

# Southwest Region Women's Law Association

(Ontario)

## **SUBMISSION ON ALTERNATIVE BUSINESS STRUCTURES:**

### **Response to the request for input from the legal community by the**

#### **Law Society of Upper Canada in its Discussion Paper**

**September 2014**

The Southwest Region Women's Law Association (SWRWLA) held its bi-annual conference on October 25, 2014. At that time the subject of the Law Society's discussion paper and call for input on Alternative Business Structures was the subject of discussion by SWRWLA members. This submission is a result of that discussion. In addition this submission is informed by a number of articles and papers written on the subject including the 2012 *Contributing Perspective: Key Trends in the Legal Marketplace* submitted by Professor Richard Susskind, OBE to the CBA Legal Futures Initiative and the 2014 Harvard Law School article by Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism*.

Harvard Law School research fellow, Nick Robinson introduced the alternative business structures conversation in his article, *When Lawyers Don't Get All the Profits*:

In the name of protecting the independence and standards of the legal profession lawyers have traditionally been restricted in the types of commercial activity they are permitted to undertake. (p.1)

There has been a trend where significant parts of the regulatory regime in many jurisdictions have been liberalized over recent decades with a push to make legal services more similar to other services offered in the marketplace.

...the most momentous shift in line with this broader trend has come in the just the past fifteen years as jurisdictions have begun to allow non-lawyers to own enterprises that

provide legal services (although it is still only licensed legal practitioners that can actually perform restricted legal activities). (p.1)

Mr. Robinson summarizes the debate:

The current wave of liberalization of restrictions concerning ownership of legal services has largely been justified on competition grounds: that allowing non-lawyer ownership will lead to higher quality, cheaper legal services for consumers, and that there is no compelling reason to bar it. The claim that outside ownership will increase access to justice by making legal services more affordable and reliable has been particularly central to this debate. (p.2)

Meanwhile, opponents of reform including decision-makers in state bar associations and the American Bar Association (ABA), assert that opening up the profession to non-lawyer ownership will undercut lawyers' independence and professionalism with adverse consequences to all clients, including underserved populations. (p.3)

He notes that this debate has been almost entirely theoretical with a lack of meaningful empirical data about non-lawyer ownership. The Robinson article goes on to "undertake the most extensive empirical investigation to date on the impact of non-lawyer ownership by focusing on its effects on civil legal services for poor and moderate income populations. It draws on qualitative case studies and other available empirical data from Australia (where non-lawyer ownership has been allowed for over ten years), England and Wales (where it has been allowed for three years) and the United States where non-lawyer ownership is generally barred, but close parallels are present in on-line legal services and social security disability representation."

In organizing this important paper, the author claims that "those on both sides of this debate have mischaracterized its (non-lawyer ownership) probable impact in at least three ways."

First, they have largely ignored how the effects of non-lawyer ownership can be affected by variations in context even though non-lawyer ownership will likely have very different types of impact depending on the jurisdiction or the sector of the legal market at issue.

Second, although non-lawyer ownership has spurred new business models as predicted by its advocates, it is unlikely these will in fact significantly increase access for reasons that are underexplored in the literature.

Finally, while non-lawyer ownership does not lead to the nightmare scenarios that some suggest, it does lead to new professionalism challenges, some of which were largely unforeseen even by critics. (p.4)

The study undertaken by Nick Robinson in his paper, concludes that the ABS experience in Australia and the United Kingdom are posing serious challenges to lawyer's professionalism, particularly in the lucrative personal injury field, while having done little to make legal services

more affordable and accessible, especially in under-served legal services sectors such as family law and criminal law.

Moving to the Law Society of Upper Canada Discussion Paper on Alternative Business Structures and the Legal Profession in Ontario, we note that legal services in Ontario can currently be provided through a number of different business structures under the existing regulatory scheme.

Although the paper identifies the limitations on the permitted business structures such as professional corporations and multidisciplinary practices, the business possibilities under the current allowable structures are not explored. A number of business structure innovations are emerging in Ontario under the current regulatory scheme but are not discussed in the LSUC consultation document. We think this is an important omission.

We also note that the jurisdictions where ABS have been permitted are jurisdictions where the legal profession is not self-regulated but government regulated – note England and Wales and New South Wales, Australia. We do not know what implications this may have for the self-regulated legal profession in Ontario but submit that this is worthy of further research and discussion.

We question the financial and competitive impact non-lawyer ownership will have depending on the size of the law firm. It seems that partners in large law firms will stand to profit significantly from the sale of their ownership in the firm to the non-lawyer corporation. Sole practitioners and lawyers in small firms of five or fewer will experience the Walmart effect: they will be driven out of business by the economies of scale available to a large corporate enterprise. This cannot auger well for access to justice and quality legal services particularly in underserved communities and rural areas of the Province.

The distinct professionalism challenges that would develop in non-lawyer ownership are only superficially noted in the consultation document. These concerns are real and significant. They may “change how legal services are offered in a way that could be detrimental to the public or the legal system more broadly.” *When Lawyers Don’t Get All the Profits*, p.42

Critically important professionalism issues such as conflicts of interest and solicitor-client privilege are noted as “possible concerns” in the consultation paper. We are of the view that these issues are real and warrant significant further research and discussion. The serious conflicts of interest ethical issues have been raised by others in the context of the personal injury legal sector, for example. We also note that this legal sector is now controlled by a handful of large ABS in Australia. Personal injury law is not an underserved legal services sector where access to justice concerns could justify the introduction of ABS.

Enterprises that offer legal services that also have other commercial interests “are more likely to have conflicting and potentially adversarial interests to their clients.” *When Lawyers Don’t Get*

*All the Profits*, p.43. The example most often cited is the insurance company in the personal injury market. In the UK, insurance companies have captured a large segment of the plaintiff personal injury market. Since they have an interest in reducing the amount they compensate for injury, the insurance companies may lobby for regulations that reduce the amounts they would have to pay out or pressure their law firms to settle claims. Both positions may conflict with their clients' best interests.

In England and Wales, non-lawyer ownership has been used to bypass professional regulation. This is especially true for enterprises offering multiple services. There, insurance companies, "which once referred injured customers to personal injury law firms, have bought up these same firms in part to bypass a new ban on referral fees". (p.44)

Nick Robinson also notes at page 43 of his article that "some potential conflicts that may undercut public trust or potentially have long-term detrimental impact to the law or legal system can be so nebulous that they are difficult to regulate."

Walmart is one of the largest employers in the United States and is frequently criticized for their employment practices. If Walmart started offering legal services in the United States, including employment law, some may question if they have a conflict of interest even if lawyers in their stores never directly represented their clients against Walmart. One could plausibly argue that Walmart has an interest in shaping employment law in the United States in a direction beneficial to the company and so it is troubling if they start representing a large number of workers for employment claims. At the very least, it may lead some to have less faith in the integrity or fairness of the justice system.

...the amorphous nature of such a potential conflict makes it difficult for a regulator to justify specifically barring Walmart, and not other retailers, from entering the legal services market in employment law. (p.44)

Lastly, we note that the regulation of alternative business structures will involve a departure from the regulation of individual lawyers and paralegals to the regulation of the business entity – which in most instances will be corporations. A more detailed description of the proposed regulatory scheme for non-lawyer ownership must be made available in order that the legal profession, the public and other key stakeholders can fairly assess the regulators ability to really regulate and curb corporate excesses, ensure high levels of professionalism and ethical practice and the protection of the public.

It has been noted by other authors and observers that the most concerning new professionalism challenges have arisen with enterprises that offer other services in addition to legal services. We are of the view that if non-lawyer ownership does become a reality in Ontario then multi-services non-lawyer ownership, where the potential for conflict of interest is high, should be banned.

In most fields- not just the legal profession – a striking feature of the spread of regulation across jurisdictions is that new regulatory frameworks are frequently adopted on the basis of ideology, or to harmonize with global norms, than on concrete evidence of their merit. John Baithwaite and Peter Drahos, *Global Business Regulation* 17 [2000]. We are concerned that that is what is possible here. More research is needed including improved collection of data regarding legal services to be able to properly assess the impact of non-lawyer ownership. We should look to England and Wales which is furthest along in gathering relevant data.

We close with a final quote from *When Lawyers Don't Get All the Profits*:

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. Carefully regulated non-lawyer ownership may be a part of achieving this larger goal, but only a part.

**RESPECTFULLY SUBMITTED,**

**SOUTHWEST REGION WOMEN'S LAW ASSOCIATION**

**December 29, 2014**

### **Mission Statement:**

The Southwest Region Women's Law Association is dedicated to bringing together the community of women lawyers and law students to provide a forum that supports women by empowering its members and future female leaders. We will achieve this through professional development,

motivational speakers, networking and mentorship opportunities and other activities that will advance women in the legal profession and the needs of our diverse community.

The Southwest Region Women's Law Association will strive to understand and address the legal and practice issues that affect women in the law and will facilitate awareness and discussion of those issues.