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Waterloo Region Law Association
Submission to the Law Society of Upper Canada
On Alternative Business Structures (ABS)

The Waterloo Region Law Association (WRLA) represents over 500 members of the Ontario Bar who practice in Waterloo Region, an area respected nationally and internationally for innovation, forward thinking, technological advancement and good governance. We believe that our members also embrace progress, balanced with a focus on practical, sensible solutions that work for the benefit of all parties, as we represent our clients in this Region.

It is in that spirit that the Trustees of the WRLA have undertaken serious consideration of the Law Society's invitation to review and respond to its Discussion Paper on Alternative Business Structures and the Legal Profession in Ontario.

To that end, our association appointed a sub-committee of Trustees to address this issue, has invited specific responses from its membership, and recently hosted a "Town Hall" meeting at the Kitchener Court House which was graciously attended by benchers Malcolm Mercer, Susan McGrath and Ross Earnshaw, all of whom serve on the Law Society's ABS Working Group, to explore this issue in further detail. We also have the benefit of responses already provided to the Discussion Paper by the Ontario Trial Lawyers' Association (OTLA), the County and District Law Presidents' Association (CDLPA) and individual members of our own association.

We substantially agree with the thoughtful submissions already provided by CDLPA and OTLA, which have been expressed in much greater detail than we wish to attempt here. The contributions of individual members of our association are also noted, with thanks for the time they have taken to consider and respond to this matter. As an association, we endorse the concerns expressed in their papers, and are supportive of them. It is not necessary for us to repeat those submissions here, beyond saying we completely agree with the point made in those submissions that the case for the introduction of ABS to Ontario – particularly as a means to improve access to justice, reduce legal costs and increase innovation and competition, which have been its ostensible selling features – has not been convincingly made at this time.

It is our perception that members of the WRLA view the potential introduction of ABS into Ontario along a spectrum that ranges from alarm and outright opposition at one end (for a variety of reasons ably expressed by OTLA and CDLPA) to cautious but possible acceptance of certain restricted forms of ABS at the other end (provided there are substantial safeguards in place). There is no discernable support among our members for any form of ABS that could:

a) permit shares in law firms to be publicly traded;

b) permit anyone other than licensed members to have a controlling interest in a law firm;

c) permit inherent conflicts of interest to be created between the duty of licensed members to their clients, and the profit motive of other shareholders.

Speaking anecdotally, and without benefit of any scientific survey, we estimate that more of our members are clustered towards the outright opposition end of the spectrum than at the cautious acceptance end. That being said, there are certainly some members of the WRLA who do not perceive a significant problem with some level of introduction of ABS, provided appropriate safeguards for the interests of clients are built in.

The point was made during our Town Hall meeting by members of the Law Society's Working Group, that if ABS is introduced in Ontario, it does not require anyone to change the manner in which they currently deliver legal services. Following this line of reasoning, ABS is purely voluntary, and simply offers the option of different business models and ways to provide legal services for those members of the profession wishing to pursue such opportunities. In other words, ABS is benign and harmless, and raises the question for its opponents, "What are you afraid of?"

Implicit in such alternative legal service delivery models, of course, is the prospect of disruption to established business models and ways of providing legal services, leading to increased competition within the profession. It is suggested, without empirical evidence, that the innovations resulting from such competition may eventually drive down the costs of providing some types of legal services and thereby increase access to justice.

The experience in other jurisdictions where ABS has already been introduced suggests that only a few "high profit" areas of practice (notably personal injury law, where access to justice has never been an issue) are likely to feel the impact of ABS. In that practise area accessibility to justice for injured parties -- in the form of freedom of choice of legal counsel -- has arguably suffered. Family law, where access to justice really is a pressing issue, has not seen any appreciable benefit from ABS. We venture to suggest this is because that area of practice is resistant to much standardization and technological innovation, since it requires time-intensive application of legal skills, experience and counseling of clients.

We acknowledge that lawyers are likely no different than any other professional group in being slow to embrace changes which appear uncomfortable and potentially threatening. We can also appreciate that there is inevitable public scepticism about the degree to which financial self-interest motivates our responses to any discussion around the delivery of legal services. The broad and inaccurate public perception that all lawyers are financially well off, earning large incomes, and that the profession therefore has a vested interest in protecting the status quo, is difficult to overcome.

In that context, since the "What are you afraid of?" question presents itself so clearly, we would like to address our comments below to that specific question, listing precisely what concerns our members, and why:

1. Maintaining and Enhancing Professionalism

As the LSUC regularly, and quite properly, stresses in its training of members and in the Rules of Professional Conduct, licensees have a broad duty to the public, and to their clients in particular, to conduct themselves in a manner that upholds the best values and traditions of the profession. There is serious concern that opening legal practice in Ontario to ABS risks undermining these principles of professionalism by essentially commoditizing legal services. Such commoditization (euphemized as "technological innovation") is an essential requirement to actually have any hope of driving down the cost of providing legal services.

Some areas of legal practice certainly lend themselves to greater standardization and the application of technological innovations, but we would argue that those areas are already being exploited by the profession. Even in areas that seem routine on the surface, however, such as preparation of Wills and Powers of Attorney, practitioners will cite file after file where individuals have tried to cut costs by downloading fillable forms from the internet without understanding when and why certain clauses are necessary or appropriate, nor appreciating what can go wrong when they have applied the precedent incorrectly.

A significant part of a lawyer's responsibility in any area of law is to interact meaningfully with the client, understand the totality of his or her situation, and then apply legal knowledge and experience in an interactive, educational manner, to achieve a result that is most appropriate for that client. The lives of our clients are not readily amenable to cookie cutter solutions and fillable on-line forms. It diminishes our professionalism to suggest that access to capital investment in the form of ABS is going to lead to technological innovations that will require practitioners to spend less time and legal expertise on behalf of their clients.

Practising law is not just a job for WRLA members, and we venture to suggest this is true of the profession across Ontario. It is a vocation for most of us -- a role in society we feel privileged and proud to have earned – and which is important to our clients to uphold. We reject the view that it is the fault of the legal profession that our services have become unaffordable to so many. The major responsibility for this issue lies with a justice system and infrastructure that has been devalued and systematically underfunded by different levels of government, by an ever-increasing need to practise law defensively, and by the increasing number of procedural steps and costs now required to bring a matter to trial.

Those are just some of the underlying issues affecting access to justice for members of the public. Introducing ABS shows no promise of addressing those fundamental structural problems, and risks putting economic pressure on lawyers to increasingly treat their clients like materials on a production line rather than as individuals who require time, care and professional attention to address their unique situations and needs.

Every lawyer in private practice can give multiple examples of situations where all else going on in his/her office was temporarily dropped in order to devote urgent time and

attention to the needs of a particular client, without thought to the financial consequences of doing so. That is professionalism at its core.

If those lawyers were required to answer to non-lawyer shareholders regarding such choices and decisions, or to compete with firms where that is the case, would they still be able to practice their profession in the same manner? What kind of "justice" do we want the public to have access to? If members of the public are to have confidence in their legal counsel and in the advice they receive, we submit it is essential to preserve the role of trusted advisor, confidant, and fearless advocate, without regard to financial consequence for the practitioner. That has always been at the core of our profession.

The introduction of ABS carries with it the potential to undermine that, by reducing legal practice within such alternative business models to a simple economic transaction governed by the profit motive. If this occurs, it has the potential to diminish the profession, both in our own eyes and in the eyes of members of the public who rely upon us. Having what we do ultimately reduced to a "job" that produces a work product, rather than a profession we are proud to be a part of, will negatively affect professionalism. While the ABS Working Group suggests that professional values can be properly protected in an ABS model, we have serious doubts about that proposition.

2. The Role of Lawyers in Democratic Canadian Society

Commentary 4.1 under Chapter 2.1-1 of the Rules of Professional Conduct says:

> *[4.1] A lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario.*

Just as freedom of the press is an important and recognized pillar of a free and democratic society, which is rigorously protected, the independence and professionalism of lawyers is fundamental to protecting the rule of law and the rights of all citizens, including those rights outlined in the *Ontario Human Rights Code* and in the *Canadian Charter of Rights and Freedoms*.

This cherished independence and professionalism is often perceived as a nuisance and impediment to those in positions of economic or political power, when their agendas are challenged by lawyers. That is all the more reason we must be vigilant in preserving and protecting such independence and professionalism, rather than opening the door to economic forces which have the potential to undermine these values.

Aside from all of the specific concerns raised by others regarding potential conflicts of interest, confidentiality and other compliance issues within an ABS, the Law Society must ask itself what damage we potentially cause to the independence and integrity of our entire profession, at a larger societal level, by permitting non-licensees to obtain an economic interest in the work done by lawyers.

We must never forget that we have special responsibilities within Canadian society, and it is for that reason we have been granted special privileges as well as substantial ethical restrictions, in how we carry out our work. The introduction of ABS poses a perceived threat to the special relationship the legal profession should have with the public, and we are loath to see that relationship undermined. If the introduction of ABS is to be considered in any fashion, serious attention needs to be paid to this issue.

3. The Public Interest

The Law Society regularly reminds its members that its role is not to protect our economic interest, but to protect the interests of the public in their interactions with licensees. The Law Society also habitually points out that maintaining our ability to be a self-governing profession is paramount, and that concern informs its attempts to be proactive.

We acknowledge that this orientation is correct and appropriate. Access to justice certainly is an increasing concern in Canadian society, just as economic inequality more broadly is garnering increased attention and concern. At the same time, we remind the Law Society that the interests of the public ought to be measured in more than simplistic economic terms.

We endorse and agree with the submissions of CDLPA which make a pointed connection between the potential effects of ABS and a narrowing of choice and access to justice across the province, particularly in smaller communities. It is imperative that the Ontario public should have reasonable choice for legal representation, and that such representation remain fearless and uninfluenced by the economic considerations of non-licensees.

We further submit that the Law Society should be less defensive about the important role played by the legal profession, and have a stronger voice in advocating with governments and with the public that an independent and self-regulated profession is vital to Canadian society as we know it. There is a profound public interest in maintaining the strength and independence of the bar and the Law Society should be trumpeting that as well.

The Law Society could focus increased effort on educating the public about the role and value of the profession in protecting their liberties and interests, instead of making defensive proposals such as ABS, generated by concern about our ability to remain self-governing. There is little utility in remaining self-governing if, in order to do so, we must voluntarily take steps to undermine our own ability to uphold the very values and traditions of the profession which make us one of the pillars of a successful democracy.

To summarize, we suggest that the discussion around the proposed introduction of ABS to the legal profession in Ontario raises concerns that go to the root of how we conceive of ourselves as

a profession. It may be eliciting such a visceral and hostile reaction from some quarters because members of the profession (whether rightly or wrongly) perceive ABS as an attack on their very identity as professionals.

At the same time, we do not wish to be seen as objecting to progress or the use of technology and innovation in the delivery of legal services. Nor do we object to new ways for lawyers to organize themselves in the delivery of their services, provided the fundamental values of the profession are preserved and, if possible, strengthened. We remain to be convinced, however, that ABS represents a meaningful and positive move in that direction.

We suggest that the Law Society, in considering ABS further, cannot treat such fears as being simply unreasonable or regressive. If the introduction of a specific ABS model is ultimately put to the profession in Ontario, we suggest that it will need to satisfy the concerns expressed above, and be clearly seen to maintain the highest standards and traditions of the profession, or it will not gain acceptance.

Submitted on behalf of the Waterloo Region Law Association

January 30, 2015