ABS & A2J

An Access to Justice Discussion on Alternative Business Structures for the Law Society of Upper Canada

Law Students' Society of Ontario
Submitted by Douglas Judson
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# ABS & A2J: A Discussion Paper

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Overview

The Law Students’ Society of Ontario (“LSSO”) is an advocacy body representing undergraduate (Juris Doctor or JD) law students at all seven Ontario law schools. We articulate student issues and concerns to the organizations that govern the legal profession, the universities that administer legal education, and the government bodies that regulate post-secondary education and financial aid.

Like other stakeholders in the legal community, we share a concern for facilitating and continuously improving access to justice (or “A2J”) for the people of Ontario. This goal is central to all of our initiatives, which seek to improve the accessibility of legal education, the representativeness of our profession, and the availability and affordability of legal services for the public. As future members of the legal profession who will be subject to its governing edicts and rules of conduct, it is within this context that we offer this submission to assist the Law Society of Upper Canada (“LSUC”, “Law Society”) with its consideration of alternative business structures (“ABS”) for the practice of law in Ontario. In this document, we offer 3 main considerations.

First, we encourage the Law Society to assess the suitability of ABS against its ability to improve access to justice, to improve public access to legal services, and to make the delivery of legal services more efficient. These goals are not mere normative, peripheral quests - they are primary objectives laid out in the Law Society's governing legislation. They cannot be shortchanged by competing interests.

Second, we believe that enabling a form of ABS is integral to the future of relevant, accessible, and responsive legal services in Ontario. The bulk of our submission addresses this
topic. In short, there is compelling evidence to support this conclusion from other ABS-permitting jurisdictions, from management best practices, and from basic economics. There are also regulatory tools and reforms available to address any challenges that ABS might pose to lawyers' special duties, or to ABS-driven circumstances that might compromise their professionalism. Overall, ABS can enable the legal community's response to the changing social, economic, and technological needs of those it serves. ABS should not be lightly cast aside by A2J-troubled Ontario. We encourage the Law Society to adopt a liberal reform to the rules on permitted law firm business structures and non-lawyer ownership, supplemented with the necessary regulatory modifications to address anticipated and reasonable professionalism concerns.

Finally, while we conclude that the A2J case for ABS is well-aligned with the business case for ABS, its potential will not be optimized in isolation from other actors. The LSSO's overarching view, across all of our priority issues, is that LSUC must adopt a systems view of its regulatory role and mandate. ABS cannot be implemented in isolation from other factors. The accessibility, efficiency, and innovation gains of any reforms to legal service delivery will be stunted without like-minded coordination with other entities in the legal services supply chain. Chief among these players are LSUC’s lawyer licensing administrators, courts and tribunals, and law schools.

The following pages develop these points from the vantage point of those who are just embarking on their legal careers. We urge the Law Society to give due weight to the perspective of this constituency. Aspiring and young lawyers are a group whose practices and career trajectories will experience enduring impacts from any fundamental reforms to the delivery of legal services. Our generation in the wider population will live the consequences of regulatory inaction.
1 | Introduction

LSUC is currently seeking input from the public, the legal community, and interested parties on ABS as a means for delivering legal services in Ontario. At present, Ontario lawyers are subject to restrictions on how to structure their practices. The Law Society has invited submissions on whether it should permit a wider variety of business ownership structures for the practice of law. If adopted, such a regulatory change would afford greater latitude in the delivery of legal services, presumably via structures which allow for ownership in association with non-lawyers.2

The Law Society’s consultation comes at a critical time in the delivery of legal services in North America. Legal institutions and service providers are challenged by both public inaccessibility, affordability questions, and industry flux. In private practice, the battle of the billable hour rages on: clients are demanding lower rates and greater certainty in their payables. Those with smaller pocketbooks, greater risk aversion, or a poor impression of legal resources are avoiding the use of lawyers altogether, leaving an array of everyday legal needs unaddressed or unsatisfactorily mitigated. The growing mass of unrepresented litigants in courts and tribunals is just one hallmark of this problem.3 Another is at the source of new lawyers, where expensive law faculties are becoming the finishing schools for the wealthy - their convocations less and less reflective of the public the profession serves.4 In result, the threat of substitutes for traditional legal service providers looms large - regulatory prohibitions notwithstanding. More broadly, public confidence in our advocacy architecture has been compromised by the view that the system itself is configured for those of means. The present

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dilemma is acutely summed up by McDowell and Sheikh: “There is a growing perception in contemporary society that while all Canadians are afforded equal rights and equal justice in theory, this may not be true in fact.”

The numbers paint a similarly dystopic picture. A 2007 study commissioned by the Department of Justice found that only 12% of Canadians sought legal help for justiciable problems they had encountered in the previous 3 years, only one-fifth sought non-legal help from unions, government, or friends, and another one-fifth did nothing. This evidence speaks to the volume of legal issues being ignored by service providers, the mass of legal needs that parties cannot afford to hire lawyers for (or that lawyers cannot afford to serve), and the opportunity for substitute resources or services to capitalize on these billable blind spots. Anecdotally, some have questioned whether other professions, like accountancy, have already subsumed work areas that would fit more naturally in a law office.

Accordingly, any assessment of a fundamental reshaping of the legal services landscape ought to be looking for opportunities to narrow the gap between rights afforded and rights that can be exercised affordably. This submission (i) advocates for the evaluation of ABS from the vantage point of access to justice, (ii) canvasses the various mechanisms by which ABS can improve A2J, and (iii) addresses anticipated criticisms of ABS. As the following sections demonstrate, prioritizing the public interest in LSUC’s assessment of ABS does not come at the cost of good business sense. In many respects, the business case and public interest rationale for implementing ABS and liberalizing the rules on legal service business structures are closely aligned.

Although the jury is still out on ABS in Ontario, change in this area of lawyer regulation is inevitable, if not politically unavoidable. In response to a recent report on legal services reform, one lawyer opined that “there is no shortage of Darwinian zeal when it comes to the core

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message: *Change or Die.* With less macabre gusto, we conclude that ABS provides an opportunity for an old profession to renew its service coverage and efficiency, and bolster its statutory obligation to serve the public interest. LSUC’s treatment of this issue may prove to be a bellwether for the role and relevance of lawyers in today’s legal market and the appropriateness of self-regulation for the legal profession. ABS provides a compelling opportunity for access to justice and a strong business case for legal enterprise.

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The Profession and the Public Interest

The potential for ABS in Ontario’s legal landscape begins with some reflection on the policy goals that society wants to achieve in the regulation of legal services. In this case, the Law Society Act is instructive. Section 4.1 indicates that it is the function of the Law Society to ensure that those who practice law in Ontario meet standards of learning and professional competence that are appropriate for the legal services they provide.\(^8\) Except as permitted by LSUC bylaws, only individuals licensed by the Law Society may provide legal services or practice law.\(^9\) ‘Legal services’ is defined as follows:

> For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.\(^10\)

The Law Society determines classes of licences that may be issued, the scope of authorized activities by class of licence, and the terms, conditions, and restrictions imposed on licensees.\(^11\)

This imposing scope of authority is bridled by guiding principles. Section 4.2 states that in carrying out its functions, the Law Society has a duty to maintain and advance the cause of justice and rule of law, to facilitate access to justice, and to protect the public interest. For greater clarity, the Act spells out that:

> In carrying out its functions, duties and powers under this Act, the [Law Society] shall have regard to the following principles:
> 1. The [Law Society] has a duty to maintain and advance the cause of justice and the rule of law.
> 2. The [Law Society] has a duty to act so as to facilitate access to justice for the people of Ontario.
> 3. The [Law Society] has a duty to protect the public interest. ... \(^12\) [emphasis added]

The importance of this statutory construct should not be understated. Plainly put: LSUC cannot carry out its licensing or regulatory functions in isolation from its public interest and

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9 Ibid. at ss 26.1(1) and (5).
10 Ibid. at s 1(5).
11 Ibid. at s 27(1).
12 Ibid. at s 4.2. The section in question lists 5 principles in total.
access to justice duties. The two branches of its mandate are interlocked by sections 4.1 and 4.2, and require mutual fulfillment. Even the ‘advancing the cause of justice’ element supports this effort - by maintaining public confidence in the legal profession through enforcement mechanisms and character standards for lawyers. As such, any consideration of ABS must be evaluated on an A2J and public interest matrix.

LSUC’s public interest mission is further emphasized by a limitation clause. The Act requires that the goal of brokering access to justice is not unduly compromised by competing interests, stating that “restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.”\(^{13}\) As such, given the primacy the statute gives to the public interest and access to justice, LSUC cannot unduly subvert these goals to other considerations. Consequently, a fitting public interest evaluation of ABS should not be undermined by the inertia of conventional law firm models or monopolies, comfortable bottom lines, or any cultural baggage of exceptionalism. It is clear that public interest and access to justice considerations must be paramount in the ABS discussion.

\(^{13}\) *Ibid.*
3 | Permitted Business Structures in Ontario

In a sense, regulators have allowed Ontario’s lawyers to perfect their craft within artificially imposed feudal conditions. As observed by technology lawyer Matthew Peters:

[In feudal times], if you were a cobbler you went out and purchased the leather and made the shoe yourself. Then you had the Industrial Revolution: now the shoemaker sources out all the pieces and they find the lowest cost way to do it. Applying that to what we are seeing in the legal profession now: We in law have missed the Industrial Revolution.14

The business of law suffers from a systemically ingrained and enforced conservatism. ABSs could revolutionize the legal industry because the province’s lawyers are currently subject to strict limitations on the business forms they can use to organize and deliver their services. Each of the existing structures is a permutation of the others, retooled on the basis of the risk exposure accruing to the lawyer, their partners, the firm, and clients.

Admittedly, it would be overly simplistic to shortchange the impact that risk has on the economics of legal services due to its influence on cost.15 However, it is also clear that none of the current structures was devised with service enhancement, efficiency, technological development, or economies of scope or scale as its primary concern. These goals are the real meat of access to justice and the substance of the profession’s guiding statute.

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Our observations are not bald assertions. To begin, LSUC’s ABS Working Group summarizes the permitted business forms and their authorities as follows:

<table>
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<tr>
<th>Business Structure</th>
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(Source: Adapted from LSUC Discussion Paper, page 7)

Sole Proprietorships  First, sole proprietors (or practitioners) own and run their own practices, which are unincorporated. The business form remains popular among Ontario lawyers, with a 2009 report estimating that 18% of them practice in this structure.\textsuperscript{16} An unincorporated sole proprietorship is subject to few formal business registration requirements, but also bears the risk of unlimited liability. The personal assets of the sole practitioner are also exposed to this liability.

Partnerships  Second, lawyers may enter into partnerships under the \textit{Partnership Act},\textsuperscript{17} provided that all of the partners are lawyers. Within a general partnership, partners are liable jointly with other partners for all debts and obligations of the firm that are incurred while they are a partner, including liability for the negligence of other partners. Obviously, this creates risks for each partner with respect to the competence of the others, and (like a sole practice) this liability extends to personal assets. However, it also creates an incentive for mutual monitoring of each partner's integrity and performance.\textsuperscript{18} Iacobucci and Trebilcock note that to mitigate risk, general legal partnerships often form management corporations to hold the assets of the legal practice,


\textsuperscript{17} \textit{Partnership Act}, RSO 1990, c P.5.  

\textsuperscript{18} Iacobucci at 14.
hire support staff, and provide agreed space and services to the legal partnership under contract. This shields the assets from liabilities arising from the partnership.

**Limited Liability Partnerships** Third, lawyers may enter into limited liability partnerships ("LLPs"), provided they secure mandated levels of errors and omissions insurance coverage. Since LLP legislation was enacted in 1998, a number of lawyers have elected to use this structure due to its favourable liability scheme. In an LLP, a partner can be held liable for:

- (a) their own negligent or wrongful act or omission;
- (b) such an act or omission of a person under their direct supervision; or
- (c) the negligent or wrongful act or omission of another partner or an employee of the partnership not under the partner’s direct supervision if the act or omission was criminal or constituted fraud, or if the partner knew or ought to have known of the act or omission and did not take the actions to prevent it.

In general, an LLP’s partner is not liable for the debts, liabilities, or obligations of the partnership or another partner.

**Professional Corporations** Fourth, the *Law Society Act* permits lawyers to form professional corporations ("PCs") under the *Ontario Business Corporations Act* ("OBCA"), provided that all shareholders are members of LSUC. Usually, creating a legal entity would establish a separate legal personality, whereby the liability of the corporation would be separate from that of its shareholders. However, the OBCA expressly provides that establishing a PC does not extinguish the liability of the professional. The lawyer shareholder may be held jointly and severally liable with a professional corporation for all professional liability claims made against

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20 *Supra* note 17 at ss 44.1-46.
21 Iacobucci at 15.
23 This restriction is somewhat unique. In Alberta, spouses and children of lawyer-shareholders may own non-voting shares in the legal PC (*see Legal Profession Act*, RSA 2000, c L.8 s 131(3)(f)). In Ontario, family members of physicians and dentists may own shares in a professional corporation (*see O Reg 665/05*).
24 *Supra* note 22 at s 3.4(1).
the corporation while the person was a shareholder. As such, the primary motivation for choosing this structure appears to be tax liability.\textsuperscript{25}

**Multidisciplinary Practices** Finally, multidisciplinary practices ("MDPs") typically allow service providers from more than one regulated profession to provide services from the same business (lawyer-accountant combinations are common in some jurisdictions). In Ontario, MDPs involving lawyers and non-lawyers are currently subject to two main limitations:

> [F]irst, the lawyer partners must be “in control” of the work undertaken by non-lawyer partners; and second, the services provided by the latter may only support or supplement the provision of legal services.\textsuperscript{26} [emphasis added]

Further, the extent to which services or operations can be integrated ‘across disciplines’ is constrained by regulations. The rules require that the lawyer licensee:

- Own the professional business through which they practice law;
- Maintain control over the professional business through which they practice law; and
- Carry on the professional business through which the licensee practices law from premises that are not used by the affiliated entity for the delivery of its services, other than those that are delivered by the affiliated entity jointly with the delivery of the services of the licensee.\textsuperscript{27}

The affiliated law firm cannot share revenues, cash flows, profits, or provide compensation for referrals with the non-legal entity with which it is affiliated. LSUC rules prohibit fee-splitting between lawyers and non-lawyers outside the exception for MDPs.\textsuperscript{28} In effect, like PCs, MDPs provide a limited reform to the structure of the law firm and continue to require the lawyer to shoulder similar risk, control, and ownership responsibilities as other permitted firm business structures.

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What emerges from this cursory overview is a small sandbox for legal service providers to play in. In each corner, the guiding paradigm consists of risk aversion, debt finance, and the

\textsuperscript{25} Iacobucci at 15.  
\textsuperscript{26} Iacobucci at 19.  
\textsuperscript{27} Iacobucci at 19; Law Society of Upper Canada, Rules of Professional Conduct, Toronto: Law Society of Upper Canada, rule 2.08(8), available online: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489377>.  
\textsuperscript{28} Ibid.
centrality of the joint lawyer-manager-owner. Under each of the current models, lawyers are the only permitted equity-holders, lawyers can only provide permitted and ancillary services, and there are limited opportunities to ‘bundle’ service offerings with non-lawyers. More urgently, there is no access to external social, human, or financial capital. In effect, the current regulatory scheme for conducting the business of law has dug a moat around legal services, and the only lowered drawbridges are narrow and perilous.
About Alternative Business Structures

ABS is a broad term referencing new forms of law firm business structure or ownership, as well as alternative means of delivering legal services. By LSUC’s definition, ABSs may include:

- non-lawyer or non-paralegal investment or ownership of law firms, including equity financing;
- firms offering legal services together with other professionals offering other types of services; and
- firms offering an expanded range of products and services, such as do-it-yourself automated legal forms, as well as more advanced applications of technology and business processes.⁹⁹

More specifically, the four models proposed by LSUC’s ABS Working Group consist of:

- Permitting up to 49 per cent ownership by non-licensees in entities only providing legal services;
- Restricting firms to providing legal services, but with unrestricted ownership;
- Allowing up to 49 per cent non-licensee ownership and permitting firms to provide legal services and non-legal services except those identified as posing a regulatory risk; or
- Permitting unlimited non-licensee ownership and the provision of legal services and any other services, except where there is a sufficient regulatory risk identified.³⁰

In general, this submission favours a more liberal approach, supplemented with regulatory reforms and modifications where legitimate risks to lawyers’ professional duties are foreseen.

This position is evidence-based. Ontario is not the first bailiwick to consider or implement a form of ABS. The ABS model has a long history in New South Wales, Australia, where it was introduced in 2001, and in England and Wales, where it has been in place since 2012. These ABS models have several common characteristics. The reforms have:

- facilitated non-lawyer equity investment in corporations;
- provided lawyers with the ability to issue equity in their corporations to family members, technology specialists, or business management experts;
- allowed law firms to operate as franchises and achieve economies of scale by centralizing management systems and shared overhead costs; and

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enabled businesses offering legal services to offer those services alongside services related to their area of practice (i.e., accountancy, human resource management, or social work).

The ABS experience in these jurisdictions has been transformative. Australia was a particularly early adopter in this respect. Beginning in the 1980s, New South Wales had allowed for MDPs and solicitor corporations to provide limited legal services alongside traditional law firms. However, these business forms were not widely adopted due to restrictions on non-lawyer ownership and concerns about conflicts of interest.31 The current rules were implemented in 2001, when New South Wales allowed legal practices to incorporate under ordinary company law without any restrictions on who may own shares or on the types of business that the corporation could conduct.32 Australia was the first jurisdiction to allow a law firm to be publicly-traded. Slater & Gordon is listed on the Australian Stock Exchange (ASX: SGH), and has expanded internationally.33 The firm employs over 1,300 people in 69 locations and focuses on plaintiff-side personal injury and class action litigation.

In England and Wales, reforms can be traced back to the Thatcher government's philosophy of liberalization.34 A 2004 report on legal services recommended a sequence of regulatory reforms to increase competition, make the market more consumer-friendly, and increase access to legal services. These events culminated in Parliament passing the Legal Services Act in 2007. The Act provided for the issuing of ABS licenses beginning in 2011. ABSs can be fully owned by non-lawyers, and can offer non-legal services alongside legal services.35 To-date, most ABS licensees are reported to be traditional law firms that have adopted a new

business form, however, the ABS licensing option has attracted new players to the market. Among these have been corporations from other industries with new ideas about how to deliver legal services, stand-alone legal innovators, and foreign investors, such as Slater & Gordon. There is no doubt that Slater & Gordon is watching LSUC’s consideration of ABS with interest.

Other jurisdictions have adopted the Australian and U.K. ABS models in whole or part, or will soon be considering whether to do so. Singapore announced in 2014 that it would permit minority ownership in law firms by non-lawyers, with the possibility of further reforms. Some anticipate that the U.K.’s membership in the European Union may eventually influence other European countries to open up their legal service markets as well (Spain, Italy, and Denmark already allow for minority non-lawyer ownership). Like LSUC, regulatory bodies in the United States and Hong Kong are also actively exploring whether to allow non-lawyers to hold an ownership stake in law firms.

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36 Solicitors Regulation Authority, "Research on alternative business structures (ABSs): Findings from surveys with ABSs and applicants that withdrew from the licensing process" (May 2014), online: SRA <http://www.sra.org.uk/sra/how-we-work/reports/research-abs-executive-report.page>.


5 | The Case for ABS

ABS is as sensible in the Canadian legal context as any other. Liberalized rules on law firm ownership can spur much-needed innovation in legal service delivery and can fortify the legal industry against emerging threats (like substitutes or public scrutiny). ABS can also facilitate new entrants to (or alliances within) the legal sector, invigorating competition among legal service providers and improving pricing and service quality for the public. In this section we will highlight four key benefits of implementing ABS.

Outside Investment Adds Value to the Firm First, law firms can use new sources of equity financing to add value to their organizations. For instance, offering stock options as compensation allows for business managers, technology specialists, private equity investors, and other non-lawyer professionals to take a leadership role in improving the firm. While many non-lawyer employees or managers hired within existing law firms may currently be offered performance-based pay, equity-based compensation offers a unique means for employees to share in the value capture of innovation. As observed by Hellmann and Thiele, innovation involves tasks that, by definition, cannot be anticipated in advance, and performance-based pay is structured around planned activities. Planned activities limit incentives and discourage staff from innovating because the firm can appropriate most of the value of their innovation. In contrast, stock-based compensation provides a unique incentive to add value - it extends some 'innovation elbow room' to a stale set of incentives.

ABS Improves Competition & Efficiency Second, new equity capital from non-lawyer investors can bolster competitiveness and diversify the range of firms in the market and the range of unique value propositions that they can offer to potential clients. Core to this are investments in technology, infrastructure, and process improvements. This is not to say that the current environment is not competitive. The Law Society reports that there is significant competition

between existing legal practices for work, but that this competition is mostly by traditional firms and mostly for traditional work. Under current regulations, firm capabilities have been sheltered from a full assault of competitive forces. ABS adds new dimensions to the competitive terrain, which creates new possibilities for legal enterprises. By giving non-lawyers a stake in the law firm corporation, these investments will allow firms to create new ways of delivering legal services or develop means of making their delivery more efficient. This outcome is far from anecdotal: empirical evidence shows that private equity-infused companies see enhancements to their economic value due to improvements in operating efficiency. As summed by Hadfield, "innovation in legal markets is ... severely hampered by limitations on the capacity for innovators . . . to finance their entrepreneurial efforts." ABS can help to grease these skids of positive change, improving access to services alongside firm value.

ABS Facilitates New Service Delivery & Lower Fees Third, ABS can result in lower costs to clients. As discussed, outside investments facilitate process enhancements and technological improvements, which can increase efficiencies and pass on savings to consumers. This is important because, while market imperfections in pricing may exist, the problem of access to legal services is primarily a cost-side phenomenon. One form that these enhancements can take is for the ABS firm to create savings through economies of scope and scale. Franchising and standardization is one mechanism. Strategic alliances with other professional service providers is also an option.

This has been the experience of other jurisdictions. After the U.K. passed its Legal Services Act, The Co-operative Group obtained an ABS license and began offering legal

45 Gillian Hadfield, “The cost of law: Promoting access to justice through the (un)corporate practice of law” (2014) 38 International Review of Law and Economics 43 at 44 [Hadfield].
46 Hadfield at 49.
services through its existing retail network of stores, pharmacies, and bank branches. Co-operative Legal Services Ltd. offers low-cost services, usually on a flat-fee basis, for common legal matters, such as will writing, probate, land transfers, personal injury claims, employment, and family law matters. Clients are encouraged to manage their file, and choose the level of legal support they want at given price points. The total cost is known to the clients at the outset. By piggybacking established technological capabilities and business competencies, Co-operative has improved access to legal services by removing billing uncertainty, improving physical accessibility, and enhancing affordability. Co-operative is a case study showing that insulating lawyers from non-lawyers prevents the emergence of consumer law firms and spreading of risk, which ultimately stagnates access to justice.

Outside Investors Reduce Capital Costs Finally, in an ABS world, new sources of financing lower the firm’s cost of capital by reducing reliance on debt and easing pressure on the equity holdings of law firm partners. As mentioned, debt is currently the only external source of capital currently available to law firms, and with debt comes periodic payments of interest expense, which increases cash flow pressures and working capital requirements. Regulation does not operate in a vacuum, and banks may not offer the lowest interest rates to law firms if they know they are not in competition with financing from venture capitalists and investment bankers (i.e., non-lawyer investors) for these cash injections. Thus, permitting non-lawyer equity financing eliminates or reduces an expense, and allows the firm to more favourably weather its cash flow cycle. It also facilitates entrepreneurialism from younger members of the bar with less accumulated capital or access to debt financing.

48 Semple at 272.
49 Ibid. at 271.
50 This is the length of time between incurring expenses and collecting on the related accounts receivable from clients. Accountants often assess this in terms of accounts receivable turnover and related indicators.
Further, partners with capital in current law firms may demand high returns for their investment in the firm due to the risk exposure they face should the firm falter or clients default on their account balances. Higher prices allow the partner to take more profits out of the firm to make other investments. This enables the partner to diversify his or her portfolio in order to reduce their risk. The upward pressure on legal fees that this creates serves as a barrier to legal services for those of limited means. Stated differently: this acts as a barrier to legal services imposed by regulations that are supposed to facilitate the opposite.

In short, ABS is an opportunity for a tired industry to renew its public interest mandate in a business-minded fashion. It is clear from business literature and the experience of other ABS-permitting jurisdictions that the promise of business structure liberalization is its ability to improve the delivery of and access to legal services.

Semple at 271.
6 | Other Access Enhancements from ABS

As shown, the business case for ABS is also the access to justice case for ABS - due to
the positive impacts from enhancements to technology, innovation, standardization, and
processes. However, there are further access to justice and public interest considerations that
arise from ABS that are peripheral to the business model itself. These merit attention in this
section.

ABS Marketing Improves A2J First, the marketing potential of ABSs can produce helpful
externalities for access to justice. One byproduct of the retailing or franchising of law are
economies gained in customer learning and the transmitting of information from service
providers. As explained by Hadfield, before consummating a transaction, consumers incur costs
(or opportunity costs) identifying goods and services, learning about product attributes and price
terms, and evaluating quality. When the sought after goods or services are complex, or where
risk or quality are difficult to evaluate, consumers may decide not to proceed. Larger scale
businesses can reduce these costs for consumers by investing in more professionalized and
polished marketing communications and advertising (respecting advertising restrictions, of
course). In law, recognized brand identities and reputations (conventionally the province of 'Big
Law' shops that target corporate clientele) can translate into familiarity and confidence for
individual consumers. Better marketing can facilitate their access to legal services by resolving
any dissonance or uncertainty for the consumer-client. As Hadfield notes, having shared
branding does not need to mean having a shared firm, but rather a shared service standard and
common service experience. In short, the marketing of ABS firms on its own may improve
access to justice by helping to clear apprehensions about legal service providers and improve
confidence in the system.

52 Hadfield at 49.
53 Hadfield at 50.
Diversity of Licensure Promotes Competition  Second, regulations which promote competition among providers facilitates access to justice. Occupational licenses, in general, tend to undermine competition and increase prices by restricting the number of suppliers. Semple critiques the North American tradition of universal licensure, which requires that all persons providing legal advice have a license, and uniquely, that all lawyers hold the same class of license. In other jurisdictions, some legal services can be rendered without a license, and in some cases there are multiple legal professions, reflecting varied scopes of practice. In the U.K., for instance, section 12 of the Legal Services Act permits anyone to give legal advice, but prohibits non-licensees from preparing documents or appearing in court. There are, in fact, 12 types of legal professions in the U.K. While the distinctions between barristers, solicitors, and notaries is well established, the other types of licensed legal professionals in the U.K. were more recently delineated in order to provide more affordable services (i.e., by allowing individuals to specialize in areas of legal practice without as much training as a solicitor or barrister). Semple observes that having parallel types of licenses helps to mitigate the anticompetitive effects of licensing, by causing self-regulated legal professions to compete with one another. This has also been the experience of other types of professions in Canada. By analogy, in Ontario, if the individual lawyer licensing regime is to remain untrammelled, then more options for structuring legal enterprises will inject competitive variety to the field.

54 Legal Services Board, Approved Regulators, online: Legal Services Board <http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm>.
55 Robin at 16.
56 Semple at 269.
57 For instance, for many years accountants were licensed under the CA, CMA, or CGA bodies.
7 | Challenges to ABS

Despite political momentum from within the Canadian Bar Association ("CBA") and elsewhere, ABS appears poised to face an uphill battle in Ontario. As explained, there is clear alignment between ABS and LSUC’s statutory purpose of advancing the public interest, the rule of law, and promoting access to justice. Yet, many practitioners are said to be firmly opposed to ABS. It is somewhat unclear on what relevant basis they expect LSUC to back them up. Here, conflict between the politics of self-interest and the duties of self-regulation may come to a head. Four main criticisms are foreseen.

LawMart At the forefront, the ABS debate is concerned with reconciling consumerism with professionalism. Legal eccentrics will presumably be dismayed at the gauche 'McLawification' and 'Walmart-ing' of a trade with roots in poetry and classics. This is intimated by the Law Society discussion paper itself, in a section about whether the reputation of the profession would be compromised should lawyers operate their practices in association with non-lawyers. The need for such front line legal services may require some holding of noses, and sullying of sensibilities.

These venues are closer to the nesting place of the little, everyday injustices and the people that generally do not (or cannot) get them resolved. This is where the rubber meets the road of injustice, conflict, family disputes, property and real estate matters, and other routine, transactional matters. It is also where accessible, user-friendly, and familiar interfaces with legal services are in short supply. It is no secret why numerous public services (including legal aid clinics) have chosen to operate within, or to provide outreach to, the communities they are targeting, or why ABS-licensee corporations in the U.K. have placed legal services in retail

59 LSUC Discussion Paper at 17.
60 See Richard Miller & Austin Sarat, “Grievances, Claims, and Disputes: Assessing the Adversary Culture” (1980-81) 115:3/4 Law and Society Review 525; see also Robinson at 8.
shops. The one-stop-shopping, ‘Tesco Law’ format is smart from a service perspective. The U.K. regulator recently relaxed rules in order to encourage even more of the shops to open.  

Similarly, the Ontario legal industry may need to reframe its conception of the spaces that can facilitate access to justice. Physical accessibility and convenience aside, literature has shown that many institutions and organizations can be intimidating places for those of lesser means (for example, first generation students in universities). For many, conventional law offices can be imposing. Introducing a more shirtsleeve solution, aside from the limited catchment and stretched resources of legal aid, may provide important contextual comforts that facilitate access to the system.

LSUC’s discussion paper leads to its own conclusions on this issue, rhetorically asking whether the reputation of lawyers in traditional personal injury firms or real estate practices has been harmed by delivering legal services online or through a retail store, as they do now. Personifying the legal needs at stake is helpful to show that a range of delivery methods may be suitable for different services. Facilitating these variations will not undermine the profession.

Professionalism Panic Still others may caution that ABS is a threat to professionalism. They may claim that the status quo (or a minor variant of it) is optimal for to ensuring that lawyers are ethically situated vis-a-vis clients and courts. The suggestion is that any reconfiguration of the business of law will irreparably scuttle this moral tightrope act by introducing conflicting duties to shareholders or outside interests. This is not an issue to be dismissed lightly, but is one that can be addressed practically.


63 Ibid.
Regulatory and governance models from other Canadian professions and from ABS firms in other jurisdictions are instructive. For instance, the prospectuses of Shine Lawyers, a publicly traded firm in Australia, indicate that their first duty is to the court, then to their client, and then to their shareholders. These duties are also spelled out in Australian law: the New South Wales Legal Professions Act states that the Act is given precedence over the company's constitution and that the Act's regulations can displace the operation of the jurisdiction's business corporations act.

Statutes and regulations can also be used to protect solicitor-client privilege - a central plank of the lawyer's professional creed. Solicitor-client privilege has been part of the common law for over 500 years and plays a crucial role in the operation of the legal system. It is also an entitlement protected in the Canadian Charter of Rights and Freedoms. In the Australian and U.K. ABS models, solicitor-client privilege has been addressed through legislation. The Australian legislation states that privilege is not affected when a lawyer acts in the capacity of an officer or employee of an incorporated legal practice. In England and Wales, privilege applies to communications made by an ABS if the communications are made through or at the direction of a relevant lawyer. If ABS is implemented in Ontario, LSUC anticipates that similar amendments giving primacy to lawyers' professional duties and adherence to the Rules of Professional Conduct may be required. These are spelled out in its discussion paper.

Professionalism can also be protected outside of traditional rule-making. Just as ABS can shake up the structure of the legal industry, it may also call for new approaches to the form of professional regulation. The Australian regime imposes a systems- and outcomes-based

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65 Robinson at 12
66 Legal Professions Act 2004 (NSW), ss 161-163 [NSW LPA].
68 NSW LPA, section 143(3)
69 Legal Services Act 2007 (UK), c 29, s 190.
70 LSUC Discussion at 19.
approach to ensure that professionalism concerns are addressed appropriately. Incorporated legal practices ("ILPs") may be audited by the Office of the Legal Services Commissioner ("OLSC") to ensure that they are compliant with the relevant legislation and regulations. Each ILP must have a lawyer designated as responsible for implementing appropriate management systems, which must conform to 10 objectives of a sound legal practice.\textsuperscript{71} Infractions can lead to findings of professional misconduct.\textsuperscript{72} As a monitoring mechanism, ILPs are encouraged to complete voluntary self-assessments of their ethical and management infrastructures.\textsuperscript{73} The OLSC also maintains a risk profile of each ILP. In result, rather than requiring ABS firms to adhere to strict, specific, and prescriptive rules and regulations, the regulatory scheme fosters competition and innovation by allowing flexibility in firm structure, so long as systems adhere to guiding principles. This is consistent with the policy rationale for allowing alternative business forms for legal practice to begin with. Notably, the New South Wales model has resulted in a substantial reduction in the number of professional conduct complaints.\textsuperscript{74}

Taking a further step back, these professionalism questions are also cause for some foundational considerations about the role of professions in society, generally. Three main features have been identified by virtually all authors that have characterized professions:

First, a rather extensive training is required to practice a profession. ..... Second, the training involves a significant intellectual component. ..... Third, the trained ability provides an important service in society.\textsuperscript{75} [emphasis added]

The final element - the ‘service to society’ component - is an important precursor to addressing any tension between ABS and professionalism. It underscores that central to the business of any professional is an innate duty to serve the public's broader interest. To meet this goal, how


\textsuperscript{72} NSW LPA at s 140(5).

\textsuperscript{73} LSUC Discussion Paper at 30.


the profession does business needs to remain relevant - down to its place of business, service format, and units of production. A profession that is unwilling to consider proposals for business model modernization, to venture outside of its consultancy model, to enact innovation-positive policy, and to question its bricks, mortar, and mahogany from time to time will eventually lose its distinction. All professions can become ensconced in their own historical particularities - it is a hazard that is perhaps deepened by the parapets of self-regulation. Setting aside the outcomes of the process, the ABS discussion is an important critical exercise because it helps industry participants reflect on and vision themselves in new forms.

**Bad for Business**  Third, other groups of lawyers may protest that ABS will decimate their business. LSUC itself anticipates this possibility in its discussion paper, noting that in both Australia and England, ABS has had significant consequences for personal injury work:

In Australia, nearly half of plaintiff’s side personal injury work is now conducted by five large personal-injury firms, two of which are publicly listed on the Australian Stock Exchange. In England, 30% of personal injury work is now conducted through firms using ABS arrangements. Half of those are new firms, and half are existing practices taking advantage of ABS liberalization.**76**

While Ontario can distinctly structure and regulate its own potential ABS regime, it is clear that certain areas of practice are more conducive to and attractive for ABS entrants than others. Robinson notes that the reason for this is likely because some fields are easily commoditized and standardized.**77** It is also possible that these areas may not be the ones with the greatest access barriers to begin with.**78** This may be one challenge to realizing benefits from ABS, but the presence of heretofore delayed efficiency gains in certain areas of practice does not undermine the value of ABS altogether. Transformations need a starting point, and seldom will that point be a perfect panacea right out of the gate). As in most industries, firms should be allowed to grow, consolidate, or fail alongside consumer expectations and competitive forces. In law, ABS may speed up this process for some practice areas. Responding to emotional

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**77** Robinson at 13

**78** *Ibid.* Robinson also notes that this experience may vary by jurisdiction.
pressures to shun new, more modern alternatives for service delivery undermines the Law Society’s mandate to facilitate improvements to access to justice and legal services.

Conflicting Goals in Business and Law  A further group of ABS opponents are likely to be concerned with what they view as divergent goals between lawyers and conventional business owners. They fear that non-lawyer owned firms might focus exclusively on profits, with little regard for the public good, which could not only cause harm to the community, but could besmirch the historical roots of the profession’s institutional legitimacy.\(^79\) Anthony Kronman’s ‘lawyer statesman’ is an archetype of this paradigm.\(^80\) The great fear is that non-lawyer owners will push firms to pursue only the most profitable work, leaving other legal needs unaddressed. This essentially boils down to a deeply-held view that legal services are more than a product, and lawyers much more than hired guns:

> [L]egal services should not be thought of as a product that can be bought and sold like car radios or toothpaste, but instead a culturally embedded practice whose practitioners must uphold and further professional ideals and norms.\(^81\)

Of course, it would be antithetical for this paper to suggest that these public service ideals are unimportant. They are central to the role of professions, generally, and to the mandate of Ontario’s lawyers, specifically.

Yet, they are debunkable. First, it seems clear (for reasons mentioned above) that lawyers themselves are already running profit-driven enterprises. Further, if a public interest balancing act is foreseen, LSUC itself has the regulatory authority to implement requirements for public interest legal service for any types of legal enterprise. Third, ABS would also be born into a social and business climate that is rapidly gravitating towards a triple bottom line and corporate responsibility paradigm. Increasingly, both end consumers and corporate clients are looking for socially responsible businesses when they select service providers or vendors -

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\(^79\) Robinson at 11.


\(^81\) Robinson at 12.
including in law. Those forces and incentives would similarly impact an ABS firm. Finally, as mentioned, ABS in Australia has resulted in a reduction in conduct complaints. Overall, it seems that there are tools available to remedy any inconsistencies between the goals of the corporate firm and its practitioners.

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Each of these criticisms emerges from a school of thought that has too narrowly conceptualized the ways in which Ontario's lawyers can deliver their service. While valid considerations, many of them can be mitigated by regulatory and policy design. Many of them also appear to be attempts to quash ABS by betting on the white knight of professionalism, when in fact, interests in maintaining the status quo and avoiding disruption may be the guiding motivation. It is likely that Convocation's deliberations may boil down to a seesaw on the questions of whether allowing non-lawyer owners will significantly increase access to legal services, or whether such ownership will negatively impact lawyers' professionalism. Fortunately, LSUC has a substantial regulatory toolbox and model Canadian and international professional regulatory schemes to turn to for best practices to address legitimate issues. The public interest balance remains tipped in favour of an ABS incarnation for Ontario.

82 Daniel Fish, "The five diversity stats BMO demands from firms", Precedent Magazine (9 September 2014) online: LawAndStyle.ca <http://lawandstyle.ca/law/diversity-stats-bmo/>.
83 Supra note 74.
84 Robinson at 13.
8 | Concluding Considerations

The implementation of ABS in the legal industry of a Canadian province or territory is not a matter of if, but when. In this paper, we have undertaken three tasks. First, we have outlined the necessity of framing the ABS debate as one that must be determined based on whether ABS advances the public interest and access to justice. Second, we have expanded on the structural mechanisms by which ABS makes good business and policy sense, and how this business case aligns with the goal of facilitating access to justice. Finally, we have waded into a host of arguments that are expected to militate against ABS. Most of these areas intersect with conventional notions of professionalism, and in each case, we have attempted to raise compelling counterpoints and remedies to these challenges. Overall, we conclude that ABS provides a compelling, modernizing, and innovating opportunity for the market for legal services in Ontario to improve its accessibility and reinvigorate its public interest function. We encourage the Law Society to adopt a liberal approach to the rules on permitted law firm business structures, supplemented with the necessary regulatory intrusions to address professionalism concerns.

In conclusion, we caution that this is only the first horizon in the ABS discussion. A subsequent challenge will be the coordination of stakeholders to optimally implement ABS and its goals. The market for legal services is linked to outside forces, such as the supply of new lawyers and the court systems and adjudicative processes that legal service providers work within. The response (or lack thereof) of these stakeholders to ABS will impact or limit the effectiveness of any reconfiguration of the industry. Logically, implementing ABS may require a concerted approach that anticipates or coordinates actions with the judiciary, court administration, law schools, and at the Law Society itself. For instance:
- LSUC should urge law schools to formalize curriculum or course offerings that give students a deeper understanding of the business of law - how law operates as an enterprise in the real world.  

- In Ontario, practical legal education, technology, simulations, and business education is already seeing some integration at both the law school level and in the new Law Practice Program licensing stream, but none of this important content is compulsory for all incoming lawyers.

- Similarly, Canadian courts have long been criticized for failing to keep pace with technological developments or improving the efficiency of their procedures or administration. ABS-driven efficiency gains will be limited to this extent.

The gains of ABS reforms will be limited - and the lawyer's value chain fractured - if these entities are not similarly responding to the needs of modern legal services. As we have insisted throughout this submission in favour of ABS, relevant, sustainable, and politically accepted institutions cannot govern themselves in a vacuum, free from external forces.

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85 See e.g. Caroline Strevens, Christine Welch & Roger Welch, “On-line legal services and the changing legal market: preparing law undergraduates for the future” (December 2011) 45:3 The Law Teacher 328 at 347.


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