



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

TO THE

LAW SOCIETY OF BC

REGARDING THE

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

Issued by:

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

PREFACE

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

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

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

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

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

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

SUBMISSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(emphasis added)

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

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

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

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

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

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

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

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

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

CONCLUSION

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

All of which is respectfully submitted,

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