LEEAKAZAKI

AN OPEN MIND : ABOUT CANADIAN LAW & PROFESSIONALISM

How origins of ABS in U.K. and Australian Law differ from Canada

by LEEAKAZAKI (HTTP://LEEAKAZAKI.COM/AUTHOR/LEEAKAZAKI/)

"Everything you want to know about ABS but are afraid to ask." That is the name of the panel discussion (http://www.cba.org/cba/midwinter/pdf/2015-M-W-Council-Agenda.pdf) at the Mid-Winter Meeting of the Canadian Bar Association (CBA) on February 21, in which CBA has asked me to represent a skeptic's perspective on the Alternative Business Structures (ABS) recommendations of the CBA Futures Committee.

As a backgrounder, I offer this historical perspective of ABS in the United Kingdom, with one eye on the Australian experience. As the topic name suggests, I have focused only on the "but are *afraid* to ask" part of this topic. The task, to some extent, invites some necessary fear-mongering for which I apologize in advance. But if you choose to read on, I simply respond: *You did ask*.*

At issue is the lead recommendation of the report of the CBA Futures Committee: *Transforming the Delivery of Legal Services in Canada (http://www.cbafutures.org/The-Reports/Futures-Transforming-the-Delivery-of-Legal-Service)*. Labelled "Flexibility in Business Structures," Recommendation #1 of the report is in fact a packaged slogan containing Recommendation #4 (ABS), and #5 (Fee-sharing with Referral Fees to Non-Lawyers). The authors unabashedly advocate a future of the practice of law in which:

> 1. ***Lawyers should be allowed to practise in business structures that permit fee-sharing, multidisciplinary practice, and ownership, management, and investment by persons other than lawyers or other regulated legal professionals.***

Proponents of this recommendation favour emulation of similar easing of the bar's monopoly on legal services in other jurisdictions, notably the U.K. and Australia. One of the recurrent arguments is that ABS has landed on those shores and the sky has not fallen. When I read the above recommendation, it was not the future I sensed. It was, rather, a feeling of *déjà vu*. Having followed the U.K. bar's implosion in the last few decades, to the point of the loss of self-regulation in 2007, I knew the sky had already fallen.

You may think British lawyers are all closet anarchists like Rumpole or other caricatures shown on TV, but the real modern-day denizens of Pomeroy's Wine Bar are answerable to a government regulator because the British people considered the bar no longer capable of governing itself. In the U.K., the break-up of the bar's monopoly came from loss of the bar's independence, not the other way around.

In fairness, the subtext of the CBA Futures white paper appears to be that if the bar in Canada embraced the U.K. or Australian model of legal practice reform, we might inoculate ourselves from the turmoil in those jurisdictions in the last decade. The report portrays the Canadian legal profession of today as a cranky anachronism, like Rip Van Winkle (http://en.wikipedia.org/wiki/Rip_Van_Winkle), the fictional British North-American colonial who slept through the American Revolution.

Canadian lawyers, possibly unique as the only truly self-regulating bar,** have a chance to turn ourselves around *before* change that is not of our choosing is forced upon us. We have started to talk about reform and innovation while we still have some control over our destiny.

THE BRITISH COMPENSATION CULTURE AND THE DEMISE OF LAWYER SELF-REGULATION

Before any discussion of the reforms of the U.K. legal profession in 2001-07, we have to recognize the decision to strip lawyers of self-regulation and to open the legal services sector to non-lawyers did not occur on a whim.

Followers of the legal profession in the U.K. during the 1990's witnessed plummeting public image of lawyers at the same time as the rise of a "Compensation Culture," a meme passing between Conservative supporters who blamed insurance and benefits fraudsters and Labour supporters who called it a legacy of the class divisions fomented during the Thatcher years. No matter the politics, both sides spared no deference to lawyers, both barristers and solicitors, and indeed portrayed them in unflattering roles within the feeding chain.

A major culprit was the advent of commercial entities called Claims Management Companies (CMC), virtually unknown in Canada. Varying in sophistication, CMC's ranged from fly-by-night operations to large concerns employing advertisers, telemarketers and clerks. Some relied on passive advertising such as an ad in a taxicab saying "Injured in an accident? Call CMC Co.'s freephone number today!" Others established networks of repair garages, medical providers and other accident responders to supply them with leads. Still others cold-called residents of economically depressed neighbourhoods and recruited claimants with little or no regard to the veracity of injury complaints. Depending on the size of the outfit, CMC's would sell the information, either individually as briefs, or in bulk, to firms of solicitors.

This market in injury compensation cases drew negative attention to lawyers from two ends. Law-abiding citizens saw lawyers profiting from insurance and public benefits litigation funded by insurance premiums and tax revenues. Legitimate injury victims were drawn into a marketing scheme that had commoditized their hurt and loss and provided inconsistent levels of customer service. More than the already difficult public relations of lawyer involvement in major corporate and investment scandals, it was retail law, particularly personal injury, which brought matters to a head. Lawyers became the target of complaints from insurers who complained of 'ambulance chasers' and of claimants who could not understand why so much of their recoveries went to pay lawyers and CMC referral fees.

As the responder to complaints, the Law Society of England and Wales wore two hats. As bar association, it fended off public outrage rather ineptly. As bar regulator, it handled client complaints in a complex, outdated procedure that looked like it was meant to protect solicitors from the consequences of providing bad service. As public goodwill ebbed, complaints of bad service and an unresponsive regulator made lawyers the target of the tabloid press. In hindsight, the bar was weak, greedy and ripe for the picking when the politicians seized the file.

HISTORY OF ABS IN THE UK IN ABOUT 8½ PARAGRAPHS

The above background to the 2007 reforms opening up the legal services sector to non-lawyers must be considered, because there was an unstoppable political belief that the legal profession no longer deserved to be independent.

In order to understand the creation of ABS in the U.K., one needs to focus on the *Legal Services Act, 2007*. It was this Westminster statute which created the Legal Services Board (LSB), an arm of the U.K. government overseeing regulation of various professional and non-professional entities, including lawyers, meant the end of lawyer independence from government regulation and of the political exceptionalism of Law as deserving a zone of self-discipline. ABS did no come from bar innovation but was a trust-busting measure to make the bar embrace a culture of customer service.

The following significant events led to the establishment of the Legal Services Board (LSB (http://www.legalservicesboard.org.uk/about_us/history_reforms/)), an arm of government overseeing regulation of various entities, including lawyers:

- In 2001, the Office of Fair Trading (OFT) recommended the legal professions should be subject to market competition, over the clamour of the Law Society as to the crude application of economic doctrines to services in complex human relationships.
- In 2004, *Clementi Report (http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/report/report-chap.pdf)* regarding the regulation of legal services in England and Wales

reported unacceptable levels of public dissatisfaction with an "inflexible, outdated and over-complex" Law Society complaints handling system and an unduly restrictive model of legal business structures.

- In October 2005, the Government White Paper, *The Future of Legal Services: Putting Consumers First (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272192/6679.pdf)* proposed an agenda for wholesale reform of the delivery of legal services, with regulation surveyed by two separate government agencies, a Legal Services Board and and Office for Legal Complaints.
- In May, 2006, a parliamentary committee tabled a draft Legal Services Bill (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272297/6839.pdf) to implement these changes.

In hindsight, the U.K. bar was in the position of having brought the proverbial knife to the gunfight. As Terry et al. observed in "Adopting Regulatory Objectives for the Legal Profession," 80 *Fordham L. Rev.* 2685 (2012) (http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4807&context=flr), legal services reform in the UK followed a new trend for professional regulators to pursue "regulatory objectives," a set out social and economic outcomes as opposed to the management of problems emanating from an existing institution. To put it simply, the achievement of public consumer satisfaction with services assisting them with legal processes was the goal, not the nature of the framework or institution. According to Semple et al., the shift from self-governance in the public interest to public regulatory objectives in the U.K. and Australia started in the 1970's, when:

> legal services regulators in England/Wales and Australia began to focus on two core values derived from economic public interest theory: competition and consumer rights. These values have gradually displaced professionalism and lawyer independence as they are understood in the United States and Canada, manifesting themselves in regulatory regimes which today contrast sharply with those of anglophone North America. ("A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England/Wales, and North America," *16:2 Legal Ethics 258 (2013-14)* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2396041))

Against this gathering storm, the U.K. bar shuttered its windows and said it was capable of responding better to public complaints. When the storm hit in 2001-07, the bar's independence was already swept away. Architects of the reform statute observed the principle that some legal services required a trained lawyer and some did not. Within a broad spectrum of services, lawyer and non-lawyer participation in the businesses providing such services could be kept on the straight and narrow by a network of specialist regulators answerable to the LSB. Those familiar with British officialdom will readily recognize the urge to solve problems by compartmentalizing them, placing them into bureaucratic versions of bell jars.

It is in this unique British context that one must consider the work of legal pundits such as Richard Susskind, the consultant to the CBA Futures Committee and author of *The End of Lawyers?* The provocative title of the book was not so much prescient as it was descriptive of an existing ethos. In the U.K., the bar as an exceptional profession was already a living anachronism and a victim of its own ignorance of public policy forces. The participants and governors in the new regime are, as expected, its strident apologists and promoters. Indeed, listen closely to legal futurists in Canada and the United States and you will hear the dialogue in terms of service delivery and meeting market demands.

One distinct feature and necessity of the consumerist model of legal services regulation is that it is realistically possible only in a regime of external government regulation or co-regulation. An LSB (or its equivalent in Australia, the Legal Services Council) is required to oversee a diverse constellation of entities serving the public. In the U.S., bar councils are delegated powers from state courts and are technically in the co-regulation category, but the legal profession *de facto* regulates itself. Canada's law societies, which in theory regulate lawyers co-extensively with Superior Courts, exercise greater independence because the courts exercise no control over lawyers who do not appear in court.

From this perspective, any belief that a Canadian provincial or territorial law society can transition itself to a regulator and disciplinarian of a host of lawyer and non-lawyer entities in a legal services consumer market is likely

to be a conceit. If Canada wants to preserve the subsidiarity of peer-to-peer governance of standards in a wide open legal services industry, we will also have to adopt the LSB model and make law societies accountable to government regulators. It will then be a question of placing the law society under a branch of a provincial Ministry of Justice or a Ministry of Trade and Industry.

THE AUSTRALIAN ABS EXPERIENCE – A DIFFERENT PATH ACROSS A SIMILAR DESERT

A word about the Australian experience. In formal terms, the advent of "Incorporated Legal Practice" in several of the Australian states pre-dates the above history in the U.K. The impetus for deregulation or commercialization of the legal industry in Australia stems back to a 1998 National Competition Policy Review, which found entry into the bar's monopoly over legal services to be unduly restricted. By 2001, New South Wales was the first jurisdiction to allow fully incorporated law firms. As in the U.K. experience, the catalyst was a recommendation by a government competition overseer. The Australian experience may seem to have been much more organic than the U.K.'s, but the reason for this is that Australian lawyers lost the right of self-governance over a decade prior to their U.K. counterparts. Similar political pressure over the lack of accountability in addressing consumer complaints led to the launch of the office of the Legal Service Commissioner (http://www.olsc.nsw.gov.au/olsc/olsc_history.html) for New South Wales in 1994. The remaining states have followed suit, over time.

If the ABS revolution in Australia seems to have been quieter than in the U.K., it is because the bar was already state-regulated when the ideas of multi-disciplinary and incorporated legal practices began to be adopted. It was very much a "can't beat 'em then join 'em" reality. It is hard to comment on the Australian experience as an outsider, not only because we are less familiar with its legal culture but also because its social, economic and political realities defy exportation to Canada. As in the U.K., the target of ABS investment in Australia has been personal injury law, where a small number of conglomerates have emerged as the largest employers of lawyers and others. This anti-competitive labour market condition appears to be the main concern of the Ontario Trial Lawyers Association (OTLA), whose position paper on ABS (http://origin.library.constantcontact.com/download/get/file/1114697326977-165/OTLA+Submission+to+LSUC+on+Alternative+Business+Structures.pdf) points out that Canadian lawyers in the field already offer diverse and competitive retail service, usually with little or no up-front cost to the consumer.

From the Australian ABS experience, one can make a significant empirical observation of which our regulators have taken notice. As a result of a self-assessment requirement in the regulation of incorporated law practices, a 2008 study of complaints histories (https://leeakazaki.files.wordpress.com/2015/01/research_report_ilps.pdf) shows that client complaints to the regulator have significantly declined. Arguably, a corporate culture of checks and balances has led to better internal enforcement of ethical rules, and the adoption of this approach to law firm self-regulation could be beneficial whether or not ABS is adopted in Canadian jurisdictions.

VERTICAL INTEGRATION

The U.K. model of introducing ABS simultaneously with the removal of self-regulation of the legal profession has led to a modest bump in commercial innovation in the legal industry, including vertical integration of allied markets such as car insurance and personal injury litigation.

In the U.K., insurers have entered the ABS legal field in order to preserve a lucrative spin-off businesses in mining and selling the personal data from policyholders collected during automobile accidents. As reported by the *Guardian* (http://www.theguardian.com/commentisfree/2011/jun/27/jack-straw-car-insurance-racket) and other media outlets, former Justice Secretary and MP Jack Straw "has lifted the lid (http://www.guardian.co.uk/politics/blog/2011/jun/27/politics-live-blog#block-6)" on the insurance industry "selling on the personal details of customers to claims-management companies and 'ambulance chasing' lawyers.'"

In 2013, the same referral fees the CBA working group now advocates in Recommendation #5 were banned in the U.K. (https://www.gov.uk/claims-management-company-regulations-guidance-and-legislation#referral-fees-ban) because of what became an out-of-control trade in the information gleaned from accident victims.

In response to the resulting clamour, as reported by Tomasz Drzewiecki (http://www.palatinate.org.uk/?p=54165), U.K. insurers have turned to ABS to bypass the scandalized CMC middleman and to circumvent the referral fees ban. Now, insurers refer accident victims directly to their own ABS legal units to profit from the value added by solicitors:

> A few leading insurers such as Direct Line, Admiral and Ageas have also created ABS in co-operation with traditional law firms. Admiral acquired shares in two traditional law firms last year and is planning further acquisitions in the foreseeable future. The most recent addition to the list of insurers with an ABS license was Allianz in March 2014. Allianz provide legal services in the UK under the brand name ALP Law and guarantee their customers superior results if ALP Law handles the legal aspects of their case. ALP Law co-operates with a law firm called Serious Law specialising in catastrophic injuries. Tim Walters, formerly the managing partner of Serious Law, became the head of the legal practice in the newly created entity. An important requirement was imposed by the Solicitors Regulation Authority, namely that the ALP Law branding logo has to be 'sufficiently different' from the Allianz logo to identify them as separate and distinct firms.

At more in-depth study of the phenomenon described by Drzewiecki appears in a 2014 paper by Harvard's Nick Robinson, "When Lawyers Don't Get All the Profits (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878)." Prof. Robinson documents how ABS law firms have swarmed into the lucrative personal injury market, while leaving access-starved areas to traditional law firms.

The example of insurer legal ABS units reflects a trend toward law as enabler of vertically integrating markets. The same insurer who pays for the car repairs and physiotherapy will also now refer the policyholder to a non-win, no-fee lawyer on the payroll of an ABS firm owned by the insurer. The conflict is readily evident to a Canadian lawyer. Insurers' ownership of personal injury law firms may ostensibly contribute to access to justice, but Insurers have an incentive to reduce or prevent the inflation of court awards and settlements. So the same industry that, in a 2011 advocacy piece (https://www.abi.org.uk/Insurance-and-savings/Topics-and-issues/~/media/A1DCD3A1AE944458BC8ACBEAF3FB95DA.ashx), warned the British public about the persistence of the "Compo Culture" is now a player in the market, possibly to keep compensation claims "reasonable" and possibly to use the profits from solicitors' referral fees to offset "unreasonable" payouts.

AT YOUR SERVICE AND *IN YOUR SERVICE*

The word *service* in the discussion of ABS invokes one of two meanings of the word.

Service can be a work or process counterpart to the manufactured product. Examples of the commodity version of service include taxi rides, car oil changes, and barbershop haircuts. Providers of such benefits are "at your service."

The other meaning of service is that of subordinating oneself to the benefit of another, "in your service." (From the Latin, *servus*, for slave.)

The commodity legal service is service one can *see*. The self-subordinating element of the legal service is usually one that defies ostensible measurements. Thus, a client who reads a short lawyer's letter wonder why he might be billed five thousand dollars for it. The careful lawyer would have managed the client's expectations by explaining the research and investigation that must go into it, as well as the nature of the thought process, before an important legal position can be communicated to a potential business partner or adversary.

This divergence between the tangible legal service and the professional obligation pervades the literature regarding ABS, especially because proponents see legal services not only in terms of consumer protection but also *as* the consumer sees the work product.

For example, the majority of testamentary instruments are drawn for people with assets. The same might be said of pre-nuptual agreements, real property closings and small business incorporations. The outsider might consider the simplicity of the service as product, a will, a pre-nup or the reporting letter for a residential house purchase, and ask why these "commodity" legal services cannot be completed by a high school graduate armed with a customized version of MS Word.

As a real estate colleague of mine practicing in repair of errors and omissions confirmed, after reading my recent piece for *Just* (http://www.justmag.ca/winter2015/fea_bigLawBlues_winter2015.html) magazine, the treatment of residential real estate closings as bulk legal work, underwritten by title insurance, has led to a culture of sloppy legal work and lawyers who do not know how to give a proper title opinion. To the consumer expectation of simply wanting to move into a new home or condominium, a title opinion may appear costly and esoteric even if it could save tens, even hundreds of thousands of dollars in litigation down the road.

The diligent attendant at a shopping mall wills kiosk might use a wills generator to prepare wills in the way the clerk at a mobile phone shop might prepare a handset contract, customized with features to suit the buyer's needs. Enter a husband and wife showing up a storefront with a grocery cart and a pram. After going through a checklist of demographic details, the clerk presses "enter" and prepares a set of spousal mirror wills. Without any education in the operation of trusts, conflicts of interest and undue influence, the clerk fails to ask questions which could have led to the fact that the husband has children from a previous marriage, or that the child in the pram has a disability that will require assistance for the rest of her life.

Equating the legal service with the consumer's desired result in line with the desired low price is not necessarily in the consumer's interest. Consumer protection, in the form that has driven legal profession reform in the U.K., is informed by a half-evolved understanding of legal service. Lawyers know that the questions usually matter as much, if not more, than the answers. A world view that sees legal processes through "regulatory objectives" cannot but fail to see the unseen service, the battery of questions that were answered in the negative before preparing the legal instrument.

In contrast, service in the sense of *in your service* imports duties of loyalty and good judgment. A lawyer acting for a client cannot simply deliver a sheet of paper with words on it, and have no regard to its ramifications to the client. A letter that "looks legal" and written without regard to the legal setting, whether in common law, the Québec Civil Code, or a specialized area of statute law, can land a client in hot water or cause the client to waive important rights. A mechanized conflict of interest screening process can both fail to detect conflicts to the detriment of the client, and spit out false positives that deprive access to the service. Despite the demand-side natural market pressure to create a "Law-Lite," legal services without the costly professional loyalty and judgment, the trouble is that law is not easy and lawyers today are in need of *more* university-level training than in the past, not less.

APPLICATION TO THE BAR IN CANADA

The experience in the U.K. and Australia appear to show the advent of ABS has not caused the public more harm than the poorly regulated bar prior to 2007 and 1994 respectively. In some respects, may have jolted the legal professions to improvement of client care. The accident injury business has shown, nevertheless, that ABS' innovations include those which perpetuate and enable questionable existing market behaviours. Because it is more feasible to ease than to restrict, once a genie is out of a bottle, regulation of ABS entities has made regulation of the legal industry more confusing and bureaucratic. The U.K. experience at least has led to calls for "software patch" regulation on top of regulation of areas such as claims management and legal-financial services, where such areas were previously overseen by law societies.

The question for lawyers in Canada is whether competition from entities that are not controlled by lawyers is or will be necessary to improve our record of reducing complaints and innovation for access to justice. Whatever our profession decides to do, standing on tradition and reliance on incrementalism – notably visible in the Law Society of England and Wales' response to the Clementi consultation – are not viable options.

What the U.K. and Australian experiences have in common is the emergence of ABS after the bar lost public confidence in self-regulation. As a matter of public administration, the institutional cause of this rift with the public was the bar's failed to shed the function of promoting the profession. In being trying to be cheerleader and prefect, bar leaders failed to tackle the profession's demons. In Canada, the CBA and its branches, as well as associations such as the Advocates Society, Canadian Defence Lawyers and OTLA fulfill that role, leaving law societies to govern the profession in the public interest.

Nevertheless, Canadian law societies are not immune to political pressures arising from a public perception that its processes protect lawyers from accountability. A recent investigative report in the *Toronto Star (http://projects.thestar.com/broken-trust/)* portrayed the Law Society of Upper Canada (Ontario) as a closed profession that protects is members from criminal prosecution for fraud and breach of trust. To the ordinary citizen, the arguments raised by LSUC regarding its mandate and the disciplinary process did appear to be complex and opaque – proving once again the bar's inability to communicate important ideas to an attention-fickle public. As I argued in *The End of Law Societies* (https://leeakazaki.files.wordpress.com/2011/11/brieflydecember20101.pdf), lawyers who treat provincial law societies as defenders of the profession feed into a misconception that erodes public confidence in self-regulation.

Lawyers must innovate. Can they do so within the current regulatory framework of requiring legal services to be performed by lawyers and firms controlled by lawyers? To answer this question, one must first disclaim the application of sweeping generalities, especially at the national level. The bar in the English Common Law world is governed regionally, not nationally. Canada's bar is not dissimilar in bijural diversity to the U.K.'s, in that Scotland and Québec employ civil codes for private law. In Québec, the Chambre des notaires (http://www.cnq.org/) governs a separate profession that is more transaction-oriented than members of the Barreau du Québec (http://www.barreau.qc.ca/fr/). ABS (SEA: Structures d'entreprise alternatives) is not a well-known topic in Québec outside national law firms with offices in Montréal. Canadian bar regulators studying ABS include the Law Societies of Manitoba, Saskatchewan, Nova Scotia, Alberta and British Columbia, but the debate appears to be concentrated in Ontario. Avoidance of a patchwork of regulation and market participants is important to a Canada whose emergence from "solitudes" requires a national bar identity and culture, professional mobility and networks.

I conclude without a conclusion. I am looking forward to the discussion among CBA leaders at its Mid-Winter Meeting.

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***Disclaimer:** what started as a set of speaking notes turned into a work-in-progress monograph, subject to *corrigenda* I am sure.

****An excellent, in-depth survey of Canada's unique role between the Anglo-Australian and American models, as well as some historical references, can be found in University of Alberta Law Dean Paul Paton's "Between a Rock and a Hard Place: The Future of Self-Regulation—Canada between the United States and the English /Australian Experience," *ABA Journal of the Professional Lawyer* (http://clp.law.utoronto.ca/sites/clp.law.utoronto.ca/files/documents/Self-Regulation.pdf), 2008.

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