



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

TO THE

LAW SOCIETY OF BRITISH COLUMBIA

LEGAL SERVICES PROVIDERS TASK FORCE

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PREFACE

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

- enhance the professional and commercial interests of our members;
- provide personal and professional development and support for our members;
- protect the independence of the judiciary and the bar;
- promote access to justice;
- promote fair justice systems and practical and effective law reform; and
- promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 38,000 members and the British Columbia Branch itself has over 6,900 members. Our members practice law in many different areas. The CBABC has established 78 different Sections and Forums to provide a focus for lawyers who share similar interests or practice in similar areas and wish to participate in continuing legal education, research and law reform. The CBABC has also established standing committees and special committees from time to time.

This submission was prepared by the CBABC Executive Committee, with the assistance of CBABC Legislation and Law Reform Officer Stuart Rennie.

EXECUTIVE SUMMARY

The CBABC commends the Law Society Task Force for its decision to issue the Interim Report and provide an opportunity for input, but warns that a great majority of the profession has not to date grappled with the significant changes that may arise from a new model of regulation. Further consultation will be required as the nature and scope of what may result becomes clearer.

In developing its submission, the Canadian Bar Association BC Branch consulted with members of Provincial Council and with internal committees and Sections, and reviewed previous CBABC submissions on the issue of scope of practice for notaries public. While many individual comments were compiled, the CBABC submission focusses on key themes among those comments:

1. There are four foundational values that must be considered in decisions about making any changes to the regulation of legal service providers:
 - a. Independence of the Bar -- In essence, independence of the bar is critical to protect, and regulation through self-governance is a key element of independence of the bar.
 - b. Access to Justice – The bar has a leadership role to play in supporting innovations and improvements that increase access to justice, and coordinated steps involving other legal services providers could also play a significant role.
 - c. Effective Regulation – The Law Society of BC has historically proved an effective regulator of lawyers, and any changes must not diminish its ability to perform its role in ensuring the independence, integrity, honour and competence of BC lawyers.
 - d. Clarity of Roles – Any changes to regulatory structure must protect against public confusion about the types and limitations of services provided by any particular legal service provider.
2. There are both advantages and disadvantages in terms of the public interest implications of the Law Society becoming the single regulator of “all” legal service providers. For example, advantages include consistency in setting standards, regulation, discipline, insurance and educational requirements, with a resulting potential for reduced risk of liability. Examples of disadvantages include potential difficulty for one regulator to deal with conflict between different legal services providers, and the risk of confusion amongst the public about the distinct roles of each provider.
3. In terms of who should be regulated, the CBABC submits that regulation should focus on the function that a service provider is fulfilling, not the service provider’s title. Any service provider providing legal services under the supervision of a lawyer may not need additional regulation. The need for and scope of any additional regulation should be tied to the ability of a service provider to act independently and without the supervision of a lawyer, applying the service provider’s own training and judgment.

4. If the scope of regulation by the Law Society is to be increased, then notaries would be a logical addition. Paralegals, to the extent that they may be allowed to act independently, should be regulated to ensure education and training, competency, and insurance. Other groups that might be considered – to the extent that they provide what amounts to legal services without the supervision of a lawyer – include mediators and tax accountants.
5. In general, a uniform and consistent approach by one regulator could provide a model that ensures the quality of legal services and reduce the risk of liability. The disadvantages would require mitigation, and any resulting single regulator structure would need to ensure preservation of an independent bar. Further consultation is required as the potential model is developed.

SUBMISSIONS

Introduction

In July 2013, Law Society of British Columbia Legal Services Providers Task Force (the “Task Force”) released its Interim Report to the Benchers of the Law Society (the “Interim Report” The Task Force’s mandate is “to consider whether the Law Society ought to regulate only lawyers in British Columbia or whether it should regulate other legal service providers”. In considering this issue, the Task Force was directed to focus on the public interest and, in particular, access to law-related services for the public.).¹

The Task Force chose to focus on whether the Law Society should regulate notaries, paralegals and potentially other categories of similar service providers. The Task Force also considered that if an expanded regulatory role was to occur, future expansion might be possible if the public interest required it.² The Task Force’s work at this point does not include consideration of regulation of accountants or immigration consultants, although it is of the view that discussions with respect to these professions should take place at some future date.

The Interim Report was released on July 12, 2013. It recommended that consultation take place with various groups, including the CBA. To facilitate the consultation, a set of consultation questions was prepared.³ The substantive questions raised can be summarized as follows:

- a) Is it in the public interest for the Law Society to regulate “all” legal service providers? Why or why not?
- b) Who should the Law Society regulate? On what basis are legal service providers included or excluded in the scope of that regulation?
- c) Does a single regulator model give the public greater choice, quality of service, or protection?

The Task Force is scheduled to provide its final report to the Law Society by December 2013. The CBABC’s submissions are made in response to the Task Force’s call for input.

¹ Page 3 Available at: http://www.lawsociety.bc.ca/docs/publications/reports/LegalServicesProvidersTF_2013.pdf.

² Page 4, *supra*.

³ Page 18, *supra*.

Background

In 2010, the Society of Notaries Public of British Columbia requested the BC government to enact legislation to expand the scope of notarial services. On October, 15, 2010, the CBABC made a submission to the BC government that recommended:

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.⁴

In 2012, the CBABC Solicitors' Practice Issues Committee (the "Solicitors' Practice Committee") studied the issue of expanded notarial services, especially for family law, estate planning and administration and incorporating companies. The Solicitors' Practice Committee is a standing committee of the CBABC that identifies, monitors and analyzes issues of significance to solicitors' practice. Its submission to the BC government, made in February 2012, expressed concerns about the protection of the public and access to justice issues if notarial services were expanded, and concluded that the Law Society should regulate notaries and that notaries should be permitted to join legal firms and perform services under the supervision of a lawyer.⁵

On April 2, 2012, the CBABC made a submission to the BC government in response to the notaries' proposal to expand their scope of practice into further incorporation, estate administration, and family law areas. That submission incorporated the February 2012 submission made by the Solicitors' Practice Committee as well as a subsequent submission prepared by the CBABC's Family Law Working Group.⁶ One of the recommendations contained in the CBABC Submission was that the Law Society of British Columbia be permitted to regulate notaries.⁷

⁴ Page 4 of Briefing Note (October 15, 2010) attached to the CBABC's Notarial Services Submission at note 6.

⁵ Page 26 of Submissions regarding the Proposed Changes to the Scope of Notarial Services in BC (February 2012) (http://www.cba.org/BC/Initiatives/pdf/2012_Notaries_Submission.pdf).

⁶ Submissions for Considerations regarding the Proposed Changes to the Scope of Notarial Services in Family Law Matters (April 2012) (http://www.cba.org/BC/Initiatives/pdf/Notaries_CBABC_Family_Working_Group_Submission.pdf).(the "CBABC's Notarial Services Submission").

⁷ Page 4 of Briefing Note attached to the CBABC's Notarial Services Submission.

The BC government has not, to date, made any changes to the scope of notaries practice. It has, however, indicated that it is awaiting the results of the Task Force before considering how to respond to the notaries' request.

Task Force Consultation Process

The CBABC commends the Task Force on its decision to issue the Interim Report and provide an opportunity for members of the legal profession, other legal service providers and the public as a whole to provide input on the issues raised in the report.

Unfortunately, the steps taken to date have not succeeded in generating significant response. The changes that may flow from the final report of the Task Force have the potential to significantly impact on the practice of law in British Columbia. However, the great majority of the profession has not to date grappled with the significant changes that may arise and we do not have a clear picture of what members of the profession think.

Of course, the report of the Task Force is interim in nature and sets out issues for discussion rather than concrete proposals for change. The CBABC encourages the Task Force to provide opportunities for further consultation as the thinking of the Task Force evolves, and as the nature and scope of what may result becomes more clear.

CBABC Consultation

To inform this submission, the CBABC has consulted internally with the members of the CBABC Provincial Council, and with internal committees and Sections. In particular, the Government Relations Committee and the Business of Law Committee have provided valuable input. The CBABC also has the benefit of previous submissions prepared by the Solicitors' Practice Committee and Family Law Working Group, as noted above.

The responses received contained a wide variety of thoughts and perspectives. This submission will not include all individual viewpoints but will attempt to develop themes that resulted from the consultation.

Foundational Comments

Before discussing the specific issues raised by the Task Force in this consultation, there are four foundational values that should be considered in the review of any proposal for changes to the organization and scope of regulation by the Law Society.

a) Independence of the Bar

The importance and constitutional significance of the independence of the bar was recently discussed by Hinkson JA in *Federation of Law Societies of Canada v. Canada (Attorney General)*.⁸ Hinkson JA concluded that the independence of the bar is a principle of fundamental justice, commenting as follows:

The independence of the Bar is fundamental to the way in which the legal system ought fairly to operate. The importance of the independence of the Bar has long been recognized as a fundamental feature of a free and democratic society. [Citing Estey J from 1982⁹]:

The independence of the bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.

⁸ 2013 BCCA 147 at paras. 105-114 (<http://courts.gov.bc.ca/jdb-txt/CA/13/01/2013BCCA0147cor2.html>).

⁹ *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 at 335–336. (<http://canlii.org/en/ca/scc/doc/1982/1982canlii29/1982canlii29.html>).

[And citing a more recent judgment of Iacobucci J. from 1991¹⁰]:

Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state. [Emphasis added.]

The independence of the Bar is also an integral part of Canadian society as a whole. [Referring to a 1993 judgment of McEachern CJBC¹¹]:

One of the great and often unrecognized strengths of Canadian society is the existence of an independent bar. Because of that independence, lawyers are available to represent popular and unpopular interests, and to stand fearlessly between the state and its citizens.

This view was echoed in *Finney v. Barreau du Québec*,¹² where LeBel J. commented that “[a]n independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society.”

The independence of the Bar has also been asserted as an element of the rule of law which is essential to the constitution of a modern democracy . . . ,¹³

Scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be.

¹⁰ *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 887. (<http://canlii.org/en/ca/scc/doc/1991/1991canlii26/1991canlii26.pdf>).

¹¹ *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)* (1993), 85 B.C.L.R. (2d) 85 at para. 53 (C.A.). (<http://canlii.org/en/bc/bcca/doc/1993/1993canlii1366/1993canlii1366.pdf>).

¹² 2004 SCC 36, [2004] 2 S.C.R. 17 at 1 (<http://canlii.org/en/ca/scc/doc/2004/2004scc36/2004scc36.pdf>).

¹³ As expressed by Lord Bingham in his book *The Rule of Law* (London: Allen Lane, 2010) at pp. 92–93.

The independence of the bar is a fundamental principle that has stood for centuries. It includes values that are at the core of the legal profession, including independence, loyalty to client and confidentiality. It must be a measuring stick against which any changes to the regulation of the legal profession are considered. And, as noted in the quotation from Estey J., independence of regulation – which has traditionally taken the form of self-governance – is a key element of the independence of the bar.

b) Access to Justice

Both the CBA and the Law Society of British Columbia have a long-standing commitment to finding ways to improve effective access to legal services. Two recent reports highlight the current trends in efforts to improve access to justice across Canada, and may have relevance to the matters under consideration by the Task Force.

In August 2013, the national CBA released its report *Reaching Equal Justice: An Invitation To Envision And Act*.¹⁴ One equal justice strategy recommended is the provision of team delivery of legal services:

Recognizing the value of a continuum of legal services approach means recognizing the importance of increased diversity and specialization among legal service providers and enhanced capacity to provide comprehensive, cost-efficient services through teams of lawyers, other legal service providers (like paralegals) and providers of related services (like social workers). Teams can deliver more comprehensive and holistic services tailored to people's needs. There is a growing consensus that this is a positive way forward, providing more affordable services to clients and adequate income to lawyers.¹⁵

In October 2013, the Action Committee on Access to Justice in Civil and Family Matters released its report, *Access To Civil & Family Justice: A Roadmap for Change*.¹⁶ Established by Chief Justice McLachlin of the Supreme Court of Canada, the Action Committee contained representation from various sectors of the civil and family justice system as well as the public.¹⁷

¹⁴ See http://www.cba.org/CBA/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf.

¹⁵ Page 27, *supra*.

¹⁶ See http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf.

¹⁷ Page v, *supra*.

In its report, the Action Committee calls for essential legal services to be made available to everyone by 2018.¹⁸ To meet this goal, the Action Committee suggests that:¹⁹

Innovations are needed in the way we provide essential legal services in order to make them available to everyone.

Specific innovations and improvements that should be considered and potentially developed include: . . .

- alternative business and delivery models;
- increased opportunities for paralegal services;
- increased legal information services by lawyers and qualified non-lawyers; . . .

The Action Committee recommends that the legal profession, including the CBA, “take a leadership role in this important innovation process”.²⁰

c) Effective Regulation

The Law Society is an effective regulator of lawyers in British Columbia, protecting the public interest in the administration of justice by setting and enforcing standards of competence and professional conduct for lawyers and ensuring that those who obtain the assistance of lawyers and enter upon dealings with them are adequately protected through mandatory insurance programs. It ensures the independence, integrity, honour and competence of lawyers serving the public within British Columbia.

These are important functions of a regulatory body like the Law Society, and any changes to the nature and extent of its regulatory function should ensure that its ability to perform these important functions is preserved.

¹⁸ Page 14, *supra*.

¹⁹ *Ibid*.

²⁰ *Ibid*.

d) Clarity of Roles

Any steps that would bring multiple groups of legal service providers together bring with them risk of confusion in the minds of members of the public as to what sort of legal services it should be seeking from what groups of providers. It will be important that any changes to the structure of the Law Society ensure that the risks of such confusion will be minimized.

Task Force Consultation Questions

a) Is it in the public interest for the Law Society to regulate “all” legal service providers? Why or why not?

The Law Society has expertise and resources in the governance of the largest group of legal service providers (i.e. lawyers). There is no reason to think that the Law Society would not be able to appropriately expand its footnoscope to additional legal service providers.

Those who participated in the CBABC consultations identified a number of advantages and a number of disadvantages to having the Law Society regulate all legal service providers. The advantages that were identified include:

- a simplified complaints process;
- consistency in:
 - ethical standards and obligations;
 - regulation;
 - discipline;
 - professional insurance;
 - educational standards, programs and qualifications;
- as a result, a potential for reduced risk of liability;
- a common approach for all types of legal service providers to:

- accreditation of education providers;
- practical training and examination; and
- continuing education requirements;
- increased legal service options;
- facilitation of communication between the legal service providers;
- would allow other legal service providers to benefit from the increased legal training and practice of lawyers;
- better guarantees of legal service quality;
- increased public trust if regulator represents all legal service providers, not just lawyers;
- increased competition may reduce the cost of legal services; and
- cost efficiency that would potentially flow from moving from multiple regulators to one single regulator.

Considering specifically the question of changes to the scope of practice for any particular group of legal service providers, any proposals for adjustment could be reviewed by a body with intimate knowledge of the requirements of practice and the ability to specify and enforce educational requirements. That body would be charged to act in the public interest in deciding such matters and have representation and input from involved legal or quasi-legal professionals.

The disadvantages to a single regulatory body that were identified include:

- the governance structure of the Law Society may have to be significantly changed to include other legal service providers;
- it may be difficult for one regulator to deal with conflict between the different legal service providers;
- it may be difficult for non-lawyers involved in governance to fully appreciate some issues affecting lawyers;

- it may be difficult to maintain the same quality of regulation as currently exists within the Law Society;
- may affect the scope of self-regulation by lawyers, lead to a dilution of the core values of the legal profession, and negatively impact on the independence of the bar – the idea of lumping lawyers, notaries and paralegals together overlooks the unique role of lawyers as being independent and officers of the Court;
- may lead to confusion by the public of the distinction between lawyers and other legal service providers;
- it may be difficult to structure a governing body in a way that satisfies the interests and needs of lawyers and other legal service providers;
- may affect market share for lawyers and therefore affect the economics of practicing law and therefore access to lawyers, particularly in rural areas;
- increased role for and duties of other legal service providers may negatively impact the opportunities for articling students;
- potential increased liability to Law Society to add notaries, paralegals and other law service providers with the potential for increased costs for lawyers; and
- may increase the costs for paralegal or notary services which could have a negative impact on the overall cost of legal services and thus on access.

As these lists make clear, there are both advantages and disadvantages to having a single regulator.

While there are concerns about quality and liability, we are of the view that a uniform and consistent approach by one regulator – including professional insurance, developing educational standards or programs, accrediting education providers, offering practical training and examination similar, and continuing education designed for the specific qualifications of the legal service provider – could provide a model that ensures the quality of legal services and reduces the risk of liability.

The Interim Report does not discuss specific options for the structure of a legal regulator. As a result, commentary on any potential models is beyond the scope of this submission. However, it would seem clear that any structural model would have to provide an appropriate role for notaries, paralegals or any other groups to be regulated by the Law Society. At the same time, that structure would need to ensure preservation of an independent bar. Those goals need not necessarily conflict – and it may be that other legal service providers who are to be regulated by the Law Society would find advantage in the nature of the Law Society as an independent, self-regulatory body.

As the discussion of advantages and disadvantages also makes clear, any structural model would have to ensure that appropriate steps were taken to ensure that members of the public were not confused as to the nature and limitations of the services that any particular legal service provider was qualified and authorized to provide.

As well, the structure would need to have appropriate systems in place to resolve any disputes between different groups of service providers fairly and appropriately.

More detailed commentary on all of these issues will await more concrete proposals as to the structures to be put in place.

b) Who should the Law Society regulate? On what basis are legal service providers included or excluded in the scope of that regulation?

The CBABC recommends that some basic criteria be established to determine whether and to what extent a legal service provider should be regulated by the Law Society.

In that regard, one key question is whether there is really a need for the regulation of service providers who work within a law firm at all times under the direct supervision of a lawyer. The reality is that support staff such as paralegals, clerks, legal assistants, etc., have been providing services for the benefit of clients but under the supervision of lawyers for centuries without any need for regulation. A focus on the function the legal service provider is fulfilling, and the manner in which that function is fulfilled, is recommended over a focus on the title.

As a result, it is suggested that the need for and scope of regulation of any particular group of service providers should be tied to the ability of that service provider to act independently and without the supervision of a lawyer in the provision of legal services, applying the service provider's own training and judgment.

That independence need not always be exercised through a separate business unit from a law firm – but the ability to act independently should be a hallmark of the need for regulation.

Notaries

If the scope of regulation of the Law Society is to be increased, then notaries are probably the most obvious group to be included within the scope of such regulation. Notaries have traditionally operated independent offices and have provided legal services that, although limited in scope, are comparable to some of the services provided by lawyers.

Paralegals

The term “paralegal” is one that is used in many different ways by different people. Many long-time legal office staff consider themselves to be paralegals who feel comfortable working in a particular area through long experience even absent any training. Others have taken formal training and have paralegal certifications in place.

The general principles outlined above – that regulation of a group should be required only where necessary due to that group having an ability to act independently – should apply to paralegals. If certain paralegals are to have the authority to provide legal services outside of the direct supervision of a lawyer, then there would obviously have to be requirements in place for education and training, specific areas of practice in which that education and training is deemed to qualify the paralegal to work, and insurance in place in the event of any errors or omissions.

Other Groups

There are many other groups that could potentially be considered for regulation by the Law Society in the event it was to consider expansion of its regulatory scope to other service providers. In reviewing the potential to include any such service providers, the comments above about independent action should be considered.

One group worthy of consideration is mediators. Expanding regulation to mediators would allow the development of uniform and consistent rules and standards for certain legal service functions – such as the drafting of settlement agreements – which in turn would be in the public interest.

Another group that could be considered is tax accountants. The current practice of many tax accountants is difficult if not impossible to distinguish from providing legal advice or practicing tax law. The boundaries are fuzzy, to say the least, and the implications for the client in the event of error can be significant.

In fact, it is arguable that a new approach to regulating legal services would also create an opportunity to take a more uniform approach to protecting the public interest in respect of providing such services.

c) Does a single regulator model give the public greater choice, quality of service, or protection?

It is difficult to respond to this question without better understanding of the model that is proposed.

Generally speaking, the commentary in the reports on access to justice issues emphasizes the possible benefit to access to justice of increased roles for other legal services providers. As well, in theory permitting more vigorous competition and stronger market forces to find new ways to give access to legal services within a revised regulatory framework, while still embracing certain core values, should be considered as part of any regulatory reform. The experience in Ontario, noted in paragraph 41 of the report of the Task Force, is an example of a regulatory reform that has worked well.

At the same time, the increased regulatory burden of compliance with Law Society standards – including educational and insurance requirements – could make the costs of alternative service providers more expensive even while improving quality of service and protection.

So the best answer that can be given at present to this question is that, in theory, a single regulator model could have the benefits identified. The CBABC looks forward to providing further input on this topic once more information is available as to potential regulatory models.

SUMMARY OF RECOMMENDATIONS

In these Submissions, the CBABC has made the following recommendations:

RECOMMENDATION #1:

Given the magnitude of the changes to the legal profession that may result from the work of the Task Force, the very preliminary state of the Interim Report, and the fact that the steps taken to date in the consultation process have not engaged many members of the profession, the CBABC recommends that the Task Force provide opportunities for further consultation as the thinking of the Task Force evolves and as the nature and scope of what may result becomes more clear.

RECOMMENDATION #2:

The CBABC recommends that, in considering proposals for changes to the regulation of the legal profession in British Columbia, the Task Force and Law Society should keep in mind certain foundational principles, including:

- a) the importance of the independence of the bar as a fundamental feature of a free and democratic society; the role that a strong independent self-regulatory agency plays in the independence of the bar; and the importance of preserving values that are at the core of legal profession including independence, loyalty to client and confidentiality;
- b) the importance of improving access to justice, including the capacity of legal service providers to supply comprehensive, cost-efficient and innovative services;
- c) the importance of ensuring an effective regulator that properly protects the public interest by setting and enforcing standards of professional conduct, mandating adequate insurance programs, and ensuring the independence, integrity, honour and competence of lawyers serving the public within British Columbia;
- d) the importance of avoiding confusion in the minds of members of the public as to what legal services they should be seeking from what sorts of service providers.

RECOMMENDATION #3:

The CBABC recommends that, in considering whether specific groups of legal service providers should be regulated by the Law Society, the Task Force establish and apply criteria. In respect thereof, the Task Force should consider the function the legal service provider is fulfilling and the manner in which that function is fulfilled, and in particular whether the legal service provider is acting independently and exercising independent judgment, or is working under the direct supervision of a lawyer. For groups that work only under the direct supervision of a lawyer, additional regulation by the Law Society may not be necessary.

CONCLUSION

The CBABC is pleased to make these submissions in this important area that interweaves professional services, protection of the public and access to justice.

We look forward to discussing these important matters further, and to providing further input as the thinking of the Task Force evolves.

Communications in this regard can be directed to:

ALEX SHORTEN
CBABC Vice-President
Barrister & Solicitor
#270-1075 West Georgia Street
Vancouver, B.C. V6E 3C9
T- 604 664 7648
C-778 847 4699
E-mail- ashorten@alexshorten.com