



**SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION  
(BRITISH COLUMBIA BRANCH)  
FAMILY LAW WORKING GROUP**

TO THE

**LAW SOCIETY OF BC**

REGARDING THE

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

Issued by:

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

## Table of Contents

<b>PREFACE</b> .....	<b>3</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>5</b>
<b>SUBMISSIONS</b> .....	<b>9</b>
ACCESS TO JUSTICE .....	10
WHAT IS THE SOLUTION? .....	11
LEGAL AID .....	12
NO COMPELLING EVIDENCE TO SUPPORT THE LAW SOCIETY’S PROPOSAL .....	13
IMPACT ON THE PUBLIC .....	16
ALTERNATE LEGAL SERVICE PROVIDERS WILL GIVE PUBLIC A FALSE SENSE OF SECURITY .....	16
NON-LAWYERS DO NOT PROVIDE SERVICES AT LOWER COSTS THAN LAWYERS .....	18
THERE ARE NO “SIMPLE” FAMILY LAW FILES .....	20
IS IT BETTER TO HAVE SOME REPRESENTATION INSTEAD OF NOTHING AT ALL? .....	26
FAMILY VIOLENCE .....	27
USE OF THE FAMILY LAW ALTERNATE LEGAL SERVICE PROVIDERS DEVALUES FAMILY LAW .....	28
FAMILY LAW PARALEGALS IN OTHER JURISDICTIONS .....	29
KEY DIFFERENCES BETWEEN LAW SOCIETY’S PROPOSAL AND OTHER JURISDICTIONS .....	35
CBABC FAMILY LAW WORKING GROUP’S RECOMMENDATIONS .....	37
<b>CONCLUSION</b> .....	<b>43</b>

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

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

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

CBABC Family Law Working Group members are:

**Fraser Valley**

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

**Kamloops**

- David Dundee, Chair

**Nanaimo**

- Erin Brook, Chair

**Okanagan**

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

**Vancouver**

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

**Victoria**

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

**Westminster**

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

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

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

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

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

## **EXECUTIVE SUMMARY**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



## SUBMISSIONS

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

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

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

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

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

### **Access to Justice**

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

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

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

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

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

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

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

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

### **What is the Solution?**

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

---

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

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

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

It is my respectful opinion, after giving this matter a great deal of thought, that though the decision to create this new category is clearly well-intentioned, it is wrong. Moving forward with it creates significant inequality concerns generally. It also has a disproportionate adverse impact on the protection of and advancement of the constitutional rights, including the substantive equality rights, of woman and children. It detracts from, rather than supports, the meaningful pursuit of justice, not just access, for all British Columbians.<sup>3</sup>

## **Legal Aid**

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

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

---

<sup>3</sup> “Consultation Paper - September 2018: Law Society Alternate Legal Service Providers Working Group” (November 26, 2018), page 1, [https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/Consultation-feedback\\_2018-11-30.pdf](https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/Consultation-feedback_2018-11-30.pdf)

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

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

### **No Compelling Evidence to Support the Law Society's Proposal**

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

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

---

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

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

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

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

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

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

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

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

---

<sup>5</sup> CBABC Position Paper Regarding Access To Justice (June 19, 2015), <https://cbabc.org/Our-Work/Advocacy/Notaries-Update-Expanded-Scope-of-Practice>. See also, Notaries Update (September 2015), [https://cbabc.org/CBAMediaLibrary/cba\\_bc/pdf/Advocacy/CBABC\\_Notaries\\_Update\\_Sept\\_2015.pdf](https://cbabc.org/CBAMediaLibrary/cba_bc/pdf/Advocacy/CBABC_Notaries_Update_Sept_2015.pdf) and Notaries Submission (April 3, 2012), <https://bit.ly/2Li2BTh>

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

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

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

---

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

## **Impact on the Public**

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

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

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

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



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

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

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

---

<sup>7</sup> Response to Public Consultation:

Expanding Legal Services Options for Ontario Families (April 29, 2016), page 5, [https://advocates.ca/Upload/Files/PDF/Advocacy/Submissions/FamilyLaw/Letter\\_from\\_TAS\\_to\\_Justice\\_Bonkalo-April\\_29\\_2016.pdf](https://advocates.ca/Upload/Files/PDF/Advocacy/Submissions/FamilyLaw/Letter_from_TAS_to_Justice_Bonkalo-April_29_2016.pdf)

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

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

#### Fees Charged

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

#### Charges for Specific Family Law Work

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

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

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

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

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

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

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

---

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

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

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

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

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

### **There are No "Simple" Family Law Files**

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

---

<sup>9</sup> Response to Public Consultation: Expanding Legal Services Options for Ontario Families (April 29, 2016), page 5, [https://advocates.ca/Upload/Files/PDF/Advocacy/Submissions/FamilyLaw/Letter\\_from\\_TAS\\_to\\_Justice\\_Bonkalo-April\\_29\\_2016.pdf](https://advocates.ca/Upload/Files/PDF/Advocacy/Submissions/FamilyLaw/Letter_from_TAS_to_Justice_Bonkalo-April_29_2016.pdf)

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

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

### *Division of Property*

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

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

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

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

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

### *Forms and Pleadings*

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

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

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

---

<sup>10</sup> Consultation Paper, page 9.

- Financial Statement (F8).

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

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

#### *Child support*

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

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

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

---

<sup>11</sup> *Supra*, pages 11-12.

<sup>12</sup> *Supra*, page 15.

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

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

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

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



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

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

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

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

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

---

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

<sup>14</sup> *Supra* at para. 1.

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

The Law Society's Consultation Paper seeks to create "options for the provision of legal services at a lower cost aims at reaching at least a portion of those who are currently seeking no advice at all."<sup>15</sup> The implication from this statement raises the question: is it better to have some representation from a family law alternate legal service provider instead of no representation at all? The Advocates' Society, in its submission to the Ontario government's Family Legal Services Review, considered this question and responded with a resounding no. The Advocates' Society's reasons are applicable to the Law Society's Consultation Paper.<sup>16</sup>

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

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

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

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

---

<sup>15</sup> Consultation Paper, page 3.

<sup>16</sup> Response to Public Consultation: Expanding Legal Services Options for Ontario Families (April 29, 2016), pages 8 to 11, [https://advocates.ca/Upload/Files/PDF/Advocacy/Submissions/FamilyLaw/Letter\\_from\\_TAS\\_to\\_Justice\\_Bonkalo-April\\_29\\_2016.pdf](https://advocates.ca/Upload/Files/PDF/Advocacy/Submissions/FamilyLaw/Letter_from_TAS_to_Justice_Bonkalo-April_29_2016.pdf)

<sup>17</sup> *Supra* at page 9.

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

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

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

## **Family Violence**

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

“family violence” includes

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

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

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

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

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

create a lesser level of service provider for family law - is that family law is viewed by the Law Society differently from other areas of law, minimizing its importance. Yet it is an area of law in which the rights and interests of women and children are most often at stake.<sup>18</sup>

---

<sup>18</sup> “Consultation Paper - September 2018: Law Society Alternate Legal Service Providers Working Group” (November 26, 2018), page 3, [https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/Consultation-feedback\\_2018-11-30.pdf](https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/Consultation-feedback_2018-11-30.pdf)

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

creates significant equality and other access to justice concerns for women and children; an unintended side effect will no doubt be a further devaluation of family law as a legitimate area of study at law schools and as a desirable area of practice by lawyers.<sup>19</sup>

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

### **Family Law Paralegals in Other Jurisdictions**

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

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

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

---

<sup>19</sup> "British Columbia Legal Aid Consultation Comment (November 26, 2018), page 6, [https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/Consultation-feedback\\_2018-11-30.pdf](https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/Consultation-feedback_2018-11-30.pdf)

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

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

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

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

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

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

The Newfoundland and Labrador Court of Appeal Rules<sup>24</sup> and the Alberta Rules of Court<sup>25</sup> contemplate McKenzie Friends providing passive assistance to litigants.

---

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

<sup>21</sup> *Supra* at para 19.

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

<sup>23</sup> *Supra* at para. 122.

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

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

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

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

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

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

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

---

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



Among other things, the Report stated:

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

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

---

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

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

Among other observations, the Report notes:

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

---

<sup>29</sup> *Supra* at page 6.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Supra* at page 7.

<sup>32</sup> *Ibid.*

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

The VSB's rationale was that:

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

The VSB opted instead to recommend:

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

### **Key Differences Between Law Society's Proposal and Other Jurisdictions**

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

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

---

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

<sup>34</sup> *Supra* at page 22.

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

## **CBABC Family Law Working Group's Recommendations**

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

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

### a) Legal Aid

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

### b) Unbundled Services

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

In August 2018, J.P. Boyd, of the Canadian Research Institute for Law and the Family released a research report, Client and Lawyer Satisfaction with Unbundled Legal Services: Conclusions from the Alberta Limited Legal Services Project<sup>35</sup> with data that show:

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

---

<sup>35</sup> See <https://bit.ly/2N0jGnP>

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

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

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

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

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

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

---

<sup>36</sup> Pages 63-64.

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

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

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

---

<sup>37</sup> See <http://canlii.ca/t/gxcsg>



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

c) Neutral Case Evaluation

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

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

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

---

<sup>38</sup> [Access To Civil & Family Justice A Roadmap For Change](#) at pages 11-12 and 17.

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

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

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

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

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

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

## CONCLUSION

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

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

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

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

---

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

<sup>41</sup> Resolution 3 passed, with 861 in favour, 297 against and 62 abstentions.

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

All of which is respectfully submitted.

Sincerely,



ANGELA DUNN

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



STEPHEN MCPHEE, QC

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

## **Appendix A**

### **Questions to be Answered**

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

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

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

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

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

END