

# CDLPA'S RESPONSE TO THE DISCUSSION PAPER ON ALTERNATIVE BUSINESS STRUCTURES

*The voice of the practising lawyer in Ontario*

The County & District Law Presidents' Association

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The County & District  
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## Executive Summary

The Law Society of Upper Canada struck a working group in 2012 to look at Alternative Business Structures (ABS) and consider what, if any, forms of ABS could be implemented in Ontario. The Working Group released its initial Report to Convocation on February 27, 2014 outlining four potential structures for ABS. After further consideration and discussion, Treasurer Minor requested the Working Group draft a Discussion paper, designed to reframe the discussion around ABS to provide additional assistance to stakeholders in understanding and responding to the issue. The Discussion Paper was released on September 26<sup>th</sup>, 2014 outlining additional considerations to help frame the discussion.

The County and District Law Presidents' Association (CDLPA) supports the Treasurer's position that education and consultation occur before any form of ABS are considered, including hearing from the practising bar and other stakeholders.

We offer the following response to the Discussion Paper to begin that process and continue the dialogue to what we hope will be an appropriate outcome. The decisions reached by Convocation on this matter have the potential to affect the entire justice system and as such requires due care and consideration.

### SUMMARY OF CDLPA'S POSITION

It is the position of CDLPA that the Law Society first define the true problem (or problems) it is seeking to solve. At this stage, neither the problems they seek to correct, nor the solutions they are proposing, are adequately described, nor necessarily directly connected. As such, pursuing ABSs further in the short term without a careful examination of the practical effects on the profession and the legal resources market could put the public in direct risk of harm and cause irrevocable harm to the profession.

**alternative**  
BUSINESS STRUCTURES  
The Future of Legal Services



Alternative Business Structures Working Group Members  
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The Law Society of Upper Canada | Barreau du Haut-Canada

What is under consideration is not a mere tinkering with the current regulatory system. To consider non-licensee majority ownership of law firms would be transformative for the legal profession in Ontario and unique in this country. One cannot simply consider what might be accomplished under such a regime. One must also consider what unintended consequences might come along with it. Simply put: would the Law Society be creating more problems than are being solved?

CDLPA represents a constituency that forms the backbone of the legal profession in Ontario. Our membership is mostly comprised of solo and small firms spread across Ontario that operate on the front-lines of the legal system. We view our membership as the “grassroots” of the legal profession who struggle every day to provide the best representation possible for their clients and to run viable, profitable businesses at the same time.

The initial “gut” reaction from much of our membership has, so far, been quite negative to ABS. At the same time, that reaction has also revealed that our membership feels inadequately informed of the discussion (both the pros and cons of the various models) and they desire more information and more rigorous dialogue and consultation. To that end, we appreciate the cautious and consultative approach taken by the Law Society to this point and acknowledge that the Treasurer and Committee have resisted any efforts to unnecessarily accelerate the process.

In response to this consultation and echoing the cautious approach of the Law Society, the CDLPA executive have taken the cautious and, we believe, prudent view that it is premature to consider implementing any form of ABS without the full range of issues being clarified and further empirical evidence on the effect of ABSs becoming available. In other words, we believe there is merit in some parts of the discussion about ABS and it is our desire to use this discussion as a platform for a broader discussion about the modernization and improvement of the regulatory structure under which the legal profession operates in Ontario.

## SUMMARY RECOMMENDATIONS

More specifically, CDLPA makes the following recommendations to the Law Society of Upper Canada in response to the Discussion paper:

- 1) The vision for ABS in Ontario must be further clarified if true consultation is to occur. Further, a clearer answer on the rationale for alternative business structures needs to be offered. Will the vision lead to a successful outcome for both the profession and for legal consumers?

The mandate of the Law Society is to regulate the legal profession in the public interest, but we do not yet fully understand, or frankly accept, the connection between the public interest and ABS. Care must be taken in this examination that the protection of the public and the impact on the profession is realistic and not only theoretical.

- 2) In the Discussion Paper, technology and innovation emerge as themes and this is a welcome discussion. In our view, however, the Law Society should review and consider the use of technology in law to provide clearer guidance to the profession on the use of technology in practices, in particular to support solo and small firms as the predominant service providers to Ontarians. If more technology and innovation in the practice of law is a goal of the Law Society, guidance on the use of same should be provided first and outside the scope of a broader discussion on ABS. We

believe that such a discussion could prove more fruitful, and carry much less risk, than a discussion about the current regulatory regime.

- 3) We recommend that the Law Society move the discussion away from “ABS” exclusively and into a more fruitful and less politically charged discussion about potential improvements and modernization of regulation. In one respect, “ABS” is a broad and far-ranging theoretical discussion about regulatory modernization, but at the same time focusing on ABS is also, in our view, limiting discussion about positive changes that can – and should - be made to the overall regulatory regime.

There are many interesting ideas arising from the discussion of regulatory modernization. There are also regulations that can be modernized to make more sense, better protect the public and help with our lawyers’ interactions with key stakeholders. We agree it is time to get the regulator and the profession adapting to the realities of the current legal system, including “access to justice” issues, rapidly changing technologies and changes to the needs and wants of the 21<sup>st</sup> century client. However, moving the discussion to better opportunities around modernization that are not necessarily ‘ABS’, reframes the goal of this exercise to, what we believe to be, a more fruitful discussion.

## Specific and Detailed Responses to the Discussion Paper

According to the Discussion Paper, the Law Society is looking at ABS's for three reasons: facilitating greater flexibility in the delivery of legal services; fostering innovation in the area, and; improving access to legal services for consumers.

With that in mind, the Discussion paper seeks to frame the discussion around some specific considerations, which we will respond to in turn.

### ACCESS CONSIDERATIONS

It is clear that changes are happening now which impact the legal profession specifically: (1) the increases in cost associated with the justice system; (2) the increasing numbers of self-represented individuals (related both to the first factor and to other factors too numerous to articulate here); and, (3) the increasing numbers of Ontarians with legal issues who choose not to proceed to exercise their full legal rights. These factors have led to some changes and effects in the legal system with which the profession and the regulator have not been able to keep pace. It is clear a good hard look at the legal system as a whole is necessary for the profession and the regulator.

However, if "the system" needs changing, it is more probably more effectively done so in coordination and cooperation with other legal system stakeholders such as the courts (example: how the SCC dealt with summary judgment motions in *Hyrniak v Mauldin* [2014 S.C.J. No. 7]), the Civil Rules Committee and by government. In other words, the Law Society cannot and should not undertake to make changes to the "system" alone.

The Law Society has an undeniable and important role to play in helping the public access legal services but it should not be the lead actor. For example of ways the Law Society could help improve access to justice we suggest it should explore ways to encourage the wider use of a contingency based retainer system. (It is noteworthy that in the area of practice where contingency fees are the norm - personal injury - there are no access to justice issues.) We would also suggest that ABS is not an answer to an inadequately funded legal aid system, which is a key driver of the access to justice challenge, particularly in areas such as family law.

The Law Society does have a key role to play in ensuring that accessibility and effective legal services are available to Ontarians and that the public can rely on the quality of service provided. It is undeniable that there are more self-represented individuals in the system and increased availability of online resources that seek to replace face-to-face interaction with a lawyer, which both require the Law Society's attention. However, it remains unclear to us how broadening the scope of ownership could alone address those access concerns, or lead to innovation that would reduce the costs of services, which would then promote access to the system, as presented in the Discussion Paper.

The initial analysis must look at what are the unmet needs to Ontarians, and where access issues arise. According to Jamie Baxter, Michael Trebilcock and Albert Yoon, "*The Ontario Civil Legal Needs Project: A*

*Comparative Analysis of the 2009 Survey Data*<sup>1</sup>, family law matters represent the highest reported access issues. Correspondingly, there exists little to no evidence that any form of ABS in jurisdictions that currently offer same, have addressed this specific need or improved access in this area. In fact, it was recently reported that nearly three-quarters of private family cases in England, an ABS jurisdiction, involve one or both parties without legal representation<sup>2</sup>.

In examining the available research on ABS, it appears there is little to no evidence that suggest that ABSs have improved access to legal services in areas that are underserved already. In jurisdictions that have implemented ABS, the experience shows that the two primary areas where new ownership structures are formed are around personal injury law and in solicitors practices focused on conveyancing, estates law and some forms of business law. We contend that these are areas that are not currently underserved in Ontario. (In fact, we believe they were not underserved in the jurisdictions that have moved to ABS either.) The recent Harvard University Study by Research Scholar Nick Robinson has argued that *“the benefits of such ownership have been oversold with respect to access to civil legal services.”*<sup>3</sup> He further noted that *“...if you look at England and Wales, and Australia, it hasn’t been the sort of magic bullet for access problems and particularly for poor and moderate income populations.”*<sup>4</sup>

TYPES OF LEGAL PROBLEMS – JUNE 2009		
	TOTAL SAMPLE	HAD LEGAL PROBLEM
	%	%
Family relationship problems	12	30
Wills and powers of attorney problems	5	13
Housing or land problems	4	10
Real estate transactions	4	9
Employment problems	4	9
Criminal problems	3	9
Personal injury problems	3	7
Money or debt problems	2	5
Legal action problems	1	3
Neighbourhood problems/property damage	1	3
Traffic/speeding offences/violations/tickets	1	3
Disability-related issues	1	2
Consumer problems	1	2
Immigration problems	1	2
Small or personal business issues	1	2
Discrimination/harassment problems	1	2
Welfare or social assistance problems	1	1
Hospital treatment or release problems	*	1
Treatment by police	–	–
Other	3	8
None	62	1
Don’t know/not applicable	*	*

\* less than 1 per cent

**Table 1 Report of the Ontario Civil Legal Needs Project**

As a result of the evidence that access to justice is a real and growing problem across Ontario – particularly in areas of family law, “poverty law” (landlord/tenant law, for example), immigration law and some areas of criminal law, the Ministry of the Attorney General is undertaking a comprehensive review and the Minister has made “access to justice” a priority of her mandate. The Ministry has made clear that a more modern platform for the delivery of legal services is desirable, signaling a wish to break from a traditional approach to the justice system that has seemingly not kept pace with the times. The Ministry’s approach is a more comprehensive view toward improving access to justice for Ontarians, and it is a most welcome development.

<sup>1</sup> Jamie Baxter, Michael Trebilcock and Albert Yoon, *“The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data”* (August 27, 2010) at page 21

<sup>2</sup> Law Society Gazette, Sept. 24, 2014

<sup>3</sup> 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878)

<sup>4</sup> Lawyers Weekly, October 10, 2104

<http://www.lawyersweekly.ca/index.php?section=article&articleid=2233>



In our view, the Ministry of the Attorney General approach has its benefits and, if it continues on the path laid out by the Minister, should prove fruitful. The work of individual lawyers and the structure of their firm's ownership are not the root of the problem to accessing legal services, but instead another piece in the system that contributes to access issues and should be viewed in that context.

In conclusion, the ABS proposal as currently put forward does not support a conclusion that ABS will accomplish enough to improve access to justice for those segments in the legal system that are currently underserved. The scenarios suggested in the Discussion Paper are too theoretical and not rooted in strong empirical evidence. As such, the potential benefits could be considered exaggerated, and the potential detriments, unanticipated. The work of the Ministry of the Attorney General to examine justice system-wide issues should prove much more fruitful in our view.

## TECHNOLOGICAL CONSIDERATIONS

The use of technology in everyday lives continues to change and evolve rapidly. The legal profession has not been immune to such changes, nor has any other profession or industry in Ontario, but it is also clear that the legal profession has been slow to adopt and adapt to these new technologies. Walking into the offices of many typical lawyers in Ontario and seeing the volume of paper that is on a desk is evidence enough of this. Walk into a typical courtroom in Ontario where such basic elements of technological infrastructure such as wi-fi and electronic document sharing are inconsistently available is further stark evidence of the fact our profession and system are behind the times.

While it is clear to us that the legal profession must more universally adopt the best-practices of information management of other industries, it is our belief that the only role of the Law Society is to facilitate this adoption by articulating risks to the public that have developed as a result of technology and innovations arising from same and providing guidance to the legal profession on how best to mitigate, or eliminate, these risks.

In the Discussion Paper, it is noted that with increased investment facilitated by changed ownership structures that the potential exists for lawyers to access the capital they need to purchase the technology to better respond to consumer demands. In other words, the capital will make access to technological innovation easier, and innovations like virtual law offices with a roster of consultant lawyers and other professionals, can be developed.

The argument behind the report appears to be that technology and innovation are the natural by-product of more access to capital and less restrictive regulation. With a more "open market" business structure, innovation will lead to better and more affordable legal services. It will just happen. Yet, there are few examples of what innovation or technology the Discussion Paper is speaking about that cannot already be attained under our current regulatory system and how such innovation and technology in the typical law firm is going to make legal services more affordable and accessible particularly, for example, in family and criminal law.

So the question that is left is whether ABS in some form is necessary to allow lawyers to use technology better or does some other regulatory or market change accomplish this?

Our submission is that the starting point on that issue is what information and guidance is currently available to lawyers about the use of technology in their practices. Our membership regularly tells us that the Law Society has, over the last few years, offered little practical guidance with respect to technology for the profession. We believe the profession is hesitant or resistant to using many available technologies in their practice because they are uncertain how the regulator will respond to the use of these technologies. As such, it seems reasonable that before assuming ABSs will lead to innovation in technology for lawyers, and improved service to the public, that the Law Society invest time and energy into developing resources so lawyers both know the limits of the technology they can use and how to better use technologies that are already available.

An example of this is in the promising area of “cloud” based technologies. There is no doubt that cloud storage and sharing of the mountains of paper that are dealt with by lawyers are “low-hanging fruit” available to the profession. Paper file storage costs alone run into the tens of thousands of dollars for many individual lawyers, not to mention the cost of search and document retrieval. Many lawyers in Ontario have taken advantage of these technologies, but many others remain hesitant because of regulatory uncertainty that exists around the security of the cloud and the obligations of the lawyer to protect these documents.

As Monica Goyle notes in the Law Times November 17<sup>th</sup>, 2014, the Law Society introduced a significant revision to the Rules of Professional Conduct in October 2014, but did not provide any updates or amendments regarding the obligations relating to the use of technology. As such, it currently falls to the lawyer’s professional judgement on what is and what is not acceptable regarding technology in practice. As she put it,

*“For those who want to innovate and create technology for our sector, what’s already a risky enterprise becomes even riskier. Any lawyer’s first question before adopting any new technology is to consider what the LSUC says about it. That reflects the real risk solo and mid-sized law firms face whereby a practice audit might deem their choice of software and technology to be out of compliance with the firms having to rewrite their internal systems to match an auditor’s interpretations of the rules. The risk drives many lawyers away from the adoption of any new or disruptive technology. Instead, it encourages the attitude that the only way to stay in compliance with practice requirements is to use the same technology and systems everyone else uses and is, therefore, one of the reasons why our industry is so slow to adopt new technologies.”*

Furthermore, for a small or small firm practitioner, it is difficult to grasp how having access to outside capital in an ABS, will improve service to clients. This is something that innovative lawyers are already doing in the province, although again, are doing so independently without the leadership and guidance of the Law Society.

We also remain concerned with the vagueness and overstatement of the potential benefits of ABS with respect to technology. The Discussion Paper at paragraph 128 states:

*“Alternative sources of capital may also enable investments in business process and technological innovations, which may lead to enhanced quality, and may enable a licensee to scale operations, thereby moving away from the billable hour to a new structure. Reliance on outside capital may encourage and enable licensees to professionalize their business processes”.*

The CBA Futures report states:

*“Alternative Business Structures permitted in other jurisdictions and fuelled by non-lawyer capital, will be able to invest more in innovative processes and technologies and provide more entrepreneurship that will enable the delivery of legal services better, faster, and cheaper across national and provincial borders.”<sup>5</sup>*

We submit there is no empirical evidence that we can find to support such statements. What “innovative processes and technologies” are being referenced? Further, why can they not be attained in the current regulatory system or in a less drastically modified system?

We are therefore left to question whether ABSs will facilitate technological innovations. Having capital to buy new computers, software or other technology does not equate with learning to think creatively about the delivery of legal services – which is where the real innovation in the provision of legal services will come from.

We believe the more widespread adoption of technology in the legal profession will come about as a result of three things: First, clear regulatory guidance from the Law Society that articulates the risks of technologies such as cloud-based document storage; second, regulatory modernization (from both the Law Society and the Ontario government) that removes barriers to the electronic exchange of documents, removing the need for the physical exchange of paper in more circumstances; and third, the modernization of technologies available in the “government-run” parts of the justice system, particularly the courts and administrative tribunals.

On this last point, we are heartened by the work of the recently launched “Better Justice Together” task-force of the Ministry of the Attorney General, though note with some

## **Better Justice Together**



degree of hesitation that the mission and vision of this particular task-force is not very different from the mission and vision of similar work started in the mid '90s under the banner of the “Integrated Justice Project”. As the Auditor General of Ontario reported in 2001, the IJP – begun in 1996 - had as an objective:

*... to improve information flow by streamlining existing processes and replacing older computer systems and paper-based information exchanges with new, compatible systems and technologies. Information was to be moved electronically between users, reducing the time, effort, and cost that now go into producing and retrieving documents ...<sup>6</sup>*

It is a testament to how far behind the Ontario justice system is that in 2014 we are undertaking a project to accomplish something that was started in 1996, but failed to deliver at the time. CDLPA believes that if the

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<sup>5</sup> CBA Legal Futures Initiative: The Future of the Legal Profession – Report on the State of Research – page 24. <http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/Future-of-the-profession-eng.pdf?ext=.pdf>

<sup>6</sup> Report of the Auditor General of Ontario, 2001 – Page 67.  
[http://www.auditor.on.ca/en/reports\\_en/en01/303en01.pdf](http://www.auditor.on.ca/en/reports_en/en01/303en01.pdf)

rest of the justice system can make up for lost time and adopt new technologies, the legal profession will be forced to adopt new technologies so it can better interact with the rest of the justice system. In short, the legal professions current technology deficit is a reflection of the system it operates within today.

Notably, none of the barriers we have identified to technology adoption have anything whatsoever to do with alternative business structures or improved access to capital for lawyers.

## ECONOMIC & BUSINESS CONSIDERATIONS; PROFESSIONAL & ETHICAL CONSIDERATIONS AND IMPLEMENTATION CONSIDERATIONS

We have chosen to respond to these three considerations together as a result of the merger of many questions and ideas regarding each area in preparing this response. We thought it more prudent to combine these, as opposed to repeating themes we wish to put forward.

An important consideration for whether to adopt ABS are the economic and business considerations. In fact, for many, these are the most important considerations. Will the new structures result in more efficient business operations and derive better macro and micro-economic outcomes? We recognize that the Law Society has as its primary mandate the protection of the public interest and not necessarily the economic interests of the profession, but there is a direct correlation between the economic viability of the private bar and the public interest. Simply and bluntly stated, if the practice of law becomes unprofitable because of competition from external factors, competent and professional legal service will become more scarce, causing prices to rise and making access to legal services both more expensive and with potentially lower quality.

If changes to regulation allow for non-lawyer ownership of legal services which is exploited with no regard to local needs, how will this assist with access to justice or other issues? Frankly, if highly capitalized entities enter Ontario and start to offer franchise and flat rate services in smaller communities, this may lead to a loss of local lawyers or a loss of “choice” of lawyers, which ultimately will have a detrimental impact on access to justice and quality of legal services. We firmly believe that the Law Society must consider the economic impact on its members when it examines changes in regulation. More than merely “protective” analysis, the consideration of the impact of ABS on lawyers across Ontario is intrinsically linked to public interest considerations and CDLPA urges the Law Society to engage in substantial research on those jurisdictions that have already experienced changed regulation.

Professors Edward Iacobucci and Michael Trebilcock in a 2013 paper provided to the Law Society argued that introducing an ABS model should facilitate innovation without substantial change in how legal services are provided. They concluded that equity investment leads to a greater sharing of risk and an increased likelihood of development and innovation, thus lower transaction costs and potentially assisting lawyers with the benefit of professional management skills of non-lawyer owners. They further noted that competition from new business models breeds innovation and cost control.<sup>7</sup>

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<sup>7</sup> An Economic Analysis of Alternative Business Structures for the Practice of Law - Edward M. Iacobucci and Michael J. Trebilcock, University of Toronto Faculty of Law, September 20, 2013

In response, CDLPA is posing a number of questions that frame our concern with these considerations. Is law a profession or a business? Is it both? Do professional considerations outweigh business considerations? Will business considerations cloud professional considerations? Does it matter? What lessons can we learn from other professions – medicine, professional accounting, etc. – to ensure the possible conflict between professional and business considerations are properly dealt with? Does applying economic theory make sense in this context?

Since the primary concern of CDLPA are solo and small firms, our commentary focuses on answering (or attempting to answer) these questions in the context of solo and small firms. In attempting to answer these questions, however, even more questions arise:

- What evidence is there to show that ABS has had no negative impact – professional or business - on the bar and, in particular, on soles and smalls in Australia and England?
- Have there been net-positive business impacts?
- Is there a direct correlation between any positive (or negative) business impacts and the move to allowing ABS, or are there external factors that have contributed?
- Has the public suffered a loss of “choice” – or an increase in choice - of legal counsel as a result of the introduction of low-cost outfits in smaller centres?

The question we really need to ask is what does ABS mean to a solo or small firm in a practical sense? The Discussion Paper notes that ABS structures for solo and small firms have inherent limitations, in that there were limited opportunities to take advantage of these benefits without being swallowed up in a larger entity. If true, the current reality is that most legal services in Ontario are provided by solo and small firms, so any move to open up the market through ABS could have limited positive business or economic impact for the majority of the profession, but could equally have very high economic risk and lead to more non-lawyer competition.

The discussion paper (on page 16) does note that many solo and small firms are running their firm and managing their clients in such a way that they have limited time and ability to offer wider services or to market themselves properly.

The discussion paper notes:

*“The informal consultations undertaken by the ABS Working Group showed that many practitioners enjoy the freedom of being a sole practitioner or in a small firm, but consider the business and marketing aspects of their practice to be a burden. For them, practising, even as a sole practitioner, in a structure that facilitated access to business expertise and infrastructure was attractive.”*

We are left to question the population sample that comprised this “informal consultation”. Who was consulted, in what part of the province did they practice and how many were consulted? A more structured and formal consultation might provide better information and give us more confidence in these conclusions.

Anecdotally, we believe these conclusions may very well be correct, and we believe there is validity to the fact that solo and small firm practitioners have to run a business and deal with clients, which provide its own business and professional conflicts of time and attention. The issue, in our mind, again comes to why the

current regulatory framework is as it is, and whether a change could be made that alleviated these burdens, without it being an ABS per se.

When considering the professional and ethical considerations, we have focused our examination on conflicts of interest that, we believe, are inherent in many corporate structures.

Critics of ABS typically express the concern that lawyers employed within a corporate type structure will be conflicted between their obligations to shareholders and their primary duty to the client. However, as Professor Robinson discussed<sup>8</sup>, just as there is little to no empirical data to support the notion that ABS improves access to justice, there is little empirical evidence to support a wide sweeping concern of shareholder verses client duty. In CDLPAs view, the bigger professionalism and ethical concerns relate to more specific areas of conflict of interest and the very nature of a profit driven corporate entity.

In his paper, Professor Robinson outlined some specific conflict problems when he looked at both England and Australia. Entities that offer legal services along with other services can find themselves in a tug between their duty to the client and their other corporate interests. Take, for example, an insurance company that offers representation to injured accident victims, such as in England. In acting for plaintiffs, the firm should be in opposition to any type of government regulation that would restrict or limit an injured person's right to either tort compensation or accident benefits. However, the same entity, in its capacity as an insurer, would be very much motivated to engage in efforts to limit amounts paid out in compensation or in accident benefits. They would lobby the government both directly and through their insurance industry association. This presents as a clear conflict within the corporation between its service to clients and its traditional scope of business.

Similar examples can be found in the area of real estate conveyancing where there would be considerable risk of conflicts if an ABS were in place to allow an insurance company, bank or other company to have an ownership interest in a law firm.

Another example cited by Professor Robinson relates to the employment field<sup>9</sup>. He refers to Walmart as one of the largest employers in the United States. They are frequently criticized for their employment practices. If Walmart offered legal services that included employment law, they may put themselves in a conflict of interest in that, as an employer, they have an interest in shaping employment law in a way that maximizes corporate profits but at an expense to corporate employees.

Potential conflict situations can arise in any number of ways where a corporate structure offers legal services to the public but at the same time continues in its traditional commercial ventures. Of course, conflicts of interest occur in the current regulatory environment, but these are governed by the Rules of Professional Conduct and by individual firm policies that work to avoid and mitigate these conflicts.

Beyond conflict of interest, CDLPA believes there are "bigger picture" professionalism issues in question and those issues relate to the very nature of corporate entities. Corporate ownership, by their very nature, have one fundamental duty to their shareholders: to maximize profit. Profits are made if more goods and services are sold and if competition within the market is minimized. If a Shoppers Drug Mart store, for example,

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<sup>8</sup> Robinson, page 42

<sup>9</sup> IBID, pages 43-44

moves into a community, it usually means less business and perhaps closure for the local independent pharmacy. A bottle of aspirin at Shoppers' is not the same as the bottle of aspirin at the local independent. If Shoppers' can sell for less that is the nature of competition and in the short-term is better for the consumer. The analogy is misplaced, however, because lawyers do not sell goods. Lawyers sell knowledge, time and expertise. What happens within the legal services market if the equivalent of Shoppers Drug Mart comes to town and there are fewer "law stores" and professionals offering the legal service?

To further illustrate this point and to learn more how an ABS structure has been implemented in practice, CDLPA has undertaken a close look at the Australian firm Slater and Gordon. Slater & Gordon is a large, publicly traded firm that dominates the personal injury market in Australia for some time and is now making significant inroads into England. Recently, Slater & Gordon's managing director, Andrew Grech, was reported to have stated that the firm would "absolutely" consider coming to Canada if the country's law societies permit non-lawyer investment in firms.<sup>10</sup>

The Slater & Gordon business model is to grow mostly through acquisitions. According to its website, it now has 68 offices in Australia and 17 offices in England. As Mr. Grech stated: "*We are looking to dominate the market in the U.K.*"<sup>11</sup> Such is the very nature of the large, corporate entity, especially if it is publicly traded, with shareholder expectations to meet.

Our question is: What does this mean for the delivery of legal services? After all, we are not talking about Shoppers' or Walmart coming to town. We are talking about professional service providers, not soap, pills, blankets or jeans.

Slater & Gordon has offices in 68 Australian towns and cities; towns such as Cessnock, Wodonga, Footscray, Warrnambool and Dubbo. These are not large places. They are the Belleville, Parry Sound, Chatham, New Liskeard and Kenora of Ontario. Although Slater and Gordon earns most of its revenues in personal injury law, their website confirms that they are a much broader based firm, offering legal services in conveyancing, family law, wills and estates, professional negligence, defamation, administrative law, insolvency, employment, elder law and intellectual property. Slater & Gordon is reported to spend millions of dollars advertising across Australia.

While much has been written about the Slater & Gordon model, what has not been adequately addressed, in CDLPA's estimation, is the impact such a massive and powerful legal entity has had on the legal services market in the smaller centers in which they have set up shop, either by acquisition of a local firm or by moving into town. Consolidation of legal services, particularly in smaller centers, is a professionalism issue that is of great importance and concern to CDLPA. If a Slater and Gordon type firm came into a community such as Belleville or Owen Sound, offering a vast array of different services backed by huge advertising dollars and deep pocket capital, what would it mean to the local bar and, for the public, what would it mean for choice in legal service providers? It is difficult to envision how limiting choice in legal service providers is either good for the profession or good for the public.

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<sup>10</sup> Precedent Magazine, November 17, 2014 <http://lawandstyle.ca/law/major-australian-firm-looks-expand-canada/>

<sup>11</sup>As quoted in numerous on-line publications including: <http://practicesource.com/asian-lawyer-website-publishes-feature-slater-gordon/>

In CDLPA's view, this is a fundamental issue. This issue of impact of the "big-box retail" type law firm coming into smaller communities is one that has not been adequately studied and researched, but it is not hard to extrapolate from the experience of many retailers that the impact will be profound. In our view, however, the difference between a Home Depot coming into town and driving the local hardware store out of business and a sole or small law firm being driven out of business is that when a lawyer is driven out of business, it is damaging to the profession, its independence and to the consumer choices available to her or his clients. In other words, it becomes a matter of access to justice and competent, professional representation.

To be further clear, our critique is not against those firms and legal innovators who choose to co-locate their storefronts in big-box retail locations. That is happening today under the existing rules and that is an innovation that could have positive competitive effects on the market, if these firms remain independent of the landlord they are renting space from and if they maintain the standard of professional conduct set out for them by the Law Society. Our concern is strictly with those circumstances where ownership structures could compromise the professional standards by imposing or implying conflicts of interest.

Our conclusion is that when it comes to the economic and business considerations for the legal profession and for the economy as a whole – and especially when placed into the context of the professional and ethical considerations - there are more questions than answers and the early empirical evidence is, at best, mixed.

On the professional and ethical considerations, we question if the very nature of corporate entities, with shareholders at its highest priority, will put an ABS in direct conflict with the very nature of the practice of law, with clients at its highest priority. The very nature of a profit driven corporate entity and its potential interaction with the law, legal policy development and common law development, have simply not been examined to this point.

On the implementation considerations, it appears at this point that it really will be a culmination of successfully examining all previous considerations raised to appropriately implement any form of ABS. However, serious examination of the existing approval and supervision processes in existing jurisdictions and their appropriateness will be necessary as the final stage of this review, if it gets to that point.

## Overall Conclusion

The legal profession, particularly in Ontario, is often, and probably quite rightly, accused of being resistant to change and stuck in the past. Our governing body remains known as the “Law Society of Upper Canada” despite the fact Ontario hasn’t been known as “Upper Canada” since 1841!

CDLPA admires the Law Society’s willingness to seriously study a different way to deliver legal services in Ontario, but urges the Law Society to tread with caution when considering fundamental changes affecting the profession and the public. We trust the Law Society will, via organizations such as CDLPA, continue to engage the profession in a meaningful dialogue concerning the impact of any proposed regulatory reforms.

The proponents of ABS are very keen to espouse the virtues of technology and innovation. There is support for ABS in some academic circles. Notwithstanding their arguments, however, the Law Society should be cautious and only proceed once a strong empirical case can be made and only once the practising bar fully appreciates the impacts to the profession and their business model.

That is not to say that the case cannot ever be made. We take the position now that there is simply more work to be done. If the legal profession is going to be transformed, there must surely be evidence from other jurisdictions to demonstrate that the public in those jurisdictions is better served by an ABS model – or some other model that we may have to consider. By “better served”, we mean better access to legal services for the lower and middle classes, that lawyers are able to provide those services through technology that is improved and more affordable than under the current system, that lawyers are afforded expanded practice options and that it can all be accomplished without compromising professionalism and practice quality. Unless and until such better service to the public can be empirically and clearly demonstrated, the Law Society should not consider trying to reinvent the wheel.

Change cannot be made in a vacuum, or without significant research and consultation regarding any anticipated changes to the profession, to ensure that any step taken by the Law Society will move to improve things for the public, as opposed to simply being reactionary to changes in the overall legal system.

There is no question that innovation has been occurring in our profession spurred on by game-changing and rapidly evolving technology, especially in the area of information exchange. Even with these changes and improved access to information, more and more Ontarians are going without legal assistance. Clearly, there is a disconnect that needs to be addressed. However, an individualized approach to resolving access to justice issues, especially through an ABS-type of reform, is not alone going to solve the root of these issues.

In fact, CDLPA believes there are many other areas of our justice system requiring reform and investment – legal aid, technology in the courts, regulatory modernization, etc. – that will provide greater benefit sooner than will a fundamental reform of ownership structure for law firms.

We look forward to the ongoing dialogue and debate and CDLPA stands prepared to continue to provide Law Society and our individual members a platform for that dialogue.

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