant. It is our understanding that the Legal Services Society is open to developing such a program.

b) Unbundled Services

Regarding unbundled legal services provided by lawyers to the public, recent research shows that unbundling works.

In August 2018, J.P. Boyd, of the Canadian Research Institute for Law and the Family released a research report, Client and Lawyer Satisfaction with Unbundled Legal Services: Conclusions from the Alberta Limited Legal Services Project³⁵ with data that show:

- i) Unbundled legal services are being used by low- and middle-income Albertans, including by Albertans living in rural areas of the province;
- ii) Clients understand the nature of unbundled legal services and public demand for such services is strong;
- iii) Services provided on an unbundled basis are inexpensive and conclude quickly;
- iv) Clients obtaining unbundled services are satisfied with the cost and speed of delivery of those services, usually cannot perform those services themselves and would not prefer to have hired their lawyer on a traditional, full-service retainer;
- v) The highest demand for unbundled services is in the areas of family law, wills and estates and civil litigation;
- vi) Clients feel that receiving unbundled legal services improves their ability to resolve their legal problem, their understanding of the applicable law and the likelihood of obtaining a good result to their legal problem;
- vii) Receiving unbundled legal services has a weaker but still important impact on clients' general understanding of how legal problems are resolved, and on their ability to identify and address future legal problems;

³⁵ See <https://bit.ly/2N0jGnP>

viii) Clients and lawyers perceive “unbundling” as including tasks that completely address a client’s legal problem, as well as tasks that address only a part of a client’s legal problem;

ix) Lawyers are satisfied providing unbundled services, even though such services are less remunerative than the services they provide as a part of their ordinary practices, and lawyers intend to continue offering unbundled services in the future;

x) Lawyers feel that providing unbundled legal services helps them contribute to improving access to justice and making legal services more affordable;

xi) Lawyers are, however, less confident that providing unbundled legal services improves the outcomes for clients or has positive benefits for the justice system where litigants are not represented by counsel;

xii) Lawyers believe that their clients are satisfied with the unbundled legal services they provided, and that unbundled services improve clients’ ability to access justice, address their current legal problem and resolve future legal problems; and

xiii) Retainer letters describing the scope of services to be delivered on an unbundled basis are not used with sufficient frequency, and those that are executed are not being amended to reflect changes in the scope or nature of the services provided.³⁶

³⁶ Pages 63-64.

The CBABC Family Law Working Group recommends that the Law Society review J.P. Boyd's research conclusions and apply lessons learned for BC lawyers providing unbundled legal services.

Further, the CBABC Family Law Working Group recommends that the Law Society can encourage greater use of unbundling by family lawyers by making necessary amendments to the Code of Professional Conduct for British Columbia and ask government to amend the *Legal Profession Act* to make sure that unbundled legal services do not create unreasonable liability for lawyers. Concern about unreasonable legal liability is present because of the Court of Appeal for Ontario's recent decision in *Meehan v. Good*, 2017 ONCA 103 (CanLII).³⁷ In *Meehan*, the Court of Appeal held that a lawyer may have liability to a client for failing to provide advice on a matter lying outside of the retainer agreement, for example, obvious risks to clients should be disclosed by the lawyer to them in writing, especially limitation periods.

There are also other creative and cost-effective ideas that the Law Society can consider. A member of the CBABC Family Law Working Group reported that there has been significant discussion on this topic in Victoria, and many family lawyers believe there are many more creative ways to address the issues than what is being proposed by the Law Society. For example, many graduating law students who cannot find articles could offer family law services at lower cost with supervision from trained lawyers. Another idea is to create online legal services created by family lawyers in conjunction with the Law Society so that law firms could offer some services at cheaper

³⁷ See <http://canlii.ca/t/gxcsg>

costs because they are not reinventing the wheel for the very basic information or information gathering function.

c) Neutral Case Evaluation

One fundamental flaw of the Law Society's Consultation Paper is the untried assumption that family law alternate legal service providers can do triage at the early stage of a family law file. It is the consensus of the CBABC Family Law Working Group that triage is key to success in a family law file and only lawyers have the training, skill and experience to do triage.

Triage is recognized as a fundamental family law service that must be provided.³⁸ Early intervention can refer files, that should be resolved, to alternate dispute resolution and expedite those cases that need to move to trial or a decision on a more urgent basis. Triage as early intervention with legal advice will sit well alongside the BC government and Legal Services Society's Guided Pathway online program.³⁹

The CBABC Family Law Working Group's position is that there should be early neutral evaluation of a family law file. Competent early legal advice at the start of the family file is essential and would operate in 2 ways. First, legal advice would be given to clients early on by independent, knowledgeable family lawyers. Second, any document that reflects an agreement between the parties has to have supervision by a lawyer or a judge.

³⁸ Access To Civil & Family Justice A Roadmap For Change at pages 11-12 and 17.

³⁹ See <https://mylawbc.com/paths/abuse/#>

The CBABC Family Law Working Group recommends that the Law Society create a new category, the Early Neutral Case Evaluation roster, similar to the current roster for mediators. Family law clients would go to this new Roster for legal advice. If clients wanted their own lawyer to go with them, that would be permitted.

The CBABC Family Law Working Group recommends that financial disclosure be required at this early evaluation stage because no agreement can be made without disclosure of finances as between the parties. Financial disclosure can be done in a variety of ways. It could be done by the family law clients filing sworn financial statements. Or, it could be done as a condition of early evaluation for family law clients to exchange financial information.

Under this model, family law paralegals would assist clients to fill in financial statements and then book an appointment with a family lawyer from the Early Neutral Case Evaluation roster.

The cost of the Early Neutral Case Evaluation roster would be paid by the Legal Services Society, which would provide 1-2 hours of legal advice to a maximum of \$500, payable to an experienced family lawyer in BC. The Legal Services Society would offer the program to any adult in BC who wants it.

The advantages of the Early Neutral Case Evaluation roster is that it is inexpensive. It does not require the BC government to hire more judges and court staff or build more courthouses. It protects the public by having experienced family lawyers regulated by the Law Society providing legal advice. The Early Neutral Case Evaluation roster would take advantage of lessons learned to date from the current mediation roster program. Costs spent in early triage would save costs later on in the family file by reducing the need for court applications, trials and mediations and the resulting time and money spent.

CONCLUSION

At the recent Law Society Annual General meeting on December 4, 2018 (the “AGM”), the membership passed Resolution 3. Resolution 3 involved the November 2018 *Legal Profession Act* amendments for licensed paralegals in the *Attorney General Statutes Amendment Act, 2018*, S.B.C. 2018, c. 49 (Bill 57).⁴⁰

Resolution 3, which was passed by over 74% of the members voting for or against at the AGM, directs the Benchers:

- (a) To request that the provincial government not pass regulations to bring the licensed paralegals amendments into force until the Benchers have had more time to complete their consultations regarding licensed paralegals; and
- (b) Not to authorize licensed paralegals to practice family law under the authority provided in the amendments to the *Legal Profession Act*.⁴¹

The CBABC Family Law Working Group urges the Benchers and the Law Society to respond to the overwhelming vote of the membership regarding Resolution 3 and to the number, breadth and depth of the submissions on this issue you have received. The CBABC Family Law Working Group also urges the Law Society to take a hard look at the evidence and the alternatives and to work with the family Bar to come up with creative solutions that will truly serve families going through separation and divorce.

⁴⁰ Bill 57 was introduced at First Reading November 19, 2018 then passed, without amendment at Royal Assent on November 27, 2018. As a result of this quick passage, there was no time for meaningful consultation. Further, the *Legal Profession Act* comprehensive amendments in sections 25-90 of Bill 57, creating and authorizing licensed paralegals, come into force by future regulation.

⁴¹ Resolution 3 passed, with 861 in favour, 297 against and 62 abstentions.

The CBABC Family Law Working Group would be pleased to discuss our submissions further with the Law Society, either in person or in writing, in order to provide any clarification or additional information that may be of assistance.

All of which is respectfully submitted.

Sincerely,



ANGELA DUNN

Co-Chair
CBABC Family Law Working Group
Tel.: (604) 669-1106 Ext. 219
Email: dunn@mhmlaw.org



STEPHEN MCPHEE, QC

Co- Chair
CBABC Family Law Working Group
Tel.: (250) 754-3321
Email: smcpee@rlr-law.com

Appendix A

Questions to be Answered

Law Society's Business Case For Family Law Legal Service Providers

1. Is there a proven gap in providing access to justice that can be met by family law paralegals?
2. How will family law paralegals achieve the objective of filling that gap?
3. Is there a proven demand for family law paralegals?
4. What adverse implications of the change to have family law paralegals are known?
5. Does the public need family law paralegals?
6. Will family law paralegals increase access to justice while still protecting the public?
7. Will fees and costs for family law paralegals be lower than lawyers?
8. How can adverse implications be protected against so that the harms to the public and legal stakeholders do not outweigh measurable benefits?
9. What do government and research stakeholders say about the market demand for family law paralegals and other legal service providers?
10. What does the public think about family law paralegals in providing access to justice?
11. Will the market support full-time paralegals? Support part-time work? Support occasional work?
12. Will family law paralegals work in law firms? Their own firms? Combination of the two?
13. Will the Law Society ban disbarred and/or suspended lawyers from applying to be family law paralegals?
14. Will the Law Society accredit paralegals from other jurisdictions to practice in BC? If so, what are the requirements to practice in BC?

15. If family law paralegals work in their own firms, what training in managing, business and marketing will they need? Who will pay for that? The paralegals themselves, the Law Society or others?
16. How will the fees charged by family law paralegals compare to fees charged by lawyers? Compare to legal aid? Will the fees charged by family law paralegals be lower than lawyers? The same? Higher?
17. How many family law paralegals will be licenced? Since the Law Society cannot set the fees charged by these paralegals, will the Law Society set limits on the numbers of these paralegals?
18. How would the family law paralegals be funded for administration, training and insurance? Paralegal fees only? Lawyers as members of the Law Society? Law Foundation? BC government? Combination of these?
19. For administration, what does the Law Society expect its costs to be regarding the family law paralegals program?
20. For insurance costs, will premiums increase with family law paralegals? Stay the same as with lawyers? Decrease?
21. What does the Lawyers Insurance Fund expect its costs to be to manage family law paralegals?
22. Will the family law paralegal program be self-supporting financially? If not, when?
23. Who will train these paralegals? The Law Society's Professional Legal Training Course? BC lawyers? The 3 BC law schools? Capilano University (who currently trains notaries)? Colleges accredited by the BC government? A combination of these?
24. Will training for family law paralegals be available outside the Lower Mainland to accommodate British Columbians who live in the Okanagan and the North? Will this training accommodate British Columbians who live in rural BC?
25. Will the training for these paralegals include limitation periods analysis and interpretation?
26. Will the training for these paralegals include how to identify and manage conflicts?

27. Will the training for these paralegals include recognizing and applying cultural diversity and cultural competency?

28. How often will the family law paralegals program be evaluated by the Law Society to see if it is effective and not harming the public? Will the evaluation for these paralegals ensure that paralegals are capable of assessing the competency of the client to give instructions? And perhaps the competency of the client to understand advice and opinion? Are these paralegals more cost effective or not, compared with unbundled legal services provided by lawyers? Compared with legal aid? Pro Bono BC? Legal information support services?

END

From: [Ana Mihajlovic](#)
To: [Consultation 2018](#)
Subject: Proposal Response
Date: December-21-18 5:23:44 PM
Attachments: [20181221.PDF](#)

Please find my attached response to the September 2018 Consultation Paper.

Kind Regards,
Ana Mihajlovic, BA Psyc, JD
Barrister and Solicitor
Aaron Gordon Daykin Nordlinger LLP
#1100 - 777 Hornby Street
Vancouver, B.C. V6Z 1S4
Telephone: 604.689.7571
Fax: 604.685.8563
Web: www.agdnlaw.ca

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Feedback on Alternate Legal Service Providers

I write in response to the consultation paper and draft proposal prepared by the Law Society and circulated among the profession.

I summered with Rise Women's Legal Centre where I provided free family law legal advice to low-income women who could not qualify for Legal Aid or whose Legal Aid hours had run out. I articulated in two separate Family Law firms, and I am now a Family Law lawyer at a firm that practices Family Law exclusively. I care deeply about Family Law, access to justice, and the future of our profession.

Much has already been written by other members of the Family Law Bar as to why the proposal is problematic and ought to be rejected. I agree with the general arguments made against the proposal and do not wish to reiterate them. Instead, my response proposes four ways the Law Society can, either on its own or with the assistance of the Family Law Bar, fix the access to justice problem. The ideas are not perfect solutions and they can all likely be improved upon. They may have already been suggested by others. Nonetheless, I set these solutions out in the hopes of giving the Law Society a starting point to build from.

I wish to note that these ideas are my own and I do not speak on behalf of my firm or anyone else, although some of my colleagues at AGDN may agree with my suggestions.

The ideas are as follows, and not listed in any particular order:

1) Lobby government to improve legal aid

This has already been suggested multiple times and I echo what has been said. The submissions of Dinyar Marzban Q.C. on the topic are particularly insightful.

2) Provide free support persons for individuals who may need them

Many family lawyers frequently work with other professionals and experts using a team approach, to assist a single client with their legal issues. For high net-worth clients these other professionals are typically accountants, valuers, and corporate counsel, among others. For low-income clients, especially those who struggle to afford lawyers, the professionals they would most benefit from would be social workers, counsellors, mental health professionals, and other support workers.

For example, low-income clients may need support persons to assist them with filing tax returns, supervising their parenting time, or converting their boxes and bags of documents into coherent binders that counsel can then review much more efficiently. For disadvantaged clients who are facing many problems and a lot of stress, weekly consultations with trained counsellors or therapists would assist them in dealing with the emotional aspect of their family law files so that appointments with their lawyer do not become therapy sessions. However, low-income clients cannot usually afford to pay for both their lawyer's fees and those of other professionals. This puts a strain on their family lawyer who is expected to wear multiple hats, engage in work outside of their area of expertise, and results in a situation where the retainer is "burnt through". These clients then become self-represented litigants and their files do not get any less complex.

By focusing on providing these services, the Law Society would benefit the public by providing a valuable and necessary service to those who need it, while also ensuring their hours (and money) are used in the most cost-effective manner. To implement this, the Law Society would not need to spend money training people for these roles – they would already be trained professionals who would simply apply through the Law Society for these positions based on their credentials and experience. Many advocates in various non-profit agencies already fulfill these roles and they greatly assist counsel when they are available on a file. This is because the non-legal aspects are somewhat contained, and the burnout rate is not as high among family law counsel. If this support were available, more family lawyers may be willing to tackle these “difficult” files knowing they would have the team support that is often necessary to run family law files effectively.

3) Encourage and incentivize lawyers to do more pro-bono by lobbying their firms

Across firms, there is no one approach to pro bono and low bono work and this is because such work is treated as a tradition instead of as an expectation. The lack of leadership on the duty to promote access to justice by taking on pro bono or low bono files by the Law Society, and in turn by some firms, makes it both easy for lawyers to avoid their duty, and difficult to pursue their duty should they want to fulfil it.

Some law firms have robust policies concerning pro bono, include pro bono hours as part of lawyer billable targets, and openly encourage their associates to give back to the community. There may even be an expectation to engage in this type of work, which further encourages lawyers to spend some of their work hours assisting on files they cannot bill for. On the other hand, some firms create barriers to pro bono work through high billable targets, lack of support or firm culture for pro bono work, and lack of necessary structures and incentives at the firm level. Many lawyers are willing to do pro bono or low bono files but find it difficult to do so because of barriers imposed on them by their firms.

The Law Society frequently encourages lawyers to “do their part” without recognizing that most lawyers are embedded in firms where they practice within a specific firm culture. It is difficult, and sometimes impossible, to go against the grain – especially as a junior associate. The Law Society may see an increase in pro bono, low bono, and unbundling work if they directed their lobbying efforts to law firms and implemented some rules and/or guidelines that would target the profession from the top down.

4) Improve the Articling Program

The consultation paper proposes to introduce “alternate legal service providers” to assist individuals who cannot afford lawyers. I propose that the Law Society already has access to “alternate legal service providers” or non-lawyers who are already regulated by the Law Society and who can (and already do) competently provide many of the services outlined on page 9 of the report, under supervision of a lawyer.

Articling students are currently a relatively large untapped resource. Each year, anywhere from 300-500 students graduate from law schools in BC and start looking for articles.

Articling students are individuals who are already partway legally trained, but are not yet lawyers. They are eager to learn and help, and many have ideas and solutions and want to make a change. However, along the road to becoming a lawyer there are many barriers that slow these individuals down, block them, or throw them off the path entirely. Many of the obstacles are created by the Law Society and almost all of them can be fixed by the Law Society.

Start with Law School

Aside from not being qualified lawyers, the main reason articling students are not taking on cases (at lower hourly rates) is because they lack the necessary skills to competently handle family law files. There is no good reason why some of the practical, skills-based training cannot begin in 2nd or 3rd year of law school. The Law Society could engage with law schools to help create a robust practical component to compliment the current theory-focused approach to legal education. Helping future lawyers get comfortable and confident with "lawyering" at an earlier stage in their legal careers would build the confidence needed to take on files as articling students and new calls. This is a cheaper alternative to creating an entirely new parallel training program from the ground up for "alternate-legal services providers".

While moots and clinics are currently available to law students, there is much room for improvement. For example, many clinics are seriously understaffed and underfunded which affects the overall experience and quality of training. Some students drop out of these clinics as a result. Other students stick it out but then find themselves regressing because the articling experience is not as involved or hands-on as their clinic experience. High quality clinical experiences with a smoother transition between the clinic experience and articling would ensure students continue to improve and build on the skills necessary for assisting the general public. Confident, capable students can provide individuals with access to legally trained "alternate legal service providers" who are already mentored and supervised by lawyers, and whose hourly rates are significantly less than a typical lawyer's.

Decrease Barriers to Articling

The current articling/PLTC mandate requires law students to obtain articles first before they are able to enroll in PLTC. This creates a barrier for many students who cannot obtain articles and results in an early attrition of potential lawyers who, saddled with debt and no ability or real skills to work as lawyers, turn to other careers in order to feed themselves and pay off debts. Some students successfully complete a clinic, but cannot obtain articles because articling positions in family law are scarce and difficult to secure. They are then prevented from enrolling in PLTC despite having hands-on training.

One way to do this is to change the Rules so that a clinical experience completed in law school could count for part of articles. Another way would be to allow students to enroll in PLTC after law school even if they don't have articles lined up. There is no real reason why students cannot simply enroll in PLTC and continue to look for articles in the meantime. In fact, students who complete PLTC would likely improve their chances of obtaining articles. A third solution would be to target smaller family law firms and sole practitioners by providing financial assistance/stipend for part of the articling salary. Many

family lawyers are solo practitioners who cannot afford to take on articling students and the bigger law firms cannot take on any more students. Lastly, the Law Society could change the Rules to allow for one Principal to have up to three articling students. This, however, should only be done in conjunction with more robust screening and training of Principals and where Principals have repeatedly received positive feedback from past articling students. More articling students would increase the availability of "alternate legal service providers" who, as already stated, are partially trained and already supervised by lawyers, and who could provide some assistance at a lower cost.

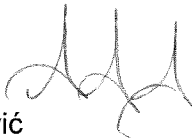
Improve Articling

Decreasing the barriers to articling is an important undertaking, but it should not be done at the expense of decreasing the quality of the articling program. There are many ways that the Law Society can improve the articling program and I invite you to contact me directly on this topic. I will not delve into the details at this time as it does slightly derail from the subject at hand. What I will say is that articling students are currently a huge untapped resource that the Law Society could look to for some of the unmet needs of the public.

In order to do this, the Law Society will need to work with the Family Law Bar to ensure articling students are provided with robust training and a strong skillset to competently handle some of the work that can be reasonably handled by "non-lawyers". These individuals are already more than halfway trained, and they are a good investment of all of our resources and time.

I thank the Law Society for taking the time to read this response and I invite you to contact me directly if I can be of further assistance.

Sincerely,

A handwritten signature in dark ink, appearing to be 'Ana Mihajlović', written in a cursive style.

Ana Mihajlović

From: [Kate Hanen](#)
To: [Consultation 2018](#)
Subject: Submission
Date: December-23-18 4:20:51 PM
Attachments: [Letter of Support.docx](#)

Please see attached submission on the Alternate Legal Service Providers proposal.

Thank you.

K. Hanen

December 23, 2018

Re: Consultation Paper

Dear Members of the Law Society Alternate Legal Providers Working Group,

I am writing in support of the initiative to establish a new group of working professionals within the legal system. I have been passionate about the administration of justice since I began working in the system seven years ago. I have read many of the submissions put forward and am saddened and frustrated by the feedback received by members of the Law Society.

I can empathize with their concerns for the profession as well as their own prosperity. If a separate group of legal professionals is established it would be natural to assume that some of the lawyer's business could be re-directed. However, it is my belief that those who would obtain these alternate legal services are those who cannot secure a lawyer in the first place. It was further suggested that those who find themselves unable to retain legal services are mentally ill, have addiction issues, and can be violent or aggressive. It continues to reason that these litigants are difficult to deal with and do not heed the advice of their lawyers which is why they find themselves unrepresented. It was further asserted that a paralegal, due to lack of education, would be even less able to represent or assist these individuals. This is insulting to both paralegals and the individuals who find themselves in the unfortunate situation of being in family court. This kind of thinking further reinforces the stigma that those who cannot afford the services of a lawyer are less than deserving of any representation. Instead of assigning prejudicial character to those seeking representation let's focus on helping them; licensed paralegals and other legal professionals can provide that help.

The notion that the alternate legal service providers would be unable to provide an adequate level of representation for their clients due to the fact that they do not possess a J.D. was also a common theme amongst the submissions. While the amendments to the Legal Profession Act do not stipulate what education will be required, it is my assertion that those wishing to work as alternate legal professionals will have to meet educational criteria that will outline the necessary credentials to become licensed. I do not believe the purpose of this amendment is to allow the justice system to become the wild west of legal services. The wording of the amendment clearly states that "licensed paralegals, [will] be permitted to provide a limited scope of services." Paralegals will not be working in the same capacity as lawyers, and rightly so. However, it does not make them incompetent or ineffective, and does not mean they cannot provide a valuable service to the citizens of British Columbia.

There is a crisis regarding access to justice in this province. Continuing to restrict legal services to those solely able to afford and access them serves only the few. I reside in a rural community in Northern British Columbia, and working in the justice system have seen first-hand the devastation this can cause. Without access to proper legal advice and services, the public resorts to self-representation which can wreak havoc on the participants, and an already belaboured system. Where I live we do not have access to Family Justice Counsellors, there are a handful of civil and family lawyers, and have no criminal lawyers whatsoever in our city. Officers of the Court and Registry employees are the only in-person resources many of these people have. It puts a strain on the employees as they are strictly forbidden

from providing advice or guidance, and creates further resentment from those in need towards the process.

In 2006 the province of Ontario passed the Access to Justice Act widening the role of alternate legal service providers, and by May of 2007 licensed paralegals were operating in the province. The Law Society of Upper Canada became the regulatory and licensing body for paralegals working independently. Ontario's licensed paralegals are able to represent clients in Small Claims Court, the Ontario Court of Justice under the Provincial Offenses Act, and on criminal cases where the maximum penalty for the crime does not surpass six months. They are further able to practice in Administrative Tribunals, Landlord and Tenancy Issues, and with the Workplace Safety and Insurance Board. As part of the implementation the Attorney General of Ontario determined that in order to "ensure that paralegal regulation [had] been implemented successfully, the Act required that two progress reviews be conducted after five years." While I was unable to locate the Law Society's report I did read the report written by Mr. David J. Morris from November 1, 2012. According to Mr. Morris "the introduction [of licensed paralegals] has been an unqualified success." The report further goes on to state that "exemptions to Law Society regulation for those providing legal services should be minimized...[and that] opportunities should continue to be sought to broaden the scope of paralegal practice..." One need look no further than Ontario for a successful blueprint for implementing alternate legal service providers.

I was disappointed that at the Law Society's AGM in December the resolution calling for the government to not pass regulations regarding the amendments to the Act was successful. I'd like to submit that perhaps this shouldn't be viewed as an all or nothing scenario. This is an opportunity for lawyers and all legal service providers to come together to create a cohesive, efficient, justice system, putting the needs of our clients first. Paralegals will be regulated, licensed, and answer to a governing body. Not unlike lawyers, these alternate legal providers will become a category of legal professionals who are able to provide clients with guidance, advice, and empathy. Licensed paralegals will be able to act as advocates for their clients during frightening, confusing, and emotional times. They will be more readily accessible to those who cannot retain the services of a lawyer, and serve those residing in rural areas. Paralegals are an important part of the justice system, and their role should not be minimized but maximized, allowing for an increased role in the administration of justice in this province.

Respectfully,

Kathryn Hanen

Dawson Creek, BC

From: [Jane Morley](#)
To: [Consultation 2018](#)
Cc: [REDACTED]
Subject: Access to Justice BC submission on Family Law Legal Services Providers Consultation Paper
Date: December-27-18 10:13:32 AM
Attachments: [A2JBC Submission to LSBC re AltLegalSeviceProviders Consultation final.docx](#)

Attached please find a submission made on behalf of Access to Justice BC with respect to the Family Law Legal Services Providers Consultation Paper.

Regards,

Jane Morley QC
Strategic Coordinator
Access to Justice BC

Website: www.accesstojusticebc.ca
Email: jane@janemorley.com
Home Office: 250-629-3780
Mobile: 604-319-8427

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ACCESS^{TO} JUSTICE BC

December 27, 2018

Miriam Kresivo QC
President Law Society BC and Chair of the Legal Service Provider Working Group
Law Society of British Columbia
845 Cambie Street
Vancouver BC V6B 4Z9

Dear Ms. Kresivo:

Re: Family Law Legal Services Providers: Consultation Paper

This submission to the Alternative Legal Service Provider Working Group is written on behalf of Access to Justice BC - a network of justice system leaders and organizations aligned around a common goal to improve family and civil access to justice in BC.

Justice system organizations engaged in Access to Justice BC may have different views on the details in your Working Group's proposal. For this reason, we will not be making submissions on the specific questions raised in the consultation paper.

This submission is instead directed primarily at encouraging the Law Society, as it seeks to implement the proposed model or some modification of it, to apply the Access to Justice Triple Aim and to take a user-centred and experimental approach to implementation. A user-centred approach will ground the alternative service model in families' experiences of the justice system.

The chances of being successful in a user-centred access-to-justice experiment are increased if we engage users (family members – both parents and children) in the design of our access to justice innovations, and if we seek advice from outside the justice system to help us understand what will work best for families.

Access to Justice BC also urges that, instead of this proposal being a reason to shut down discussion about alternative ways of providing legal services to families, the consultation process be viewed as a step towards an expanded dialogue about how we can best design the family justice system to serve families.

But first some contextual comments.

The access to justice crisis

A justice system that is not accessed by most citizens with legal problems is not sustainable in the long-term. It is not acceptable that currently some 80% of people with legal problems do not obtain legal advice or assistance from lawyers,¹ or that increasing numbers of litigants represent themselves only

¹ The best data available about user experience in the justice system is the seven-year study by the Canadian Forum on Civil Justice: *Everyday legal problems and the cost of justice in Canada – Overview Report (2016)*. See page 9 of that report for support of this assertion.

because they have run out of funds to pay a lawyer.² It is likely that at least as many of those unable to afford legal representation simply give up. What little data we have about the user experience of the justice system (and we need more) suggests that a majority of people with identified legal problems report that these legal problems are not resolved.³

Ignoring these realities risks undermining societal support for the Rule of Law. Substantial steps need to be taken to address the access to justice crisis, and they need to be taken soon.

If those of us within the justice system do not act to find ways to meet the unmet demand for legal services, others will. That is already happening: globally, 1,400 companies are working to disrupt the legal business.⁴ We (the leaders in the justice system) can either choose to be part of the change and influence it, or let it happen in ways that probably will not incorporate the basic principles that we value deeply.

Central to Access to Justice BC's view of its mission is the encouragement of innovation directed at addressing the access to justice crisis. We commend the Law Society of BC, and you personally and your committee, for all the work that has been done on this alternative legal service provider proposal. Creating a new category of regulated family law service providers is clearly aimed at addressing the gap between the demand for quality family legal services and the accessible supply of those services. It represents a substantial effort to pursue access-to-justice innovation within the context of the Law Society's mandate.

A user-centred perspective

Access to Justice BC has adopted a user-centred definition of access to justice: *Access to justice means enabling people to avoid, manage, and resolve civil and family legal problems and disputes.*⁵ The justice system is more than the courts, and access to justice is more than access to representation in court by lawyers.

The legal problems faced by a family going through separation and divorce are an aspect of a larger personal and social issue being experienced by that family that has many non-legal aspects –physical, emotional, relational, financial ... there are more. The justice system is appropriately focused on addressing legal issues, but if it is to serve families, it must offer ways to address legal issues that take into account the non-legal interests of family members, especially children. A user-centred perspective calls for a different approach to justice system innovation than the justice system usually engages in.

Recent scientific research indicates that high conflict familial situations are particularly damaging to the health and well-being of children, and can have intergenerational consequences.⁶ Court processes are inherently adversarial and risk exacerbating high conflict dynamics and undermining the well-being of adults and children. We need to take this research into account when we introduce or critique family justice system innovations, such as the alternative family legal services providers model.

² *Tracking the Trends of the Self-Represented Litigant Phenomenon: Data from the National Self-Represented Litigants Project, 2017*, Scarrow, Robinet and Macfarlane, pp 8,9

³ *Everyday legal problems and the cost of justice in Canada – Overview Report (2016)*, p. 11.

⁴ *Let the tech wars begin*, <https://www.canadianlawyermag.com/author/jim-middlemiss/let-the-law-tech-wars-begin-3708/>

⁵ *From Access to Civil and Family Justice: A Roadmap for Change*, Action Committee 2013

⁶ A landmark American study in the 1990's identified that the more adverse childhood experiences (ACEs) a person has, the higher the risk later in life of health and social problems. If parents are bitterly fighting about money and ignoring their children, it can lead to brain altering toxic stress.

Applying the Triple aim

As you are aware, Access to Justice BC has developed the Access to Justice Triple Aim and Measurement Framework. Increasingly justice system organizations are aligning in support of the Access to Justice Triple Aim.

The Triple Aim is user-centred and outcome focused. It is one goal (improved access to justice) with three elements:

1. Improved population access to justice outcomes
2. Improved user experience of access to justice
3. Improved costs.

In implementing an alternative service provider model, we urge you to adopt the Access to Justice Triple Aim as a measurement framework for measuring the degree to which you are successful. This means defining the objectives of the model in terms of how it will improve one or all aspects of the Triple Aim, and measuring success in relation to these interrelated objectives.

Applying this framework will assist in asking the right questions as you proceed to implement and evaluate the alternative service provider model. Does the proposed model improve access to justice for the general population of BC families? Does it assist sub-populations that disproportionately confront obstacles to accessing the family justice system? Does it improve the experiences of family members who engage (or avoid engaging) in the family justice system?

The third element of the Triple Aim is important because it brings into the equation a cost analysis that raises the issue of the benefits (not just to the justice system, but also to other systems and to the economy) of a high functioning family justice system. Relating that to the alternative family legal services model, it will be important to ask: Does the model actually reduce costs for families? What impact, if any will the model have on justice system costs? Would the Law Society regulation of alternative legal providers benefit other systems and reduce their costs?

We do not know the answers to these questions, but it will be important to ask them and to measure success in relation to them, and if the evidence suggests something other than success, the model should be modified accordingly.

Expanding the dialogue

Our failure as a sector to look at access to justice from the perspective of the multi-faceted interests of families and children has led us to be too narrow in our solutions. Our lack of curiosity about how the family justice system impacts families may have been a contributing factor to the access to justice crisis. As a sector, we need to reflect more and expand our thinking.

Creating an additional category of legal service providers is only one solution to the gap between the demand for and supply of legal services for families experiencing separation. For example, unbundling of legal services is another promising approach, although it too is not a silver bullet for achieving access to justice. We need to consider a full range of approaches. The alternative legal service provider proposal assumes that the family justice system will continue to be designed much as it currently is. But does that assumption lead to the best solution to the access to justice crisis? If we approach the access to justice crisis in the family justice system from the point of view of the families and children, it might

well lead to a significant redesign of the system, in which service-providers who are not lawyers have a quite different service to provide than we can currently imagine. The most appropriate role of the Law Society in regulating these service providers remains to be seen.

We understand that a significant group within the Bar, especially the family law bar, are demanding that further discussion of the alternative family legal service provider issue be shut down, and the proposal dropped. It is important to listen to this strong voice and to ask: what are the interests underlying their concerns? Is there a way to meet those concerns that still allows expansion of the categories of people who are permitted to provide legal services? Collectively, they represent a significant experience with serving families going through the transition of separation. Still their voice cannot be allowed to undermine a movement that supports access to justice for a wider spectrum of the public.

Access to Justice BC submits that, instead, of shutting down the debate, a dialogue should be encouraged that considers more dramatic changes to the family justice system and includes participants outside the justice system – users of the system, non-legal family service providers who are attuned to the needs of families, and people from other disciplines and sectors who will be more knowledgeable than lawyers are about the non-legal aspects of the experience of families going through separation. The challenges for families going through the transition of separation are complex, and our capacity as a sector to design a responsive family justice system will be enhanced if we invite more people with varied experiences and perspectives into the dialogue.

Access to Justice BC may be able to play a role in facilitating a fuller dialogue about what is needed to really impact access to justice for families in British Columbia. If in your deliberations on this consultation process, you can see a useful supportive role for Access to Justice BC- perhaps in providing a space for a broader facilitated dialogue - please let us know. You can contact me via email at jane@janemorley.com.

Respectfully submitted,



Jane Morley, QC
Strategic Coordinator, Access to Justice BC on behalf of Access to Justice BC

c.c. The Honourable Chief Justice Robert Bauman, Chair, Access to Justice BC Leadership Group and Steering Committee

Peacebuilder Mediation

1601 Loran Drive,
Dawson Creek, B.C. V1G 4X9

Wayne Plenert

B.Th., B.A., LL.B., LL.M.

Retired lawyer (BC and Yukon)

Member of the Civil and Family Rosters of Mediate BC

Phone:(250) 784-7910(c)

Email:wplenert@peacebuildermediation.com

Law Society of BC

Dear Law Society

You have asked for input respecting the Family Law Legal Service Providers: Consultation Paper.

My Background and some Context

I am a retired litigator, including in the area of family, who has a Masters of Laws (ADR) from Osgoode Hall, and who has been involved in leadership in the area of mediation and conflict resolution. I was President of the BC Mediator Roster Society and then vice chair of Mediate BC, and chaired the Roster Committee. I have been engaged in studying and developing models for the relationship between lawyers and mediators and have been published in the Advocate on the subject.

Twice, Kari Boyle and I met with administration at the Law Society for the purpose of engaging on the topic of how family mediators and lawyers can improve the existing arrangement for family transition.

The Northern Navigator project is a court/mediation initiative in the Peace River region in which people who have initiated process in Family Court get assessed and may be referred to a mediator. I have dedicated the past years to developing this project and training and mentoring mediators.

The result of the reaction of the membership to this Consultation suggests that if reform is to happen, it will be different than what is suggested in the Consultation Paper and the amendments to the *Legal Profession Act*. This note offers a different approach.

Working from one of the Paper's Key Assumptions

85% of those facing a legal problem do not seek the advice of a lawyer, according to the Consultation Paper. That statistic is borne out here in the Peace River. People turn to self-help, internet searches, the LawLine, mediation, and friends. The courts see very few lawyers, often only duty counsel flown up from Vancouver. There are fewer lawyers who do family now than 40 years ago, with far more situations involving family matters.

Mediation is becoming popular, in part because the Provincial court bench orders them, and in part because in a lot of situations, parties do not want lawyers involved. Their reasons are costs, the fear of escalation that lawyers imply, and their desire to work directly with the other instead of through an intermediary. In a way, mediators are legal service providers, in the sense that people are trying mediation who want to work differences out collaboratively even when they cannot get along.

This suggestion is that you encourage reform that would make the mediation process easier to use, safer for the public, and a sensible alternative to court as the *Family Law Act* describes.

I offer two suggestions: for mediations involving property (separation agreements) and parenting (consent orders).

Drafting Separation Agreements

At present, people are legally entitled to draft their own separation agreements. When this covers property (including pensions and businesses), the results can be unfortunate.

Family Law mediators are entitled to mediate in areas including property, debt, pensions and businesses so long as they have the necessary training and experience. When these mediations conclude, the parties receive a Memorandum of Understanding. The parties may draft their own agreement, or one may hire a lawyer to draft it, or the two may hire a lawyer on a limited retainer arrangement. In all of these arrangements, it is not necessary for both parties to get independent representation on the exercise, or independent advice respecting their agreement.

Mediators can give legal information, but not legal advice. Lawyers who work jointly for the parties or on a limited retainer arrangement, also cannot give independent legal advice to one side. This approach can be improved.

In Alberta, the *Matrimonial Property Act* RSA 2000 c M-8 sets out the basis for sorting family property in that province. The legislation has a different definition of spouse, and other difference from BC's *Family Law Act*. What it has of interest is section 38 which I append.

38. (1) An agreement referred to in section 37 is enforceable if each spouse or each person, in the case of persons referred to in section 37(2), has acknowledged, in writing, apart from the other spouse or person
- (a) that the spouse or person is aware of the nature and the effect of the agreement,
 - (b) that the spouse or person is aware of the possible future claims to property the spouse or person may have under this Act and that the spouse or person intends to give up these claims to the extent necessary to give effect to the agreement, and
 - (c) that the spouse or person is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse or person.
- (2) The acknowledgement referred to in subsection (1) shall be made before a lawyer other than the lawyer acting for the other spouse or person or before whom the acknowledgement is made by the other spouse or person.

To summarize, a person in Alberta can only enter into an enforceable agreement when that person has acknowledged in writing that they understand the deal, and have made this acknowledgement separate from their spouse, and before their own lawyer.

This approach requires that mediators and lawyers work together. It would do much to get lawyers back into helping the 85%, and would reinforce that law is not just about fighting. It would improve the present model for parties in that each side would see their own lawyer, and it would allow mediators to actually do their job which is take a problem and develop a model that sorts it out.

I practiced with this model when I developed a family mediation practice just across the border from Dawson Creek in the Alberta Peace River region, and in those cases the parties accepted this way of proceeding. I also appreciated the cooperation between the Alberta bar and myself. It was a good way for lawyers and mediators to work together. In fact, the lawyers there invited me to provide them with mediation training!

Consent Orders in Provincial Court

My second suggestion covers the problem of how to conclude provincial court parenting and support matters. These are usually resolved with a consent order, so the test is finding a way for the parties to get an acceptable order. Again, the barrier is the *Legal Professions Act*, which describes the preparation of a consent order as “drafting”.

This proposal is that mediators be able to prepare consent orders.

At present, a mediator prepares a memorandum, the parties present it to a judge, and the judge directs a clerk to write their order. Most of the writing is from the Pick List, which is the approved language for orders being developed by the Attorney General’s office. The present approach puts all the strain on the court system to complete what the parties had negotiated in their mediation.

When the agreement involves a mediator who is a Family Justice Counsellor, that FJC can do the drafting and assist the parties in filing their order. This is permitted because the FJC’s are paid by the MAG rather than by the parties. This technical difference is no basis for determining the entry level for court order drafting. The test, instead, should be if the potential drafter has met the expectations of the *Family Law Act* Regulations. Someone who is accepted as a mediator under the Regulation, and who has received appropriate training in drafting orders as is the case with FJCs should be acceptable

If the *Legal Profession Act* or *Family Law Act* are being changed to improve access to justice, I ask that the changes include answering this pressing need.

Thank you

The topic of family reform, and access to family justice reform, is crucial for British Columbia, including the rural reaches in which I live. It is also controversial. I thank you for taking the initiative, wish you all the best as you move forward, and hope these suggestions are of assistance.

PEACEBUILDER MEDIATION

Per: **WAYNE PLENERT**