



**Submissions of the Criminal Lawyers'
Association
To Law Society of Upper Canada
Alternative Business Structures Discussion Paper**

THE CRIMINAL LAWYERS' ASSOCIATION

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The Criminal Lawyers' Association (CLA) represents more than 1200 members. Our membership consists primarily of criminal defence lawyers in Ontario.

Among our considerable contributions to the justice system, a large portion of our efforts relate to ensuring access to justice in the criminal law context and protecting the civil liberties of Canadians. The majority of our members' clients are part of vulnerable groups in one way or another. Both our organization and our members routinely assist individuals with mental health issues, marginalized racial groups, the impoverished, and the uneducated.

The CLA is opposed to any measures that would bring ABS models to Ontario at the present time. Looking towards other common law jurisdictions, like the U.K. and Australia where ABS models are employed, there is still no compelling evidence that these models significantly benefit legal practitioners or the public they seek to serve. This is particularly true in the area of law that concerns our members. We base this opinion on numerous sources but primarily those already assessed and evaluated in the Ontario Trial Lawyers' Association (OTLA) submission on this issue.

As is well known at this point, ABS models are rationalized and justified on several key areas. Above all, the ABS models claim to enhance

- a) Innovation in practice;
- b) Flexibility towards local and global market forces in legal services;
- c) Desired growth of legal entities through private equity or capital markets;
- d) Business efficiencies and cost saving measures; and,
- e) Access to justice.

Although the consequences of ABS models at large are of concern to all lawyers, the CLA places its greatest concern and focus on claims of enhanced access to justice for Ontarians.

Incidentally, and beyond the access to justice issue, our organization does not accept any conclusions that the remainder of changes (a to d) are necessary to adapt to market forces or innovation requirements. To date, lawyers and law firms have proven themselves capable of adapting to various changes in society like any other business or profession. There is no compelling reason or evidence that ownership of legal entities must be opened to non-lawyers to facilitate what is already happening across the province.

ABS models also give rise to serious concerns relating to conflicts of interest that are presently overridden by our professional and ethical obligations to the client, court, and profession at large. Adding duties to shareholders and profit-driven priorities will only undermine the nobility of the profession and the values it seeks to uphold.

The Ontario Trial Lawyers' Association has prepared extensive and well-researched submissions on why ABS models ought to be opposed in Ontario. **We, as an organization, adopt and agree with the OTLA submissions in their entirety.**¹

This is not to say that ABS models can never, in time, come to prove their necessity or worth. However, when we consider the time that has already elapsed in other jurisdictions and the lack of evidence demonstrating the clear benefits of the ABS regime, it would be an unnecessarily rash measure for the Law Society to proceed without persuasive evidence that it will benefit the public and its members.

At a minimum, the fundamental changes inherent in ABS models ought to be placed to all Law Society members to vote upon.

The Nature of Criminal Law:

Author Richard Susskind² defines five different categories of legal services that form the continuum of legal services ranging from 1) bespoke (highly individualized), 2) standardized, 3) systematized, 4) packaged, and 5) commoditized. The services provided by criminal lawyers generally fall within the first category.

Unlike commoditized legal services, there is no standard form of advocacy or litigation in the criminal justice system.

The overwhelming majority of legal services offered by criminal defence lawyers within the Province of Ontario are of necessity highly individualized. Criminal trials and appeals, guilty pleas, alternative resolutions, review board hearings and all of the other myriad ways that defendants proceed through the criminal justice system are entirely dependent on the unique facts of each case and the unique situation of each defendant. It is near impossible to see how mass replication through ABS models could be implemented without assuming that all defendants are the same and each charge has the same underlying facts.

Consequently, the nature of criminal law makes ABS models exceptionally challenging to implement in this context. For an ABS model to work, an entity practicing in criminal law would require significant efforts at commoditizing the

¹ "OTLA Submission to Law Society of Ontario on Alternative Business Structures"

² Richard Susskind, *The End of Lawyers: Rethinking the End of Legal Services* (Oxford: Oxford University Press, 2010), pp.28-33, and *Tomorrow's Lawyers; An Introduction to Your Future* (Oxford: Oxford University Press, 2013, p.25.)

workflow of lawyers, which in turn will only serve to the detriment of clients whose needs are necessarily individual, complex and nuanced.

There may be some more marginal and mundane areas of the practice that could be “commoditized”, “standardized”, or “systemized” such as administrative court appearances. However, these types of tasks are typically already assigned in efficient ways to staff, law students, or other employees in order to save costs for the client and add efficiency in the practice. The economic realities of the practice of criminal law are such that few, if any, criminal lawyers perform tasks that aren’t best performed, and most efficiently performed, by them.

Such tasks are also infrequent enough that full time staff are rarely required for their completion, let alone an entire system designed to save money through such efficiencies of scale.

Access to Justice:

Access to justice is a perpetual and ubiquitous issue our members face for those we seek to help. Therefore, the proposed implementation of Alternative Business Models (ABS) and its purported justifications are of great concern to our members as well as those we represent.

ABS models are often presented as the panacea to solving access to justice issues. Such issues pervade every jurisdiction. Ontario is no exception.

As noted by the OTLA Submission³, even though access to justice is a considerable issue in Ontario, a large majority of those in low and middle-income brackets sought legal advice from a professional and of those, 80% received the help they were looking for. Needless to say, this could stand to be improved. Yet, the conclusion that ABS models will somehow achieve that is highly speculative and unsupported by evidence or common sense.

In a critically important paper analysing ABS models, Nick Robinson, of Harvard Law School has summarized the current thrust towards implementing ABS models succinctly as follows:

The current wave of liberalization regarding restrictions on ownership 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 has been particularly central to this debate. In light of the perceived limitations of pro bono assistance and stagnant or declining legal aid budgets, proponents argue that non-lawyer ownership may be

³ OTLA Submission to Law Society of Ontario on Alternative Business Structures , p.3

one of the most impactful and realistic ways to increase access to legal services.⁴

Presently, both the CLA and its individual members spend an inordinate amount of time acting for clients pro bono and at rates far below what might be considered a fair market value. This is sometimes done out of necessity and sometimes out of choice. Either way, pro bono and low paying work are simply the realities of criminal defence practice.

Our placement as criminal defence lawyers allows our members an acute understanding of the challenges the justice system faces in providing meaningful access for all Ontarians. It is obvious to anyone in this area of practice that qualitatively acceptable access to justice has little, if anything, to do with increased innovation, business efficiencies, or greater motivation for non-lawyer members (the ABS rationales to name a few).

In addition to informal pro bono services our members routinely engage in, our organization has formally provided countless hours in pro bono services advancing the interests of marginalized and vulnerable groups. As part of those efforts, over the past decade, our members consistently struggle with the government to ensure there is greater funding and eligibility to Legal Aid funding for Ontarians.

Robinson also argues, to which we agree, that the focus on access to justice is better spent on Legal Aid initiatives and programs that offer immediate and tangible results as opposed to surmised effects of unproven market forces that will be driven to seek quantity over profit; quality over efficiency:

Given the questionable impact of non-lawyer ownership on access, it suggests that the attention of access advocates is better turned elsewhere, particularly to strengthening and broadening legal aid.⁵

This is also supported by the OTLA submission to which we adopt in position:

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.⁶

⁴ “When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism” Nick Robinson, Harvard Law School, Program on the Legal Profession; Center for Policy Research (India), p.3

⁵ Robinson, N, *supra* at p.5.

⁶OTLA, *supra*, p.8

We also strongly adopt the OTLA conclusion on this matter that adopts the Robinson paper mindset:

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

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. 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.

It is the view of our members that if resources, efforts, and expenses are delegated in an attempt to improve access to justice, ABS models are not the solution. Access to justice is solved by governmental efforts to ensure that those in vulnerable groups who cannot afford lawyers are made accessible through state funding to acquire counsel of choice within reasonable limits.

The conflict between business and the legal profession's ideals

From a common sense point of view, the Alternative Business Structures that would presumably be driven to reduce those services that fail to meet proper business objectives in order to increase profit are fundamentally at odds with the manner in which criminal law is practiced.

Very few of our members start, continue, or complete the profession of criminal law with a primary view to make profit from our clients. The ideals that motivate criminal defence lawyers are not the same that drive capital markets.

The late Eddie Greenspan, Q.C., in accepting his Law Society Medal, wrote:

The idea of the lawyer – the classical, central idea—that is—of the lawyer battling in the criminal courts – corresponds to a universal trait in the human family. I was irresistibly attracted to the lawyer’s role in that ultimate sense. I am happy in the role. It permits me to be both cynic and idealist. As a criminal lawyer, I have come to learn that things are seldom what they seem. No frailty surprises the criminal lawyer. Indeed, surprise is reserved for occasional confrontations of virtue. Nothing gives the criminal lawyer more pleasure and satisfaction than to win a difficult case against the pressure of inflamed opinion, vindicating the stirring principles of the legal tradition against all odds. Criminal lawyers have the blood of Don Quixote in their veins. Criminal lawyers demonstrate that an honourable lawyer can have an exciting life representing persons accused of crime.⁷

This is not to say that criminal lawyers cannot run successful businesses; indeed, many of our members do. However, these businesses are often run despite the lack of profitability, not for it – something that is antithetical to ABS models and non-lawyer ownership. It is of great concern that when a paradigmatic shift is taken in what drives a criminal law practice, there are going to be irreparable consequences not only on the public’s respect for the profession, but also on the public at large in protection of their own civil liberties and freedoms.

Put another way, fighting for rights and freedoms is not profitable. It is generally inconsistent with the model and objectives of ABS. The criminal justice system is not composed of individual litigants. Rather it is the power of the State prosecuting individuals. The comparison to David and Goliath is unavoidable. The issues that arise in the criminal justice system do not lend themselves to profit based models of economic efficiency and assembly line “justice”. Access to justice in the criminal justice system is about justice in the most profound sense of the word.

This is not to say that ABS models cannot, in rare circumstances, be used to towards access to justice issues. For example, the law firm of Salvos Legal in Australia markets itself as offering a full service firm that engages in a pro bono division:

We practice in the areas of commercial and property transactional law on a paid basis. However, all of our fees (net of expenses) are used to fund the operations of our ‘legal aid’ sister firm, Salvos Legal Humanitarian, which is a full service free law firm for the disadvantaged and marginalised in NSW and Queensland. Both firms are solely owned by The Salvation Army.⁸

⁷ <http://lawsocietygazette.ca/wp-content/uploads/2013/05/Verbatim-E.-Greenspan.pdf>

⁸ http://www.salvoslegal.com.au/about_us

This is laudable indeed and such efforts must be commended. That said, such a firm should not need to exist in a proper legal system that recognizes the need for access to justice. Our system of justice cannot afford to precariously rely upon private firms to fill the pro bono gap that governmental funding should be responsible for in a fair justice system.

The most effective advancement in achieving greater access to justice does not rest in ABS models, but rather in committed efforts on the part of the Law Society, its members, and the Government of Ontario to ensure proper legal funding for those in need.

The Special Relationship of a Client and Lawyer in Criminal Practice.

Not only is the nature of the work highly individualized in criminal law, but also so is the solicitor-client relationship.

Clients charged with criminal offences must trust their lawyer completely. This trust often does not extend beyond the individual lawyer and those they directly work with. Adding a model that increases efficiency by shifting lawyers' responsibilities and interactions with clients to more cost-effective staff or technology only serves to undermine that bond.

The presence and tailored advice of the criminal litigator is the final product for sale. Our members sell our abilities to engage in a completely unique set of circumstances as a case unfolds, during dynamic and often unpredictable proceedings, and well as those events leading up to them. The role of counsel in the criminal law context is one of constant decision making that must persistently and seamlessly integrate with a dynamic, nuanced, and often unsympathetic legal process. Efficiencies and innovations through business models cannot in any way add to this challenge.

If anything, the more a client feels part of a larger system driven by motivations not perfectly aligned with their specific predicament, the more that special bond will break down. Compounding this to a systemic problem (as one might see through a privatization of Legal Aid contracts with large equity owned firms in ABS models), only serves to undermine confidence in the entire justice system.

The economical efficiencies touted by ABS models are already maximized in criminal law

Often operating as sole practitioners or in small associations, the concept of a law practice as a large, inefficient, and uneconomical machine is not familiar to the vast majority of our members.

Our members have pushed innovative and cost-saving measures to their maximum capacity. Since the margins of survival, let alone profitability, in criminal law are often times so thin, our members have already found ways to advance the goals projected by ABS advocates.

Furthermore, with advances in business methods and technology (practice based software programs, cloud-based services, mobile technology devices, internet conferencing, virtual office options), there are already myriad cost-effective means to providing legal services without the necessity of these various ABS models. Our members are intensely aware of the efficiencies that technology provides and utilize them throughout their practices.

Purported “efficiency” in one area only leads to added administration in another?

Insofar as the problems identified by the Working Group may indeed apply to the practice of criminal law, there seemed to be an overriding notion that lawyers are forced to spend an inordinate amount of time focusing on business management.

It is reasonably thought that lawyers’ expertise and skills lie in the practice of law and not in business management, leading to the conclusion that it is therefore inefficient to have a lawyer spend time managing the business when (a) his or her time is more valuable when spent doing work only lawyers can do; and (b) a business professional can do more of the management work in a shorter period of time.

Our members responded to this current inefficiency and suggested that, in the context of an ABS, the old problem would only be replaced with a new problem.

The time lawyers will require to marshal the non-lawyer equity owners to comply with LSUC by-laws will replace the time currently spent on firm management. This is particularly so as it will be the LSUC members who will be, practically speaking, more responsible for the implementation of the by-laws than the business experts who are not lawyers and have a different area of expertise and familiarity: maximizing profits.

Essentially, no matter the structure, the fact that the LSUC (appropriately) requires that the business operations of law firms and practices be carried out in a certain way that reflects the duties and responsibilities of an independent bar necessitates oversight by lawyers.

This problem – if it is a problem – is unavoidable. It is lawyers who are self-regulated and are thus given public trust that their businesses will be managed in a certain way. One way or another, through direct management or oversight of non-lawyer equity owners, it will – and ought to – fall to the members of the bar to

ensure the regulations of the LSUC are being followed. This is not inefficiency, it is a necessity.

ABS models affect quality of service and conflicting ethical duties

As exemplified above, our organization has serious concerns when profit as the overriding force in a law practice. In the context of a publically traded law firm, it may be the case that the most profitable course of action is to pare services.

In business generally, the market is presumed to regulate the quality of services provided in that customers will take their business elsewhere if the quality of the product is unacceptable. In the context of a business providing legal services, however, lawyers have a duty to provide a quality of service that will not likely match exactly with the minimum level necessary to retain customers and maximize profitability. There is, therefore, an inherent conflict between the interests of the shareholders and the duties of the lawyers employed by the firm. This is particularly so in criminal law where the clients are often unsophisticated, rarely wealthy and pressured to make choices in relatively short order. A quick guilty plea may be cost efficient in the short term, but the long term consequences to the client may be tremendously expensive.

This is not an abstract conflict; one can imagine the everyday situation in which a lawyer must determine how much time to spend on any one element of a client's file beyond the point where it remains profitable to do so.

Regulations seeking to ensure that these duties are respected may not practically avoid this conflict. The necessary quality of the services a lawyer ought to provide to a client is often a matter of subjective assessment. One lawyer may err on the side of caution and spend an extra five hours researching a legal issue to ensure (s)he is providing services of necessary quality. Another lawyer may choose to end the research five hours early and spend that time on client acquisition.

If time spent on client acquisition is more profitable for the business, the company directors will favour the second lawyer. The business would not run afoul of regulations requiring lawyers' duties to quality of services be met, because the directors and the lawyer may convincingly report that in their opinion the work was of sufficient quality.

Furthermore, there is a concern that if indeed the quality of services are reduced and an issue arises of public dissatisfaction, it is the lawyers who will be held responsible and made to answer for possibly failing in their duties, and not the directors or business owners applying the broader pressures of profitability and efficiency on those employees, i.e. the lawyers.

The problem lies in government funding, not in regulation.

Our organization takes issue with the notion that the ABS proposal is attempting to address the access to justice issue by taking aim at the inefficiencies of lawyers. Particularly, in light of the steady decline in the issuance of Legal Aid certificates it is difficult to accept that lawyers – ready and willing to take on Legal Aid clients at the reduced Legal Aid rates – are being identified as the source of the access to justice problem.

The Legal Aid structure, although not without its faults, ensured affordable access to legal services and essentially demanded economic efficiency as criminal lawyers who took on low-paying Legal Aid certificates could not survive if they were inefficient.

The Legal Aid structure epitomized the provision of quality legal service, accessible to the public, while often to the detriment of the lawyers providing the service at very low hourly rates. In light of the decrease in certificates being issued and the serious jeopardy this causes to their practices, it is very difficult for criminal lawyers to accept the suggestion that it is the model of their business that is causing inefficiency and unaffordability of legal services.

Implementation of ABS models requires considerable costs

It cannot be doubted that implementing such a drastic change in practice ownership will be exorbitantly expensive to the Law Society, and in turn, its members. Consequently, lawyers will seek to recover those unforeseen and unrelated costs by increasing fees to their clients.

Such cost-recovery measures are inevitable and will only serve to decrease access to justice by increased legal fees.

To make matters worse, additional and significant regulatory systems will need to be implemented in an ongoing capacity. Increased fees of the Law Society members will continue to rise to offset the dual member and ABS regulatory regimes. This, of course, will increase fees of clients and reduce access to justice for the same reasons

Conflicts of interest:

The CLA has concerns of unforeseen complexities relating to conflicts of interest. This is of particular concern in the criminal law context where large publicly-owned companies may own companies which are adverse in interest to accused persons' interests. One example, taken from Prof. Robinson's paper expresses the subtle complexity of such a problem. There are infinite possibilities as to how this might arise but the following example is telling:

Capita, a large business process outsourcer with multiple contracts with the UK government, has recently entered the legal services market by buying a law firm. Before buying this law firm, Capita already helped run the UK's migrant removal process and, separately, one of the government's telephone hotlines to assess litigants' entitlement to legal aid. While perhaps not a direct conflict of interest, those active in legal aid have expressed concern that immigrants who were worried about the legality of their immigration status would not call the legal aid hotline out of fear that Capita might then try to deport them. This conflict existed before Capita had started its ABS, but similar conflicts could arise in the future with its affiliated law firm, particularly if it began providing legal aid.⁹

In essence, no one knows how far these conflicts can go but one can imagine a number of scenarios arising in the future that would impact upon the public's perception of the legal system and where the loyalty of conflicted lawyers may lie.

The unsupported premise of market forces reducing fees:

Over and over ABS advocates make claim to access to justice through lower fees. Yet, there is no credible evidence that ABS actually benefits the public. These claims rely on the unsupported premise that "efficiencies" will be passed down to the public in the form of savings. It is counter-intuitive to think that a large firm that might be able to realize certain efficiencies would not simply profit from them, rather than pass on the savings to the client.

Businesses are only altruistic to the degree that the market forces them to be and there is no evidence that these savings will, or have been, passed on to consumers.

Conclusion:

It is the view of the CLA there is no overriding reason or reasons why the ABS model ought to be implemented in Ontario. In those jurisdictions where such models are in place, access to justice and costs of legal fees are far from being solved or even improved over the present state of affairs in a relative comparison to Ontario.

Lawyers, firms, and the public can already achieve any benefits that are purportedly derived from ABS models through Law Society regulation, governmental participation, and natural advancements in a more efficient and effective manner than recalibrating the entire legal system.

⁹ Robinson, *supra*, p.42

Even if the theory of ABS models is accepted as making good business sense, it is far too early to implement such drastic changes when the evidence is entirely lacking. The experiences in the U.K. and Australia have demonstrated that there is no clear answer to the benefits of ABS models despite the considerable amount of time that has passed. As Prof. Robinson writes:

[B]oth sides of this debate have mischaracterized its probable impact in at least three ways. First, their claims are frequently overly abstract. Not only do they not ground their claims empirically, but they generally ignore how the impact of non-lawyer ownership will likely be affected by contextual factors, such as the type of non-lawyer owners, the legal sector at issue, or regulatory and economic variations between jurisdictions. Second, although non-lawyer ownership has spurred new business models as predicted by its advocates, it is unlikely these innovations will significantly increase access in most legal sectors for reasons that are underexplored in the literature. Finally, while non-lawyer ownership probably will not lead to the nightmare scenarios in relation to professionalism that some suggest, it can create new conflicts of interest and undermine the profession's public spiritedness and professional standards, often in ways even critics have failed to appreciate.¹⁰

What the Robinson paper makes very clear is that the empirical evidence advancing the case for access to justice is lacking at best. We cannot, on speculative rationales, seek to advance drastic changes that result in profound changes to the manner in which law is practiced, perceived by the public, and regulated in Ontario.

¹⁰ Robinson, N, *supra* at p.4.