Submissions Regarding the Implementation of Alternative Business Structures in Ontario
December 17, 2014
INTRODUCTION

The Law Society of Upper Canada is considering allowing non-lawyer ownership of law firms. On September 26, 2014, the Law Society’s ABS working group released a discussion paper regarding the pros and cons of different models of non-lawyer ownership being considered by the LSUC.

Alternative Business Structures or “ABS” can be defined as any form of non-traditional business structure designed to deliver legal services to the public. The term includes non-lawyer investment and ownership of law firms. It also includes the bundling of legal and non-legal services within a single practice.

There are two main models being discussed for possible implementation by the LSUC:

- Those that provide legal services only.
- Those that provide both legal and non-legal services.

For each of these models, the Law Society is also considering whether to restrict non-lawyers to minority ownership, or whether there should be a restriction-free model of non-lawyer ownership.

Other jurisdictions are also considering non-lawyer ownership of law firms. In addition to Ontario, law societies in the United States, Hong Kong, and Scotland, as well as other Canadian provinces are actively considering whether to allow non-lawyers to own law firms.
A number of countries have implemented ABS in various forms. Australia and the United Kingdom have permitted unrestricted ownership by non-lawyers of law firms. Countries such as Spain, Italy, Denmark and Singapore currently allow minority non-lawyer ownership. In order to evaluate the arguments in favour of allowing non-lawyer ownership of law firms and the arguments against, it is helpful to consider the experience of jurisdictions that have implemented ABS.¹

Looking at the experience of other jurisdictions, the most common arguments in support of allowing non-lawyer ownership and not allowing such ownership are discussed in the following sections.

ARGUMENTS IN FAVOUR OF ABS

Supporters of ABS posit that it will lead to higher quality, more affordable legal services and that there is no compelling reason to bar this positive change. They argue that the implementation of ABS will result in the following benefits:

- **Improvements in administrative systems, infrastructure and technology:** Proponents argue that the implementation of ABS will improve the efficiency with which lawyers are able to provide legal services and thereby reduce the cost to consumers. Basically, the argument boils down to the idea that outside

¹ Large sections of these submissions were taken liberally from Harvard Research Fellow, Nick Robinson’s excellent research paper “When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism” (August 27, 2014). HLS Program on the Legal Profession Research Paper No. 2014-20. Available at SSRN: http://ssrn.com/abstract=2487878
ownership brings with it outside capital, with an increased capability to grow legal firms, and to research more efficient ways to deliver legal services. These efficiencies can then be passed along to the consumer.\textsuperscript{2}

In the early 2000s, Australia’s New South Wales government adopted a set of reforms which permitted Multi-Disciplinary Partnerships and Incorporated Legal Practices, which could offer legal services together with almost any other non-legal service, and which allowed unlimited non-lawyer investments. At approximately the same time, Victoria and other Australian states undertook similar reforms. The experience in Australia has been that while there has not been a rush of non-lawyer owners into the general legal services market, there has been a significant increase in terms of public ownership in the personal injury and class action market.\textsuperscript{3} Two of Australia’s three largest personal injury law firms, Slater & Gordon (20 to 25% of the market share), and Shine Lawyers (almost 10%), are presently listed on the Australian Securities Exchange. Maurice Blackburn is another of Australia’s three largest personal injury firms, with a market share of just over 10%. Maurice Blackburn has not gone public. Because Maurice Blackburn has been able to scale and grow the firm without going public, a comparison of the three law firms may cast doubt on whether outside ownership is necessary to achieve economies of scale.

\textsuperscript{2} Ibid. at page 9-10.
\textsuperscript{3} Ibid. at page 27.
In 2007, Slater & Gordon became the first law firm to list on a stock exchange in Australia. At that time, it had annual revenues of $55 million, with 400 staff in 15 offices, and an estimated 10% share of the personal injury market. By 2013, Slater & Gordon had expanded to revenues of $228 million. It employed 1200 people in 70 locations, and controlled 20 to 25% of the personal injury market. In comparison, between 2005 and 2013 Maurice Blackburn expanded at a similar rate to Slater & Gordon. It grew from employing 120 staff in 10 offices, to 800 staff in 27 offices, although most of this growth was internal and not through acquisitions. The rapid growth of Maurice Blackburn and Shine Lawyers (before it went public) ought to raise questions as to whether non-lawyer ownership is a prerequisite for such growth.

- **Ability to brand and bundle services**: The relatively small size of the majority of Canadian law firms limits the ability of customers, especially customers who use legal services infrequently, to use brands to make informed consumer choices. Investment by non-lawyers may allow firms to scale and grow their brand, and increase advertising funding, to better allow customers to comfortably rely on brands when trying to select a legal service provider. Alternatively, if an already well-known brand such as a bank or insurance company begins to offer legal services through ABS, customers may be able to use their perception of the quality of the larger brand as an indicator of the quality of the legal services. In the latter situation, larger companies may also be able to bundle their services, creating convenience and potential efficiencies for the consumer and lowering

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4 *ibid.* at pages 28-29.
the price of legal services. These larger companies may also be able to share overhead for different aspects of their business such as marketing. These savings may then be passed on to the customers.\textsuperscript{5} However, in reality, the attachment of a brand name to a product is a tenuous guarantee of its quality.

- **Increased access to justice for low to mid-income individuals in civil law matters:**
  Consideration of the data from the UK since the implementation of ABS does not provide clear support for the proposition that non-lawyer ownership improves access to justice. This is especially true in the personal injury sector, where the large, profitable market is considered to be one of the most likely sectors to attract non-lawyer investors. Consider the following historical data. The number of personal injury claims in the UK rose steadily from 2005 – 2006 to 2011 – 2012. After the first ABS firms began to be licensed in 2011, the UK saw a plateau, and then a drop in the number of personal injury claims. In fact between 2011 – 2012 and 2013 – 2014, the number of motor vehicle accident claims, which account for about 75\% of all personal injury claims, dropped approximately 7\%. Without more data, it is impossible to attribute the drop in personal injury claims to the implementation of ABS alone. There are a number of other factors which may have caused this result.\textsuperscript{6}

One of the best reasons to doubt the claim that the implementation of ABS will result in access to justice gains in the personal injury sector is the method by which that lawyers in the personal injury bill their clients. In 2010 – 2011, the year

\textsuperscript{5} Ibid. at page 10.
\textsuperscript{6} Ibid. at page 22-23.
before the UK began licensing ABS firms, 97% of personal injury claimants reported that they were not paying for their personal injury lawyer because they were either funded by their own insurance company, or they were contracted under a contingency fee arrangement. Because personal injury clients hire lawyers based on contingency fees, and pay no fees unless the firm is successful in recovering a settlement or judgment, the access to justice concerns advanced by proponents of ABS are not likely applicable to this sector of the population.

Another reason to doubt that ABS firms are having a significant impact on access to justice in the personal injury sector is the increasing number of personal injury lawyers and paralegals in jurisdictions which have not implemented ABS, such as Ontario. Between 2004 and 2014, the membership of the Ontario Trial Lawyers Association, an organization comprised exclusively of lawyers and paralegals, whose practice consists of at least 90% plaintiff side personal injury cases more than doubled from 624 members to 1600 members. This increase in the number of personal injury practitioners, nearly all of whom operate on a competitive contingency fee basis, undermines the claim that there is an issue with access to justice for individuals who have suffered a personal injury.

Another area where the data from the UK has not borne out the claims of increased access to justice is in the family law sector. In 2013, the government enacted cuts to legal aid in family law disputes. Between 2011 and the first quarter of 2014, the percentage of private family law disputes where neither party

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was represented by a lawyer rose significantly from 11% to 25.7%. At the same time, the percentage of cases where both parties were represented by a lawyer dropped from 49.7% to 26.3%. Therefore, at least in the short term, the rise of ABS in the United Kingdom has proved to have had less of an effect on whether persons are represented in family law disputes than the cuts to legal aid programs.

In Australia, some proponents have claimed that Slater & Gordon’s access to investor capital allows it to achieve a large enough size so that it can engage in more pro bono work and better fund large class action cases against corporations. This again is not necessarily borne out by the available evidence. Competitor firms Maurice Blackburn, (which is not publicly listed) and Shine Lawyers (which was only recently publicly listed) are better known for their pro bono work than Slater & Gordon.\(^8\) In terms of class action practice, Slater & Gordon and Maurice Blackburn are recognized as by far the two largest law firms who do plaintiff class action work in Australia. These class actions are in large part funded by third party litigation funders. The third party litigation funders favour securities class actions and are less likely to fund consumer and product liability class actions, which therefore must be funded by the law firms themselves.\(^9\) In light of the fact that Slater & Gordon has to answer to the market at large, rather than merely to the firm’s partners, Slater & Gordon may actually be less likely to take on consumer and product liability class actions than Maurice

\(^8\) *Ibid.* at page 29.

Blackburn. A good example of this occurred in 2012, when Slater & Gordon lost a major consumer drug class action, which led to a 10.5% profit loss for the firm that year. The firm’s chairman then reassured the market and Slater's shareholders that this was a "once-off situation" and that most of the rest of its class action practice was funded by third party litigation funders.\textsuperscript{10}

In his paper, \textit{When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism}, Harvard Research Fellow, Nick Robinson, provides the following four reasons to doubt the assertion that the changes brought about by non-lawyer ownership will bring about significant gains in access to justice:

- **i)** Those persons who require civil legal services often have few resources, are involved in complicated cases, and commonly are not sophisticated at navigating the legal services market or the legal system. The example used in Mr. Robinson's paper is that non-lawyer ownership provides few new options for a bankrupt tenant facing eviction. Mr. Robinson concludes that even a deregulated market is unlikely to provide for this type of legal need because these consumers would remain unable to purchase the sophisticated legal services they need.

- **ii)** Non-lawyer owners are likely to be attracted to sectors in which they expect to see high returns, such as personal injury and social security disability representation. While these sectors have historically seen the

greatest investment by non-lawyers, spurring new models of provision, this does not result in increased access to legal services, or drive down prices, because the work is predominantly done on a contingency basis. The competition in these fields tends to relate to how to find clients with credible claims (advertising and marketing) rather than price reductions.

iii) Non-lawyer ownership may not flourish in certain sectors of the legal market which do not lend themselves to commoditization. These sectors, including criminal law, mergers and acquisitions, and patent law, require the individualized attention of experienced practitioners—the type of practitioners who charge high rates. In fact, it may be that non-lawyer ownership is not able to provide a more efficient model than a traditional worker-owned partnership model in these areas. "Indeed, where the attention of a lawyer is the primary input into a service, a worker owned model may provide potential advantages over investor ownership."

iv) For some legal services there may not be as much price elasticity in the market as those in favour of ABS believe there is. For example, even if the price of preparing a will decreases, many persons may still not purchase one because they do not like to plan for their own death or do not perceive it as a need.

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12 Ibid. at pages 41 to 42.
Accordingly, the evidence emanating from jurisdictions which have implemented non-lawyer ownership provides reason to question the veracity of claims of increased access made by ABS supporters.

The next section will address the arguments commonly raised by those who oppose non-lawyer ownership.

ARGUMENTS OPPOSED TO ABS

Individuals who oppose the implementation of ABS, (including the New York Task Force on Non-Lawyer Ownership, and the American Bar Association) argue that allowing non-lawyers to own businesses that provide legal services will have the following negative consequences which they say will result in adverse consequences for all clients:

- **Commoditization:** In contrast to businesses at large, lawyers work not only to earn a living from their trade, but also to promote ideals that encourage public spirited devotion to the law.\(^\text{13}\) Opponents of ABS argue that non-lawyer owners and in particular investor-owners seek only to maximize the profit of the firm. They fear that non-lawyer owners will focus solely on profit, rather than the public good. Increased non-lawyer ownership may result in firms seeking only the most profitable work, and reduce the likelihood of lawyers taking on pro bono work, or taking cases that pit them against governmental powers. For example, in Australia, critics of non-lawyer ownership argue that the culture of a firm is

\(^{13}\text{Ibid. note 1, and Kronman, Anthony, The Lost Lawyer: Failing Ideals of the Legal Profession (Harvard University Press, 1995)}\)
altered by public listing, towards meeting investors' expectations. Some maintain that publicly listed firms do not take on riskier cases, such as large class actions, and emphasize growth through acquisitions rather than building the firm.\textsuperscript{14} Publicly listed firms have even been accused of pressuring their lawyers to settle cases to meet fiscal targets, particularly close to the time when financial results are to be reported to the market, although this has not been independently verified.\textsuperscript{15} While one should not jump to conclusions based on unverified accounts, the evidence arising from Australia appears to at least support the theory that ABS has not led to more pro bono or class actions (as discussed above), and that it has at least been perceived to put pressure on firms to reduce some types of this work.

- **Conflicts of interest:** Lawyers working in firms owned by non-lawyer investors will potentially be caught in a conflict between their duties to investors and their duties to their clients and their duties to the justice system. While some may argue that the interest of lawyers do not always align perfectly with the interests of their clients, enterprises that offer legal services that also have other commercial interests are more likely to have conflicting interests to their clients. Non-lawyer stockholders may try to create new demands on the firm and the lawyers working in firms, to ensure that commercial interests come first. For example, stockholders of a firm might try to pressure lawyers to settle a case

\textsuperscript{14} Supra, note 1 at page 30.
\textsuperscript{15} Ibid. at page 30.
because they believe that this would lead to the most profitable outcome with the least potential risk, regardless of the best interest of clients.\textsuperscript{16}

Other types of conflicts of interest may arise based on the nature of the non-lawyer investors' business. When government outsources more public functions related to the legal system—like prison or probation services—there is a greater possibility that real or perceived conflicts of interest will arise. Consider the example of a criminal defence firm owned entirely or in large part by a company responsible for building and operating private prisons. Or consider the UK company, Quindell, which has integrated its personal injury lawyers and testifying medical experts into the same company, thereby raising serious concerns about the doctors' autonomy to give impartial expert testimony.\textsuperscript{17} Another example is that of insurance companies.\textsuperscript{18} It is in the interest of the insurance industry overall to keep the cost of claims down. If these companies are permitted to own personal injury firms, there may be an inherent conflict, even if the firm does not bring cases against the insurers that own them. Insurance companies have traditionally lobbied for regulations to limit the amount of compensation paid in personal injury cases, while personal injury lawyers have lobbied for regulations that would allow for greater compensation. It seems clear that permitting insurance companies to own part of the personal injury sector would upset this political balance.

\textsuperscript{16} Ibid. at page 12.
\textsuperscript{17} Ibid. at page 21.
\textsuperscript{18} Ibid. at pages 21-22.
The implementation of ABS may also make it more likely that insurance companies coordinate their behaviour in an attempt to limit payouts. In February 2014, many of the major insurance companies that own law firms through ABS in the UK signed a voluntary code of conduct in which they agreed that they, and any party they might refer customers to, would whenever possible settle their customers’ claims through a government sanctioned claims portal in a manner that does not unreasonably increase legal costs for the at-fault insurer. This type of behaviour raises concern that insurance companies are actively trying to shape the way the firms they have invested in practice law in order to keep the insurers’ costs as low as possible. This is not in the best interests of injured claimants.¹⁹

- **Reputational pressures:** Well-known companies which own legal service providers may be less likely to offer legal services to publicly unpopular clients out of fear of harming their brand. Unpopular clients, who already face discrimination from some law firms today, will potentially be further marginalized and have fewer alternatives in a market with a small number of large providers that want to create or maintain highly respected brands or high levels of positive public perception. An example of this was seen in the UK when management of the Cooperative Group, an 8 million member co-op with 3750 retail outlets throughout the UK, known for its grocery stores, pharmacies, banks and services in funeral care and farming, expressed concern through its management about its legal services branch, Cooperative Legal Services, taking on certain kinds of

clients, including men who had abused their wives, out of concern for the preservation of their brand.\textsuperscript{20}

- **Potential for misuse**: Non-lawyer ownership can also be used in some circumstances to bypass professional regulation, particularly for enterprises offering multiple services. For example, in England and Wales, insurance companies, which once referred injured customers to personal injury firms in exchange for lucrative referral fees, have bought up these same firms in part to bypass a new UK ban on referral fees. By owning the firms they formerly referred clients to, the companies are able to ensure that they share in the proceeds of the case. Non-lawyer ownership could also be used to get around other regulations such as restrictions on advertising or fee structures (i.e. where non-lawyers are allowed to enter contingency fee arrangements, but lawyers are not, such as in Australia.)\textsuperscript{21}

- **Tasteless advertising**: We have all seen a dramatic increase in marketing by personal injury lawyers. One cannot turn on the television, listen to the radio, go into a parking lot, or drive behind a bus, without seeing or hearing how the advertising lawyer is going to “get you the money you deserve”. For the most part, this advertising is in very poor taste. In an ABS world, the amount of advertising by personal injury firms would likely increase. The ability to advertise on television or elsewhere has nothing to do with a lawyer’s level of experience

\textsuperscript{20} Ibid. at pages 23-24.  
\textsuperscript{21} Ibid. at pages 12, 13, and 44.
or competency. Skillful marketing by the financial backers of unskilled lawyers will result in uninformed consumers not getting proper representation. It will also result in an honourable profession being degraded and demeaned by non-lawyer investors who are prepared to market for profit, with little regard for the reputation of the legal profession as a whole.

**SOME EXTRA CONSIDERATIONS AND CONCLUSION**

Aside from the most common arguments raised for and against non-lawyer ownership, it is important to consider that some sectors of legal services are more likely to witness much more non-lawyer ownership than others. From past experience, non-lawyer ownership appears to be more likely in lucrative areas of the law that lend themselves to economies of scale, where work can be easily standardized, and where overhead costs (including marketing and technology) are high. In Australia and the UK, the personal injury bar has seen a disproportionately large amount of non-lawyer ownership.\(^{22}\) As was discussed above, the growing number of personal injury practitioners, and the model of compensation in personal injury cases undermine the argument that plaintiffs in the personal injury sector are experiencing access to justice issues. Therefore the implementation of ABS in the personal injury sector would be providing a solution to an access problem that does not exist.

In contrast, areas such as criminal law, immigration and complex family law matters have seen much lower levels of non-lawyer ownership. The chart below, provided by England and Wales’ Solicitor Regulator Authority, depicts the percentage of market

\(^{22}\) *Ibid.* at page 40.
share held by ABS firms in different legal sectors, as well as the number of ABS firms operating in each sector. Note the disproportionately large presence of ABS firms in the personal injury field when compared to other sectors:

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<tr>
<td>Children</td>
<td>3.47%</td>
<td>33</td>
<td>0</td>
</tr>
<tr>
<td>Consumer</td>
<td>19.77%</td>
<td>6</td>
<td>0</td>
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<tr>
<td>Criminal</td>
<td>2.87%</td>
<td>34</td>
<td>7</td>
</tr>
<tr>
<td>Debt Collection</td>
<td>3.73%</td>
<td>46</td>
<td>5</td>
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<tr>
<td>Employment</td>
<td>6.07%</td>
<td>94</td>
<td>5</td>
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<tr>
<td>Family Matrimonial</td>
<td>5.27%</td>
<td>76</td>
<td>5</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>2.46%</td>
<td>16</td>
<td>1</td>
</tr>
<tr>
<td>Landlord Tenant</td>
<td>3.45%</td>
<td>57</td>
<td>2</td>
</tr>
<tr>
<td>Litigation (Other)</td>
<td>4.26%</td>
<td>112</td>
<td>18</td>
</tr>
<tr>
<td>Mental Health</td>
<td>23.49%</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Non Litigation Other²⁰¹</td>
<td>16.80%</td>
<td>64</td>
<td>5</td>
</tr>
<tr>
<td>Personal Injury</td>
<td>33.53%</td>
<td>102</td>
<td>53</td>
</tr>
<tr>
<td>Probate Estate Administration</td>
<td>4.78%</td>
<td>67</td>
<td>0</td>
</tr>
<tr>
<td>Property Commercial</td>
<td>3.19%</td>
<td>73</td>
<td>0</td>
</tr>
<tr>
<td>Property Residential</td>
<td>3.03%</td>
<td>78</td>
<td>2</td>
</tr>
<tr>
<td>Social Welfare</td>
<td>11.96%</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>Wills Trusts Tax Planning</td>
<td>3.35%</td>
<td>89</td>
<td>7</td>
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Given this information, and combined with the fact that ABS will not improve access to justice for individuals who have suffered a personal injury, there appears to be no advantage to consumers in implementing an ABS system.

Aside from the specific sectors targeted by ABS companies, decision makers ought to consider restrictions on the type of non-lawyer individuals and entities permitted to become non-lawyer owners. Many of the worrisome professionalism challenges

²³ Ibid. at page 17.
identified in these submissions arise from non-lawyer ownership that involves enterprises who also offer other related services, such as insurance companies in the context of personal injury law, or title insurance companies in the context of real-estate law. As a result, jurisdictions adopting non-lawyer ownership should consider implementing bans or strict regulations against these types of ownership where potential for conflict of interest is high.

At least in the world of personal injury law, the disadvantages and risks to the consumer of ABS appear to far outweigh any potential advantages.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of December, 2014.

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