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December 15, 2014

Ms. Janet Minor
Law Society Treasurer
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West,
Toronto, Ontario M5H 2N6

Dear Ms. Minor,

RE: Submission on Alternative Business Structures

The Ontario Trial Lawyers Association (OTLA) is pleased to provide The Law Society of Upper Canada with our response to your working document "Alternative Business Structures and the legal Profession in Ontario: A Discussion Paper".

After many hours of research and debate on this matter, we have provided a detailed response on each area of the discussion paper and on the various models. Due to the length of our response, we have also included an Executive Summary.

We thank the Law Society for the consultation with OTLA and our members on this matter and for the opportunity to provide you with our comments and concerns.

If you have any questions on our submission, we would be pleased to meet with you and the ABS Working Group to provide clarification.

Yours truly,

Steve Rastin
President

Linda Langston
CEO

December 15, 2014

OTLA Submission to Law Society of Ontario on Alternative Business Structures

EXECUTIVE SUMMARY

The Ontario Trial Lawyers Association ("OTLA") has been studying the potential impact of Alternative Business Structures for the past 18 months by reviewing a vast array of documents, undertaking its own research, and debating the merits of the proposals made in the Law Society's Discussion Paper (Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper) as released in September 2014. By applying hundreds of hours of Board, member, and staff time to understand the intricacies of ABS, OTLA is well-poised to take a position on this issue.

OTLA's submission in response to the Discussion Paper provides an in-depth response on matters of Access to Justice, Technological Considerations, Economic and Business Considerations, Professional and Ethical Considerations, Conflict Considerations and the '4 Models' proposed by LSUC.

It is our position that there is **not** enough empirical evidence, available from the jurisdictions in which ABS is permitted (namely Australia and UK), to endorse permitting ABS in the Ontario legal profession.

Although OTLA recognizes that there are segments in the legal system that have particular access concerns, especially in the family law context, no evidence has been brought forward to show how these access concerns will be effectively addressed and reduced through ABS. In fact, OTLA is concerned that the introduction of a non-lawyer ownership will have unintended consequences that will not serve the public interest and hurt access to justice.

OTLA believes that ABS advances in technology are overstated. Technological change is already occurring at various rates throughout the legal profession. It is not clear that ABS can provide innovation in delivery of legal services that lawyers practicing in traditional firms cannot. There is scant evidence from other jurisdictions that ABS leads to significant technological innovation.

There is an absence of empirical data showing savings to consumers of legal services. The consolidation and monopolization of legal services in the industry, where only a few players dominate the market, could leave consumers with less competitive choice and less competitive prices to deal with legal issues.

There are significant concerns about the duty of lawyers to their clients, the need for independence of legal professionals, the issues of confidentiality and the lack of ability for LSUC

to regulate firms and non-lawyer owners in ABS.

In particular, the matters of conflict of interest when an ABS is owned by a firm, like an insurance company that provides a multi-platform of services from insurance to legal to rehab and tow trucks, has the potential for significant conflicts of interest, as is occurring in the UK.

It would not be adequate for the Law Society to simply create new rules in the hope of protecting the public against the types of conflicts of interest that are inevitable in an ABS environment. This will require significantly increased resources and infrastructure for LSUC to regulate such matters.

Overall, OTLA is unequivocally opposed to unrestricted non-lawyer ownership and particularly to any change that would allow publicly-traded law firms in Ontario. We believe that lawyers should always maintain a controlling interest in law firms, in order to ensure that the core values concerning conflicts of interest, client confidentiality and independence of lawyers are maintained and protected.

Law firms should offer legal services only, subject to the allowances already made under the current regulatory system for MDP's. There is, as yet, no identified need for law firms to offer non-legal services that are abundantly and readily available within the litigation support industry.

OTLA believes that the profession's core values, and the public interest, can only be protected by ensuring that lawyers maintain control over the delivery of legal services. We do support the regulation of law firms, rather than just individuals, in order to ensure that the actions of employees, for which the firm may be vicariously liable, can be regulated.

Until more empirical evidence is available for all ABS jurisdictions and has been fully and critically reviewed by the LSUC and members of the profession, OTLA submits that the introduction of ABS on any level would be premature and, therefore, ill-advised in Ontario. A more measured and considered approach would be the most reasonable one going forward.

SUBMISSION OF THE

ONTARIO TRIAL LAWYERS ASSOCIATION

ALTERNATIVE BUSINESS STRUCTURES ("ABS")

In Response to

The Law Society of Upper Canada
Discussion Paper, Alternative Business Structures and the Legal Profession in Ontario

The Ontario Trial Lawyers Association ("OTLA") was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

Our organization has 1,600 members who are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

PART I
INTRODUCTION

In September 2011, following the Bencher election, the Law Society of Upper Canada ("LSUC") held a strategic session in which it set out its priorities for the upcoming term (2011-2015). One of these priorities was to examine alternative business structures ("ABS"). A Working Group, co-chaired by Malcolm Mercer and Susan McGrath, was established for that purpose.

In a document dated September 24th, 2014, entitled "Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper" (the "Discussion Paper"), the Law Society advised potential stakeholders, including the public and the legal community, that it is interested in determining whether ABS can:

- Facilitate greater flexibility in the delivery of legal services;

- Foster innovation in the area; and
- Improve access to legal services for consumers.

OTLA first became aware of the ABS discussion and the Law Society's Working Group in the summer of 2013 when the Association was invited to attend a two-part Law Society symposium on the subject of ABS, in August and October. Following the symposium, OTLA established its own Working Group to examine ABS and its implications for the public and the profession. The OTLA ABS Working Group is comprised of 11 lawyers including 8 Board members: Charles Gluckstein, Laurie Tucker and Allen Wynperle as co-chairs, as well as, Graham Bennett, John Michael Bray, Maria Damiano, Michelle Jorge and Siona Sullivan, in addition to Past President, Greg Monforton and OTLA members David Lackman and Duncan Macgillivray.

In addition to having attended the symposium, OTLA's Working Group has reviewed the 3,200+ pages of background material that the Law Society has relied on, and has surveyed the response of other jurisdictions to ABS.

OTLA has commissioned its own research to determine whether there is any empirical evidence to support the contention that ABS – specifically, non-lawyer ownership – has improved access to justice in the UK and Australia.

The OTLA ABS Working Group has studied Nick Robinson's recently released research paper, "When Lawyers Don't Get all the Profits"[1].OTLA recommends this as essential reading for those involved in the ABS debate.

OTLA has devoted two Board meetings and a portion of its annual Long Range Planning session to discussing ABS. OTLA had Mr. Mercer and Ms. McGrath attend its September 2014 Board meetings to present and answer questions. Representatives of OTLA's Board has met with Andrew Grech, the managing director of Slater & Gordon, and other lawyers familiar with the ABS issue in Australia, the UK and the United States. OTLA has also conducted a panel discussion at its Spring Conference in May 2014, with two members of the Law Society's Working Group participating as panelists in front of 400 OTLA members.

With well over a year of research, review and work on the ABS issue, we believe that OTLA understands the intricacies of the ABS issue and is well-poised to take a position. As discussed in depth below, OTLA is of the position that there is not enough empirical evidence available from the jurisdictions in which ABS is currently permitted to endorse permitting ABS in our

[1] Nick Robinson, "When Lawyers Don't Get all the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism" (Harvard Law School, Program on the Legal Profession, Center for Policy Research, August 27, 2014) ["Harvard Study"] at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878.

jurisdiction. At this stage, OTLA cannot support ABS as envisioned in the Discussion Paper. Until empirical evidence on the benefits of ABS to access to justice and the market as a whole is available and has been fully and critically reviewed by the LSUC and members of the profession, OTLA submits that the introduction of ABS on any level would be premature and ill-advised.

The submission which follows reflects the subject matters raised in the Discussion Paper and is presented in the following parts: Access Considerations; Technological Considerations; Economic and Business Considerations; Professional and Ethical Considerations; Conflict Considerations; and Concluding Comments.

PART II
ACCESS CONSIDERATIONS

Access to Justice Introduction

One of the major arguments advanced in support of ABS is that it will open the door to legal services and, in doing so, broaden access to justice especially for those otherwise unable to afford representation.

Recognizing that not all individuals can readily afford or access legal services, the LSUC is exploring "whether existing restrictions can properly be liberalized to facilitate more effective and economical delivery of legal services, where services are not available or accessible at present"[2].

One of the means put forth to "liberalize" the delivery of legal services is non-lawyer ownership or equity in law practices. OTLA cautions that there is insufficient data and research to support the proposition that non-lawyer ownership will improve access to justice. Indeed, according to OTLA's commissioned research, there is no empirical data to support the argument that non-lawyer owned ABS firms have improved access to justice in either the UK or Australia on any of the metrics that would be important to Ontarians. Moreover, OTLA is concerned that access to justice may in fact be hurt by non-lawyer ownership.

Access and Affordability of Legal Services

According to the LSUC's Discussion Paper, "[p]eople are always sensitive to cost. And the more serious the problem, the more legal services are likely to cost. In fact serious legal problems often cost more than the average person can afford".[3]

The LSUC Discussion Paper also notes that one-third of low and middle-income Ontarians did not seek legal assistance for what they regarded as legal problems[4]. However, the Civil Legal

[2] The Discussion Paper at pg. 12.
[3] The Discussion Paper at pg. 11.

Needs Project,[5] which the Discussion Paper cites as its source for this proposition, frames the discussion another way, and more positively, stating that in fact almost 70% of low and middle-income Ontarians "who have experienced a civil legal problem in the last three years sought legal assistance from a lawyer whom they paid. Eighty per cent of those people stated they found the assistance helpful".[6]

The focus of many who discuss the issue of access to justice is that lawyers are expensive and that litigation is costly. However, those assertions fail to take into account the particular context in which the legal services are required. If a highly contentious family law or contractual issue is at the forefront of the dispute, then it is difficult to see how ABS will effectively decrease the costs of that litigation in a way that will increase "access to justice" for the parties involved. Certain litigation is inherently expensive. The costs are driven by protracted timelines and other vagaries of the legal process itself. ABS will not materially contribute to the efficiency of the legal process or reduce the costs inherent in the litigation model, without the nature of litigation changing dramatically.

As discussed further below, it is the position of OTLA, based on the available information, that non-lawyer ownership will not materially improve access for the areas in which self-representation is most prevalent. The recent expansion of eligibility for legal-aid in Ontario is a progressive step towards closing the gap in the justice system between those who are self-represented and those who have counsel.[7] OTLA supports the expansion of programs such as this initiative as a practical means of improving access to legal services.

The Data on Access and Non-Lawyer Ownership

OTLA is concerned about the dearth of research or empirical data in the LSUC's Discussion Paper, and elsewhere, that convincingly demonstrates that the ABS experience in jurisdictions in which ABS has been adopted has ameliorated problems associated with access to justice.

The Noel Semple paper "Access to Justice: Is Legal Services Regulation Blocking the Path?"[8] has been cited for the proposition that ABS has improved the availability of legal services and lowered costs in England, Wales and Australia.[9] However, the Semple Report, rather than being based on empirical evidence, is premised on the theory that ABS has led to economies of scale and scope, and flat fee servicing. The real deficiencies in the Semple hypothesis are found in

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[5] The LSUC was a partner in researching and preparing this the Civil Legal Needs Project.
[6] Civil Legal Needs Project at pg. 3.
[7] Guly, C. "Ontario AG: Legal aid threshold 'still low'", The Lawyers Weekly: November 21, 2014 at pg. 3.
[8] Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path? (2013) University of Toronto Working Paper (the "Semple Report").
[9] See for example the CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada" (August 2014).

the unsupported assumptions that the savings inherent in economies of scale will be substantial, will be passed on to the consumer, and will thus open up access to legal services.

The most comprehensive study to date on the impact of non-lawyer ownership of legal services is that of Nick Robinson.[10] Robinson summarizes his observations regarding the relationship of ABS to access to justice, this way:[11]

> Proponents [of ABS] argue that these developments will spur investment and innovation, promoting access to justice by making legal services more affordable and reliable. But by using case studies and other empirical research to examine non-lawyer ownership in Australia and England and Wales, as well as the United States–where parallels to such ownership have emerged in online and administrative law legal services—this article … argues that **the benefits of such [non-lawyer] ownership have been oversold with respect to access to civil legal services for poor and moderate-income populations. While non-lawyer ownership is likely to continue to spread, these conclusions cast doubt on the ability of a more deregulated legal services market to substantially improve access to legal services** [emphasis added].

Following a comprehensive analysis of non-lawyer ownership in England and Wales, Australia and the United States, Robinson concludes that even if ABS brings innovation and large economies of scale, these "improvements" are not likely to translate into significant access gains.[12] Robinson's conclusion is based on four reasonable assumptions:

1. **<u>The Lack of Resources and Knowledge</u>** – Those who cannot afford legal services in the current market will likely not be able to access those same legal resources even in a deregulated legal market. Even assuming moderate savings in legal services occur with ABS, those savings will likely not be enough to assist those who cannot afford legal resources. As pointed out by Robinson, "[p]ersons in need of civil legal services frequently have few resources, are often involved in complicated cases, and commonly are not sophisticated at navigating either the legal services market or the legal system"[13].

2. **<u>Investment in the High Profit Sectors</u>** – Logically, non-lawyer ownership is mainly based on return on investment. Following that logic, investors will gravitate towards those areas of law where profitability and returns on investment are likely to be high, such as the personal injury area. As pointed out by Robinson, new models or innovation will not likely affect prices greatly, if at all, in this realm, as potential personal injury clients are less sensitive to cost considerations since they generally do not pay their lawyers directly (i.e. contingency basis payment).[14] Even assuming lawyers have more access to resources and technologies through outsider equity capitalization, non-lawyer ownership in these areas will likely not make a material difference in these areas where traditionally there have been minor access concerns.

[10] See the Harvard Study, *supra* note 1.
[11] Harvard Study at pg. 1.
[12] Harvard Study at pg. 41.
[13] Harvard Study at pg. 41.
[14] Harvard Study at pg. 41.

3. The Realities of Legal Work - Conversely, Robinson points out that those highly specialized areas of law which are not easily commoditized will likely see little or inconsequential investment from non-lawyer owners.[15] Where the legal work requires highly individualized attention of an experienced lawyer, that work cannot be delegated or out-sourced and will not generally be enhanced by economies of scale. As a result, there will not likely be improvement to access to legal services in these areas of law.

4. Cultural or Psychological Barriers to Access – As pointed out by Robinson, there are segments of society who are currently, and in future will likely continue to be, reluctant to access legal services because they either "do not believe they need a legal service or there are cultural or psychological barriers to accessing the service"[16]. Price or innovation will likely not be a factor for this segment of society and, as a result, non-lawyer ownership will likely have no effect on these individuals.

Reduction of Legal Costs

One of the anticipated benefits of non-lawyer ownership is that it "might encourage innovation that would reduce the cost of services and permit greater access"[17]. This proposition makes two critical assumptions:

(1) that ABS will lead to innovation that will result in a reduction of the cost of providing legal services; and

(2) these cost savings will be passed on to the consumers of legal services rather than be retained by the service providers.

Reduction in Legal Costs through Innovation

The relationship between ABS and technological innovation in the delivery of legal services is discussed at length in PART III – Technological Considerations of this submission. However, even assuming that innovation and economies of scale can translate into greater productivity, any real savings in legal costs would likely be seen in practice areas that are more amenable to flat fee structuring, for example- simple real estate transactions, simple wills and simple divorces – areas where flat fee structures are already prevalent in the delivery of legal services.

Again, the Civil Legal Needs Project provides some interesting information on the affordability of the legal system for most people who are dealing with everyday legal issues. According to the Project[18]:

> A significant challenge is to find ways to encourage more people to receive the full benefit of the **existing** resources available to them.

[15] Harvard Study at pg. 41.
[16] Harvard Study at pg. 42.
[17] The Discussion Paper at pg. 14.
[18] Civil Legal Needs Project at pgs. 3-4.

> People often can't find legal help because they don't know where to look, or because they perceive they won't be able to afford it. The study reveals, however, that **fully half of the low and middle-income Ontarians who had civil legal needs were able to access free help or to resolve their legal problems for less than $1,000 in legal service fees**. [emphasis added]

One problem with self-represented individuals and access appears to be the lack of information regarding available resources. Moreover, access issues might be more prevalent in the areas of criminal law, family law, and other civil litigation disputes where contingency fee arrangements are either not permitted for public policy reasons, or would not be practical from a revenue-generating standpoint. Also, highly contested matters are not amendable to flat fee contracts, as the flat fee model assumes a certain outer parameter of work to be done.

OTLA cautions that innovation and streamlining of legal services within a law firm will not likely translate in a way that makes highly contested matters appreciably less costly, at least not without comprising the quality and extent of legal services that may be demanded by the complexity of the tasks required to effectively service the client's needs.

The Trickle Down Theory: Assuming Savings will be Passed onto the Consumer

Even accepting that greater competition or innovation will streamline legal services, and potentially reduce the overall cost of providing those services, there is no proof, beyond conjecture, that those savings will be passed along to the consumer of legal services. This is especially true where the business model includes – indeed may be driven by – financial accountability to non-lawyer investors whose interests in the firm are measured only by the returns they receive on their equity investments.

Even where savings are passed onto consumers, in many cases the savings will be marginal with the result that legal services will continue to be inaccessible to individuals identified as having access issues. For example, for someone who struggles with providing the necessities of daily life, an hourly rate "reduction" to $130 is just as out of reach as an hourly rate of $150.

The Likely Direction of ABS Investment

Our legal system is already able to manage, without ABS intervention, the cost to consumers associated with contentious legal proceedings in major areas such as personal injury. The contingency fee system works very well in Ontario with individuals gaining access to lawyers without having to fund potentially costly litigation. Access to justice has also been increased in recent years through the availability of programs that provide litigants with protection against adverse cost awards. ABS will not change that level of access.

It is also unclear how any of the forms of ABS currently under consideration in the LSUC Discussion Paper will necessarily assist those groups who are identified as traditionally having problems finding or affording representation, such as family and criminal law litigants, especially where Legal Aid is already available.

As pointed out by Robinson in the Harvard Study, ABS has in other jurisdictions been attracted to areas where traditionally there has been less concern about access, namely the personal injury field. [19]

Non-lawyer investors are more likely to invest and be drawn to the personal injury area because of the anticipated profitability and high returns. This will not in any way assist those in other areas identified as having access issues. It is certainly no coincidence that the preponderance of non-lawyer investment in jurisdictions where ABS has been adopted has been in personal injury firms. As the LSUC Discussion Paper itself underscores, at least with reference to the Australian and UK experience, "it is clear that personal injury work has been attractive to firms using ABS models"[20].

Australia's Slater & Gordon is the leading example of ABS on a world-wide scale, being the first legal service firm to be listed on a national stock exchange and the first ABS firm to migrate to other countries. As of December 11, 2014, Slater & Gordon has more than 1200 staff in 70 locations across Australia, and 1300 staff across 18 locations in the United Kingdom[21].

In theory, areas of law which have higher rates of return will attract ABS investors. But, traditionally higher return areas of practice are not underserviced, have minimal access concerns, and are least in need of ABS incursion.

Slater & Gordon now has the largest share in the personal injury market in Australia with an estimated national market share of between 20-25% as of July 2013, with its closest competitor holding 15% of the market.[22] On the other hand, Slater & Gordon holds less than 1% of the Australian *non-personal injury* market.[23] Outside of Australia, in only two years, Slater & Gordon has captured 5% of the UK personal injury market.[24] Eighty percent of Slater & Gordon's revenues come from personal injury litigation.[25]

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[19] Harvard Study at pg. 41.
[20] The Discussion Paper at pg. 15
[21] See Slater & Gordon's website at: The Firm: Who We Are [https://www.slatergordon.com.au/firm]
[22] See RBS Morgans Report on Slater & Gordon dated July 1, 2013 at pg. 39 [https://media.slatergordon.com.au/morgans-research-update-1-july-2013_0.pdf].
[23] See Wilson HTM Investment Group Report on Slater & Gordon dated August 12, 2014 at pg. 11 [https://media.slatergordon.com.au/wilson-12-aug-2014.pdf].
[24] See Morgans Report on Slater & Gordon dated February 12, 2014 at pg. 4 [https://media.slatergordon.com.au/morgans-research-update-12-feb-2014.pdf].
[25] See Slater & Gordon's 2014 Annual Report at pg. 2.

The Slater & Gordon ABS model is an excellent example and indication that if non-lawyer equity investment is permitted in Ontario law firms, the personal injury market will be the first target in the sights of profit-minded investors. Ironically, therefore, the area of law that traditionally has had the least access concerns in Ontario will be the area that likely sees the greatest attraction and exposure to non-lawyer investors, quite conceivably at the expense of other areas where access to legal services is a greater challenge.

Unintended Consequences

Rather than improve access to justice, therefore, OTLA is concerned that the opposite may occur with individuals having less access to lawyers if non-lawyer ownership is permitted.

With lawyers primarily accountable to their ABS equity investors for the firm's profitability and use of legal resources, those now providing *pro bono* legal services, or accepting non-profitable retainers based on legal novelty or sympathetic circumstances, may no longer be able to justify these pursuits given their downward impact on the profitability of the firm. OTLA is concerned that the focus on "return on investment" will cause lawyers to avoid taking certain meritorious cases all together, or will substantially reduce the amount of time spent on these files.

In addition, to seemingly increase access to legal services the fees charged to clients may initially be lowered when an entity is first trying to get a foothold into a market and build brand recognition. However, OTLA is concerned that those legal service fees will likely rise and become less affordable, once the ABS firm has established a strong market share or, worse, a monopolistic share.

Conclusion Regarding Access to Justice

Although OTLA recognizes that there are segments in the legal system that have particular access concerns, especially in the family law context, no evidence has been brought forward to show how these access concerns will be effectively addressed and reduced with non-lawyer ownership.

As pointed out by Robinson, change only for sake of change is not, and should not be, the goal:[26]

> There is a danger that the push to deregulate legal services may come to dominate the access to justice agenda as deregulation and competition become central tenets of a new set of ideals about how to organize the delivery of legal services in society… **For policymakers the goal should not be deregulation for its own sake, but rather increasing access to legal services that the public can trust, delivered by legal service providers who are part of a larger legal community that sees furthering the public good as a fundamental commitment**. [emphasis added]

[26] Harvard Study at pg. 54.

OTLA is concerned that the introduction of non-lawyer ownership will have unintended consequences that will not serve the public interest. The indication from other jurisdictions where ABS is currently afoot is that the ABS firms are targeting certain profitable segments of the legal market that do not traditionally have access problems, while ignoring areas of law that may be less lucrative and where access problems are more prevalent. This should not come as a surprise given that the non-lawyer ABS model sees the highest return on equity, rather than the public interest, as its principal motivator. There is virtually no indication that the introduction of non-lawyer ownership will resolve the access to justice concerns identified by the Discussion Paper.

PART III
TECHNOLOGICAL CONSIDERATIONS

Introduction to Technology

The LSUC Discussion Paper also seeks to determine whether ABS can foster innovation in the legal field. Proponents of ABS often point to technological advances in support of their position. Increased capital injected through equity financing, they argue, leads to better technology, which in turn leads to innovation.

The legal profession may not have been as quick as other professional or business sectors to embrace the digital revolution and make the most of technological advances. Perhaps that is because the legal profession is one steeped in tradition rather than transformation. But it would be wrong to think that ABS is the panacea for the bar's technological woes, assuming such woes do even exist. First, the legal profession is now availing itself of the advantages offered by technology, as will be discussed below. Second, the most obstinate of barriers to innovation and the adoption of technology are simply not addressed by ABS. The real hurdles we face have little to do with firm structure. Third, empirical evidence from England and Wales suggests that the technological benefits of ABS are being overstated.

Ontario is advancing technologically without ABS

Although the legal profession has been slower than others to embrace the digital age, nevertheless in recent years we have seen significant change. We have seen change in the courts, change in legislation, and change in individual firms across the province. This change has come about as a result of the efficiencies and exigencies of modern-day practice, not as a result of ABS.

The Courts

The judiciary has recognized the need to innovate and has already taken steps to do so. In *Bank of Montreal v Faibish,*[27] Brown, J. recently ordered a completely electronic six-week trial. In doing so, His Honour stated:

> [4] Providers of music to the public have had to adapt to changes in technology in order to continue to provide their particular service. Why should courts and lawyers be any different? Why should we be able to expect that treating courts like some kind of fossilized Jurassic Park will enable them to continue to provide a most needed service to the public in a way the public respects? How many wake-up calls do the legal profession and the court system need before both look around and discover that they have become irrelevant museum pieces?
>
> [5] Paper must vanish from this Court and, frankly, the judiciary cannot let the legal profession or our court service provider hold us back.

Another example of forward thinking by the judiciary is the 2013 decision in *Fehervari v Kiss*[28] where Perkins, J. validated the service of electronic documents over a website, Support Information Exchange, under the *Family Law Rules*.

Legislation

In January 2015, *the Rules of Civil Procedure* will be changing to allow for electronic service of documents. These changes are, in part, the result of lobbying by Michael Treyman, the co-founder and CEO of Courtside EDX, a company that electronically serves court documents instantaneously.[29] Mr. Treyman identified a bottleneck in the litigation process — service. Service as we experience it now is slow, costly, and often a source of contention. A program developed by Mr. Treyman aims to make a tedious process simple by allowing the transfer of large court documents, electronically, and by generating a Record of Service that allows members to prove the contents of their documents and eliminate the need for an affidavit of service. In effect, this program facilitates electronic document exchange. On a broader level, the efficiency gains realized by law firms through Courtside EDX and similar service providers facilitate access to justice by making burdensome processes leaner and more cost-effective.

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[27] *Bank of Montreal v Faibish,* 2014 ONSC 2178 (CanLII).
[28] *Fehervari v Kiss*, 2013 CanLII 74231 (ON SC), <http://canlii.ca/t/g1zgq>.
[29] Michael McKieran, "Lawyers filling court technology void" *Law Times*, September 29, 2014. [http://www.lawtimesnews.com/201409294227/headline-news/lawyers-filling-court-technology-void]

Courtside EDX is an example of technology that is being used to innovate within existing business structures. It is an example of an Ontario lawyer identifying inefficiencies within his practice and effecting change to eliminate the problem using technology. Ontario lawyers, such as Mr. Treyman, are in the best position to identify areas where technology can be used advantageously and to influence change. Alternative business structures are not required to effect such change.

Firms

Law firms in Ontario are already making in-office changes as well as looking for efficiency gains externally. In-office, firms are increasingly adopting a paperless practice. Through technology solutions such as PrimaFact, paperless litigation has become a reality. Offices that have adopted this type of technology report significant efficiency gains.

In addition to firms making changes within their existing bricks and mortar practices, they are also rethinking the idea of what a law office is. Technological innovation has allowed lawyers to transcend physical boundaries, opening up possibilities for expanded legal markets and redefining client communication. For example, technology has enabled lawyers to have virtual offices that are able to reach under-served communities at affordable rates.[30] This is particularly useful in rural areas where older lawyers are retiring, leaving a void that would otherwise go unfilled.[31]

Firms are also creating efficiencies within their organizations through legal process outsourcing ("LPO"). In other words, firms are moving to outside contractors certain functions or litigation steps that would traditionally have been undertaken in-house. Over the past few years the prevalence and growth of LPO has been significant. LPO still has plenty of room to grow and it is expected that it will continue to grow. To take one example, improved technology that allows for document review over the Internet could help the LPO industry grow by leaps and bounds.[32]

Even absent ABS, Ontario Law firms are already re-thinking the way that they provide and price legal services. A recent article by Julius Melnitzer in *Law Times News* [33]explored how innovation, aided by technology, is evident, giving three examples of (lawyer owned) firms operating non-traditionally and achieving profitable results: Hansell LLP is a rapidly growing

[30] LSUC, "The Changing Legal Profession: Anticipating the Future", *Gazette*, Spring 2013 at <http://kowalski.ca/wp-content/uploads/2013/05/Gazette-2013-spring.pdf>.
[31] LSUC, "The Changing Legal Profession: Anticipating the Future", *Gazette*, Spring 2013 at <http://kowalski.ca/wp-content/uploads/2013/05/Gazette-2013-spring.pdf>.
[32] Matthew Wocks, "Legal process outsourcing grows by leaps and bounds" *Legal Post*, April 17, 2013 at <http://business.financialpost.com/2013/04/17/legal-process-outsourcing-grows-by-leaps-and-bounds/>.
[33] Julius Melnitzer, "Some firms changing incrementally as ABS debate rages", *Law Times*, November 24, 2014

practice founded by Carol Hansell, formerly of Davies Ward Phillip & Vineberg LLP. Hansell's challenges in her former practice, including conflicts of interest and independence issues, prompted her to create opportunity through a specialized corporate governance practice. Now, the firm is focused on legal advice, but Hansell envisages a multidisciplinary practice including non-legal services related to corporate governance issues. Next, a commercial litigation boutique, Speigel Nichols Fox LLP, is the first firm in Canada to offer flat fees on all services across the board. The flat fee has two parts: a fixed fee and a result-oriented fee. This, says Allison Speigel, has led to an alignment between the financial interests of the firm and the client. Finally, Conduit Law PC allows clients to adjust their bill based on perceived value of the legal services received. This model is based on client trust and increased incentive to deliver quality work. These entrepreneurial, innovative firms have achieved success by thinking outside the box while remaining lawyer-owned, non-ABS entities.

Clients

Lawyers are not alone in their quest for cost savings and efficiency gains. Clients want alternate ways of meeting their legal needs, and increasingly, they are finding what they are looking for online.

Three examples of alternative legal service providers are as follows:

Rocket Lawyer

Rocket Lawyer provides online legal services for individuals and small to medium sized businesses.[34] As of 2011 the "firm" had 70,000 users a day and had doubled revenue for four years in a row, reaching a maximum of $10,000,000.00 in 2011.[35] Rocket Lawyer provides online legal forms from wills to certificates of incorporation to be completed by non-lawyer users, and provides members with a wide array of flat-rate legal services[36.] An additional feature called Rocket Lawyer On Call connects members with a local attorney who will review legal documents at no additional cost. Founder Charlie Moore states that, "Rocket Lawyer gives consumers technology to do things themselves with no human intervention at all. When they do need help, and they do, they can consult with a lawyer."[37]

[34] Rocket Lawyer, Your Legal 'I Do' List: Rocket Lawyer Provides Legal Tips for Getting Married. *Marketwire, November 23, 2010.*
[35] Fisher, Daniel. Google Jumps Into Online-Law Business With Rocket Lawyer. *Forbes*. August 11, 2011.
[36] Wilson, Jeffrey L. Rocket Lawyer On Call Delivers Affordable Attorney Access. *PC Mag*. July 12, 2011.
[37] Wilson, Jeffrey L. Rocket Lawyer On Call Delivers Affordable Attorney Access. *PC Mag*. July 12, 2011.

Axess Law

Axess Law provides services ranging from everyday legal needs such as traffic tickets and personal injury, to wills, powers of attorney and helping people buy or sell a home. Additionally, they offer business/corporate legal services such as shareholder agreements, employment contracts, and incorporation and business name registrations.[38]

Axess Law is unique in that it has set up in select Wal-Mart stores so that customers can access legal services while they shop during Wal-Mart's hours of operation.

Legal Zoom

Legal Zoom was established by four attorneys in the United States. It is an online service that provides business and individuals with routine solicitor work involving incorporations, trademarks, and wills and estates.

The Law Society's Discussion Paper states, "[p]eople who use online providers are, from the perspective of the legal profession, lost clients. In other words the existing business structures are not effectively serving the market."[39] In OTLA's view, that individuals might be better served by an online provider does not mean that they are lost clients; rather, they have found a more efficient means of meeting their legal needs.

The fact that clients are seeking legal services from online providers is not an argument in support of ABS. Rather, it is a call to action for lawyers in traditional firms to adapt to changing technologies and consumer demands. The examples referred to above demonstrate how technology can be used to better serve the legal market. These technology-based innovations exist, and will continue to exist and thrive in the future, absent and independent of ABS.

Barriers to technological innovation are not necessarily overcome by ABS

ABS may provide capital to invest in technology. This does not mean ABS facilitates innovation through technology. For example, a firm with more capital may be able to provide all employees with iPads, but the mere presence of technology will not achieve innovation, growth, efficiency or client satisfaction.

Progress and change must come from creative thinking about better ways to deliver legal services to existing clients, and to attract new clients, through the implementation of

[38] Axess "Who we are" at < http://www.axesslaw.com/who-we-are.html>.
[39] The Discussion Paper at pgs. 11 to 12.

technologies that complement and preserve traditional law firm values rather than threaten or replace them.

That said, we have reached a point in the practice of law where change in our profession and our court system must now be considered. Chief Justice Strathy addressed the necessity of a move in that direction in his 2014 Opening of the Courts speech. In support of change, he stated:[40]

> In my view, we must ask every court, every court office, every person responsible for the administration of justice to consider how their practices and procedures can be simplified, streamlined and made more user-friendly. And we must also foster a culture where these changes can be implemented.

While the culture shift referred to by Chief Justice Strathy is necessary for innovation and the adoption of technology, this is not a shift that is dependent upon or facilitated by ABS.

In this regard, the Legal Service Board in England and Wales had the following to say in a 2013 ABS survey :

> Permitting new business structures in legal services was designed to enhance innovation. However this may be an enabler but not a guarantee of success. As one respondent to the ABS survey stated: "ABS has facilitated the introduction of investment into new ways of delivering legal services product. The legal professional must recognise the need to change though and worryingly there still seems reluctance in the profession to do so. An ABS licence does not suddenly turn you in to a profitable legal services business, the people managing the business still have to do that bit".[41]

This excerpt echoes Chief Justice Strathy's remarks, pointing to people, as opposed to business structures, as the proper catalyst for innovation and change. The study also stated that from 2006 to 2009, regulation and traditional culture were the main barriers to innovation. ABS firms state that these barriers are still a problem along with a lack of capital and uncertainty around future laws and regulation.[42]

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[40] Opening of the Courts of Ontario for 2014 – Remarks of the Honourable George R. Strathy, Chief Justice Of Ontario, Toronto Court House, September 9, 2014 at http://www.ontariocourts.ca/coa/en/ps/ocs/ocs.htm.
[41] "Evaluation: Changes in the competition in different legal markets," October 2013, Legal Services Board ["Legal Services Board Report"] at: <https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-REPORT.pdf>.
[42] Legal Services Board Report.

When clients desire (or demand) a greater level of customer service, the incentive for firms to innovate is greater. There is a risk that ABS may diminish this incentive by creating a disconnect between a firm's decision-makers (i.e. non-lawyer stakeholders) and its clients. For example, from our experience, plaintiff-side personal injury firms operating on a contingency fee basis have innovated more than their defence-side counterparts. Plaintiff's counsel has more incentive to achieve efficiencies though investing in technology, as a better outcome for each client is also a better outcome for the business and reputation of the firm. Defence counsel, on the other hand, bill hourly. This is not to say that defence lawyers have no reason to innovate—all firms with greater efficiency will attract and retain more clients—but the incentive is not the same. Because the structure of ABS firms will be corporate in nature and similar to defence firms in operation, the incentive to adopt new technology to improve client service may be lacking when compared to plaintiff firms.

ABS Advances in Technology are overstated

The advances in technology as cited by the Legal Services Board Report are underwhelming to say the least, with 88% of respondents not changing the services they offer since receiving their ABS license.[43]

The following chart from the Legal Services Board survey shows how ABS firms are using technology.[44]

Figure 40. ABS firms and use of technology

	ABS survey
Basic information via our firms website to provide a guide for customers as to when to use our services	81%
Email addresses and phone numbers on our website	87%
Contact details, and more such as online case tracking for customers	51%
Online video conferencing	10%
Message board/forum facilities for clients	6%
Online feedback from customers	43%
Interactive online serviced used throughout the whole process	3%
Telephone based services	3%
Other	2%
No capability	2%
No answer	5%

The technology uses cited by ABS firms are common practices in Ontario. Based on this, it is unclear where the argument for ABS increasing technological innovation, is coming from.

Additionally, the Harvard Study refers to the increasing role of technology as one of the biggest unanswered questions concerning the impact of ABS. In particular, the Harvard Study states:

[43] Legal Services Board Report at pg. 85.
[44] Legal Services Board Report at pg. 67.

> Legal professionals in the future may need to rely on technology, and on an accompanying organizational structure, that lawyers cannot efficiently provide for themselves either in-house or otherwise. If this proves true then non-lawyer ownership likely will provide clear benefits for the delivery of legal services. Still, it is not certain such a future is ordained. Lawyers may find a way to effectively outsource or contract for these technological and organizational needs. Or, as is the case with Legal Zoom, lawyers and their services may become the outsourced product offered by a company.[45]

It is not clear that ABS can provide innovation in delivery of legal services that lawyers practicing in traditional firms cannot.

Proponents of ABS who argue that it offers technological benefits that are unavailable to traditional law firms have thus far fallen woefully short in producing any evidence in support of such claims.

Conclusion Regarding Technological Innovation

Technological change and innovation is taking place (albeit slowly) in the legal profession in Ontario. Without doubt, those who adopt and adapt to new technologies, and who pursue efficiency through innovation, will flourish where those who scorn the digital age will fail. But the change in mentality required to make the most of technology has little to do with ABS. Major impediments to technological advancement are not addressed by ABS and require a larger cultural shift. Moreover, in any event, there is scant evidence from other jurisdictions that ABS leads to significant technological innovation.

PART IV
ECONOMIC AND BUSINESS CONSIDERATIONS

Monopolization and Consolidation of Legal Services

In any industry, where only a few players dominate the market, consumers are often left at the mercy of the will of the monopoly. This inevitably leads to issues with quality and price control, and the elimination of market competition which normally serves as a check and balance that safeguards consumers from monopolistic practices.

In jurisdictions where ABS is permitted such as Australia and the UK, there is ample evidence of

[45] Harvard Study at pg. 46.

monopolization. Legal services, particularly in certain sectors, are consolidated into a small number of mega-firms such as Slater & Gordon. The latter operates under the ABS model as the world's first publicly-traded law firm.

In Australia, over 50% of the personal injury litigation market is controlled by only three law firms. The managing director of Slater Gordon is predicting that nearly 40% of the personal injury market in the UK will also be controlled by three firms within a short period of time.[46]

ABS firms have seen their revenue growth rise at an exponential rate. Since becoming a publicly-traded company in 2007, Slater & Gordon's revenue has skyrocketed from $63 million (CDN) to nearly $420 million (CDN) as of June 2014, a seven-fold increase in just seven years. It also employs nearly 2500 personnel and has over 66 offices throughout Australia.[47]

Such growth is attributable in large part by the firm's aggressive takeover of existing law firms. According to Andrew Grech, Managing Director of Slater & Gordon, 60% of the firm's growth has resulted from the acquisition of many smaller/local law firms throughout Australia and the U.K.[48]

This rapid and large scale "corporatization" of law firms poses serious and unnecessary risk to the competitive environment as well as to the survival of smaller, local-based firms that provide services to regionally-based clients with regionally-distinct concerns and issues.

Absence of Empirical Data Showing Savings to Consumer

Many of the proponents, who advocate the implementation of ABS in Ontario, believe that this system will create economies of scale offering significant cost advantages and savings to clients.

However, as discussed above in PART II - Access Considerations, no empirical evidence has been advanced to substantiate the claim that costs savings have been passed onto consumers, or that access to justice has improved, in either the UK or Australia.

Furthermore, there has been no statistical or empirical analysis of the risks of concentrating a significant portion of legal services within the hands of a few national corporations – a phenomenon that it would appear typically exists in ABS markets, particularly within the personal injury field.

Consolidation of Non-ABS serves as Indicator of ABS system shortfalls

The expansion of ABS firms has also resulted in the emergence of large non-ABS firms as a

[46] John Hyde, "Slater chief predicts rapid consolidation in PI Market", *The Law Society Gazette* (May 2, 2014) at http://www.lawgazette.co.uk/practice/slater-chief-predicts-rapid-consolidation-in-pi-market/5041050.article.
[47] Daniel Fish, "Major Australian Firm looks to Expand in Canada", *Precedent Magazine*, November 17, 2014
[48] OTLA meeting with Andrew Grech, Managing Director, Slater & Gordon, April 16, 2014.

reactionary effect caused by the shortfalls of the ABS system. The Australian firm of Maurice Blackburn is a notable example of this trend which has been previously mentioned.

Despite ABS, indeed as part of its backlash, non-ABS firms such as Maurice Blackburn expanded from 39 lawyers with four Queensland province offices in 2009, to over 240 lawyers in twelve offices throughout the province.[49] Some of their lawyers had joined and then left Slater & Gordon because of their dismay with company practices.

Many of the lawyers who practised within the Australian ABS system became disenfranchised as a result of their practise environments which took on characteristics including the following:

- the interests of shareholders overriding client interests;
- the tendency of ABS firms to settle files quickly and lightly but not necessarily in best interests of clients;
- an increase in number of staff having no legal training yet being involved on files
- a reduction in the number of lawyers actually involved on any given file; and
- heavy reliance upon IT systems that direct staff and employees instead of having direction come from a responsible lawyer.

Therefore, not only has ABS caused a rapid consolidation of legal services within its own model, it has also resulted in a reactionary consolidation from lawyers and law firms who oppose ABS in principle and practice.

Effect of ABS on Local Law Associations in the UK and Australia

The implementation of the ABS system has also had a negative impact on local law associations across the UK and Australia. Large ABS based firms, such as Slater & Gordon, have developed their own internal programs to meet continuing legal education requirements. As such, members of that firm, as well as outside lawyers who register for their programs, are not required to pursue such programs through their communal law associations.[50]

Many law associations depend on revenue from continuing professional development ("CPD") programs to ensure their financial existence. With firms like Slater & Gordon offering internal CPD courses to their staff, without charge, there is no reason for their staff to register and pay for outside CPD programs and courses, thus significantly reducing the overall revenue to local law associations. They also have 'proprietary' systems so they provide their own training in-house for their staff only.

Law associations play a vital role in local legal communities and are an important resource

[49] OTLA teleconference meeting with lawyers from Maurice Blackburn, August 22, 2014.
[50] John Hyde, "Slater chief predicts rapid consolidation in PI Market", *The Law Society Gazette* (May 2, 2014) at http://www.lawgazette.co.uk/practice/slater-chief-predicts-rapid-consolidation-in-pi-market/5041050.article.

centres for lawyers, particularly those who practice solely or within smaller firms. In addition to fulfilling their CPD requirements, lawyers rely on their associations for library and research facilities as well as networking opportunities. Thus, the inability for local law associations to sustain themselves financially due to ABS will undoubtedly have negative implications for the practises of the lawyers they serve and may impact the quality of services to the public.

Consequences to Law Students and Young Lawyers

A discussion of business and economic considerations relative to ABS would be incomplete without mention of the implications of ABS for law students and young lawyers.

OTLA is concerned that ABS will not assist in resolving the current entry-to-profession issues plaguing law students seeking articling positions and young lawyers seeking full-time employment.

There is an unprecedented struggle among law students in Ontario to secure articling positions. The increased enrolment in law schools is outpacing market demand for articled students. This struggle has only been intensified with the recent establishment of a Faculty of Law at Lakehead University, which admitted its inaugural class of 55 in September, 2013. Controversial ideas, such as the new law practice program (LPP), have been born as a 'solution' to Ontario's articling crisis.

ABS has been in place in Australia since the early 2000's, with several states allowing for non-lawyer ownership of legal services. An article in the Australian Financial Review on February 21, 2014 referred to the oversupply of law students, noting that "two-thirds of law students who intend to work as legal practitioners are in a for a rude surprise when they apply for graduate positions, as firms pick and choose from a massive oversupply of candidates of an unprecedented quality."[51]

ABS does not appear to be a solution to the current surplus of law students and young lawyers looking for work. The experience in Australia amply demonstrates that point. There is no reason to believe that the experience in Ontario will be any different insofar as the placement of students and young lawyers in an ABS environment is concerned.

Impact on Quality of Services

The traditional model with which we are familiar requires for the continued training of lawyers after their completion of law school and call to the bar. Our system creates and fosters mentorship, and gives young lawyers the opportunity to hone their skills.

[51] Edmund Tadros, "Oversupply leaves law students without jobs", *Financial Review* (February 21, 2014) at http://www.afr.com/p/national/legal_affairs/oversupply_leaves_law_students_without_0vuDtdyxrmivZCj8hrN5YJ

A lawyer that is not properly trained and mentored will be less able to provide quality service. This, in turn, can only lead to mistrust by the public.

The introduction of ABS will create a legal service framework that serves, first and foremost, the profit-minded interests of shareholders over the interests of clients. As a cost measure, junior lawyers, whose skills will be less honed through mentorship, will be providing services that would otherwise be provided by senior lawyers. Similarly, law clerks will be providing services that would otherwise be provided by junior lawyers. The inevitable result is a diminished quality of professional legal services for the public.

There are genuine professionalism concerns when one considers the risk that legal services will be provided without the traditional mechanisms that create incentives for senior lawyers to invest their time in the training and mentorship of junior lawyers.

Meeting Quotas: What does it meant to be publicly traded?

Significant conflict between the duty owed to clients and the duty owed to shareholders is inevitable under ABS. The system of ABS, by its very nature, is one that is built on compromise between competing interests.

All law firms are businesses, to be sure. And all have financial pressures and responsibilities, and must ensure a healthy cash flow in order to thrive or at least survive. However, a publicly-traded company whose principal responsibility is to shareholders will necessarily operate in a way that sees the duties owed to clients yielding to the financial pressures on lawyers to meet the demands of the shareholders. OTLA is concerned that profits and dividends will trump professionalism and duty.

Under ABS, cases that create uncertainty for investor groups because of financial risk, such as test cases involving important legal issues, will be likely be rejected as incongruent. In addition, ABS firms that have established regional or national name-recognition will be less willing or unwilling to provide legal services in claims involving unpopular clients or unpopular causes, for fear of brand denigration.[52]

There are legitimate concerns over the "race to the bottom," resulting from firms undercutting each other to offer ever-cheaper fixed fee services. The reasoning is clear: conventionally structured firms with traditional values and longstanding expertise could reasonably expect to lose core business to aggressive and less-experienced new entrants.[53]

[52] Harvard Study at pg. 14.
[53] http://www.chambersstudent.co.uk/where-to-start/newsletter/alternative-business-structures

Block Fees

Supporters of ABS assert that transparent pricing broadens the market by appealing to consumers who would otherwise shun legal services as expensive and intimidating. In reality, however, this has not been the experience in jurisdictions where ABS is in place.

Under the contingency fee model currently in place in personal injury firms across Ontario and elsewhere, the fee is not measured in time but, rather, is result-driven based on a percentage of the recovery regardless of the time expended. A block fee system, on the other hand, does not promote keeping files open on a long-term basis to achieve the best results for a client. Moreover, in the ABS context, once the maximum time contemplated by block fee has been reached – essentially the profit margin – any time expended beyond that point diminishes the returns to shareholders. In addition, a system that provides for block fees, especially under ABS, is one that cannot encourage the taking of risky or complicated cases, which is also an access to justice issue for the public.

Currently there are over 1100 OTLA member lawyers practicing plaintiff personal injury litigation in Ontario. Few would be able to say in candour that any of their litigation files would have been accepted on a 'block fee' arrangement.

PART V
PROFESSIONAL AND ETHICAL CONSIDERATIONS

Introduction to Professional and Ethical Considerations

A key part of mandate of the Law Society is to protect the public interest and increase access to justice. Public interest is protected when professionalism standards are maintained and ethical considerations enforced. OTLA is concerned that ABS will erode the ability of the LSUC to ensure that ethical and professionalism standards are maintained. The ABS being suggested in the Discussion Paper may well change the focus from access to justice to 'access to profits', and relegate lawyers from professionals to 'profiteers'. There is simply too great a potential to compromise the sacred values upon which the legal profession has been built over centuries: professionalism and ethics in the profession. As this submission makes clear, ABS cannot be justified on a number of levels, one of which is professionalism and ethics.

Evidence-based decisions are what lawyers expect from their governing body. The LSUC has been considering ABS as a priority for several years now. OTLA's ABS Working Group members have confirmed that there is no access to justice issue which ABS addresses. There is still no empirical evidence of an advantage to the public or an increase in access to justice. [54]

[54] See the Harvard Study generally.

Jurisdictions where ABS has been implemented need to be carefully studied and compared first, before this complete shift in paradigm for the delivery of legal services is embraced and implemented by the LSUC – the very body entrusted with the mandate to protect the interests of Ontario consumers of legal services.

OTLA

OTLA has a well-recognized and established history of protecting the rights of victims. OTLA, as an organization and on behalf of its members as individuals, seeks to maintain the highest levels of professionalism and ethics while advocating for clients' interests in the judicial system. Our professionalism and our rigorously-enforced ethical standards are what make us stalwart advocates for our clients' interests. We think the issues related to professionalism and ethics are very important to consider in the ABS discussion.

Intangibles

ABS will shift the focus away from individual clients and redirect it toward maximizing profits. Investors rarely direct their minds to long term goals or intangibles when assessing an investment. "Games are won by players who focus on the playing field – not by those whose eyes are glued to the scoreboard".[55] That folksy wisdom admirably captures the difference between professionalism, focused as it is on the playing field, and non-lawyer investors, focused as they are on profits, the scoreboard. Investors seek profits. Lawyers seek professionalism, as we are duty-bound to do.[56]

Professionalism is an intangible quality that is not easily understood by non-lawyers. Lawyers are often challenged – at times vilified – by the public for representing the interests of unpopular clients, particularly in the criminal law field. How can you represent a murderer? A rapist? A drunk driver? The public does not understand our motivation. How do we justify to non-lawyer investors the importance of intangibles like the rule of law, the presumption of innocence, and other requirements of the due administration of justice, if it does not ensure profits?

Trials are costly and often risky ventures. It is doubtful that a non-lawyer investor is going to appreciate the boost to the lawyers' reputation or the professionalism shown unless the trial is also successful from a financial point of view for the investor. The ethical considerations that are taken into account on a daily basis during trial are not always, or necessarily, the most "profitable" decisions. For example, deciding to produce a document or call a specific witness,

[55] Warren Buffett, Annual Shareholder Letter , Fortune Magazine, Feb 24, 2014
[56] Law Society of Upper Canada, Rules of Professional Conduct at Section 2.1-2.

even in the face of risk that it will hurt your case, is an ethics-driven decision.[57] Knowing that you will have to justify that decision, indeed any decision, to investors is bound to have a chilling effect on maintaining ethical standards. OTLA is concerned that professionalism and ethics will be potentially sacrificed on the altar of ABS opportunism.

Ethical issues in personal injury work

The ethical and professionalism issues that arise particularly in personal injury work are bound to be a quagmire under ABS. There will be subtle, if not overt, pressure to prefer the most profitable cases and the most profitable route to resolution. OTLA is concerned that the cost of referral fees to non-lawyers, if permitted, will ultimately be a cost passed on to the consumer.[58]

The insurance industry is dealing with serious fraud complaints as a result of health practitioners paying entities like towing companies to direct consumers to their rehabilitation services instead of getting medical advice from their own treatment providers. OTLA is concerned that ABS will amplify this ethical issue. Lawyers will find themselves paying referral fees to doctors, hospital staff, and collision repair services to acquire new client business in order to satisfy investors. Consumers will not be choosing their lawyers based on merit or reputation but, rather, on the basis of fees paid to others within a subculture of profit-sharing; fees which clients will nevertheless end up subsidizing themselves.

Advertising is regulated by the LSUC.[59] Once non-lawyers, as majority shareholders, own or control law firms, or as minority shareholders, influence professional decision-making, advertising will not be restricted to legal services, and the ability of the LSUC to regulate this area will be a challenge, to say the least. Non-lawyers are free to advertise according to the standards of the marketplace, which for many means few or no standards beyond the limits of public tolerance. Unlike lawyers, they are free to criticize both the administration of justice and the reputation of lawyers and judges. They are free to use ads or slogans without the rightly-imposed regulatory constraints on the legal profession that are designed to promote integrity and respect for the profession and the institutions of justice. They can essentially employ whatever tactics work to bring in business and maximize profits.

Tying lawyers' reputations to the reputation or branding of the investor, undermines professionalism and public respect. When lawyers' independence is lost to overriding investor

[57] Law Society of Upper Canada, Rules of Professional Conduct at Chapter 5.
[58] Harvard Study at pg. 20.
[59] Law Society of Upper Canada, Rules of Professional Conduct at Section 4.2.

interests, control is given up and, inevitably, the ability of lawyers and the Law Society to maintain the highest standards of professional integrity is seriously impaired.[60]

Professionalism in personal injury work

Lawyers are unique in placing ethics and professionalism above profit. The two models of motivation - professionalism and capitalism - are incompatible. Personal injury work, like most areas of law, attracts individuals who are socially-minded. Lawyers regularly engage in *pro bono* work, promote safety for the public, take test cases to trial, contribute time and expertise to charitable organizations or service providers for their clients, and act as an independent check on government and corporate power. As professionals, lawyers put their client's interest first. Lawyers take pride in representing victims against Goliaths--like insurance companies. Many of these socially-responsible and community-based activities require substantial outlays of time. It is unlikely that investors will find the time spent with such activities, rather than on files, profit-worthy or inspiring of shareholder confidence.

Often what serves the public or the individual's interest may not be profitable or may be less profitable than the alternative. For example, a two week trial can cost in the range of $75,000 - $100,000 per side, apart from disbursements. Thus, unless the case is one of substantial value, it will not necessarily make economic sense to run a trial. If taken to trial, it is done to promote access to justice. This can be a risky, anxiety-producing gamble for the client and for the firm. A quick settlement that reduces the risk, on the other hand, is clearly the more profitable route. Non-lawyer investors, who control the decision-making process, either directly or more generally through economic-based risk analysis, will almost inevitably seek to settle rather than try a case. Compromise would be necessary to fulfil the dual obligation of maximizing profits versus advocating fearlessly for clients.

When the driving interest is financial success, professionalism suffers. While there is nothing inherently wrong with seeking a return on investment, it does not synchronize well with the professional's goal, indeed duty, to fearlessly advocate the client's interests. There is an inescapable tension and conflict in maintaining professionalism and ethics under ABS models that include non-lawyer equity holders, controlling or otherwise.

Confidentiality

Professionalism is a defining aspect for lawyers' reputations. While one need not cast a very wide net to trawl a host of lawyer jokes, nevertheless the public turns to lawyers when they have significant problems, and they trust their lawyers to assist. Maintaining client confidences

[60] Law Society of Upper Canada, Rules of Professional Conduct at Chapter 2.

is a fundamental part of that trust. Yet, it will be much more difficult to contain and safeguard information when that information is important to both the investor and the client. Investors want control. They will want input into the decisions made on cases and will need access to confidential information to make informed decisions. Whether it is implicit or explicit, subtle or overt, the pressure will be there. They will be watching the bottom-line. Will non-lawyers, not subject to regulation, protect confidentiality? There is huge potential for breaches. It is a complicated area of law. No amount of regulation can protect confidentiality unless the entity breaching confidentiality is subject to that regulation. How do we maintain confidentiality if we have to explain or justify decisions that cost profits or create losses? Without clear and convincing evidence that confidentiality can absolutely continue to be protected, ABS should not be implemented. There is no evidence yet that the "compliance lawyer" system is working in other jurisdictions, and the very need for such a system shows the danger.

Placing the burden on the lawyer, of ensuring that confidentiality is maintained by all involved parties, many of whom may not be lawyers or legal staff, is unrealistic and impractical. A lawyer's reputation with clients and with fellow professionals is important. If we reduce the lawyer to a small cog in the larger wheel of a non-lawyer-owned business, it is naive to think that lawyers' professional reputations will not be shaped or tarnished by the reputation of the business. That, unfortunately, is the part of the high price to be paid when allowing non-lawyers to invest in firms where professional reputations and the public interest are at stake.

Independence

In compromising our independence, we compromise our professionalism. Lawyers are defined by our professionalism, the constituting elements of which include acting with integrity, upholding the administration of justice, providing competent legal advice and services, strictly maintaining client confidentiality, and placing clients' interests above our own and others.[61] These characteristics are what set the legal profession in Ontario apart from other businesses and even other professions. We cannot expect to maintain the independence of the Bar and serve as a check on corporate and government power if we are beholden to corporate investors such as insurance companies or the banking industry.

Competence

There is a reason lawyers train and study for years in order to provide competent and ethical legal services. Law, by its nature, is complicated and is not amenable to standardization of services. Litigation in personal injury work is highly fact-driven and individualistic by its nature.

[61] Law Society of Upper Canada, Rules of Professional Conduct.

Clients often cannot understand even basic insurance forms. Trained insurance adjusters have difficulty interpreting and understanding the ever-evolving laws. The expertise that lawyers offer has value that should never be understated or overlooked. The recent move by the LSUC to regulate paralegals demonstrates the need to ensure that the public is receiving competent representation. Diluting professional responsibilities by a creating a structure that allows work to be done in an environment controlled or influenced by non-lawyers in order to provide cheaper, standardized services and thus maximize profits, is plainly not in the public interest.

LSUC Proposed Solutions

One suggested solution would be to require an ABS to disclose to the public the legal and non-legal services being provided. Mixing legal services with non-legal services creates uncertainty, where now it is clear. What is not clear is how one would explain and disclose to the public a complex interaction of services, some regulated and others not, and the implications for confidentiality and the protection of the public, in any meaningful way. It is difficult enough to understand the difference between a traditional partnership, a limited liability partnership, and practicing within a professional corporation, for example. A lawyer who works for a non-lawyer-controlled or influenced organization will inevitably encounter difficulty communicating the lines of distinction and ensuring public understanding of them. This raises the potential for bringing the administration of justice into disrepute.[62]

Another suggested solution is a prohibition against violating the rules of professional conduct, directed to non-lawyers. However, this creates a whole new area of complex regulation which may not only be cost-prohibitive but very difficult to police and enforce. Again, there is no evidence that the "compliance lawyer" system in the UK is effective. How public understanding and confidence would be enhanced by a "compliance lawyer" is unclear and uncertain.

Finally, it is suggested that there be a required acknowledgment that professional obligations must come first. That acknowledgment already exists by virtue of the Rules of Professional Conduct and the oath that every licensee takes upon being called to the Bar. There is no evidence that such an acknowledgment can be enforced against non-lawyers effectively, if at all.

Conclusion Regarding Professional and Ethical Considerations

The legal profession is often criticized or derided as being unduly focused on profit. If that is the current perception, it is difficult to even imagine the extent to which ABS will not only magnify

[62] Law Society of Upper Canada, Rules of Professional Conduct at Section 5.6.

that perception but transform it into reality. In other words, ABS provides access to profits, not access to justice, and is not in the public interest.

PART VI
CONFLICT CONSIDERATIONS

Introduction to Conflict Considerations

Conflicts of interest, real or perceived, erode public confidence in the administration of justice. Conflicts can come in many shapes and forms. When examining ABS, the Law Society must be cautious about conflicts which are easily identified and those which are more insidious.

Shareholder vs. Client

Corporations are financial devices that are set up to benefit investors. Normally, it is management's first and foremost duty to return profits to the shareholders. The legal profession's primary obligation is to clients and to the court. ABS purports to bring these two objectives together under one roof. OTLA is concerned that this will inevitably result in a systemic conflict of interest whereby non-lawyer investors exert pressure and influence on lawyers (or the managing lawyer) for the sole purpose of maximizing investors' returns on their investments. In fact, "publicly-listed (ABS) firms (in Australia) have even been accused of pressuring their lawyers to settle cases to meet fiscal targets, particularly close to when financial results have to be reported to the market, although this has not been independently verified"[63].

Even the possibility of such behaviour should provide the Law Society serious pause for thought and concern.

Preventing Specific Classes of Shareholders

In the UK, where ABS has been permitted since 2011, insurance companies have captured a large segment of the plaintiff personal injury market by creating their own law firm or buying up existing personal injury law firms.[64] Although, the Discussion Paper suggests banning investment in an ABS by an adverse party in litigation,[65] this will not be a satisfactory resolution. It is often difficult to determine from records whether the parties are adverse in interest, and what may start out as non-conflictual can evolve into a conflict as parties to litigation align or are added.

[63] Harvard Study at pg. 30.
[64] Harvard Study at pg. 43.
[65] Discussion Paper at pg. 22.

If insurers are permitted to own ABS plaintiff-focused personal injury firms, there are clear negative consequences for both the perception and administration of justice in this province. Indeed, it has been noted that since a major objective of the insurance industry is to keep claims costs as low as possible, "this raises questions about whether there is an inherent conflict in having personal injury firms owned by insurers even if they do not bring cases against the insurers that own them".[66]

Furthermore, as has been pointed out by the same observer, the problem is not solved by simply refusing to allow insurers to own an ABS firm. The example that is provided is the UK's Quindell PLC, a publicly-traded independent claims management service, retained although not owned by insurers. Quindell has contracts with insurers to manage call centres for frontline adjusting. As part of their service, Quindell has been referring injured parties to a law firm which Quindell happens to own. By using this strategy, Quindell has managed to increase profits by more than 2.5 times between 2012 in 2013.[67]

Companies in the UK have also used ABS to strategically integrate their business so that they can assist accident victims from tow truck to rehabilitation and legal counsel.[68]

Since clients are typically not aware of these sophisticated commercial structures, and the equity relationships that serve as their foundation, it is unlikely that they will identify existing or potential conflicts. It is, therefore, unlikely that complaints will be brought forth to the Law Society. In any event, the public should ask whether the Law Society truly has the resources, or even the mandate, necessary to investigate complex commercial entities in ways that may be necessary if ABS is allowed in Ontario.

Shaping the Law to Meet the Investors Needs

In his recent paper, Nick Robinson gives an example of how a corporation such as Wal-Mart might acquire its own ABS law firm and, through representation of individuals in employment law cases, shape common law in a way that serves the corporate interests of Wal-Mart. Even though Wal-Mart lawyers would not be permitted to bring claims against Wal-Mart for obvious reasons, they could certainly represent others with claims in an area of law having strategic importance to the company. In this regard, Mr. Robinson notes "some potential conflicts that may undercut public trust or potentially have long-term detrimental impact on the law or legal

[66] Harvard Study at pg. 21.
[67] Harvard Study at pg. 21.
[68] Harvard Study at pg. 21.

system can be so nebulous that they are difficult to regulate"[69]. Clearly, this is yet another potentially undesirable consequence of ABS.

Conclusion Regarding Conflict Considerations

It would not be adequate for the Law Society to simply create new rules in the hope of protecting the public against the types of conflicts of interest that are inevitable in an ABS environment. Rather, the Law Society would have to consider a substantial increase in infrastructure and resources to hire, train and supervise a large contingent of compliance officers and investigators to monitor and police ABS firm activities, and to investigate investment and practice complaints, so as to protect the public interest against the real, or even perceived, conflicts or abuses that are the product of the ABS marketplace.

At present, the resources that are made available for the investigative function of the LSUC are insufficient to meet demand[70]. If infrastructure and financial resources do not match the compliance and investigative burden created by ABS, it will not be possible to independently verify whether the legal service providers in the ABS environment are profiting from a conflict of interest. As mentioned above, one cannot rely upon the clients to identify or make regulators aware of the problem when such sophisticated commercial entities are created.

PART VII

CONCLUDING COMMENTS

The 2005 Report to Convocation

In its January 27, 2005 Report to Convocation, the working group established to study law firm financing models noted the following which are pertinent to our current discussions almost a decade later on ABS[71]:

1. The Ontario legal system is not actively seeking new methods of financing for either law firm cash flow or capital requirements. There is sufficient flexibility in the private debt markets to accommodate any financing requirements of Ontario law firms, and those models do not violate any of the Law Society's rules with respect to client confidentiality or lawyer independence.

[69] Harvard Study at pg. 43-44.
[70] Rachel Mendelson, "Law Society probes hamstrung by heavy caseloads and gag rule, ex-auditor says", *Toronto Star*, October 24, 2014.
[71] The Law Society of Upper Canada, Professional Regulation Committee: Report to Convocation dated January 27, 2005 ["Report to Convocation"] at http://www.lsuc.on.ca/media/convjan05prcreport.pdf.

2. Financing that involves non-lawyer investors attracts scrutiny from the perspective of the profession's core values:
    a. Independence;
    b. Client confidentiality; and
    c. Avoiding conflicts of interest.
3. Lawyers play a pivotal role in the administration of justice and upholding the rule of law in the public interest.
4. Focus on the "business" of the practice of law may result in intrusions on core values.
5. If unrestricted third party (non-lawyer) investment in law firms occurred, there is a risk that the interests of the non-lawyers could create instability in the firm that affects how the firm manages itself, with a filter-down effect on client interests.
6. "Although there is no information that publicly-traded law firms are an imminent development, the Committee's view is that this structure would create a significant problem for a lawyer in fulfilling the role of independent counsel." [72]
7. In the Multi-Discipline Practice ("MDP") policy report, which was adopted by Convocation, the authors focused on the need for the lawyer's independence, stating[73]:

> "Independence requires for its efficacy untrammeled freedom on the part of the lawyer to interact with, for and on behalf of the client. Questions necessarily arise as to whether any such environment could be maintained where the lawyer is but a small part of a larger commercial enterprise, full service in nature, in which inter-professional dependencies are vital to its well-being. Is the lawyer's practical freedom to react in the best interests of the client not likely to be compromised in these circumstances, more so where the enterprise is controlled by non-lawyers?"

The question, therefore, becomes: what has changed since 2005, aside from the introduction of ABS in Australia and the UK? We have not seen evidence of law firms having difficulty sourcing adequate financing. Engaging in the ABS discussion from time to time is perhaps a worthwhile goal in and of itself, but there is nothing that OTLA has seen in the background documents, or heard in the presentations made by the Working Group, or in discussions with Australian and UK stakeholders, that would lead this organization to believe that any departure from the

[72] Report to Convocation at pg. 30.
[73] Report to Convocation at pg. 30.

approach taken and conclusions reached by the Law Society, in its 2005 Report, would serve the public interest.

Arguments have been made that OTLA members, and other members of the Bar opposed to ABS, are self-interested and seek only to "protect their turf". While it would be naive to suggest that lawyers do not have an interest in their own livelihood, it is likewise unrealistic to see lawyers as having nothing of value to add to the discussion and debate. On the contrary, self-interest does not define OTLA members who have dedicated their careers to helping injured accident victims, and who are typically on an uneven playing surface when confronting insurance companies and large corporations with seemingly limitless resources. Indeed, much of the criticism directed at ABS has as its objective the preservation of those core values that define and distinguish our profession, especially the protection of the public interest.

If the discussion is to centre on self-interest, one need look no further than Australia's Slater & Gordon. This is a firm with annual revenues which have increased from $63 million to $420 million over the past 7 years, and which has clear designs on the Canadian personal injury market. Sixty percent of that growth has been the result of the acquisition of personal injury firms in the UK and Australia.

The kind of consolidation of the market that would occur if publicly-traded firms are permitted is not in the public interest. Healthy competition is good for both the market and consumer, and there is no shortage of competition in the existing legal services market. There is no access to justice problems in personal injury, and there is sufficient, indeed robust, competition to control the market.

That companies like Slater & Gordon will do the work that is currently being performed, but at a significantly reduced or fixed cost, is simply fiction. The fixed fee, for example, is only available in the most straightforward cases, in which relatively little time is involved and litigation is not required. Even if the retainer starts out on a significantly reduced or fixed fee basis, clients may subsequently be told that increased fees are necessitated by the vagaries of their specific cases, including unanticipated complexities.

In addition, personal injury lawyers do community and *pro bono* work that is vital to the public interest. They support local organizations that assist injured persons – including brain and spinal cord injury associations, local hospitals, and charities. They provide free initial consultations without knowing that a file will necessarily be opened, to ensure that injured persons have the information they need to start their insurance claims or otherwise preserve their rights. They volunteer for organizations like REACH Canada, which provides free legal advice to disabled persons. They lobby MPP's to ensure that the interests of innocent accident

victims are being considered when changes to provincial legislation affecting auto insurance are proposed.

To think that large corporations, who are primarily responsible to their shareholders, will undertake much or any of this community and public interest work, or even appreciate the nature and importance of it, would be unrealistic.

And most importantly, personal injury lawyers are trial lawyers -- prepared to see the fight through to the end when it is necessary. Personal injury firms have been prolific users and early adopters of technology, one objective being to achieve efficiencies in the administration of files. But efficiency and innovation, while important, are not the cornerstones of a good legal system; rather, the courage to advocate and fight for the client and see things through to the end are what ensures fair treatment for plaintiffs and true access to justice. An ABS-driven focus on efficiencies, to the exclusion of these other more fundamental values, undermines the integrity of our justice system and the sacred trust owed to clients by their lawyers.

There has been a lot of discourse around the UK and Australia models versus the US model. Why does it have to be either/or? Why not a Canadian model? While we may have much in common, both culturally and in terms of our legal systems, with those jurisdictions, we are also unique. We do not have the regulatory and public confidence problems that the UK had experienced, for example. There is a real and concerning lack of empirical evidence that speaks to the outcome of ABS in the UK and Australia in terms of the public interest. What has been the measured effect of ABS on access to justice? On core values such as independence, conflicts of interest and confidentiality? What has been the effect on the profession, and the public's perception of, and confidence in, the profession? Unless, and until, credible, independent, and persuasive research is carried out, why the rush to ABS?

There are access to justice problems in Ontario – most particularly in family law and criminal law. There is no evidence that demonstrates that the introduction of ABS will solve this problem.

So what are the problems in the Ontario legal market that the Working Group expects be solved by the introduction of ABS? No such problems have yet been clearly identified. The push for ABS, therefore, seems to be a 'solution looking for a problem' that simply does not exist.

The ABS Models Proposed in the Discussion Paper

In terms of the four ABS models proposed in the Discussion Paper, the position of OTLA may be summarized as follows:

1. Law firms should offer legal services only, subject to the allowances already made under the current regulatory system for MDP's. There is, as yet, no identified need for law firms to offer non-legal services that are abundantly and readily available within the litigation support industry.

2. OTLA is unequivocally opposed to unrestricted non-lawyer ownership and particularly to any change that would allow publicly-traded law firms. We believe that lawyers should always maintain a controlling interest in law firms, in order to ensure that the core values concerning conflicts of interest, client confidentiality and independence of lawyers are maintained and protected.

3. In terms of non-lawyer ownership that is restricted in some way, short of an amendment to the regulatory system that might permit some minor (25% or less) ownership in law firms by family members, we are otherwise opposed. Again, OTLA believes that the profession's core values, and the public interest, can only be protected by ensuring that lawyers maintain control over the delivery of legal services. We do support the regulation of law firms, rather than just individuals, in order to ensure that the actions of employees, for which the firm may be vicariously liable, can be regulated.

4. OTLA understands that some of its members, and members of the profession at large, may be interested in the type of spousal ownership (non-voting) that is currently permitted for other professionals, including physicians and dentists. This might benefit some sole practitioners and small firms, allowing additional or alternative financing to capitalize the practice for expansion or otherwise. While OTLA would not necessarily oppose this type of change, we do not see the need for the introduction of broader ABS in order to allow this to occur.

It is important to continually engage in research and dialogue about ways to advance the delivery of legal services and improve access to justice. In the case of ABS, however, at this time, the case has not been made. The Law Society should be highly tentative about, and critical of, the kind and extent of regulatory change that ABS would necessitate, without first knowing, with some degree of evidence-based assurance, whether what is being introduced will significantly improve the legal service landscape for the public. Once established, it is highly unlikely that ABS can be undone.

OTLA's ABS Committee has reviewed all the background documents the Law Society's Working Group has reviewed. It has conducted its own research as well. There is, quite simply, a lack of any empirical evidence that shows:

1. Why ABS was introduced in the UK and Australia;
2. Whether the problems sought to be solved in other jurisdictions correlate in any way to the legal landscape in Ontario;
3. Whether the introduction of ABS has in fact solved the problems it presumably sought to resolve in the UK and Australia;
4. Whether there has been significantly improved access to justice (particularly in areas of practice where access to justice is a concern);
5. Whether core values such as avoiding conflicts of interest and the independence of counsel have been compromised to any extent with the introduction of ABS;
6. Whether the regulatory bodies in the UK and Australia have been effective in dealing with ABS-related issues as they arise (which includes an examination of the structure of the regulatory bodies and complaints reporting systems); and
7. What the overall impact has been for the profession and the public interest since the introduction of ABS in jurisdictions where it has been adopted.

Until the type of empirical evidence referred to above is available for all ABS jurisdictions and has been fully and critically reviewed by the LSUC and members of the profession, OTLA submits that the introduction of ABS on any level would be premature and therefore ill-advised. A more measured and considered approach would be the most reasonable one going forward.