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IN ADVOCACY

# The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

**PRESIDENT: Peter J. Lukasiewicz**

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VIA EMAIL

ABS Discussion  
Policy Secretariat  
Law Society of Upper Canada  
Osgoode Hall  
130 Queen Street West  
Toronto, ON M5H 2N6

Dear Sir/Madam:

## **RE: Law Society of Upper Canada Consultation on Alternative Business Structures**

The Advocates' Society (the "Society") is a not-for-profit association of over 5,000 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates.

The Society is keenly interested in the issue of Alternative Business Structures ("ABS") and has formed a Task Force to examine the developments in this area. In this regard, the Society has been pleased to engage with the LSUC over the past two years on this issue, through consultation meetings in the summers of 2013 and 2014, and as a participant in the LSUC ABS Symposium in October 2013. The Society recognizes that the LSUC has devoted many resources to a comprehensive examination of ABS and the potential for their implementation, in some form, in Ontario.

The Society's Task Force has reviewed the LSUC publication *Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper* with interest and has discussed this publication, along with the issue of ABS generally, with the members of the Board of Directors of the Society. Generally speaking, the Society's Board of Directors felt more information was needed to demonstrate how the four proposed ABS models would enhance access to justice in those practice areas for which access to justice is an issue (e.g. family law in contrast to personal injury practices).

Members of the Board of Directors also expressed difficulty in distinguishing between the four ownership models proposed in the LSUC's publication and ascertaining how each of these models might impact the practice of law. Share ownership is only one aspect of control-in-fact. The Society encourages the LSUC to consider other indicia of control over a corporation, such as the level of control exercised by the Board of Directors, or a minority owner's control over certain aspects of the corporation's management.

The Society wishes to raise several issues which it feels the LSUC must consider as it continues to examine the potential for implementation of ABS in Ontario. As the LSUC

process unfolds, we request the opportunity to expand further on these preliminary submissions. These issues are outlined below:

### **Preserving confidentiality of information and solicitor-client privilege**

Where legal services are offered as part of a corporate entity, the Society is concerned that lawyers may be placed in a difficult position with regard to preserving the confidentiality of client information and solicitor-client privilege. The necessary infrastructure would need to be put into place to ensure that systems shared between the legal service provider and other product or service providers would not disclose privileged client information received in the course of providing legal services to the non-lawyer owners of the ABS.

### **Avoiding conflicts of interest**

The Society is concerned that offering a multiplicity of services to a client will in turn multiply the potential for conflicts of interest to arise. Systems for checking conflicts would necessarily have to become much more complex if legal services were to be provided in connection with other products and services, to ensure the protection of a client's rights and avoid placing a lawyer in a compromising position, even inadvertently.

Conflicts, and the appearance of conflicts, between the potential owners of an ABS and the law practice itself must also be considered. For example, there could be an actual or apparent conflict in the case of an insurance company owning an ABS where the law practice associated with the ABS is focused on personal injury law.

### **Enhancing access to justice**

The Society is concerned that the LSUC's publication does not include any evidence that ABS models, when implemented in other jurisdictions, have enhanced access to justice. The theoretical implications of different proposed ABS models may not, practically speaking, have the intended impacts on increasing access to justice for litigants.

Many important stakeholders have indicated that technological improvements are essential to increasing access to justice. For example, at the recent "Better Justice Together" forum jointly organized by the Ministry of the Attorney General and the LSUC's Action Group, the focal point was improving technology to allow for increased efficiencies and access to the courts for litigants. It is not clear how the implementation of ABS, by themselves, would contribute to enhancements in technology.

### **Maintaining the independence of the bar**

The Society is concerned that having law practices offer their services as a part of large corporations might have a deteriorating effect on the independence of the bar. In an ABS model, a lawyer would be faced with the necessity of reconciling the duty of care owed to a client and the duty of care owed to the ABS' shareholders. These duties may be in conflict with one another. Shareholders of any ABS would need to be educated on the paramountcy of a lawyer's duties to his or her clients and the court.

## **Avoiding ethical issues**

Related to the maintenance of the independence of the bar, there may be ethical issues raised through offering legal services as part of a full-service consumer model. Different providers of professional services (which presumably, under an ABS model, could provide services under the same roof) will have different professional codes of conduct, and these may be in conflict with one another – including provisions in different professional codes relating to privilege. This highlights the potential difficulties with regulating the ethical issues which may arise out of joint ownership.

## **Regulation of Law Practices as Opposed to Individual Lawyers**

The Society understands that the LSUC is considering moving towards the regulation of law practices as opposed to individual lawyers. This form of regulation is related to the potential implementation of ABS, but the Society understands that the LSUC is prepared to move forward with this change in regulation structure regardless of whether ABS are implemented in Ontario. The Society would encourage the LSUC to debate the merits of law practice regulation separately from ABS and the Society would welcome the opportunity to make further submissions on this particular issue.

We would be pleased to elaborate on these concerns further with you, and we look forward to future discussions on the issue of ABS in the new year.

Yours very truly,



Peter J. Lukasiewicz  
President