THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

April 3, 2012

The Honourable Shirley Bond
Minister of Justice and Attorney General
PO BOX 9044 STN PROV GOVT
Victoria BC V8W 9E2
CANADA

Dear Ms Attorney:

The Canadian Bar Association, BC Branch (CBABC) has provided the following submissions on the substance of the areas which BC Notaries seek expanded practice:

- 2010 – October 15 2010 CBABC Submission
- 2012 – February 2012 Solicitors Practice Issues Committee Submission
- 2012 – April 2012 Family Law Working Group Submission

The CBABC continues to be of the view that protecting the public must be at the forefront for analysis of this issue. Increased access to legal services can be achieved while protecting the public interest by ensuring the following conditions are met:

- there is a proven gap in access and/or demand,
- the change will achieve the objective of filling that gap, and
- 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 notaries should be regulated by the Law Society.

Access to Justice

Legal Problems Which Are Areas of Need for Legal Services

The CBABC has been involved in improving access to justice since the beginning of our organization. More recently, the CBABC has worked extensively on access to justice issues

around pro bono work, legal aid and justice system reform with an aim to make the justice system less expensive and more affordable. Addressing access to justice and access to legal services issues has been a priority for many justice system stakeholders and it is a complex challenge on which we all must work together. BC Notaries are welcome to join with us in addressing that challenge. It is important, however, that the resources to identify and fashion solutions be focussed on true access issues and the most important access issues.

Empirical work has been done on that front. Among many studies we point to two: the *Civil Legal Needs Research Report*[1] commissioned by the Law Foundation, and a survey commissioned by the Legal Services Society in 2008 entitled *Legal Problems Faced in Everyday Lives of British Columbians*[2]. Those studies rank the most frequently cited legal problems that British Columbians and Canadians experience. Probate issues, trusts and incorporations are not on the list. The top issues are poverty law issues such as consumer, debt, housing and employment. Family problems are 5th and 6th on the list and wills and powers of attorney are 8th on the list.

The BC Notaries' characterization of legal issues involving drafting wills and trusts, probating estates, incorporating companies and acting as records offices as access to justice issues seems to be premised on anecdotal evidence. The empirical evidence shows otherwise.

With regard to family law problems, there is no doubt that contested matters call out for more access to justice and access to legal services. The most pressing issue is the need for greater coverage for legal aid for those who live in poverty and cannot afford any level of paid-for legal service. There is no empirical evidence that there are more legal service providers needed for uncontested separations or for parties who make an informed decision to waive legal advice. Characterization of problems in this way does, however, engage serious public protection concerns which are discussed at length in the Family Law Working Group submission.

Geography

The CBABC believes the BC Notaries' assertions with respect to the list of communities on page 14 of the BC Notaries' briefing note to be inaccurate. In short, our review of the facts indicates that only 5 of the 31 communities listed are served by notaries and not served by lawyers.
Of the 31 communities listed, the BC Notaries Society website indicates **there are no notaries in 19 of those communities**. Of those 19, 1 (Hope) has a lawyer in the community; 3 have lawyers in proximate communities that are closer than the closest notary; and 8 have lawyers and

[1] McEown, Carol *Civil Legal Needs Research Report*, 2nd edition, March 2009, Written for the Law Foundation of BC
[2] http://www.lss.bc.ca/assets/aboutUs/reports/legalAid/IPSOS_Reid_Poll_Dec08.pdf

notaries in equidistant adjacent communities. That leaves 7 communities where there are notaries closer than the nearest lawyers. The following is the list of communities with the nearest community with a lawyer in it next to it in brackets:

Belcarra (Port Moody)
Birken (Whistler)
Bralorne (Lillooet)
Chetwynd (Dawson Creek)
Clinton (100 Mile House)
Darcy (Whistler)
Goldbridge (Lillooet)
Hope (Hope)
Horn River (Fort Nelson)
Jordan River (Sooke)
Masset (Prince Rupert)
McLeod Lake (Prince George)
Mt. Currie (Whistler)
Otter Point (Sooke)
Port Clement (Prince Rupert)
Port Renfrew (Sooke)
Shirley Point (Sooke)
Tlell (Prince Rupert)
Tumbler Ridge (Fort St. John)

Of the 12 listed communities where notaries do have offices, the following **6 are also served by lawyers with offices in the communities:**

Bowen Island
Enderby
Fort Nelson
French Beach
Rossland
Sparwood

That leaves 6 communities where notaries are practicing and there is no resident lawyer. Of those, Keremeos is in question, since the notary who was located there has apparently moved to Westbank. The other 5 are Hudson's Hope, Mackenzie, McBride, Pemberton and Valemount.

The legal profession has committed itself to improving geographical access to legal services through the REAL Program (Rural Education and Access to Lawyers). REAL is a program in which second year last students are placed in in summer positions in small communities and rural areas of British Columbia. The program has resulted in 52 students being placed in 28 rural communities over three years. Over half of individuals accepted offered articling positions in those communities. The Law Foundation of British Columbia funded this program for its initial three years, and it is currently funded 100% by the legal profession, through the Law Society of British Columbia (LSBC) and the CBABC.

The Cost of Legal Services - Non Lawyer Service Providers and Unbundling

The LSBC has undertaken to improve access to legal services through changes to the justice system regulatory framework through:

- increasing the areas in which articled students and paralegals may work while under the supervision of a lawyer,
- unbundling lawyer services to enable a lawyer to provide legal services for part, but not all, of a client's legal matter, by agreement with the client.

Unbundling allows lawyers and clients to tailor representation more closely to the client's budget by permitting the lawyers to accept limited retainers so long as the client is carefully advised of what is within and outside the retainer. This latter feature is critical. Essentially, the BC Notaries' proposals are a form of unbundling, but with the BC Notaries only being trained to do the first half of the necessary work for safe unbundling. The BC Notaries proposals do not address the critical issue of how the client will be advised on the part of the work the BC Notary cannot do and what the consequences of that might be.

Protection of the Public

The Notaries initiatives raise serious public protection concerns, many of which can be addressed by two guiding principles.

> *First, notaries should not practice in areas in which it is likely that legal advice will be required.*
>
> *Second, notaries should act under the supervision of lawyers and be regulated by the Law Society so that if the issue does appear to require legal advice or becomes complex, a system is in place to identify that need or complexity and it can readily be obtained without putting the client at risk and the notary in a conflict of interest. Being regulated by the Law Society will also address concerns around the BC Notaries having insufficient infrastructure in place to deal with public protection issues and will ensure a common regulatory system for all legal service providers.*

Legal Advice

The CBABC understands that the Attorney General intends to be guided by the principle that notaries should not be involved in the provision of legal advice and the CBABC supports that principle. The difficulty is identifying when these categories of legal problems could require legal advice. Certainly, in family law cases, the concept of parties waiving independent legal advice is very problematic. Providing training in the areas into which expansion will be

permitted does not fully address this concern because BC Notaries will not have the extent of legal training necessary to identify the issues on which legal advice is required if the training is focussed on acting within areas where legal advice is not necessary. Put another way, in order for this proposal to work, a notary needs to have been trained to identify the spectrum of legal issues which could arise in a given instance, not only those the notary is trained to deal with; further it is necessary to ensure that those issues all present themselves at the outset in order for this to be efficient and cost effective. That will not happen in practice. Examples of these types of problems are identified in the 2010 and 2012 Submissions of the CBABC.

Regulation by the Law Society

To the extent that areas can be identified where these "triage" problems can be managed with adequate public safeguards, the CBABC is of the view that it is best managed by having BC Notaries work under the supervision of lawyers with a single regulatory body providing consistent standards for all legal service providers in British Columbia.

Infrastructure Issues

At page 11 of the BC Notaries submission, the BC Notaries note that it has been 26 years since the last claim for misappropriation by a BC Notary. Unfortunately, in early 2012 it has been revealed that a notary is under investigation for perpetrating a Ponzi scheme resulting in the misappropriation of approximately $36 million dollars. Since E&O insurance does not cover fraud, the available recourses are the assets of the notary or the BC Notaries special compensation fund. There is some question as to whether the BC Notaries will dispute that the special compensation fund should not be used to cover to the extent of the funds available - $3 million[3].

Even if the BC Notaries agree, or the court orders, that the special compensation fund covers $3 million of the losses, it is not realistic to expect that the BC Notaries can make up the shortfall. It is simply not possible for 330 notaries to cover $33 million.

On the other hand, BC lawyers ensured that every person who was the victim of the Wirick fraud was made whole without any legal action being necessary. BC lawyers can do that because we have both the numbers to raise the funds and the infrastructure to put in place a compensation system quickly and efficiently.

[3] http://www.vancouversun.com/story_print.html?id=6352119&sponsor=

Conclusion

The CBABC looks forward to working with government, the BC Notaries and the Law Society of British Columbia to address areas where need for greater access to legal services can be met by the Notaries and mechanisms to ensure that the public protection is maintained.

Regards,

Sharon Matthews,
CBABC President

cc. Deputy Attorney General David Loukidelis, QC
Assistant Deputy Minister Jay Chalke, QC

Briefing Note

The Proposed Changes to the Scope of Notarial Services in BC:

Canadian Bar Association - British Columbia Branch Submission

October 15, 2010

THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Summary

The Canadian Bar Association BC Branch's (CBABC) submission regarding proposed changes to Notarial services in BC highlights the following issues for consideration:

1. This is an important public issue and the proposed changes have far reaching implications in terms of both protection of the public and other issues related to an expansion of services provided by notaries in BC.
2. The underlying issue of access to justice is a very important one. Any proposal purporting to improve access to justice needs to be scrutinized carefully to ensure the change achieves the objectives, and any adverse implications of the change are known. The CBABC believes this is best achieved by a dialogue between notaries and the legal profession about how best to serve and to protect the public. The CBABC would be pleased to participate in such a dialogue.
3. The expansion of services proposals (attached as Appendix "A") are undeveloped. However, even in their present form they raise serious public interest protection concerns, and exhibit a lack of understanding of the legal issues involved. The issues concerning public interest protection cannot be addressed in the short time frame provided, and a much more thorough review is necessary and should include other justice system stakeholders and the public.

Proposed Changes to Notarial Services in BC

The Ministry of the Attorney General (AG) is in the process of reviewing the *Notaries Act of British Columbia (Notaries Act)* with the primary objective to examine the authority and structure of the Society of Notaries Public of British Columbia (BC Notaries). In addition to the numerous issues relating to the regulatory structure for notaries, the Ministry is considering a proposal to expand notaries' powers and responsibilities.

The proposed changes provide that BC notaries broaden their current scope of practice to include the following:

- Preparation of all wills
- Probate of estates
- Preparation of trusts
- Incorporation of companies and routine corporate resolutions; and
- Creation of non-contentious cohabitation agreements and non-contentious end of marriage agreements.

The proposals are set out in Appendix A.

On September 8, 2010, the Ministry initiated a short-term consultation process requesting written input on the proposed legislative changes to the BC notaries' regulatory framework by October 1, 2010. The Canadian Bar Association British Columbia Branch was invited to provide feedback however, at the time the Ministry was unable to provide details on the proposed changes. The CBABC requested a deadline extension to review the full proposal submitted by the Society of Notaries Public of BC. The consultation process was extended to October 15, 2010.

Key Issues Arising from the Proposed Changes

Despite the limited consultation period, to demonstrate good faith and a willingness to engage in the consultation process, the CBABC canvassed its Provincial Council Members[1] for input on the proposed changes. We received an overwhelming response from individual lawyers, including those representing small and large group practices covering a broad range of legal practice areas and geographic regions across the province.

We are still receiving submissions.

Three common themes emerged from CBABC member submissions regarding the BC Notaries proposal in its present form. These themes focus on how changes to the scope of practice and regulatory framework for BC Notaries will:

- Impact the public
- Impact the handling of complexities inherent in the law
- Impact rural communities

We explore the main issues arising in each of the key themes below, and where appropriate, have included direct quotes from our members.

The CBABC has demonstrated a strong commitment to improving access to legal services to all British Columbians. We have identified the problems associated with demographic changes in our profession, and have taken concrete steps to address them with, for example, our Rural Education and Access to Lawyers (REAL) program.

The leadership role taken by the CBABC with the Public Commission on Legal Aid is another concrete step in improving access to justice for all British Columbians.

The CBABC is constantly looking at innovative ways to address these issues. Notaries, paralegals, articling students and even community advocates are resources that the CBABC sees as key components in the delivery of legal services. We would encourage a thoughtful process to engage in a discussion of these issues and other access to justice issues.

1. Protecting the Needs and Interests of British Columbians

The CBABC welcomes the opportunity to discuss and provide feedback on such an important issue affecting the public interest. As the leader and voice of BC's legal profession, the CBABC represents more than 6,500 lawyers, judges, notaries, law teachers, and law students across the province and is governed by a 108 member Provincial Council.

Lawyers and notaries have a long-standing tradition in this province of working in harmony to serve the legal needs of the people of British Columbia. The CBABC recognizes that notaries acting within their powers provide useful services for uncomplicated matters. The current relationship and scope of powers has well served the public in British Columbia.

The CBABC is open to engaging in this consultation process to examine the regulatory structure and scope of powers of BC notaries. However a key concern is the stringent timeframe designated for input on what is a critical public issue. British Columbians are most effectively

[1] The CBA Provincial Council consists of 72 Section Chairs, representing more than 3,000 members, and 46 regional representatives representing 6,500 members.

served by a robust discussion between the CBABC, the Society of Notaries Public of BC, the Law Society of BC and the Ministry of the Attorney General and other legal and public stakeholders through a comprehensive consultation process. This will ensure that key public protection issues are examined appropriately, and that adequate safeguards are in place to protect the public good in the event any legislative changes are made to the BC Notaries regulatory framework. This is a vital matter of public protection.

2. Access to Justice – Exploring Alternatives to Improve Access to Justice

Access to justice is a very serious concern in British Columbia. The CBABC has made it a priority and is encouraged to see that other stakeholders in the justice system are taking steps to address it. 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 current Public Commission on Legal Aid is a good example of the CBABC's commitment. In addition, the CBABC established the 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 is willing to assess the relationship between lawyers and other providers with the legal system, and to determine how best to protect the needs and interests of the people of British Columbia.

The current regulation, governance and education of notaries in BC is well suited to the areas of law within which they currently practice. However where there is a request to expand the scope of notarial operations into the provision of legal services, the CBABC and lawyers from across the province need to be involved in the process to advise on the setting of standards and the categorization of practice areas to ensure adequate safeguards are in place to protect the public interest.

The CBABC is agreeable to exploring options and alternatives to support the public's access to appropriate, cost-effective and timely justice. For example, CBABC members have proposed a number of suggestions for further exploration:

- Allow notaries to join legal firms and perform services under the supervision of a lawyer. If notaries can indeed provide the services at a lower cost, access to justice would be served while protecting public interests. This scenario would also alleviate the issue of the identification and accommodation of complex legal issues. It would enable a notary to pass on a file to a lawyer within the same firm, eliminating the duplication of fees to the public. A CBABC member submits "*I like the idea of lawyer supervision for Notaries. It would enable Notaries to assist people who would otherwise be unable to get legal help and would ensure that some qualitative standard is met."*
- Allow the Law Society of British Columbia to regulate notaries. Such regulation will protect the public interest through proper examinations, continuing education, insurance, experience and education requirements.
- Provide new legal graduates with incentives to encourage young lawyers to establish practices in rural and remote areas of BC. Incentives would include the inclusion of lawyers in the loan forgiveness program – forgiving student loans after three years of

practice in a rural community. This would improve the public's access to cost effective high quality legal services in those communities.

3. Substantive Responses to the Proposed Changes

a. Impact on the Public

Proposed changes to the BC Notaries scope of practice are under-developed in terms of protections against negative impacts on the public such as:

- ❖ The increased likelihood of public disservice due to perception that legal services provided by a notary are "good enough" for their case.
- ❖ The fact that the public is vulnerable to erroneous categorization of their legal issues as 'simple'.
- ❖ The lack of safeguards in place to protect the public from notarial mishandling of their issues.
- ❖ The inherent conflict of interest issue that it is in a notary's financial interest to categorize a case as simple.
- ❖ The fact that there is no proof of cost savings realized for the public; may in fact lead to increased costs when legal issues move from simple to complex and require a lawyer to take over a case; or when issues are erroneously categorized to be 'simple' and require legal representation to correct a wrong.

Public access to appropriate, comprehensive and cost-effective justice is of utmost importance. The CBABC believes the public may be adversely impacted by proposed changes to the BC notaries scope of practice in the following ways:

- Public confusion will increase as the blurring of the clear line delineating specific areas a notary can and cannot practice will unfairly put the onus on the lay person to determine who the most appropriate service provider is to attend to their family, will, estate or incorporation matter.
- Expansion of notarial powers will not lead to greater access to more cost-effective legal services for the public, especially in small town and rural BC. Lawyers' fees in rural BC are comparable, if not in some cases more competitive, than those of their notarial counterparts. A CBABC member writes "*The expansion of notarial abilities will not lower the cost of legal services in rural areas…. This will only propagate the misconception that retaining the services of a notary instead of those of a lawyer provides an individual with an equivalent quality of legal services at a decreased cost, when in fact, the public is often provided with a decreased quality of legal services at an equivalent cost."*
- The public will be vulnerable to the inappropriate handling of potentially complex legal matters. The Notaries proposal would place the responsibility on a notary to determine if a legal matter is simple or complex. This represents a conflict of interest as it is in the financial interest of a notary to categorize a case as simple. A member submission to the CBABC states *"The proposed Act puts notaries in conflicts of interest – they can do a divorce if the assets are divided equally or custody is equal so the notary won't want to*

recommend a different division. Likewise they can do probate if there is no contest to the distribution so the notary won't be inclined to advise someone to contest the will."

- The public may incur extraneous costs when a matter of family law, corporate law or probate, for example, is incorrectly deemed 'simple' and in fact is complex, requiring the transfer of the case to a lawyer later in the processing of the matter. CBABC members describe the issues:
    - *"In situations where complex or contentious issues were either not identified at the commencement of service or subsequently arise, individuals will be forced to seek out the services of a lawyer to complete the matter. In addition to the difficulty a consumer may face in locating a lawyer able to act, especially in rural areas, this will result in the duplication of fees paid by the consumer. This is due to the fact that the lawyer will have to review the steps taken by the notary to ensure due diligence in the case at hand."*
    - *"Inexpensive services often means a failure to properly deal with the issues leaving people with later recourse to lawyers in any event (at more cost than if they had gone to lawyers in the first place). There are few truly 'simple' issues."*
    - *"Notaries who haven't explored the issues or the file still have the authority to profoundly impact the lives of their clients. The Notary trusts the client, the notary signs and files, the client thinks it's fine and then has to spend thousands of dollars in legal fees later when it turns out something was missed, not considered or otherwise tailored to their particular situation. Doing it right the first time can save money in the long run – that is an access to justice issue."*
- The BC Notaries' proposal does not outline what safeguards will be imposed to protect the public from a notary mistakenly determining that a file is simple or not fully disclosing their inability to deal with complex matters. CBABC members had many questions about how the public would be protected:
    - *"Will an individual approaching a notary know that he or she cannot rely upon a notary for any identification of legal issues? Will the notary be obliged to tell clients that if they have any concerns regarding legal issues, they must consult a lawyer? Without legal training, how will notaries be able to identify, appreciate or address issues that may have consequences for a client?"*
    - *"Is signing a 'waiver' for legal advice sufficient? Does this adequately protect members of the public? If a notary takes conduct of a matter that he or she shouldn't have, what is the recourse for the client? Does the client complain to the Society or pursue court action? Is there sufficient insurance for notaries to cover the potential losses to a client in such a situation?"*
- There is an absence of empirical evidence demonstrating public need or a gap in service that would demand the government expand the capacity of notaries to act in a larger scope of practice. In fact, no such expansion in the scope of notarial powers and ability has occurred in any other province in Canada.
- There has not been any analysis on the implications of the Trade, Investment and Labour Mobility Agreement (TILMA) [now the New West Partnership Trade Agreement], and particularly the likelihood that notaries from other jurisdictions, such as Alberta, could practice in BC after satisfying BC notary regulation requirements under TILMA in areas that they have not been trained in, nor are able to practice in their home jurisdictions.

- The Attorney General recently introduced sweeping, progressive changes to the legislative framework addressing property division on relationship or marital dissolution. A key objective of these changes is to ensure that arrangements made by the parties at the time of dissolution are informed, certain and permanent. These progressive amendments are directed at limiting the disruption and costs of serial legal proceedings. Introducing a side structure where parties can waive their rights to independent legal advice, and notaries who do not have training in the complexity of property division issues can simply accept the parties' assurances that they have properly identified and disclosed all of their assets, will undermine the objectives of the new family relations legislation. This has the potential to create downstream legal work with attendant costs for the parties and the taxpayer.
- Foreign trained lawyers who wish to practice in BC and provide legal services to the public have to submit their credentials to the National Committee on Accreditation. These lawyers have to take law school courses (the number varies according to their home jurisdiction and quality of their law degree), and then article and complete the PLTC and Bar exams in BC. The notaries' proposal appears to allow notaries to practice law with significantly less training and education.

b. Impact on the Handling of Complexities Inherent in Legal Matters

Expanding BC Notaries scope of practice may jeopardize the very safeguards currently in place to protect the public such as:

- ❖ Framing of family law, wills, estates, and incorporation as 'simple' belies a lack of appreciation of the subject matter.
- ❖ Notaries' current limited legal training and education means their appreciation and understanding of legal issues is significantly less than a lawyer's. Even with increased access to "professional development" opportunities, notaries lack the broader legal training necessary to determine what to do when something is "outside the norm".
- ❖ The BC Notaries proposal lacks detail regarding how educational programs (e.g. Simon Fraser University's Masters Program) and licensing requirements will be revised to upgrade new and currently practicing notaries from technical to 'quasi-lawyer'.
- ❖ Lawyers' training is steeped in complex issues of conflict of interest and ethics, and their ongoing development of expertise is framed as much by knowledge regarding the ever changing common law as it is in a knowledge of legislation, continuing education and the like.
- ❖ Issues such as the determination of competency for practice in these expanded areas of law or disciplinary actions should a notary practice beyond their scope boundaries are not addressed within the proposal.

Lawyers and notaries often work side-by-side to provide the public with access to appropriate legal services. The clear delineation of scopes of practice for both professions has ensured the protection of the public good. The proposed expanded scope of practice for notaries into 'simple' areas of law and the criteria suggested for use by notaries to make a determination of 'simple' or 'complex' may put the public at risk in the following ways:

- The framing of the preparation of wills and trusts, probate of estates, incorporation of companies and cohabitation and divorce agreements as 'simple' underestimates the nature of the subject matters. There is nothing more contentious about the current proposal than this one aspect. CBABC members provided numerous examples of how issues that appear 'simple' on the surface are rich in complexity and challenge.
    - *"To suggest that a Cohabitation Agreement is either simple or non-contentious is dangerous. These are among the most difficult and complex documents prepared in my day-to-day practice. Not only should this practice area be reserved to lawyers, there should be a requirement that independent legal advice be provided to both parties."*
    - *"My main concern is the removal of advocacy in the creation of family law agreements. Whether the agreement is a marriage or separation agreement, I would never represent both parties in drafting said agreement…There is often a power imbalance in relationships which is subtle, and this is a time when individual advocates are important. Whether it be a lawyer or notary, my opinion is that it is very risky to have one professional represent both parties. The advocacy component is essential."*
    - *"An incorporation is rarely "simple". It requires the exploration of issues such as tax matters, director and shareholder liability, shareholder remedies, and business name protection. These issues directly impact on the nature of an incorporation, and a notary is not qualified to discuss them in a meaningful way with a client, in order to ensure that client's interests are protected."*
    - *"You can't register a corporation or make a change in the corporation without making a great number of decisions that require legal input and analysis.....I don't think we do the public any favour by fostering the illusion that it's really a matter of forms and record keeping when legal decision-making is inherent in the entire process."*
    - *"Trusts are complex and complicated documents that create new entities for the purpose of holding legal title to assets on behalf of beneficiaries who may or may not otherwise be entitled to a beneficial interest in the assets….The provisions of a trust are complicated and must be very carefully constructed so that the trust achieves its intended purpose and does not create any unintended result or liability. ….There are few lawyers who feel comfortable to enter into this extremely complex practice area. This is not a 'fill in the blanks' exercise."*
    - *"I have been practicing in the area of Wills & Estates since 1988 and experience has led me to believe that there is no such thing as a 'simple Will' that is now adequate to deal with the variety of assets (and jurisdictions) included in the 'average' person's estate….I can honestly say that I have seen more changes in this area (in both statute and case law) in the last five years of practice than in the entirety of the previous 25 years. How a Notary Public, given the nature and extent of their training can deal with these changes and provide their clients with proper advice that is appropriate to the client's circumstances is beyond my comprehension."*

- A ‘simple’ legal matter can rapidly develop into more complex and contentious issues over time. Allowing notaries to act independently of lawyers on ‘simple’ matters will create situations where notaries begin to act on a file and then must cease to act once complicated issues arise. This will inhibit, not increase, access to justice, and may very well increase the cost of proper management of a case for the client.
- Notaries’ current limited legal training and education means their appreciation and understanding of the rule of law is significantly less than someone receiving an LLB or JD from an accredited law school, and completing a period of post-graduate legal training and articling to meet the Law Society of BC’s requirements to practice law, including significant ongoing legal education. The Master of Arts in Applied Legal Studies at Simon Fraser University requires students to complete 10 courses, part time over 2 years – none of which deal with family law, commercial law, company law, wills and estates, taxation, creditor’s remedies, international law, conflicts of law, constitutional law, practice management or professional responsibility.
- A CBABC member states “*The Masters program is a good program and together with ‘bright line’ legislation, the system has worked. But two years of theory is not a substitute for the other aspects of training that allow them to deal with marriage agreements, wills and corporations – especially the clients whose requests may not accord with the law or what is in their best interest. For these skills, lawyers have articling, PLTC (Professional Legal Training Course) and mentoring. That is where you learn to deal with the human dynamic of providing legal advice and services.*” Even if the current SFU Masters of Arts program sought to expand to cover off the proposed scope of practice, a requirement to successfully complete the Masters Program is not envisioned in the BC Notaries’ proposal; they propose to allow 302 individuals to expand their practice without any requirement for a graduate degree in legal education.
- The BC Notaries proposal lacks detail regarding how educational programs and licensing requirements will be revised to upgrade new and currently practicing notaries from technical legal practitioners to ‘quasi-lawyers’. While the proposal indicates that for BC notaries entering the profession, the Society will build the necessary academic instruction into the Master of Arts Program, the proposed expanded abilities would also extend to the more than 302 notaries currently practicing in BC. The majority of currently practicing notaries have not had any formal training in these subject areas.
    - *“If the Society’s proposed amendments are implemented, members of the public will assume they are receiving and paying for advice from individuals who have specific knowledge, education and training in the area in which they are practicing, and that simply may not be the case….The public has a right to know that if they pay for legal services, the individual providing those legal services has received adequate training in that practice area.”*
- Issues such as the determination of competency for practice in these expanded areas of law or disciplinary actions should a notary practice beyond their scope boundaries are not addressed within the proposal, yet these are critical to ensuring the protection of British Columbians.

c. *Impact on Rural Communities*

The proposed changes to the Notaries Act will have a significant impact on the practices and livelihood of BC's rurally-based lawyers and their communities, and may result in a reduction in access to justice for the public residing in small communities across the province, in that the changes will:

- ❖ Lead to a loss of 'bread and butter' income for small community lawyers' practices who may be forced to close shop, thereby reducing consumer access to legal advice and support in rural areas.
- ❖ Force rural lawyers to raise their fees for 'complex' legal matters.
- ❖ Not improve access to justice for rural consumers, as there is already (and will continue to be) an inequitable distribution of lawyers and notaries due to lifting of the notarial geographic practice restrictions.

As noted above, the presumption that notaries provide a more cost effective alternative to lawyers needs to be examined. However, it is clear that notaries work under fewer restrictions, regulations and often lower overhead costs, than lawyers. Permitting an expansion of their scope of practice into areas where more heavily regulated lawyers practice will make rural practice less attractive to lawyers and undermine access to justice. If a lawyer is driven out of practice in a rural area, the public loses the lawyer in the areas in which notaries cannot provide the service, as well as the shared areas in which both lawyers and notaries practice. Those areas that notaries cannot cover such as litigation matters, criminal defence work, child custody matters and business transactions have serious impact on the standard of living and economic viability of rural communities.

The following highlights the main impacts such changes will have on rurally-based lawyers across the province:

- The mainstay of rural and remote lawyers' practices often revolve around the provision of legal services in 'simple' areas of law - family law, wills, probate and incorporations. Expanding notaries scope of practice into these arenas may jeopardize the public's access to appropriate informed legal services in both these simple areas of law and more complex areas of law. Without the 'simple' cases to cover the basic costs of doing business, many rural lawyers will be put out of business.
    - o An Okanagan-based member writes *"This is my whole practice – it will be gutted."* Another cites *"If the notaries jurisdiction is expanded, then there is a risk that further lawyers will abandon the smaller and more remote areas hence compounding the lack of access to a lawyer."*
- Expanding notarial scope of practice will force small town and rurally-based lawyers to raise their fees for complex legal services. This will reduce the public's access to appropriate, cost-effective justice. A northern BC lawyer writes "*Simple files are used by small rural firms to cover overhead so we can offer a reasonably priced service for complex matters. Take the simple files out and the cost of legal services for complex matters will rise."*
- There is no evidence that these 'simple' files would be handled at any greater cost by a lawyer. All the evidence is that services currently offered by both notaries and lawyers are priced equivalently.
- Changes to the notarial scope of practice will not resolve the issue of access to justice for rural British Columbians. One of the historical reasons for the development of an

independent, self-regulating notary profession in BC was the lack of available lawyers in remote and small communities. Notaries used to be tied to specific geographic areas but that restriction was removed in 1998. Today many of the areas underserved around the province by lawyers are equally not well serviced by notaries. *"Expanding the scope of practice may grow the discipline but not necessarily in the areas of the province where people do not have enough choices for affordable legal services."*

The CBABC welcomes further dialogue with the Society of Notaries Public of BC and the Ministry of the Attorney General to determine how both professions can best serve the needs and protect the interests of the people of British Columbia.

Respectfully submitted,

Stephen McPhee, President
Canadian Bar Association BC Branch

Appendix A – Proposal from the Society of Notaries Public

THE SOCIETY OF NOTARIES PUBLIC OF BRITISH COLUMBIA
1220 – 625 Howe Street, Box 44 Vancouver, BC V6C 2T6
Telephone: 604.681.4516 Facsimile: 604.681.7258 Toll-Free: 1.800.663.0343

Executive Summary

Over the last several years, The Society of Notaries of BC has been working with the Province of BC and the Attorney General's office to revise the *Notaries Act.*

The primary goal of this legislative request is to bring the Act's language into the 21st century by clarifying the powers and responsibilities of BC Notaries with respect to

- the protection of the public interest through a more rigorous self- governance model;
- the preparation of wills;
- the probate of estates;
- the incorporation of companies and routine corporate resolutions; and
- the creation of noncontentious cohabitation agreements and noncontentious end-of-marriage agreements.

The Society of Notaries is excited about this revised Act, which will establish a new legislative framework for the profession. When passed by the Legislature, the new structure will ensure an increased level of accountability and transparency for The Society of Notaries, its member BC Notaries, and for British Columbians.

Because The Society of Notaries Public of British Columbia is a self-regulating organization, the Act will provide The Society with the necessary authority to properly regulate our members for the protection of the people of British Columbia. Furthermore, modernizing the legislation that governs The Society of Notaries strengthens The Society's ability to responsibly manage the day-to-day affairs of the organization.

The Background of BC Notaries

The first Notary in British Columbia was appointed in 1868 and the profession was established a number of years later, in 1926. Today, you will find Notaries in every community of our Province; they represent the diversity of our vast ethnic cultures.

The position of a Notary as a member of one of the branches of the legal profession is sanctioned and safeguarded by law. BC Notaries are unique in North America in their provision of noncontentious legal services to the public.

Currently, there are more than 320 Notaries working in the Province of BC. To become a BC Notary, an individual must complete a postgraduate degree at Simon Fraser University, pass a series of 6 stringent statutory examinations, and be accepted for membership in The Society of Notaries Public of British Columbia.

Because The Society of Notaries believes in a strong community and in the community's ability to assist less fortunate individuals to gain access to legal services, the BC Notary Foundation was created in 1986. Since then, over $35 million has been donated to legal aid, legal research, and legal education in British Columbia.

BC Notaries
A TRUSTED TRADITION

THE SOCIETY OF NOTARIES PUBLIC OF BRITISH COLUMBIA
1220 – 625 Howe Street, Box 44 Vancouver, BC V6C 2T6
Telephone: 604.681.4516 Facsimile: 604.681.7258 Toll-Free: 1.800.663.0343

Proposed Rights and Powers of the BC Notaries' New Act

August 27, 2010

1. Estate Administration

At present, BC Notaries are able to draw and supervise the execution of certain types of wills. We would like to see Section 18(b)(iii) amended so the youngest member of the class attains the age of 30.

In addition to being able to draw such wills, Notaries seek the ability to obtain the grant of probate for simple estates, provided

a. there are no disinherited children;
b. there are no challenges to proposed estate administration pursuant to the *Wills Variation Act*; and
c. the probate does not appoint more than three executors.

It is proposed that if anyone files a legal challenge to the proposed estate management, the Notary would cease to act.

2. Incorporation and Maintenance of Companies

BC Notaries seek the ability

a. to incorporate simple companies and to maintain such companies in good standing by the preparation and filing of standard resolutions and to act as the Company's Records and Registry office;
b. to file the Company's Annual Report; and
c. to draft standard resolutions for use by the Company as provided in the Articles, such as provision for the Company to borrow money.

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Notaries propose to be able to incorporate the following companies:

d. where the company has no more than two shareholders;
e. where the company uses the standard Articles of Corporation used by the Corporate Registry on its electronic submission site; and
f. where the shareholder or shareholders have received advice from an accountant or a tax lawyer regarding the appropriate share structure.

3. Family Law

BC Notaries seek the ability to assist clients with simple family relations issues. For example, Notaries wish to be able to draw and supervise the execution of Pre-Nuptial and Co-Habitation Agreements, provided that

a. the assets of the two parties are of equal or similar value;
b. in the event the parties' assets are not of equal value, the parties provide a certificate of independent legal advice;
c. the parties are currently not married;
d. the parties can clearly demonstrate the value of their assets; and
e. the parties indicate they have been offered and waive independent legal advice.

In addition, BC Notaries wish to be able to prepare and file Divorce orders, provided that

f. the divorce is uncontested by either spouse;
g. there are no minor children involved or there is joint custody and equal access;
h. there are no ongoing maintenance requirements; and
i. there is an equal division of assets.

When the provisions are implemented, we will be providing specific education in each of those areas to our members. Only those Notaries who complete the approved program will be permitted to practise in those areas.

For BC Notaries entering the profession, we will build the necessary academic instruction into our Master's Degree program and include practical instruction in our Practical Training and Mentoring process.

Submission to

MINISTRY OF JUSTICE

Strategic Planning and Legislation Office

THE PROPOSED CHANGES TO THE SCOPE OF NOTARIAL SERVICES IN BC

Issued by:
Solicitors' Practice Issues Committee

Endorsed by:
Executive Committee

Canadian Bar Association
British Columbia Branch
February 2012

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PREFACE

The Canadian Bar Association nationally represents over 38,000 members and the British Columbia Branch (the "CBABC") has over 6,700 members. Its members practice law in many different areas and the CBABC has established 74 different Sections and Forums to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBABC also establishes special committees from time to time to deal with issues of interest to the CBABC.

This submission was prepared by the Solicitors' Practice Issues Committee (the "Solicitors' Committee") of the CBABC, at the request of the Executive Committee of the CBABC. The Executive, and in particular President Sharon Matthews, had made several attempts to open up lines of communication with the Society of Notaries Public in order to discuss the details of the Society's proposal for expanded scope of practice and the safeguards proposed to ensure protection of the public. It was the President of the Society's position that he could not discuss the details due to a confidentiality agreement with the Government of BC. Given the serious public protection issues involved, the Executive Committee tasked the Solicitors' Committee with consulting with members of the profession and providing submissions based on the proposal circulated

The Solicitors' Committee is a standing committee of the CBABC. The Solicitors' Committee identifies, monitors and analyzes issues of significance to solicitors' practice. The comments expressed in this submission reflect the views of the Solicitors' Committee and have been endorsed by the Executive Committee of the CBABC. The Solicitors' Committee was composed of the following members:

- Donna L. Kydd, Chair;
- Alex Shorten, CBABC Executive Liaison;
- Shelby J. O'Brien, Vice-Chair;
- Lisa Stewart, Secretary;
- Denese Espeut-Post;
- Sheena Mitchell; and
- Melody Yiu.

SUBMISSIONS

Background

In 2010, the Society of Notaries Public of British Columbia requested that the Ministry of Attorney General (the "Ministry") make changes to the scope of notarial services.

Current Scope of Notarial Services

The notaries' scope of practice is set out by statute, not common law. The *Notaries Act*, R.S.B.C. 1996, c. 334 (the "Act") limits notaries to:

- administer oaths;
- draw affidavits;
- draw some wills;
- attest commercial instruments; and
- draw land title documents suitable for filing in the Land Title Office.

Under the Act, notaries are regulated by the Society of Notaries Public of British Columbia ("the Society"). The Act sets the scope of practice, provides for a special fund for compensation for theft by a member of the Society and regulates the standard and conduct of members of the Society.

There are currently 314 notaries public registered with the Society of Notaries Public of British Columbia.[1]

Expansion of Notarial Services

The attempts by notaries to expand their scope of practice are not new. For example, in 1969, notaries sought court approval to incorporate companies. A unanimous BC Court of Appeal held that neither the common law nor the *Act*

[1] Roll of Notaries Public on the website of the Society of Notaries Public of British Columbia: http://www.notaries.bc.ca/findNotary/notaryRoll.rails (Accessed January 24, 2012).

permitted notaries to incorporate companies.[2]

In 2007, the government amended the Act to permit notaries, along with lawyers, to draft and witness: advance health directives, representation agreements and powers of attorney.[3] Those new notarial powers are in force as of September 1, 2011.

For many years, the Act limited the number of notaries to 323 and allocated notaries' practice to within 81 notarial districts. In 2008, the government amended the Act in the *Trade, Investment and Labour Mobility Agreement Implementation Act*, S.B.C. 2008, c. 39 (Bill 32) to repeal the number of notaries at 323 in 81 notarial districts and add a requirement that a person may be appointed a notary if there is a need and this appointment may define and limit the geographical area in which the person appointed may practice. These changes to the Act came into force in 2009. [4]

In 2009, the government introduced and passed the *Wills, Estates And Succession Act*, S.B.C. 2009, c. 13 (Bill 4)("WESA"). Among other things, WESA implements into British Columbia law *The Convention Providing a Uniform Law on the Form of an International Will*. Under that Convention, lawyers and notaries public designated as the "authorized persons" are permitted to act in connection with international wills. Sections 77, 83, 240 and Schedule 1 of WESA affect notaries. WESA is in force by future regulation.

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[2] *Reference Re Powers Of Notaries Public In British Columbia* [1969] B.C.J. No. 444 6 D.L.R. (3d) 447.

[3] Section 98 of the *Adult Guardianship And Planning Statutes Amendment Act, 2007*, S.C.B. 2007, c. 34 (Bill 29) is in force September 1, 2011 (B.C. Reg. 14/2011).

[4] Sections 58 to 70 of Bill 32 are in force January 1, 2009 (B.C. Reg. 325/2008).

In 2010, the Society of Notaries Public of British Columbia requested that the Ministry further expand notaries' scope of practice in these areas of law: estate administration, incorporation of companies and family law.

Specifically, the Society sought an expansion to allow notaries to:

Estate Administration

- draft and supervise the execution of wills that provide for the assets of the deceased to vest in the beneficiary or beneficiaries as members of a class where the youngest member of that class attains the age of 30 years, from the current limit to the age of majority 19 years;
- probate wills where there are no disinherited children, no challenges to proposed estate administration pursuant to the *Wills Variation Act* and the probate does not appoint more than three executors; if anyone files a legal challenge to the proposed estate management, the notary would cease to act;

Incorporation of Companies

- incorporate simple companies and maintain such companies in good standing by the preparation and filing of standard resolutions and to act as the Company's Records and Registry office;
- file the Company's Annual Report; and
- draft standard resolutions for use by the Company as provided in the Articles, such as provision for the Company to borrow money;
- incorporate companies where the company: has no more than two shareholders; uses the standard Articles of Corporation used by the Corporate Registry on its electronic submission site; and where the shareholder or shareholders have received advice from an accountant or a tax lawyer regarding the appropriate share structure;

Family Law

- draft and supervise the execution of pre-nuptial and co-habitation agreements, provided that: the assets of the two parties are of equal or similar value; in the event the parties' assets are not of equal value, the parties provide a certificate of independent legal advice; the parties are currently not married; the parties can clearly demonstrate the value of their assets and the parties indicate they have been offered and waive independent legal advice;
- draft and file divorce orders, provided that: the divorce is uncontested by either spouse; there are no minor children involved or there is joint custody and equal access; there are no ongoing maintenance requirements; and there is an equal division of assets.

The Society of Notaries Public of British Columbia has stated that:

> [W]hen the provisions are implemented, we will be providing specific education in each of those areas to our members. Only those Notaries who complete the approved program will be permitted to practice in those areas.[5]

2010 Consultation on Expansion of Notarial Services

In 2010, the Ministry began a time-limited consultation requesting written submissions on the Society's proposal to expand the notaries' scope of practice.

Despite the short consultation period, the CBABC made a written submission. We attach a copy of our October 15, 2010 submission ("2010 Submission").

[5] Society of Notaries Public of British Columbia, Proposed Rights and Powers of the BC Notaries' New Act (August 27, 2010) at page 2.

By way of summary, our conclusions in the 2010 Submission were:

1. This is an important public issue and the proposed changes have far reaching implications in terms of both protection of the public and other issues related to an expansion of services provided by notaries in BC.

2. Any proposal purporting to improve access to justice needs to be carefully scrutinized to ensure that: there is a proven gap in access and/or demand; that the change will achieve the objective of filling that gap; and that any adverse implications of the change are known. The CBABC believes this is best achieved by a dialogue between notaries and the legal profession about how best to serve and to protect the public.

3. The notaries' scope of service proposals are undeveloped. However, even in their present form they raise serious public interest protection concerns, and exhibit a lack of understanding of the legal issues involved. The issues concerning public interest protection cannot be addressed in the short time frame provided, and a much more thorough review is necessary and should include other justice system stakeholders and the public.

2011

In 2011, the Society of Notaries Public of British Columbia renewed its call to the Ministry for an expansion of notarial services. The CBABC learned of this renewed effort and continues to want to be involved in this process and dialogue on any changes made. The CBABC offered to participate in such a dialogue, and did in fact host a meeting with the Society after many months of effort to achieve it, and asked for additional information that was not forthcoming. In order to ensure that the public protection concerns were raised with government, this Submission was prepared.

Protecting the Needs and Interests of British Columbians

As we stated in our 2010 Submissions, these proposed expansions of notaries' services are comprehensive and far-reaching. Adequate safeguards need to be in place to protect the public good if any further expansion of notarial services is made by the government.

Over the last year, the Society of Notaries Public of British Columbia has not updated or provided the profession or public with further details to its 2010 proposal for expanding notarial services.

In its 2010 proposal, the Society of Notaries Public of British Columbia is silent on specific safeguards to protect the needs and interests of British Columbians. The Society does not provide details of the "specific education" it will give its notaries and how this will protect the public interest. In fact, the Society only will provide this specific education after the Act is amended to add to their powers. The Solicitors' Committee is concerned that this approach will not protect the public interest.

The Solicitor's Committee is mindful of the Law Society of British Columbia's concerns about expansion of notarial services and its negative impacts on the protection of the public interest. In both its 2003 and 1989 reports on paralegals the Law Society has stated:

> We cannot condone the continuation of a parallel legal profession such as the Society of Notaries Public which markets its members to the public as a provider of legal services, yet has lower standards than those that are met and adhered to by members of the Law Society. This is misleading and unfair to the public.[6]

[6] Law Society of BC, Paralegal Task Force Report (October 27, 2003) (http://www.lawsociety.bc.ca/docs/publications/reports/ParalegalsReport_2003.pdf) at page 11: "The Paralegal Task Force echoes the views of the 1989 Paralegalism Subcommittee Report".

The Solicitor's Committee agrees with the Law Society's assessment regarding the proposed notaries' expansion of practice in estate administration, company law and family law.

Exploring Alternatives to Improve Access to Justice

To provide access to justice, we re-iterate our proposals in our 2010 Submission for notaries:

- allow notaries to join legal firms and perform services under the supervision of a lawyer. If notaries can indeed provide the services at a lower cost, access to justice would be served while protecting public interests. This scenario would also alleviate the issue of the identification and accommodation of complex legal issues, and it would enable a notary to pass on a file to a lawyer within the same firm, eliminating the duplication of fees to the public. This proposal is consistent with the Law Society's recent Rule changes to allow an expansion of the scope of practice of paralegals and articling students working under the supervision of a lawyer;

- allow the Law Society of British Columbia to regulate notaries. Such regulation will protect the public interest through proper examinations, continuing education, insurance, experience and education requirements.

In addition to this, as we stated in our 2010 Submissions, the CBABC continues to call on the government to provide new legal graduates with incentives to encourage young lawyers to establish practices in rural and remote areas of BC by including lawyers in the loan forgiveness program and forgive student loans after three years of legal practice in a rural community. For its part, the profession has funded a program to encourage increased access to lawyers in small and remote

communities, through the Rural Access and Education of Lawyers (REAL) Program; this program has made a tangible difference in attracting law students to work and article in under-served communities.

Substantive Responses to the Proposed Changes

As we stated in our 2010 Submissions, the proposed changes to the notaries' scope of practice continues to be under-developed in terms of protections against negative impact on: the public, the handling of complexities inherent in legal matters, rural communities and law practice issues.

Negative Impacts on the Public

The negative impacts on the public include:

- vulnerability to erroneous categorization of their legal issues as 'simple';
- inherent conflict of interest, in that it is in a notary's financial interest to categorize a case as simple;
- increased likelihood of confusion about what level of legal expertise is required for their case, and whether notary service is "good enough";
- lack of safeguards to protect against errors in training, judgment or expertise of notaries;and
- no proof of cost savings; it may, in fact, lead to increased costs when legal issues move from simple to complex and require a lawyer to take over a case, or when issues are erroneously categorized to be 'simple' and later require legal representation (and court resources) to correct a wrong.

The notaries' expansion of practice proposal raises more questions than it answers. Who determines if an estate matter, company matter or family matter is "simple" and thus within the notaries' proposed expansion of powers? The notaries themselves have a conflict of interest. Without legal training, how will notaries be able to identify, appreciate or address issues that may have consequences for a client? Is having a client sign a sign a "waiver" for independent legal advice sufficient and proper protection for members of the

public? If a notary takes conduct of a matter that he or she shouldn't have, what is the recourse for the client? Does the client complain to the Society of Notaries Public of British Columbia or sue in court? Is there sufficient insurance for notaries to cover potentially much larger losses to clients if there are expanded notarial services?

We are unaware of any research, study or survey conducted by the Society of Notaries Public of British Columbia as evidence to justify its expansion of notarial services.

Negative Impacts On The Handling Of Complexities Inherent In Legal Matters

In addition to the negative impacts on the public, expanding the notaries' scope of practice may negatively impact on the handling of complexities inherent in legal matters. The consensus amongst the Solicitors' Committee is that few legal matters are "simple". It is common for clients to seek legal advice for a "simple" matter, only to find -- after their lawyer reviews the facts, the relevant case law and enactments -- that the matter is far from simple.

A recent case from the British Columbia Provincial Court is an example of how a "simple" matter, improperly handled by a notary can cost the public more time and money than originally anticipated. In *Machray v. Simpson*, the defendant notary was found by the BC Provincial Court to be negligent in drafting codicil to a will in which the distribution clause was mistakenly revoked by the notary, which resulted in estate litigation:

> The error is apparent on a simple reading of the will and codicil and no expert evidence is required to prove the obvious. It is disappointing that the Defendant attempts in his evidence to gloss over this or to suggest that it should be obvious to everyone what he meant, i.e. that by deleting clause 3, he only meant to delete that portion of it that pertained to the appointment of executors or executrices. I do not accept the suggestion that the Society of Notaries would see this as a trivial matter, and if I am

> wrong about this, perhaps that is the best endorsement for people to have their wills drafted by lawyers rather than notaries.[7]

If notaries were given expanded powers as proposed, without specific safeguards for the public, the Solicitor's Committee is concerned that the problems in notaries' practice identified by the BC Provincial Court will be multiplied with the attendant negative effects on the public interest in time and money and court time.

Negative Impact on Rural Communities

As we stated in our 2010 Submissions, the proposed changes to the Act will have a significant impact on the practices and livelihood of BC's rurally-based lawyers and their communities, and may result in a reduction in access to justice for the public residing in small communities across the province. For example, it may result in:

- lawyers being unavailable or unable to take on higher risk cases which may be of unique value to the public residing in small rurally-based communities. These cases include: resource-based administrative proceedings, environmental actions, and *pro bono* cases.

- lawyers retiring earlier than usual, or retiring without being able to find a replacement, or lawyers moving their practices to more urban areas. This, in turn, leads to additional difficulties in finding a "winding up" lawyer and succession planning for sole practitioners and small firms (which is an issue being actively promoted by the Law Society of British Columbia). Solicitors, therefore, must rely on fellow solicitors in addressing such practice issues. If there is a shortage of solicitors in rural communities because solicitors can't make ends meet due to increased

[7] 2011 BCPC 309 (CanLII) (http://canlii.org/en/bc/bcpc/doc/2011/2011bcpc309/2011bcpc309.html) at para. 24.

competition from notaries, solicitors will have a very difficult time properly handling these aspects of their practice.

- young lawyers not willing to risk establishing and maintaining practices in rural and remote areas. This is a real concern for mature lawyers as well – particularly, lawyers who relocate from other provinces (most often Alberta) for lifestyle or other reasons find themselves competing with notaries for business.

  For example, in the South Okanagan, there is steep competition between lawyers and notaries in every area of practice in which a notary can currently practice. It appears that there are four notaries who provide services in Penticton and one in Summerland. It has been the experience of some such solicitors that, despite a reduction in solicitor fees (done to remain competitive with local notaries), the public perception seems to be that notaries are significantly less expensive, which is not necessarily true. In fact, some solicitor services are cheaper than those of existing notaries. This raises a significant access to justice issue. Why would solicitors establish a practice or relocate a practice just to compete with non-lawyers to provide complex legal services at a reduced rate? The reality in many small rural communities is that residents do not have a great deal of disposable income because of the cost of living coupled with a low income rate and/or seasonal work. In short, but for a specific referral to a solicitor, the public in rural areas appear to be willing to risk hiring a notary over a solicitor thinking, mistakenly, that the notary provides the "same" service at a lesser fee than the lawyer.

Given the number of notaries that currently service the public, access to justice is not in issue. As there is no longer any limit to the number of notaries in BC, notaries are able to compete for services directly with lawyers, and more and more solicitors are discovering how difficult it is to manage a law practice (from a business perspective) in rural and remote areas of BC. Even with the current

scope of notaries practice, it has become more and more difficult for solicitors to cover the normal overhead costs associated with maintaining a law practice in smaller communities. Services such as wills and incorporations, financially speaking, form a necessary part of a solicitor's practice in rural and remote communities, even though those services may not be that lawyer's primary area of practice.

It should be noted that, in the early 1970s, the government of the day was very concerned about the lack of solicitors locating in rural and remote communities throughout BC.[8] An entity called the Justice Development Commission (under the auspices of the Attorney General's Department) was created to ensure access to justice to residents of those communities and undertook, among other things, to encourage solicitors from the urban areas to move into these communities by establishing community law offices. Donna L. Kydd, Chair of the Solicitor's Committee, was employed by the Justice Development Commission between 1974 and 1975. It would seem odd indeed if solicitors who have relocated to these communities can no longer financially maintain their practices due to the increase in numbers of notaries. This would seem counter to the notion of access to justice, particularly, as notaries do not have to complete the same educational standards or the same articling requirements, or maintain similar practice standards as solicitors must.

The proposals for expansion of notarial services raise law practice issues for each of the areas of law affected: estate administration, company law and family law.

[8] Justice Development Commission, Delivery Of Legal Services Project: Interim Report No. 1. Systems Of Delivery. Victoria, B.C.: Justice Development Commission, 1974. See also, J. Terence Morley, "The Justice Development Commission: Overcoming Bureaucratic Resistance To Innovative Policy-Making", Canadian Public Administration (Volume 19, Issue 1) (March 1976):121–139.

Estate Planning and Administration

Drafting and execution of wills, powers of attorney, health representative agreements and advance health directives is complex and requires specific legal training and experience. New legislation (e.g., WESA and the *Adult Guardianship and Planning Statutes Amendments Act*) that deals with each of these estate planning tasks has raised the standard of care owed by solicitors, particularly in the areas of: determining capacity of the adult making the Will, granting the authority of an attorney or of a health representative (the "adult-maker"). The test for determining capacity is inexact. As a result, each solicitor (and thus notary) must determine whether the adult knew and understood the nature and effect of the document being made.

The standard of care owed by a solicitor in determining capacity of the adult-maker is fairly onerous, and a series of carefully constructed checklists are needed to be prepared in order to determine capacity. Additionally, careful considerations must be given to the intentions of the adult-maker and to give full expression to those intentions in the legal instruments. If errors, inadvertent or otherwise, are made on the face of the document, this will impact upon the adult-maker's personal estate, financial and health planning as well as that adult's estate administration. The legal training and experience that is required of solicitors (including maintaining competent professional practice), currently far exceeds that of notaries. Furthermore, in order to offer sound legal advice and engage in a competent legal practice, one must not only understand how to prepare a generic document but, know how and why the document must be prepared to meet the client's needs.

It has long been the wish of many a solicitor to probate a simple estate. The "simple will" or "simple estate", is generally-speaking, a fiction. What seems to be "simple" in the eye of the executor often does not end up being so. Inevitably, challenges arise as a matter of course, and at one stage or another, in the administration of a "simple" estate from:

- named beneficiaries in the Will;
- disinherited heirs;
- spouses of the deceased;
- creditors of the estate (including the Canada Revenue Agency).

Even with the limitation on the 2010 proposal by the notaries to allow them to probate wills (where there appears to be no disinherited children, no challenges to proposed estate administration pursuant to the *Wills Variation Act* and the probate does not appoint more than three executors), there is a reasonable likelihood during the course of estate administration that the status of a "simple" estate will change. For example, a spouse who is separated but not divorced may make a claim against the estate. Also, a disinherited child or a child of the deceased (who was born outside of the deceased's matrimonial union is publicly known and recognized as a child of the deceased) but is not named in the Will, may make a claim. Further, assets may be located in other jurisdictions which were not held jointly by a spouse of the deceased and all the heirs have a claim to a portion of it (or the proceeds of sale thereof).

Unforeseen challenges may be made to a Will based on equity, such as constructive trust or resulting trust, unjust enrichment or in a *quantum meruit* claim. As well, there may be issues that arise from "mutual wills". What happens where there is a disabled adult beneficiary to be named in a Will; does the notary have the capacity to advise that that there should be a life trust rather than an outright gift in order to avoid access to government benefits to that particular beneficiary? None of these circumstances would appear to be excluded from the expanded scope of coverage being proposed for notaries. In short, there is a risk to clients – in particular, that the notary will only give the client options that they are capable of performing rather than discussing (or even knowing about) alternatives which may be in the best interest of the client. Respectfully, these types of matters fall within the services which ought to be exclusively provided by solicitors as they are beyond the legal education and practice experience of notaries.

It is not uncommon, therefore, in "simple" estates that estate settlement/heirs agreements must be drafted to resolve these types of issues. Solicitors practicing in the area of estate law develop customized checklists to quickly identify any complications and mitigate against potential risk or exposure to liability of an estate at the earliest opportunity.

A notary, on the other hand, would be required to transfer the file to a solicitor as soon as any complication becomes known to them, which immediately adds costs to the estate. What happens if a notary does not discover the complication at the earliest possible moment? How is the public to be protected? An action brought against such a notary does not provide sufficient recourse or adequate relief to the executor, the beneficiaries or heirs; rather, in such circumstances, additional costs would inevitably be borne by the estate and to the loss of the beneficiaries and/or heirs.

There seems to be an awareness (particularly since *Pecore v. Pecor*e), of the breadth of spousal claims.[9] Section 12 of the *Wills Variation Act* provides that the time limit for action must be within 6 months from the date of the issue of probate of the Will in British Columbia or the resealing in British Columbia of probate of the Will. Legal actions, then, may be filed from the death of the testator/testatrix to within 6 months of the issue of probate. That means that a notary would be acting for a client for up to 6 months before the notary must cease to act if a wills variation action is filed. If that happens, the client must retain a lawyer or represent him or herself in court. The result is increased costs for the client, both for the fees to the notary, then to the lawyer, if the client can afford a lawyer. It is best for the client to seek probate with a lawyer in the first instance to avoid the risk of duplicating costs and effort in the event of a wills variation lawsuit.

[9] [2007] 1 S.C.R. 795, 2007 SCC 17 (http://scc.lexum.org/en/2007/2007scc17/2007scc17.pdf).

Also, regarding conflict of interest, notaries do not appear to be bound by the same rules as lawyers when informed of a conflict of interest situation or when a notary has been acting on both sides of an estate matter (e.g., for the executor and beneficiary). Public protection requires that this be subject to the same standard of care as exists for solicitors.

In addition, there are significant changes in the duties and obligations of executors of estates, attorneys who have been granted financial authority under a Power of Attorney, or health representatives who have been granted health authority or directions as to health care of an adult. These duties and obligations have become more onerous with the new legislation and there is concern as to whether or not notaries can adequately advise on these changes.

Furthermore, there are benefits to the public within the framework of access to justice which have not been addressed by the notaries. This relates to the unique relationship between a solicitor and a client, and is something that does not fall to notaries. Solicitor-client privilege provides a degree of privacy that cannot be breached save for an order of the court or waiver by the client. It applies to confidential communications between a solicitor and a client, which is of a permanent nature, and serves the "secure and effective administration of justice according to the law".[10]

As the Supreme Court of Canada has held:

> The interest that underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be

[10] *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39 (http://scc.lexum.org/en/2006/2006scc39/2006scc39.pdf) at para. 71 per Bastarache and Charron, JJ (concurring with Fish J. in the result).

> revealed, it will be difficult if not impossible, for that individual to obtain proper candid legal advice.[11]

The Supreme Court of Canada has further held that:

> Indeed, solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance. Accordingly, this Court is compelled in my view to adopt stringent norms to ensure its protection.[12]

Given this absolute protection to solicitor-client privilege, it is not surprising that British Columbia courts have found that in the Wills context, solicitor-client privilege applies to protect clients from having their solicitor's files disclosed in *Wills Variation Act* proceedings.[13]

Solicitor-client privilege does not apply as between a notary and a client; such privilege only applies as between a client and a lawyer. The public may not be informed of this most critical of distinctions when retaining a notary as opposed to a lawyer. There is a risk of confusion that the public is being offered by notaries the same solicitor-client privacy protection as with a lawyer.

Finally, on the matter of costs, what evidence is there that notaries provide services for less money? The evidence to date suggests that notaries do not provides services for less money compared to lawyers, in areas where both are providing services. In 2000, for representation agreements, Public Guardian and Trustee of BC's appointed independent legal consultant found that:

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[11] *Supra* at para. 28 per Fish J. for the majority.

[12] *Lavallee, Rackel & Heintz v. Canada (A. G.); White, Ottenheimer & Baker v. Canada (A. G.); R. v. Fink*, 2002 SCC 61, [2002] 3 S.C.R. 209 (http://scc.lexum.org/en/2002/2002scc61/2002scc61.pdf) at para. 36 per Arbour, J (for the majority).

[13] *Gordon v. Gilroy*, 1994 CanLII 829 (BCSC) (http://canlii.org/en/bc/bcsc/doc/1994/1994canlii829/1994canlii829.pdf) at page 14.

> While many people have the perception that the cost of notaries is more reasonable, there is no clear evidence that the fee for a notary to prepare a Representation Agreement will be any more affordable than lawyers.[14]

In our 2010 Submissions, we found that: "[A]ll the evidence is that services currently offered by both notaries and lawyers are priced equivalently."[15]

For this submission, in 2011 and 2012, the Solicitors' Committee canvassed this issue of costs with solicitors. We found that, as in 2010, the evidence is that services currently offered by both notaries and lawyers are priced equivalently. Therefore, before any legislative change is made by the government, it seems reasonable to first determine what notaries charge for a particular service in comparison to lawyers.

Incorporation of Companies

As is true in estate practice, incorporating companies is not 'simple'. To properly advise and protect clients, legal advice needs to be commonly provided in these areas:

- corporate name, copyright and trademarks;
- company capacity and powers:
- share allotments and issuance of shares;
- trust indentures;
- debentures;
- director's duties (by statute and at common law) and liabilities (statutory and otherwise);
- director's insurance;
- disqualification of directors;

[14] Dulcie McCallum, Report on Section 9 Representation Agreements with General Powers (July 24, 2000)(http://www.trustee.bc.ca/pdfs/General/mccallum.pdf) at page 41.

[15] Page 10.

- conflicts of interests;
- shareholder, insider and director liability;
- director and shareholder meetings;
- shareholder remedies;
- tax;
- finance;
- corporate and financial records;
- audits, investigations and court proceedings;
- company alterations, liquidations and restorations and reinstatements; and
- offences and penalties for violation of the *Business Corporations Act*.

Even with the limitations in the Society of Notaries Public of British Columbia 2010 proposal (incorporating companies where the company has no more than two shareholders, uses the standard Articles of Corporation used by the Corporate Registry on its electronic submission site and where the shareholder or shareholders have received advice from an accountant or a tax lawyer regarding the appropriate share structure), these limitations are insufficient to protect the public.

Most solicitors can attest to the fact that there is no "simple" in corporate law and that a corporation with two shareholders can be complex (particularly, when there is dissension between the two shareholders). Generally-speaking, when there is more than one shareholder, a shareholders agreement ought to be seriously considered. Shareholder agreements are complicated documents which describe, among other things, how the shareholders will interact with each other, how shares can be acquired or sold, and what the rights and obligations of each shareholder are. Notaries currently do not have the legal education, skill or experience to provide legal advice on shareholders agreements or to provide advice in the event that:

- one of the shareholders is a parent acting for a minor, or is a trust or is a limited liability company;
- one of the shareholders becomes incapacitated or goes into receivership or commences bankruptcy or some other type of forfeiture proceedings.

How will a notary be able to determine whether the standard Articles used by the Corporate Registry is appropriate for a client? Such a determination requires an open and frank discussion with the client with assurances of privacy protection and solicitor-client privilege, as well as the provision of legal advice on utilizing such “standard” Articles, neither of which can a notary ensure or provide.

If a notary relies on instructions from an accountant or tax consultant to prepare a “standard” incorporation or “standard” corporate resolutions or other “standard” corporate documentation, how is the public protected? Is this really an access to justice issue? Costs, in these instances, do not seem to be a critical factor.

Most solicitors are troubled by the term “standard” when applied to the drafting of corporate resolutions. While there may be “routine” resolutions to appoint directors and officers each year or to waive shareholders’ meetings, the standard Articles do not provide any prescribed language for such resolutions. Also, there is nothing “standard” in drafting a resolution enabling a corporation to borrow money. Indeed, without a clear definition of what is “standard”, there are effectively no boundaries imposed on what a notary can draft in terms of resolutions.

As to the maintenance of corporate records, often legal advice is warranted when, as a result of a client’s request, certain actions are taken with respect to such records. For example, a solicitor will often ask questions and probe the client to understand the request (for example, to complete a transfer of shares). If a notary was instructed to undertake or perform such a task, what standard of care does a notary owe to the client? If the standard of care is significantly less than the duty

owed by a solicitor to a client, how is the public being protected and how is this then an access to justice issue?

Further, what is the triggering event which changes the “simple” corporate matter into a complex corporate matter and who determines that? Also, if a notary does decide that the circumstances of the corporate file are such that it must be transferred to a solicitor, does the notary instruct the client to hand over the file to a solicitor? What happens if the client does not do so or refuses to do so? What is the obligation of the notary to ensure the file is transferred to a solicitor? How is the public protected in such event?

If and when a corporate file is transferred by a notary to a solicitor, is the solicitor then not obligated to review the corporate work undertaken by the notary to eliminate or, at the very least, mitigate against the risk of liability – that is, in addition to protecting the client? Inevitably, costs will be added on to those already expended by the client and these added costs are paid for by the public.

If a person is in a position to incorporate a limited liability company and is seeking advice on how to do so, this is not an access to justice issue. A person wishing to run a commercial enterprise usually realizes that the company must have sufficient capital on hand to do basic corporate functions, including the incorporation and maintenance of that company. Additionally, anyone who wishes to incorporate a limited liability company is looking for potentially favourable tax treatment or to limit their risk to exposure to liability. This is not an access to justice issue. This is a voluntary commercial endeavour.

Again, it must be said that to be competent and protect the public, the legal training required is that of a law degree and regulation by the Law Society of British Columbia. The Solicitors’ Committee believes, with respect, that if a notary wishes to give advice to the public on company law, then the notary should go to law school and be licensed by the Law Society of British Columbia to practice law.

Family Law

The Canadian Bar Association BC Branch Family Law Working Group is developing a separate submission on this subject.

SUMMARY OF RECOMMENDATIONS

As a result of the submissions above, the CBABC Solicitors' Practice Issues Committee recommends that:

1. notaries be permitted to join legal firms and perform services under the supervision of a lawyer. If notaries can indeed provide the services at a lower cost, access to justice would be served while protecting public interest. This scenario would also alleviate the issue of the identification and accommodation of complex legal issues. It would enable a notary to pass on a file to a lawyer within the same firm, eliminating the duplication of fees to the public;

2. the Law Society of British Columbia be permitted to regulate notaries. Such regulation will protect the public interest through proper examinations, continuing education, insurance, experience and education requirements;

3. the government provide new legal graduates with incentives to encourage young lawyers to establish practices in rural and remote areas of BC by including lawyers in the loan forgiveness program and forgive student loans after three years of legal practice in a rural community.

During the course of lobbying for expansion of their scope of practice, representatives of the notaries have asserted that their clientele do not want to hire lawyers. The Bar does not accept this assertion but agrees that it should be explored. The Bar has also suggested that lawyers and notaries could work together to co-refer clients and ensure that the right professional is providing the service at an affordable level which also ensures the client is protected from mis-characterization of the issue. These issues must all be further explored and underpin the recommendations made in this submission. Therefore, the Committee's final recommendation is:

4. the Solicitors' Committee and the Society of Notaries Public of British Columbia create a working group of lawyers and notaries to investigate and determine:

   a. whether the public would choose a notary's services over that of a lawyer, after full disclosure of the benefits and risks of such a choice; and

   b. whether the public would be willing to accept the risk of the loss of a law practice in a rural or remote community if notaries' services were expanded.

CONCLUSION

The CBABC Solicitor's Committee welcomes the opportunity to provide further input and dialogue with the Attorney General respecting these submissions.

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THE CANADIAN BAR ASSOCIATION
British Columbia Branch

Submission to

MINISTRY OF ATTORNEY GENERAL

Strategic Planning and Legislation Office

CONSIDERATIONS REGARDING THE PROPOSED CHANGES TO THE SCOPE OF NOTARIAL SERVICES IN FAMILY LAW MATTERS

Issued by:
Family Law working Group
Endorsed by: Executive Committee
Canadian Bar Association
British Columbia Branch
April 3, 2012

Preface

The Canadian Bar Association represents over 38,000 lawyers, judges, scholars, articling and law students nationally. The BC Branch ("CBABC") represents over 6,700 members practicing throughout BC in a wide range of practice areas. The CBABC's purpose includes:

- upholding the rule of law and protecting the independence of the judiciary and the bar
- upholding a fair justice system and contributing to improvements in the administration of justice
- contributing to effective law reform
- promoting the public interest in the administration of justice and delivery of legal services
- enhancing the professional and commercial interests of our members through professional development and communication with partners within the legal system.

The Law Society of British Columbia regulates the legal profession in BC, protecting the public interest in the administration of justice by setting and enforcing the standards of professional conduct for lawyers and articling students.

This submission was prepared in consultation with the Executive of the CBABC and the Family Law Working Group (the "Working Group") of the CBABC. The Working Group's membership includes family law lawyers who are

- the chairs of the seven BC Family Law Sections,
- BC resident members of the National Family Law Section, and
- lawyers who have contributed to law reform with respect to the *Family Law Act*, and the rules for family law practice in both the Provincial Court and Supreme Court of British Columbia.

Submissions

Background

These submissions should be read in conjunction with the CBABC's Briefing Note of October 15, 2010 which was submitted to the Ministry. By way of summary, our conclusions in that submission were:

1. This is an important public issue and the proposed changes have far reaching implications in terms of protection of the public and other issues related to an expansion of services provided by notaries in BC.

2. Any proposal purporting to improve access to justice needs to be carefully scrutinized to ensure that: there is a proven gap in access and/or demand; that the change will achieve the objective of filling that gap; and that any adverse implications of the change are known.

3. The notaries' proposals are undeveloped. In their present form, they raise serious public interest protection concerns and exhibit a lack of understanding of the legal issues involved.

Since the fall of 2010 and continuing through January 2012, the CBABC President has made several attempts to open the lines of communication with the BC Notaries in order to discuss the details of the BC Notaries' proposal for the expanded scope of practice into Family Law and the safeguards proposed to ensure protection of the public. It was the BC Notaries President's position that he could not discuss the details due to a confidentiality agreement with the Government of BC. This position effectively eliminated any opportunity to seek understanding of the issues or work collaboratively to identify changes which would enhance the delivery of legal services in British Columbia.

These submissions should also be read in conjunction with the Submission of the CBABC's Solicitors' Practice Issues Committee dated February 2012 which amply outlined our suggestions for exploring alternatives to improve access to justice and our concerns regarding

- the protection of the public,
- the absence of solicitor-client privilege when services are provided by notaries,
- the negative impact on rural communities, and
- the inherent conflict in notaries self-characterizing "simple" matters.

The submissions on those issues also apply to family law matters.

On March 26, 2012, the Ministry of Justice provided the CBABC with a Brief for the Attorney General dated January 27, 2012. Despite the content of this Brief, the conclusions expressed by the CBABC in October 2010 remain.

Proposal of the Notaries

The notaries' present scope of practice does not include any aspect of family law. Expanding to include services in family law represents a significant and marked departure from limitations on the notaries' scope of practice. Such a significant change requires careful analysis of the need for this change, the protections required to support such a change, and consideration of any adverse implications. We are unaware that anyone has conducted such an analysis.

The BC Notaries' propose to expand their areas of practice into "simple family-relations issues". They offer two examples of such issues:

a) drafting and supervising the execution of pre-nuptial and co-habitation agreements ("Agreements") (subject to conditions); and

b) preparing and filing all documents required for uncontested divorce orders ("Divorce Orders") (subject to conditions).

It is important to note that by using the words "for example" in their proposal, the BC Notaries imply that there may be other family matters which they say are "simple family-relations issues".

There is no element of family law which can be characterized as "simple".

In order to evaluate the examples of Agreements and Divorce Orders as areas in which notaries might provide services, it is necessary to understand what is meant by each.

Agreements

The BC Notaries wish to draft Marriage and Co-habitation Agreements, but not Separation Agreements.

A Marriage Agreement takes effect at the time of marriage or a later date during the marriage, and addresses:

- the ownership and management of property during marriage,

- the division of property at the end of a relationship,
- spousal support in the event of the end of a relationship,
- issues which arise after the death of a spouse, and
- where applicable, guardianship and parenting of children or anticipated inheritances for children of a previous marriage.

Co-habitation Agreements, which are between people who live together in a marriage-like relationship but are not married, address:

- the ownership and management of property during the relationship,
- the division and ownership of property at the end of a relationship,
- spousal support in the event of the end of the relationship,
- issues which arise after the death of a spouse, and
- where applicable, guardianship and parenting of children, or anticipated inheritances for children of a previous marriage.

Divorce Orders

With respect to Divorce Orders, the BC Notaries seek to be able to prepare and file uncontested or joint Divorce Orders. It is unclear whether the notaries wish to complete all parts of the divorce application or simply the divorce order; however we assume it is all parts of the divorce application.

In order to apply for a divorce in British Columbia, a person must file the following documents:

- Registration of Divorce Proceeding Form, and
- Notice of Family Law Claim or Notice of Joint Family Claim.

The Notice of Family Law Claim or Notice of Joint Family Claim may also seek other orders including guardianship, custody, access, division of assets, child support and spousal support ("Corollary Relief"). Issues of Corollary Relief require consideration of the applicable law and the detailed circumstances of the spouses.

A family law proceeding becomes uncontested and eligible for a divorce order without a hearing in any of these circumstances:

- a Notice of Joint Family Claim is used;
- no one responds to the Notice of Family Law Claim;
- all of the Corollary Relief issues sought are settled and the divorce order is uncontested.

Once a family law proceeding is uncontested and the parties seek a divorce order, a person must prepare and file the following documents:

- Requisition requesting a divorce order;
- Affidavit in support of the divorce order;
- Affidavit of personal service of the Notice;
- Requisition requesting search for Response to Family Claim;
- Notice of Withdrawal (when Corollary Relief was opposed and then settled);
- Affidavit with respect to child support (whether settled or not);
- Certificate of the Registrar; and
- Divorce Order.

Family Law Matters Are Complicated, Not Simple

Family law matters are by their very nature complex because of several factors including the length of the relationship, other people who may be affected by the agreement or order, and the legal issues themselves.

Unlike other civil litigation, family law matters can extend for decades from the birth of a child, through the child's education and post-secondary education, through to the receipt of pensions of spouses, and through to the period after a spouse's death. Where the parties to a Marriage Agreement or Co-habitation Agreement are older, perhaps with grown children, the issues facing those parties may also extend for decades and have an impact on the next generation following the death of one of the spouses.

Agreements and Divorce Orders govern the future relationships and the rights and obligations between people other than the spouses who make the Agreement or are

parties to the Divorce Order. Minor children are obviously affected by issues such as guardianship, custody, access and child support. Previous spouses and adult children can be affected by the terms in a Co-habitation Agreement or Marriage Agreement. Future spouses may be affected by the pension or spousal support terms as drafted in a Divorce Order.

The most complicated elements of family law matters are the legal issues themselves.

To make an enforceable agreement about what will happen to assets upon relationship breakdown the parties in many cases require legal knowledge extending to contract, trust, insolvency, income tax, corporate law, as well as a familiarity with the *Family Relations Act* or the new *Family Law Act* and the accompanying *Child Support Guidelines* and *Spousal Support Advisory Guidelines*.

To make an enforceable agreement about what will happen to assets upon relationship breakdown (as would be set out in a Marriage or Co-habitation Agreement), people need to be aware of the law as it pertains to the division of assets and liabilities and in particular the laws regarding reapportionment of these assets. This requires examination of applicable statutes, family circumstances and case law. This requires legal advice from a lawyer.

> **For example**, how do parties know that they have equal assets? What if a party owns a business or has interests in a pension? The valuation of those assets frequently requires the assistance of a business valuator or an economist to determine the value of the asset and the proposed division of assets. That is not a simple matter.

To make an enforceable agreement about spousal support which a party may claim upon relationship breakdown, people need to be aware of the circumstances under which entitlement to spousal support may arise or change including disability, underemployment, the nature of the spousal relationship, etc. This requires examination of the case law. To determine what amount of spousal support might be fair, a person needs advice about how spousal support is calculated and how events such as the division of assets, unemployment or retirement might affect the calculation or how circumstances such as the receipt of child support might affect the calculation. This requires legal advice from a lawyer.

> **For example**, consider two people who wish to enter a co-habitation agreement and have equal assets. They have agreed to divide their assets equally in the event that they separate. They also expect to have children together and wish their agreement to state the expectation that one spouse will stay at home during the first three years of that child's life. They have decided that each party will waive spousal support. Without legal advice about the

factors which govern entitlement to spousal support, this term of the co-habitation agreement may be subject to variation or may be unenforceable.

To make an enforceable agreement about what will happen in the event of the death of a spouse, the people require advice about the *Estate Administration Act* and the *Wills Variation Act*, among others. This requires legal advice from a lawyer.

For Marriage Agreements and Co-habitation Agreements, the more rigid applications of the laws of contract to the challenge of as envisaged by the new *Family Law Act*, and the provisions with respect to the exceptions from equal division under Part 5, all require detailed legal analysis.

Family law lawyers frequently meet new clients who believe they have made an agreement with their spouse only to discover, after receiving legal advice, that the agreement is not enforceable or it is not in their best interests or their children's best interests, and they should renegotiate their agreement or make applications to court to vary those agreements. In such circumstances these individuals are faced with increased conflict, delay and expense which could have been avoided had they received legal advice before making an agreement.

In summary, there are no "simple" family law matters. To suggest otherwise and permit notaries to draft the proposed Agreements and Divorce Orders effectively misleads the public as they will believe that an Agreement or Divorce Order created by a notary public is as effective and fair as one prepared by a lawyer after the benefit of legal advice.

Spouses who wish to have fair and enforceable Agreements about their rights and obligations during their relationship, in the event of the end of the relationship or in the event of the death of one of the parties must have legal advice.

A spouse who wishes to have an "uncontested divorce" and seeks to have a notary prepare and file a Divorce Order must have legal advice to determine if the agreements made for Corollary Relief are fair and enforceable.

Protection of the Public

Without legal advice, people may make agreements or consent to terms in a divorce order that are unenforceable, or grant rights, or impose obligations that are unfair or are not in the best interests of children. It is not in the public interest for notaries to be providing agreements and applying for uncontested divorces as they are not authorized, nor regulated, to provide legal advice.

To expand the scope of practice of the notaries into family law matters as proposed by the BC Notaries amounts to the Province's endorsement of the public making family law agreements and orders without legal advice.

Further, expanding the scope of practice of notaries as proposed misleads the public by representing to them that having professional drafting of an agreement or court order by a notary public is the equivalent of legal advice and a fair and enforceable agreement. It is not.

Without the protection of legal advice on each and every issue contemplated for a Co-habitation or Marriage Agreement or a Divorce Order, the agreements and orders drafted by notaries will increasingly be challenged in court as unenforceable agreements or through applications to vary agreements made without the benefit of legal advice. This will increase the conflict, stress and expense borne by the public.

In order to properly protect the public and increase the public's access to these types of legal services, we propose:

- Notaries may join legal firms and perform services under the supervision of a lawyer. This scenario would also alleviate the issue of the identification and accommodation of complex legal issues, and it would enable a notary to pass on a file to a lawyer within the same firm, eliminating the duplication of fees to the public. A lawyer would provide a spouse with the necessary legal advice, take instructions about the terms of the agreement, and then forward the exercise of drafting and execution to the notary public. This proposal is consistent with the Law Society's recent Rule changes to allow an expansion of the scope of practice of paralegals and articling students working under the supervision of a lawyer.

- Notaries become regulated by the Law Society of British Columbia. Such regulation will protect the public interest through proper oversight examinations, continuing education, insurance, and experience and education requirements as part of the continuum of legal services.