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ACCESS TO JUSTICE AND THE ETHICS AND POLITICS OF ALTERNATIVE BUSINESS STRUCTURES

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Despite ongoing concern about access to justice in Canada, the problem persists. Meanwhile, the basic model for legal practice in Canada is the same as when the profession first emerged centuries ago in England. Only lawyers can own and control legal practices. This is not the case in other common law jurisdictions where rules have evolved to allow non-lawyers to own the companies that provide legal services. Based on a comparative analysis of the development of these alternative business structures (ABSs) in Australia and the United Kingdom, and the non-development of ABSs in the United States, the authors argue that ABSs may be at least a partial solution to the access to justice problem in Canada. Recent developments indicate ABSs will eventually come to Canada, at which point, the authors argue the legal professional societies will have a crucial role to play in developing appropriate regulation to ensure ABSs improve access to justice.

Malgré les inquiétudes croissantes au sujet de l'accès à la justice au Canada, le problème persiste. À cet égard, le modèle traditionnel pour

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exercer le droit au Canada n'a pas changé depuis l'apparition de la profession en Angleterre il y a des siècles. Seuls les juristes peuvent posséder et contrôler les cabinets. Cela n'est toutefois pas le cas dans d'autres pays de common law où les règles ont évolué afin de permettre aux non-juristes de posséder des sociétés qui offrent des services juridiques. À la lumière d'une analyse comparative du développement de ces structures d'entreprise alternatives (SEA) en Australie et au Royaume-Uni, et de l'absence de tels développements aux États-Unis, les auteurs soutiennent que les SEA pourraient s'avérer une solution, du moins partielle, au problème de l'accessibilité à la justice au Canada. Par ailleurs, certaines indications récentes laissent présager que les SEA finiront pas être acceptées au Canada. Selon les auteurs, lorsque ce moment sera venu, les ordres professionnels auront un rôle essentiel à jouer afin d'élaborer la réglementation appropriée garantissant que ces structures contribuent véritablement à améliorer l'accès à la justice.

1. Introduction

Over the course of the last two centuries there have been a series of transitions in the delivery of legal services in the common law world. Initially lawyers were lone rangers, individual agents who provided their services to fee-paying clients. Over time there emerged the small partnership model in which two or three lawyers would come together to pool their talents. As legal systems became more complicated and with the exponential rise in the number of lawyers, firms became increasingly larger, morphing into boutique firms, then national firms, and then (with increasing globalization) multi-national law firms.¹ Despite the changing scale of law firms, however, the basic economic model of the practice of a law firm remained the same as it was when the profession first emerged in thirteenth-century England² – only lawyers could own and control legal practices.

Paralleling these (non) developments in the structure of law firms has been another pattern: increasing concerns about access to justice. Although access to justice requires much more than access to lawyers, there can be little doubt that in societies that are deeply sedimented in law, access to lawyers is a key dimension of access to justice. Despite the proliferation of lawyers over the last 30 years, however, there are widespread concerns

¹ See generally Jennifer Brown, "Lateral Thinking," *Canadian Lawyer* (May 2013), online: <<http://www.canadianlawyermag.com/4633/lateral-thinking.html>> for a discussion of the impact of this phenomenon in Canada.

² See generally Jonathan Rose, "The Legal Profession in Medieval England: A History of Regulation" (1998) 48 *Syracuse L Rev* 1.

about the capabilities of the legal profession to provide genuine access to justice. While there is consensus that there is no one silver bullet that can solve the access to justice problem, one partial remedy might be to change the economic model for the delivery of legal services. In the course of the last decade some common law jurisdictions have begun to experiment with what are called “alternative business structures” (ABSs), economic entities not owned by lawyers that can provide legal services. The key idea is that because of better access to capital and enhanced technology such organizations can more efficiently, more effectively and more cheaply provide legal services and thereby partially resolve some aspects of the access to justice problem.³

This essay is a preliminary inquiry into the likelihood that ABSs can take root in Canada to improve access to justice for people in this country. Through a comparative analysis of recent developments in four common law jurisdictions – Australia, the United Kingdom, the United States and Canada – we will trace the emergence (or not) of ABSs. In particular we will focus on the role of four constituencies in the debate on whether ABSs are desirable – governments, the organized legal professions, corporations, and consumer groups. As we will discover, the interplay between these constituencies determines the fate of ABSs in a given jurisdiction. ABSs have been embraced first in Australia, and then the UK. They have been rejected in the US. In Canada, they have figured marginally in the debates on access to justice. Tracing the development of ABSs elsewhere in the world shows that the most assured route to the introduction of ABSs in Canada requires government support for the idea. If that support is unlikely, it then falls to the professional organizations, through their commitment to advance the public interest, to pursue ABSs as a means to improve access to justice. The change required to introduce ABSs is still possible without government support, but only if the professional organizations are willing to take the initiative. The following comparative analysis supports the argument that if ABSs are to take shape in Canada, the law societies and the Canadian Bar Association (CBA) must step up to make that happen.

The essay proceeds in four stages. Part 2 provides an overview of the access to justice problem in Canada. Part 3 offers a brief explanation of the nature of ABSs and introduces the ethical debate on their advantages and disadvantages. Part 4 analyzes the history of each of four common law jurisdictions with respect to ABSs, and attempts to determine the relative

³ See Gillian Hadfield, “Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets” (2008) 60 *Stan L Rev* 1689; see also Gillian Hadfield, “The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law” (2012) [unpublished, posted to SSRN].

influence of each constituency when it comes to making the changes required to bring about ABSs. Part 5 is a short conclusion.

2. *The Problem: Access to Justice*

Canada, despite being one of the most affluent countries in the world⁴ and being consistently rated as one of the most desirable countries in which to live,⁵ has an embarrassing wart on its face: we have a significant problem providing our citizenry with access to justice.

From the global perspective, the World Justice Project, which tends to give Canada impressively high grades (close to the 0.80 mark and above) on most justice indicators – such as absence of corruption, order and security, and open government – only gives it 0.72 for “civil justice,” ranking it 13/97 globally, 9/16 regionally and 13/29 in the comparator group of “high income” countries.⁶ In terms of “criminal justice” Canada is not much better, garnering only 0.75, 13/97, 8/16 and 13/19 respectively. Even more disturbing is that when we look at the subfactors for civil justice we see accessibility and affordability at 0.64, freedom from discrimination at 0.65, and, lowest of all, freedom from unreasonable delays at 0.47.

Subfactors	Scores
7.1 People can access and afford civil justice	0.64
7.2 Civil justice is free of discrimination	0.65
7.3 Civil justice is free of corruption	0.84
7.4 Civil justice is free of improper government influence	0.83
7.5 Civil justice is not subject to unreasonable delays	0.47
7.6 Civil justice is effectively enforced	0.79
7.7 ADRs are accessible, impartial, and effective	0.84

On criminal justice Canada does better, except for the important category of impartiality, where the country ranks a measly 0.56.

⁴ Canada ranks 14th on a list of the world’s wealthiest countries; see “The World’s Richest Countries” Forbes, online: <<http://www.forbes.com/pictures/egim45egde/14-canada/>>.

⁵ See “OECD Better Life Index” OECD, online: <<http://www.oecdbetterlifeindex.org/>>, where Canada ranks third among OECD countries on the overall scale.

⁶ Mark David Agrast *et al*, “The World Justice Project Rule of Law Index 2012-2013” (2012-2013), online: The World Justice Project <<http://worldjusticeproject.org/country/canada/>>.

These somewhat abstract numbers are given concrete form in the results of a recent qualitative survey of 259 self-representative litigants (SRLs) in several Canadian provinces.⁷ Some of the highlights include:

- The vast majority of SRLs want legal assistance;
- SRLs are broadly representative of the Canadian population, in terms of gender, education and income;
- 57% reported annual income of less than \$50k and 40% reported income of less than \$30k;
- 60% were family litigants, mostly in the realm of divorce;
- 31% were civil law litigants;
- The overwhelming reason for choosing self-representation was financial: “the inability to afford to retain, or to continue to retain, legal counsel;”
- Some SRLs expressed a significant dissatisfaction with the quality of the legal services provided, including dilatoriness, adversarialism, unresponsiveness, ignorance of the law and incompetence;
- Some SRLs expressed concern about the incivility and rudeness of judges and the inconsistency of judges;
- The recent reforms to simplify court forms, develop on-line resources and provide enhanced technologies to assist SRLs are insufficient;
- SRLs experience a complex set of financial, physical and emotional consequences including
 - Depletion of personal funds and savings for other purposes;
 - Instability or loss of employment;
 - Social and emotional isolation from friends and family;
 - Myriad health issues, both emotionally and physically.⁸

⁷ Julie MacFarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report* (2013), online: Representing Yourself <<http://www.representing-yourself.com/reportM15.pdf>>.

⁸ *Ibid.*

In short, in the words of one SRL, she experiences “post traumatic court disorder.”⁹

The Canadian legal community has, increasingly, begun to acknowledge and respond to the problem of access to justice. The judiciary has been particularly vocal. For example, in a series of speeches the Chief Justice of Canada, Beverley McLachlin, has expressed serious concerns about access to justice in Canada and has explicitly identified the legal profession as one of the contributing variables in the troubling equation. At the Empire Club of Canada in March of 2007, she identified access to justice as one of four key challenges that needed tackling by Canada’s justice system (along with long trials, delays in the justice system, and endemic social problems). The concern is that middle-class Canadians are unable or unwilling to pursue litigation due to costs, and thus cannot afford justice. In her words, “The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve.”¹⁰ More recently, in a 2011 address to the Council of the CBA, Chief Justice McLachlin reiterated that access to justice is the biggest challenge facing our justice system. In response to the World Justice Project index she remarked that, despite Canada’s judicial system performing relatively well, our lack of access to justice stands out as a blemish on an otherwise excellent record: “We have a justice system that really is the envy of the world. The problem is that it is not accessible for far too many Canadians. In my view, access to justice is the greatest challenge facing the Canadian justice system.”¹¹

Other chief justices have been even more direct. In a 2013 speech to the Trial Lawyers Association of British Columbia, Bauman CJ acknowledged that “access to justice issues are daunting and potentially fatal to our profession as we know it ... [a]s a profession if we are not accessible and accountable and importantly, are seen to be, we risk the possibility of losing all relevance.” He then continued: “Now is the time ... for all of us to wake-up, speak-up and shake-up: Wake-up to the realities of these challenges; Speak-up about our value and our critical

⁹ Yamri Taddese, “Litigant decries ‘post-traumatic court disorder,’” *The Law Times* (13 May 2013), online: <<http://www.lawtimesnews.com/201305132189/headline-news/litigant-decries-post-traumatic-court-disorder>>.

¹⁰ Beverley McLachlin, “The Challenges We Face” (Remarks delivered at the Empire Club of Canada, Toronto, 8 March 2007), online: Supreme Court of Canada <<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2007-03-08-eng.aspx>>.

¹¹ Beverley McLachlin, “A Busy Court, Access to Justice, and Public Confidence” (Address delivered to the Council of the Canadian Bar Association at the Canadian Legal Conference, Halifax, 13 August 2011), online: iPolitics <<http://www.ipolitics.ca/2011/08/16/beverley-mclachlin-address-to-the-council-of-the-canadian-bar-association/>>.

relevance in the lives of ordinary Canadians; Shake-up our attitudes towards lawyering.”¹² Even more pointed are the remarks of the Chief Justice of Ontario, Warren Winkler, in a question and answer session with the practicing bar in which he described a looming “meltdown in the courts,” and called on lawyers to “forgo their flashy suits and cars for their ‘moral duty’ to represent the poor.”¹³

The judiciary has gone beyond speeches. In 2012, Chief Justice McLachlin convened the National Action Committee on Access to Justice in Civil and Family Matters (NACAJ). The Committee has representation from “the bar, ... judges, court administrators, law societies, pro bono groups, legal education groups, law deans and the public.”¹⁴ It has issued discussion papers on four priority areas: court process simplification; access to legal services; access to family justice; and prevention, triage and referral. The NACAJ issued a final report in the fall of 2013, which laid out a nine-point roadmap toward achieving access to justice, meant to bridge the gap between ideas and implementation.¹⁵ It is also planning for a “high level colloquium in 2014.”¹⁶

The judiciary is not alone in its discomfort. The Governor General of Canada, David Johnston, has also placed at least some of the responsibility for the lack of access to justice at the feet of the legal profession. Prior to becoming the Governor General, David Johnston was a corporate lawyer, a professor of law, a law dean, and a university president. Also speaking at the 2011 CBA conference, he singled out lawyers and judges as having a unique responsibility to ensure that justice is accessible: “We in the legal community have a responsibility to take the lead in reforming the court system for the public good; remember our oath to ‘improve the

¹² Robert Bauman, “Address” (Remarks delivered at the Trial Lawyers Association of British Columbia 2013 Bench & Bar Awards Luncheon, 5 April 2013), online: The Courts of British Columbia <http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/speeches/TLABC%20Bench%20Award%20-%20April%205%202013.pdf>.

¹³ Kendyl Sebesta, “Winkler lectures bar about access to justice,” *The Law Times* (2 April 2012), online: <<http://www.lawtimesnews.com/201204022005/headline-news/winkler-lectures-bar-about-access-to-justice>>.

¹⁴ Jeremy Hainsworth, “‘Window of opportunity’ closing to fix country’s access to justice,” *The Lawyers Weekly* (10 May 2013) 23, online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=1895>>.

¹⁵ *Access to Civil and Family Justice: A Roadmap for Change* (2013) The Action Committee on Access to Justice in Civil and Family Matters, online: <<https://www.ciaj-icaj.ca/en/component/content/article/207-important-news/477-final-report-access-to-civil-and-family-justice-a-roadmap-to-change>>.

¹⁶ *Ibid.*

administration of justice.’ Justice delayed is justice denied.”¹⁷ The core message of the Governor General’s remarks was that lawyers have a social contract with society, they have broken that social contract, and that a remedy is required: we as legal practitioners need to craft a new conception of the legal professional.

Legal practitioners have also begun to respond to the access to justice challenge. The CBA, which is a voluntary organization representing approximately two thirds of practicing Canadian lawyers, established an Access to Justice Committee in 2011. The Committee “co-ordinates and integrates CBA activities to improve and promote access to justice for the poor and middle class in Canada.”¹⁸ In particular the CBA “stresses government responsibility for a publicly-funded legal aid system as the essential foundation, promotes pro bono service in the legal profession and supports innovative delivery options for legal services, as a supplement to (but not a substitute for) a publicly-funded legal aid system.”¹⁹ More recently, the Committee has developed an Envisioning Equal Justice Project, and has completed the final phase of the three-phase project. At the outset, the project identified four barriers that currently impede sustainable and sustained improvement to access to justice: lack of political profile; inadequate strategy and coordination of access initiatives; absence of mechanisms to measure change; and identifiable gaps in our knowledge as to what actually works to improve access.²⁰ Phase one focused on drafting and disseminating five “Building Block Discussion Papers.” Phase two involved the hosting of a “Summit on Equal Justice” in April 2013. Phase three consisted of a summary of its final report *Reaching Equal Justice: An Invitation to Envision and Act*.²¹ The full report was released in the fall of 2013. As part of the Envisioning Equal Justice project, the Committee researched “innovations that could improve access to justice” and these included links to other services that, in conjunction with traditional legal services, could help provide better overall quality service to people seeking justice, such as “mental health and counselling services to assist with

¹⁷ David Johnston, “The Legal Profession in a Smart and Caring Nation: A Vision for 2017” (Speech delivered at the Canadian Bar Association’s Canadian Legal Conference, Halifax, 14 August 2011), online: <<http://www.gg.ca/document.aspx?id=14195>>.

¹⁸ Canadian Bar Association, *Committee and Mandate*, online: <<http://www.cba.org/CBA/Access/main/committee.aspx>>.

¹⁹ *Ibid.*

²⁰ “Access to Justice Metrics: A Discussion Paper” (2013) The Canadian Bar Association, online: <<http://www.cba.org/CBA/Access/main/project.aspx>>.

²¹ “Envisioning Equal Justice Project: 3 Strategies,” online: Canadian Bar Association <<http://www.cba.org/CBA/Access/main/committee.aspx>>; see *ibid* at 242 for the summary report “Reaching Equal Justice.”

underlying personal issues ... and, employment counselling.”²² This committee has also collaborated with the NACAJ.

Another constituency within the Canadian legal community is the Federation of Law Societies of Canada (FLSC). Whereas the CBA is a voluntary organization that represents the views of a significant number of Canadian lawyers, the FLSC is an umbrella group that co-ordinates the activities of the regulators of lawyers in Canada, the fourteen provincial and territorial law societies. It has also been active on the access to justice front, although perhaps less active than the judiciary or the CBA. In 2010 the FLSC established a Standing Committee on Access to Legal Services “to identify practical initiatives to improve access.”²³ In September 2012 it published an “Inventory of Access to Legal Services Initiative of the Law Societies of Canada” which described contributions in the following categories:

- Self-help services;
- Public legal education and information;
- Advice from non-lawyers;
- Summary advice, brief services and referrals;
- Assessing legal needs;
- Economic initiatives;
- Unbundled legal services / limited scope retainers;
- Pre-paid legal insurance plans;
- Legal aid;
- Reduced fees (pro bono and low bono);
- Alternative billing models;
- Supply side issues (small and sole practitioners, rural and remote areas, cultural and linguistic issues).

The FLSC is also represented on the NACAJ.

Finally, some individual lawyers and law firms are also cognizant of, and responsive to, the access to justice challenge. For example the CEO of one of Canada’s biggest law firms, David Scott, has characterized access to justice as “the legal professions equivalent of global warming.”²⁴

²² “Innovations that could improve access to justice,” online: Canadian Bar Association <<http://www.cba.org/CBA/Access/main/innovations.aspx#f>>.

²³ “Access to Legal Services,” online: The Federation of Law Societies of Canada <<http://www.flsc.ca/en/access-to-legal-services/>>.

²⁴ Julius Melnitzer, “David Scott warns of profession’s global warming equal,” *The Law Times* (13 February 2012), online: <<http://www.lawtimesnews.com/201202131983/headline-news/david-scott-warns-of-professions-global-warming-equal>>.

Significant numbers of lawyers participate in *pro-bono* and “low bono” initiatives.²⁵

In another paper, one of the authors has argued that while all this attention to access to justice is important as a contribution to equality in Canada, and that the various initiatives are undoubtedly commendable, the problems are more structural than have hitherto been acknowledged.²⁶ In particular, because the legal profession in Canada is self-regulating it is important for the law societies to take a leadership role in responding to the challenge of access to justice. The law societies are the gatekeepers of the legal profession; they are the key pressure point in the in the system for the demand and supply of legal services; they are the guardians of the normativity of the profession. As a consequence the author has suggested the law societies in Canada should pursue a variety of initiatives that will help foster a reconstruction of the model of the delivery of legal services including:

- An expanded role for paralegals;
- Mandatory *pro bono* services;
- Provison of brokering services;
- Mandatory ethical infrastructures;
- Financial transparency in lawyers’ incomes; and
- Enabling the growth of alternative business structures (ABSs).

Most of these proposals have not been seriously considered by the judiciary, the Governor General, the CBA, the FLSC or by individual members of the legal community in their various contributions to the debate on access to justice.

Of particular interest to us in this paper is the relative silence in Canada with respect to ABSs, which have received a great deal of attention in three of Canada’s “sister jurisdictions”: Australia, the UK and the US. In Australia and the UK, ABSs have been embraced. At least part of the justification for ABSs in these countries was expected benefits to consumers of legal services, particularly lower prices. In the US, where ABSs have been rejected, alternative structures have at least been considered as a potential means to increase access to justice. In Canada, however, despite

²⁵ Alison MacPhail, “Report of the Access to Legal Services Working Group” (2012) Action Committee on Access to Justice in Civil and Family Matters at 15, online: <<http://www.cfcj-fcjc.org/sites/default/files/docs/2012/Report%20of%20the%20Access%20to%20Legal%20Services%20Working%20Group.pdf>>.

²⁶ Richard Devlin, “The Structural Determinants of Access to Justice” (2013) (Paper delivered at CBA Envisioning Justice Conference, Vancouver, April 2013) [unpublished].

all the reports, discussion papers, inventories and conferences, as well as the calls to wake up, speak up and shake up to improve access to justice, ABSs have been almost completely ignored, until recently. This paper seeks to understand why this is the situation in Canada.

One possible explanation is that ABSs, because of their explicitly commercializing and commodifying character, simply do not dovetail with the normative universe – and hence the discursive domain and regulatory framework – of the Canadian legal profession. We want to pursue a different tack here, one that does not necessarily contradict the “normative” analysis, but puts that normative analysis in the context of the politics of the regulation of the legal profession. In particular, we want to suggest that the issue of whether ABSs are normatively acceptable depends to a large degree on the interplay between four key constituencies: government, consumer groups, the legal profession, and corporations. By tracing the diverse histories of the status of ABSs in Australia, the UK and the US, we hope to construct a better understanding of whether ABSs can, and should, come to Canada.

3. A Partial Solution: Alternative Business Structures?

An alternative business structure can refer to any means through which legal services are delivered to the public, other than the traditional lawyer-owned practice that provides legal services only. This includes: what are called multidisciplinary practices (MDPs) which provide legal and other professional services; law firms that are owned by, or receive investment from, non-lawyers, including equity financing; or companies that provide legal services in non-traditional ways, such as over the Internet or in grocery stores.

A) The Ethical Debate

Much of the debate on the desirability, indeed the legitimacy, of ABSs has been at the normative level. A variety of ethical issues have been identified and arguments have been marshalled both for and against the acceptability of ABSs. In this section we will synthesize these arguments, in order to set the context for Part 4 of this paper.

1) The Ethical Arguments in Favour of ABSs

Broadly speaking the arguments in favour of ABSs fall into two distinct – although sometimes connected – categories: the economic rationale and the access to justice rationale.

a) *The Economic Rationale*

i) *Fundamental Premise*

In a liberal democratic society committed to the public interest, competition is presumptively good, monopoly presumptively bad. The burden of proof should be on those who favour a monopoly in the provision of legal services to justify why it is defensible in the public interest, rather than lawyers' interests.

ii) *Particular Benefits*

Capital Investment: ABSs allow for greater access to capital and outside investment through public and private offerings and this investment of capital can be used to develop innovation in, and the potential restructuring of, legal services.

Strategic Opportunities: ABSs can take advantage of economies of scale, new technologies, innovative ideas, and more specialized and efficient management systems.

Experimentation and Responsiveness: ABSs allow legal services providers to experiment with the best model for delivery in a complex and rapidly changing market for law. Options might include mergers of law firms, franchising options, co-operatives, and partnerships with other professions.

Collaborativism: ABSs can provide more comprehensive services and products that are responsive to the specific needs of increasingly diverse clienteles. The possibilities might include shared practices between lawyers and other professionals like psychologists, social workers, financial planners, nurses, accountants, real estate agents, architects, engineers or scientists.

Employee Satisfaction and Incentivization: ABSs may be very attractive to employees for several reasons. Many lawyers are unhappy with the current structure of the legal profession, in terms of its hierarchy, cultures of exclusion, billing practices, openness to work-life balance, and, if it is a small practice, the need to have the skills to run a small business. As a result many lawyers are leaving the private practice of law. ABSs hold out the possibility of allowing for less stressful and hierarchical legal careers, and make them more balanced, flexible, and inclusive. Also ABSs can offer significant employee incentives. For example, stock options can be made available for both lawyer and non-lawyer employees thereby

enabling the ABS to recruit and retain talent, encourage loyalty, and reward increased productivity.

Global Competitiveness: ABSs can respond not only to the needs of the national community, but they can also position a country's legal services industry regionally and internationally.

Tax Benefits: In some jurisdictions, there may be tax advantages to forming an ABSs rather than a traditional sole practice or partnership form.

Economic Realism: Potential concerns about the commodification of legal practice are more rhetorical than substantive because the current practice of law is already driven by profit margins and bottom lines, as exemplified by the dominance of the "billable hour," the emergence of "the managing partner" and an emphasis on "branding."

b) Access to Justice

Although many of the economic justifications for ABSs might be said to have distributive consequences for access to justice, it is helpful to separate out the distinct access to justice justifications.

Price Competition: The statutory monopoly on legal services granted to those licensed to practice law has been accused of generating artificially high prices and therefore hindering access to justice. By allowing structures beyond the traditional model, ABSs generate price competition and therefore tend to drive down the price for legal services.

Improved Delivery: ABSs can allow for more convenient and accessible delivery of services; for example, ABSs would permit one-stop shopping for intrinsically connected legal and non-legal matters, including financial and health services.

Timeliness: Many people are intimidated by, and hostile toward, lawyers and are reluctant to seek legal assistance except as a last resort. If, however, lawyers are part of an ABS comprised of other professionals, then clients might be more willing to approach the ABS and therefore access to the services of a lawyer sooner. This might enable clients to avoid some of their legal problems, or resolve them sooner (and potentially less expensively).

Deep Pockets: ABSs are likely to have better access to capital, allowing them to take on riskier cases. This enhances access to justice for

those involved in cases that would have previously been unattractive for lawyers to take on.

Market Hegemony: Potential concerns about excessively large legal services providers becoming dominant in the marketplace are unlikely to materialize because conflicts of interest rules will provide an effective restraint on excessive growth.

Loyalty and Confidentiality: Potential concerns about loyalty and breaches of confidentiality are unwarranted, because the market provides its own regulatory mechanisms – disloyal and leaky firms will suffer a reputational hit thereby alienating potential clients.

2) *The Ethical Arguments Against ABSs*

Broadly speaking the arguments against ABSs tend to be articulated in terms of “the core values of the legal profession,”²⁷ which include: independence of the legal profession; self-regulation; duties of loyalty, confidentiality and the avoidance of conflicts of interest; and fiduciary obligations. They also draw upon the theory of negative gains to suggest that ABSs may in fact decrease access to justice. As a result opponents invoke the precautionary principle in response to ABSs.²⁸

Independence of the Legal Profession: This argument operates on a couple of levels. First there is a symbolic – and symbiotic – connection between the ability of individual lawyers to be independent and the ability of the legal profession to remain independent. If lawyers surrender their individual independence through absorption into an ABS, the profession will also lose its capacity for collective independence.

Furthermore, the independence of the legal profession is also said to be a central component of a free and democratic society – including an independent judiciary – and to the extent that ABSs challenge that independence they are a threat to democracy and an independent judiciary.

Self-Regulation: Acceptance of ABSs opens up the Pandora’s Box of self-regulation. If only lawyers can offer legal services then the case for regulation-of-lawyers-by-lawyers is easier to defend. If, however, non-

²⁷ Paul D Paton, “Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America” (2010) 78 *Fordham L Rev* 2193 at 2202 [Paton, “Multidisciplinary Practice Redux”].

²⁸ Ted Schneyer, “‘Professionalism’ as Pathology” (2012) 40 *Fordham Urb LJ* 75 at 115 [Schneyer, “Professionalism”].

lawyers are involved in the delivery of legal services it is no longer obvious that self-regulation is the only defensible governance regime. In fact, coinciding with the opening up of the legal services market in Australia and the UK, self-regulation is effectively a thing of the past for lawyers' professional organizations in both countries, as government bodies take on more responsibility for the regulation of legal services. For reasons of accountability, transparency, efficiency, and democracy, other regulatory options can be put on the table.

Loyalty, Confidentiality and Conflicts: These three principles are the holy trinity of legal ethics and are jeopardized by ABSs. Lawyers owe a primary duty of loyalty to their clients, therefore they must remain independent in order to maximize the rights and interests of those clients. In an ABS the primary obligation is to maximize profits of shareholders, undercutting the duty of loyalty to the client.

Furthermore, a key dimension of the duty of loyalty to a client is confidentiality, and if a lawyer is a part of an ABS, then non-lawyers will potentially have access to that confidential information. The potential for conflicts of interest also increase in an ABS setting. The ABS may have clients with interests, or interests of its own, which have potential to trump the rights and interests of the lawyer's current client.

Fiduciary Obligations: The fiduciary obligation of a lawyer is marked by a relationship of trust between the lawyer and each of her clients. This creates unique and personal obligations to each client. The ABS model, however, tends to commodify and commercialize legal services, thereby reconstructing them as a fungible product. The result is the elimination of the essential fiduciary nature of the relationship between a lawyer and a client.

ABSs as a Danger for Access to Justice: Opponents of ABSs draw on the theory of negative gains to argue that despite promises to enhance access to justice, the opposite is the more likely outcome for a variety of reasons:

Reduced Supply: ABSs pose a threat to the economic viability of certain sectors of the legal community, especially sole practitioners and small firms, which will be driven out of the market by large retailers, a.k.a. "Fear of Sears" or "Tesco Law." The net result will be a decrease in access to lawyers and therefore a reduction in access to justice.

Cherry-picking: ABSs will concentrate their efforts on relatively unsophisticated legal matters that can be routinized and even "off-shored" with no real improvement in access to justice.

Reduction in the Quality of Service: ABSs are likely to draw heavily on non-lawyers, for example paralegals, who do not have the same training or competencies as lawyers. While this might allow for the appearance of increased access to justice, in reality it will result in less competent legal advice. A nuanced conception of cost requires consideration of more than just price.

Abandonment of Pro Bono/Low Bono: In a regime of lawyer independence, the honour of the profession encourages many lawyers to provide *pro bono*/low bono legal services to those who cannot afford them. If the function of ABSs is to maximize economic efficiency, *pro bono*/low bono will be discouraged or eliminated.

Increased Litigation: ABSs may make legal services more available, but as a consequence this might generate a more litigious society when what might be desirable from a societal standpoint are more alternative dispute resolution mechanisms.

*Precautionary Principle:*²⁹ Finally, opponents argue that although in theory ABSs might enhance the economic efficiency of the legal services marketplace and increase access to justice, there is no empirical proof that this will in fact happen. Until there is such empirical proof, and in light of the aforementioned risks, it is best to adopt the precautionary principle and continue with the prohibition on ABSs.

3) Summary

As this section has demonstrated, the normative debate on ABSs is rich, engaging, complex, and challenging. But it is also inconclusive. While some arguments on either side are perhaps stronger than others, neither position is ultimately more compelling on the basis of rational argument alone. Rather there is more in play. Some jurists, philosophers and deliberative theorists might place their hope in the power of rational argument,³⁰ but this paper argues that the foregoing normative arguments need to be put in context – the context of a larger set of political, economic, and social interests. The point is not that normativity does not matter; rather, it is that normativity needs to be situationally embedded. As the next section demonstrates, two jurisdictions (Australia and the UK) have both adopted ABSs, although for somewhat different reasons, and one jurisdiction has explicitly rejected ABSs (the US). A fourth, Canada, seems to be only slowly waking up to the idea of ABSs. These very different

²⁹ *Ibid.*

³⁰ See e.g. Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Boston: MIT Press, 1996).

outcomes have been largely determined by the power of four different constituencies in each of these jurisdictions (governments, the legal professional organizations, the business community, and consumer groups) and the way they have (un)successfully and strategically mobilized these normative discourses.

B) The Politics of ABSs

1) Australia: To Boldly Go Where No One Has Gone Before

Regulation of the legal profession falls within the legislative purview of each of the six states and two territories that make up the Australian federation. Historically, the state legislatures delegated this regulatory authority to the law societies and bar council of each state or territory,³¹ and like most common law jurisdictions, there has been a traditional ban on lawyers practicing law in partnership with non-lawyers. Reform to Australia's competition policy, however, prompted lawmakers to take back some of this authority, and boldly go where no other common law jurisdiction had gone before.³²

a) New South Wales: The Vanguard State

In 1998, the government of the state of New South Wales conducted a review of the legislation regulating the legal profession (called the National Competition Policy Review of the Legal Profession Act), and pointed to restrictions on the business structures of law firms as anti-competitive.³³ New South Wales is home to Sydney, the country's most populous city, as well as home to more than half the country's lawyers. This reality seems to push the state to be somewhat of a vanguard when it comes to legal reform in Australia, and the move toward ABSs proved to be no exception.

³¹ As in the UK, the legal profession in Australia is divided into solicitors and barristers, although the division is not as pronounced as in the UK. Barristers offer specialist advocacy services, solicitors can practise solely as advocates if they choose to, and can use the title "solicitor and barrister."

³² Christine Parker, "Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible" (2004) 23 UQLJ 347 at 351.

³³ National Competition Policy Review of the Legal Profession Act 1987, *Final Report* (Sydney: Attorney General's Department, 1998), online: <http://www.lawlink.nsw.gov.au/report%5C1pd_reports.nsf/pages/ncpf_toc> [Competition Report]. As a signatory to the *Competition Principles Agreement* between the Commonwealth of Australia and other Australian states, New South Wales was required to review and, where necessary, reform existing legislation to ensure that it did not unnecessarily restrict competition. See also Trade Practices Commission, *Study of the Professions: Legal: Final Report* (Canberra: Commonwealth of Australia, 1994).

Even at this early stage, New South Wales had more relaxed regulations than most: multi-disciplinary partnerships (MDPs) were permitted in the state, allowing lawyers to practice in collaboration with other professionals.³⁴ But these MDPs were burdened by something called the “51-per-cent ownership rule,” which forced the partnership to be designed such in such a way that majority ownership belonged to lawyers, and that those lawyers retained at least 51 per cent of the company’s net income. In the name of promoting competition, the policy review found that this restriction, while still comparatively liberal when placed in the context of other common law jurisdictions, was a hindrance to competition in the field.³⁵

The government’s findings were based on responses from various stakeholders canvassed as part of the legislation review. Respondents included other government departments, the legal professional organizations, and lawyers working at large and small law firms.³⁶ The final report (the Competition Report) noted particularly that ABSs had general support from the Law Society, at least one managing partner at one of Australia’s largest and oldest law firms,³⁷ and the government. Support

³⁴ Multidisciplinary partnerships (MDPs) are partnerships between legal practitioners and others who are not certified to practice law, such as other business professionals. The services offered by the MDP must include legal services, and under *The Legal Profession Act 2004*, the MDP has an obligation to notify the Law Society of New South Wales of some details of the business. See “Practice Structures,” The Law Society of New South Wales, online: <<http://www.lawsociety.com.au/ForSolicitors/practisinglawinns/practicestructures/index.htm>>. These partnerships were permitted for solicitors under *The Legal Profession Act, 1987*, subject to restrictions in the *Solicitors’ Rules*. The Act did not restrict barristers from forming this kind of partnership, but the *Barrister’s Rules* prohibit barristers from partnering with anyone; see Competition Report, *supra* note 33 at ch 10. See also Tahlia Gordon and Susan Fortney, “Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation” (2013) *St Thomas L Rev* [forthcoming] for more detail on restrictive legislation before this.

³⁵ Competition Report, *ibid*; “Alternative Business Structures: Australia” *The Law Society of Upper Canada Gazette*. (27 December 2012) online: <<http://www.lawsocietygazette.ca/focus/alternative-business-structures-australia/>>.

³⁶ A complete list of respondents is available in the executive summary of the review. It includes, among others: The Legal Aid Commission; the Insurance Council of Australia; the Office of the Protective Commissioner and Public Guardian; Ken Gabb, Acting Chief Executive Officer, Supreme Court of New South Wales; the Public Interest Advocacy Centre; and Steve Mark, Legal Services Commissioner.

³⁷ Competition Report, *supra* note 34 at ch 10. The managing partner was Bruce Cutler of Freehill Hollingdale and Page. In 2000, the firm changed its name to Freehills as part of its transition to a single, nationwide partnership model; see “The Making of a National Firm: Freehills,” *The Lawyers Weekly* (2 June 2011), online: [The Lawyers Weekly](http://www.lawyersweekly.com.au/features/the-making-of-a-national-firm-freehills/) <<http://www.lawyersweekly.com.au/features/the-making-of-a-national-firm-freehills/>>.

from the government was vocalized through the Australia Competition and Consumer Commission (ACCC),³⁸ a government agency charged with a dual mandate to promote competition and protect consumers. There were some caveats; one concern in particular that permeated most of the respondents' submissions was the risk that conflicts of interest and a degradation of the professional standards would flow from allowing lawyers to partner with non-lawyers who were not subject to the same codes of ethics and professional practice. Both the Law Society and the ACCC acknowledged that safeguards should be put in place to preserve lawyers' independence and reduce potential for the alternative business structure to interfere with lawyers' ethical and professional obligations. The ACCC proposed that professionals at MDPs should have to disclose to their clients potential risks associated with the business structure.³⁹ The Law Society recommended some rules be put in place to manage conflicts of interest.⁴⁰

The Australian Bar Association, on the other hand, was fundamentally opposed to any business structure apart from sole practice. The association argued that the rule prohibiting non-lawyers from owning law firms ensured barristers' independence and preserved the cab rank rule.⁴¹ The Bar Association also argued that sole practice for barristers actually promotes competition in that profession, and so changing the rules for them would be counter-productive.⁴²

The Competition Report set the stage for the changes to come in Australia over the next years – changes that ultimately led to the

³⁸ The ACCC's website describes the agency's role as one of promoting "competition and fair trade in markets to benefit consumers, businesses, and the community. ... [and regulating] national infrastructure services;" see Australian Competition & Consumer Commission, *About Us*, online: Australian Competition & Consumer Commission <<http://www.accc.gov.au/about-us>>.

³⁹ Competition Report, *supra* note 33, Executive Summary.

⁴⁰ *Ibid* at ch 10. Some respondents also floated the idea that the number of incorporated legal practices should be limited, as well as the number of non-solicitors with voting rights.

⁴¹ The cab rank rule is said to be what ensures that the barrister "is the 'servant of all,'" see *What is a Barrister?* online: New South Wales Bar Association <http://www.nswbar.asn.au/docs/about/what_is/whatis_index.php>. Part VI of the *Code of Conduct* of the Bar of England and Wales explains that in most cases, a barrister is obliged to act for any client on any case, as long as the matter is within the barrister's expertise and there is no conflict of interest; see "Part VI – Acceptance and return of instructions," online: Bar Standards Board <<https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/the-code-of-conduct/part-vi-acceptance-and-return-of-instructions/>>.

⁴² Competition Report, *supra* note 33 at ch 10.

introduction of ABSs. It is clear from the report that the major forces at play were professional organizations, representatives of major law firms, and, importantly, the Australian government. As we will see, a strong voice from government was a feature throughout the debate on ABSs.

Not long after this report, in 2000, the Attorney General of New South Wales, Jeffrey Shaw, introduced the *Legal Profession Amendment (Incorporated Legal Practices)* bill on behalf of the ruling Labour Party. The bill sought to make it possible for any business in the state to become a legal practice so long as it had at least one solicitor director – greatly increasing the scope of acceptable business structures for law firms. The bill was heralded for allowing a “flexible corporate structure” that would see “Australia to become the legal hub ... in the Asia-Pacific region.”⁴³ It was also vocally opposed by some members, however. Liberal member Helen Sham-Ho said she “vehemently and vigorously oppose[d] the Bill,” and quoted Steve Mark, the Legal Services Commissioner of New South Wales, as having criticized the bill for being “an ethical minefield.”⁴⁴ There was concern lawyers’ duties to the court would be undermined and the public might lose faith in the justice system; there was fear that because this amendment would make law firms just like “any other firm,” consumers would be confused about what services they were receiving and from whom.⁴⁵ Other people in high places also took issue with the bill, including the Chief Justice of the High Court, Murray Gleeson, and the Federal Attorney General, Daryl Williams.⁴⁶

But still, the general tone in Parliament was that while there was space for debate, the bill would ultimately pass. *Hansard* records show that

⁴³ New South Wales, Legislative Council, *Official Report of Debates (Hansard)*, 52nd Parl, 2nd Sess (12 October 2000) at 9153 (James Samios).

⁴⁴ *Ibid* at 9153. Later, Parliamentarian RSL Jones referred to other concerns voiced by Legal Services Commissioner Steve Mark, including “concerns that the legislation would not totally protect consumers, and that some of its regulatory provisions appeared to have been inadequately thought through,” suspicions that it would be “harder to extract information from incorporated legal practices and that it would be very easy for lawyers from incorporated practices to avoid complaints about their conduct,” and discomfort “philosophically with the shift from profession to business because he did not believe it was possible for a profession to be businesslike;” see *ibid* at 9156.

⁴⁵ *Ibid* at 9153-54. The Law Institute of Victoria, the professional association for solicitors in the state of Victoria, also opposed the bill. Helen Sham-Ho acknowledged “that there are provisions within the bill that aim to retain a high standard of professional obligations and privileges,” but expressed concern that “professional obligations may take a back seat to the driving force of investor gains. I am of the opinion that the present partnership arrangements function well enough. Indeed, I believe that there is no need to fix something when it is not broken.”

⁴⁶ *Ibid* at 9158.

concerns for consumer protection were overshadowed by expected benefits to business that the amendment was to bring.⁴⁷ As businesses, law firms themselves were understood to be generally supportive of the changes, although no actual expressions of support from these firms were brought up in the debate.⁴⁸ The Law Society of New South Wales was the only group outside of government that backed the bill, but it had not done much to explain its support and parliamentarians noted this.⁴⁹ From the perspective of certain members of Parliament, the bill was being “rammed” through Parliament by the government, despite a lack of overt support from other interested groups, including the professional associations, consumer groups, and the business community.⁵⁰ The government support for ABSs appears to have been the key difference that

⁴⁷ *Ibid* at 9153. JM Samios, a member of the opposition Liberal Party, said

Incorporation of legal practices may lead to more transparent management structures and enhance the accountability of individuals for the management of a practice. Of course, there is the danger that consumer protection may be compromised unless appropriate safeguards are in place. The insurance requirements and legal oversight bodies of New South Wales currently cannot completely protect the client from dishonest or fraudulent practice by a solicitor. Small firms may be disadvantaged by incorporated legal firms driving out competition by offering discount prices. Nevertheless, the advantages provided by the bill – I have referred to pro bono work and a more transparent management structures – are very positive. The Opposition will not oppose the bill but I make the point that implementation of the bill must be carefully monitored.

⁴⁸ *Ibid* at 9158 and 9163. Some politicians pointed out that a notable advantage for these law firms is the lower tax rate they would enjoy under the corporate tax regime. Peter Breen, an independent member, noted that “Given that the partners of major law firms can earn between \$400,000 and \$800,000 per year, profits distributed at the company rate of tax will be considerably higher than individual earnings taxed at the top personal rate.” While some looked at this motivator with disdain, others defended it. Arthur Chesterfield-Evans said:

Most people working in the law do so as a professional to earn a living from it. Lawyers working in private practice want to make money. There is nothing wrong with this. That does not mean they are not doing the best for their client. Indeed, it could be argued that the better they do for their client, the better the reputation of the firm, the more work they will get and the more money they will make ... Changing the business structure from a partnership to an incorporated entity will not affect services to clients, standards of work or public confidence in the courts, as suggested by the New South Wales Legal Reform Group.

⁴⁹ *Ibid* at 9154. RSL Jones, a Democrat, said he did not support the bill because, among other things, “[Legal Services Commissioner Steve Mark] pointed out that the only backer of this bill is the New South Wales Law Society - the only backer. It is opposed by the New South Wales Bar Association, by the Law Institute of Victoria and by several other constituent bodies of the Law Council of Australia that discussed the scheme soon after it was unveiled in March.”

⁵⁰ *Ibid* at 9156. Jones said, “This is the first time similar legislation has been introduced anywhere in the world, the first time that lawyers have been incorporated. We

allowed ABSs to become a feature of the legal landscape in that country relatively quickly.

b) Going Even Further

Since the *Legal Profession Amendment (Incorporated Legal Practices) Act* passed in 2000, national model laws have been developed and many states beyond New South Wales have adopted them. All states and territories except South Australia have now adopted a *Legal Professions Act* based on the model.⁵¹ These national model provisions were developed with similar aims to New South Wales' initial legislation on ABSs: to encourage innovative business structures while still protecting consumers,⁵² and to promote local, national, and international investment.⁵³ Significantly, the New South Wales Bar Association and the Office of the Legal Services Commissioner were now onside with the ABS-friendly legislation when it was introduced in the state.⁵⁴ It seems after an initial push from government, other players were willing to get onside at a later stage.

should not be letting this bill pass without proper debate and without having a number of questions cleared up.”

⁵¹ Legal Services Board, *National Legal Profession Reform*, online: Legal Services Board of Victoria <<http://www.lsb.vic.gov.au/news/national-legal-profesion-reform-project/>>.

⁵² New South Wales, Legislative Assembly, *Parliamentary Debates*, 53rd Parl, 1st Sess (7 December 2004) at 13415. When a new act based on the model laws (the *Legal Profession Act 2004*) was introduced in the Parliament of New South Wales, Labour member Barry Collier, explained it was his belief that “the interests of consumers will be better protected because the model provisions provide for the exchange of information and for co-operation between authorities in different jurisdictions.” Parliamentarians were also keen on the idea that the Legal Professions Act would help achieve consistent regulation for all of Australia. Virginia Judge believed this would better enable lawyers and their clients to understand their rights and obligations. Paul Lynch, another Labour member, called this desire for consistency the “genesis” of the bill.

⁵³ *Ibid* at 13416. Virginia Judge, a Labour Party member, asserted:

This bill will assist the transaction of local, national and international business and encourage international companies to further invest here. That is what we want in this State: lots of investment projects to promote business, particularly small business, which employs about 80 per cent of Australians. Hard-working families will have more opportunities available to them.

Judge also noted that the bill was expected to result in reduced costs to businesses, which could be passed on to consumers.

⁵⁴ *Ibid* at 13417. Paul Lynch is quoted in *Hansard* as saying “I understand that this legislation follows close consultation with the Bar Association, the Law Society of New South Wales and the Office of the Legal Services Commissioner. I understand that the bill has the support of all peak bodies. I commend it to the House.”

c) *The Picture Today*

All states and territories except South Australia have now adopted a *Legal Professions Act* based on the model bill.⁵⁵ The belief that ABSs would be good for business has since been vindicated. As of April 2012, about one-third of law practices in New South Wales were incorporated, taking on the forms of MDPs as well as publicly traded companies.⁵⁶ The majority of incorporated law practices are sole practitioners or have between three and ten partners, although several of the large law firms have also incorporated.⁵⁷ Still more firms are expected to be eyeing incorporation but have not pursued it to date because of taxation and branding issues.⁵⁸ Complaints against law firms have gone down,⁵⁹ and small law businesses appear to be prospering.⁶⁰ Much of the fear that MDPs would threaten law firms and drastically alter the way legal services were provided has

⁵⁵ Legal Services Board, *supra* note 51.

⁵⁶ Steve Mark, “Commercialisation of Legal Practice – Reflections from NSW” (Paper presented at the Commonwealth Law Conference, Sydney, 21 April 2012) at 4, online: <http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/commercialism_of_legal_practice_clth_law_conference_april2012.pdf> [Mark, “Commercialisation”].

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Christine Parker, Steve Mark, and Tahlia Gordon, *Research Report: Assessing the Impact of Management-based Regulation on NSW Incorporated Legal Practices* (Sydney: Office of the Legal Services Commissioner, 20080) at 44. A 2008 study carried out by the Australian Office of the Legal Services Commissioner (OLSC) and the University of Melbourne Law School found that complaints against law firms that became incorporated and participated in the OLSC’s self-assessment process fell by two-thirds. See also Steve Mark, “A Short Paper and Notes on the Issue of Law Firms in New South Wales” (Paper presented to the Joint National Organization of Bar Counsel (NOCB), Association of Professional Responsibility Lawyers (APRL) and American Bar Association (ABA) Centre for Professional Responsibility Panel entitled “Brave New World: The Changing Face of Law Firms and the Practice of Law from a Professional Responsibility Perspective,” San Francisco, 10 August 2007) [unpublished] at 7. The self-assessment process consists of firms reflecting on their performance under various objectives. For example, under the heading “competent work practices to avoid negligence” a company will be asked to consider whether “fee earners practice only in areas where they have appropriate competence and expertise.” See also “Alternative Business Structures: Australia,” *The Law Society of Upper Canada Gazette* (27 December 2012), online: [The Law Society Gazette](http://www.lawsocietygazette.ca/news/alternative-business-structures-australia/) <<http://www.lawsocietygazette.ca/news/alternative-business-structures-australia/>>. This article notes that the OLSC received fewer complaints in 2012 than in any of the previous 18 years during which Mark Steve was commissioner, despite the fact that the number of lawyers has about doubled in that time.

⁶⁰ *Law Society of Upper Canada Gazette, ibid.*; the article quotes Australia’s Legal Services Commissioner Steve Mark as saying that New South Wales’ legal service providers, many of which are small, are “more profitable, better managed and more ethically based.”

abated.⁶¹ Law firms don't appear to have succumbed to the brutal forces of an unregulated market. The two publicly-traded legal service providers in Australia make a point of saying that their primary duty is to the court followed by a duty to their clients, both of which are ahead of a duty to their shareholders.⁶²

The corporate world, while they did not ask specifically for ABSs, has been quick to pick up on the new opportunities created by the relaxed ownership regulations. By 2007, OLSC data showed a "steady stream" of firms incorporating.⁶³ In 2004, Sydney-based law firm Noyce Legal listed its banking and finance practice on the Australian Stock Exchange, and law firms Slater & Gordon and Integrated Legal Holdings were listed in their entirety in 2007 and 2008 respectively.⁶⁴ Professional services firms such as Pricewaterhouse-Coopers have also added legal services to their offerings.⁶⁵ There is also at least one firm in New South Wales that has adopted a franchise model, generating agreements with more than 20 branch offices. The independent branches operate in New South Wales and other states, each as its own incorporated legal practice (ILP) and follow

⁶¹ *Ibid.* The same article quotes Steve Mark as saying, "Initially, there was a fear that multidisciplinary practices would proliferate and we'd end up having accounting firms becoming law firms and taking over the legal profession and drowning it." Mark explains, "There was also a fear that there would be all kinds of weird conglomerations of financial services merging with real estate agents and law firms – and indeed that did happen, but not anywhere near as much as what was expected."

⁶² See e.g. "Slater & Gordon Limited Prospectus: Key Risks" (2007) online: Slater & Gordon <http://www.slatergordon.com.au/files/editor_upload/File/prospectus/Prospectus.pdf>. See also Mark, "Commercialisation," *supra* note 57 at 12 where Mark has also stated, "[The OLSC is] firmly of the view that it is essential that the provisions of the LPA prevail over provisions of the Corporations Act to the extent of any inconsistency."

⁶³ Steve Mark, "The Corporatisation of Law Firms – Conflicts of Interests for Publicly Listed Law Firms" (Paper delivered at the Australian Lawyers Alliance National Conference, 13 October 2007) [unpublished] at 1 [Mark, "Corporatisation"].

⁶⁴ Steve Mark and Tahlia Gordon, "Innovations in Regulation – Responding to a Changing Legal Services Market" (2009) 22 *Geo J Legal Ethics* 501 at 515-16.

⁶⁵ *Ibid.* at 518. The article quotes Leigh Minehan, Pricewaterhouse-Cooper's Deputy CEO, as saying, "The newly formed MDP provides our clients with seamless access to specialist legal expertise in areas of Corporate and Commercial, Employment and Industrial Relations, Tax Controversy, Environment, Property and Litigation, as well as new areas of legal practice such as Corporate Tax consulting services." Hugh Macken, President of the New South Wales Law Society was also quoted as saying, "PwC's move is unique in terms of the scale, depth and breadth of its legal service offerings in a multi-disciplinary environment. The market for legal services in Australia is sophisticated, and I am sure many organisations will appreciate the benefits of receiving both legal and non-legal services from the one provider."

the typical franchise structure of being connected to the head law firm but not to each other.⁶⁶

There is also some evidence that the number of MDPs in New South Wales has been on the decline. One hypothesis is that the “one-stop-shop” has not delivered the benefits to consumers that were expected.⁶⁷ Research shows that many of the incorporated legal practices in New South Wales were formerly sole practitioners or small partnerships, and that little in those firms’ day-to-day activities has changed since incorporating.⁶⁸

d) Present-Day Roadblocks

Some Australian lawmakers now have their sights trained on a national act to set uniform regulations for the legal profession across all states, making it possible for lawyers to practice “seamlessly” anywhere in the country.⁶⁹ Presumably, uniform regulations would also make it easier for large firms to operate across the federation. While the adaptations of the model bill in most states achieved general consistency, that “‘harmonisation’ [also] served to highlight the many remaining differences.”⁷⁰ In 2009, the Council of Australian Governments (COAG), a forum comprised of the prime minister, the premier of each state and territory, and other senior politicians, decided to make the creation of a single national framework one of its goals and appointed a task force to carry that out. In 2010, the task force presented draft legislation, called the *Legal Profession National Law*, which highlighted consumer protection.⁷¹ The process hit a setback in October 2012 when Queensland announced it was no longer interested

⁶⁶ *Ibid* at 517.

⁶⁷ Mark, “Corporatisation,” *supra* note 63 at 3. MDPs in New South Wales are largely made up of firms that provide property services and include professionals such as solicitors, real estate agents, and accountants, as well as financial services companies comprised of solicitors, tax advisors, accountants, and investment consultants.

⁶⁸ Steve Mark and Georgina Cowdroy, “Incorporated Legal Practices – A New Era in the Provision of Legal Services in the State of New South Wales” (2004) 22 *Penn St Int’l L Rev* 671 at 688.

⁶⁹ Office of the Legal Services Commissioner, “Regulation of the legal profession in Australia,” online: Office of the Legal Services Commissioner http://www.olsc.nsw.gov.au/olsc/olsc_education/lsc_lawregulate.html.

⁷⁰ Legal Services Commission in Queensland, “National Legal Profession Reform,” online: Legal Services Commission <<http://www.lsc.qld.gov.au/headline-issues/national-legal-profession-reform>>.

⁷¹ *Ibid*. The draft national law includes reforms that would give consumers of legal services the same options for redress against lawyers as consumers of financial, telecommunication, and energy services have against their financial planners, stockbrokers and other providers.

in a national scheme.⁷² Queensland has since said it is open to amending some of its laws regulating the legal profession so that they mirror the national laws, but is against the structural reforms proposed by COAG's task force.⁷³ These latest developments further highlight the importance of government support if legal reforms are to take place. In this instance, the state government's refusal to pursue further reform is stalling nation-wide progress. The flip side was that, as we saw in New South Wales, government support propelled early-stage progress, a development that has also taken place in the UK, albeit at a slightly slower pace.

Despite the recent setback, Australia is important for boldly going where no other jurisdiction appeared headed at the time. The Australian experience is significant for what it did to energize others around the world and push the issue of alternative business structures into the forum for debate elsewhere.

2) *United Kingdom: Yes Minister*

In the UK there are approximately 135,000 lawyers, or one for every 465 people.⁷⁴ The legal profession is bifurcated between solicitors (about 120,000) and barristers (about 15,000).⁷⁵ Although over the centuries there has been great rhetorical emphasis on the "independence of the legal profession" in the UK, constitutionally the doctrine of parliamentary sovereignty means Parliament has regulatory authority over the legal professions. While Parliament has mostly delegated authority to the Law Society and the Bar Council to set and enforce regulatory standards for solicitors and barristers respectively, legislation dating back to the thirteenth century demonstrates the authority of Parliament.⁷⁶ As in Australia the path toward ABSs in the UK began with a push from government, but this one came even earlier.

⁷² Law Society of New South Wales, "Update on National Legal Reform," online: Law Society of New South Wales <<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ruleslegislation/nationalreform/index.htm>>.

⁷³ Legal Services Commission in Queensland, *supra* note 70.

⁷⁴ In the City of London, the concentration is even higher. Simon Rogers, "How many solicitors are there in England and Wales? And who are they?" *The Guardian* (4 April 2011), online: The Guardian <<http://www.guardian.co.uk/news/datablog/2011/apr/04/solicitors-number-england-wales-ethnicity>>.

⁷⁵ Legal Services Board, "Frequently Asked Questions," online: Legal Services Board <http://www.legalservicesboard.org.uk/can_we_help/faqs>.

⁷⁶ Judith Maute, "Bar Associations, Self-Regulation and Consumer Protections: Whither Thou Goest?" (2008) *J Prof Law* 53 at 55-56.

a) *The First Push: The Mackay Report*

In 1989, then-Prime Minister Margaret Thatcher directed Lord Chancellor James Mackay to investigate changes to the legal profession.⁷⁷ Mackay's report contained a resounding conclusion in favour of multi-disciplinary practices for both barristers and solicitors, which had been strictly prohibited at the time by the Bar's *Code of Conduct* and Law Society practice rules.⁷⁸ Noting that the idea had been considered before in the 1979 Benson Commission (which recommended maintaining interdisciplinary practice restrictions) and Scotland's Hughes Commission in 1980 (which recommended removing the ban on fee-sharing with others),⁷⁹ this time around the Mckay Report framed its call for change to acceptable business structures for law firms in terms of the government's "fundamental polic[y]" of promoting competition. Similar to the approach in Australia, MDPs were deemed one way to inject a more competitive spirit into the practice of law.⁸⁰ The government's view was laid out in the following terms: "Choice available to users of legal services in England and Wales should not be limited unless there are strong public interest reasons to the contrary, and ... restrictions on competition between solicitors should be no greater than is necessary adequately to safeguard the interests of their clients."⁸¹

The Mackay Report noted that opposition to the idea generally broke down into two concerns. Those against MDPs argued first, that the maintenance of high professional standards and solicitor independence would come into conflict with the particular standards of the other

⁷⁷ Before the creation of the British Ministry of Justice in 2007, the Lord Chancellor essentially held the role of the minister responsible for the administration of justice.

⁷⁸ James Mackay, *The Work and Organisation of the Legal Profession* (London: Lord Chancellor's Department, 1989) at 45-46 [Mackay Report]. Preceding this there was actually one report that also concluded in favour of MDPs, the Hughes Commission, which was tasked with assessing the business structures of law firms in Scotland only.

⁷⁹ *Ibid* at 44-45.

⁸⁰ *Ibid* at 2 and 43. The Mackay Report notes, "Both the increased emphasis on allowing market forces to determine the allocation of resources in the economy and the changing nature of the market for professional services prompt a re-examination of the special status of the professions in UK competition law." At the time of the report, both solicitors and barristers were prevented from practicing with other professionals either by practice rules or their code of conduct. There was also statutory backing for the restriction through the combined effect of the *Solicitors Act 1974* (UK), c 47, s 39, and the *Partnership Act, 1890* (UK), 25 & 26 Vict, c 89, s 5. Barristers were particularly constrained because their *Code of Conduct* allowed them only to practice individually, barring even partnerships with other barristers.

⁸¹ *Ibid* at 45.

professionals with whom solicitors partnered, and second, that that new MDPs would steal business from traditional solicitor practices.

The response from those in favour of MDPs was that those objections were overblown. They argued the present reality was already one where consumers had to choose between working with a small or large legal practice, and that “multi-disciplinary practices would do little to narrow that choice.” Further, proponents pointed to the fact that some solicitor firms already employed specialists in other professions without a diminution in the standard of conduct. And on top of that, they argued, any concerns about consumer protection could be addressed with “safeguards” to protect clients.⁸²

The report wrapped up its discussion of MDPs for solicitors by proposing to amend the *Solicitors Act 1974* to remove provisions barring MDPs for solicitors. Mackay noted that the government expected the Law Society to amend its practice rules to reflect those changes, and the professional body was also tasked with coming up with the appropriate safeguards to ensure professional standards did not suffer as a result of the changes.⁸³ Finally, the report noted briefly that there appeared no reason to distinguish barristers from solicitors in the context of MDPs – they should be allowed for the barrister in the same way as the solicitor.

b) The Stall

Mackay’s recommendations had the potential to radically change the nature of legal practice in the UK, but after these big ideas were presented, the movement seemed to peter out. In the interim between Mackay and eventual passage of an act permitting MDPs, the Law Society moved “at a glacial pace” while the government increasingly applied political pressure to try to get MDPs off the ground,⁸⁴ and passed acts that incrementally reduced the power of the Law Society and increased that of the Lord Chancellor.⁸⁵ Finally, the British government renewed the conversation by

⁸² *Ibid* at 44.

⁸³ *Ibid* at 45.

⁸⁴ Paton, “Multidisciplinary Practice Redux,” *supra* note 27 at 2233.

⁸⁵ Christopher Whelan, “The Paradox of Professionalism: Global Law Practice Means Business” (2008) 27 Penn St Int’l L Rev 465 at 473-74. The *Courts and Legal Services Act 1990* (UK), c 41 took away the Law Society’s “autonomous power to self-regulate” by making all changes to the professional rules subject to approval from the Chancellor’s Advisory Committee for Education and Conduct, comprised of lawyers and laypeople, as well as approval from the Lord Chancellor. In 1999, the Law Society’s power was further eroded when this advisory committee was disbanded and approval of rule changes was up to the Lord Chancellor alone.

highlighting one specific justification for ABSs above all others. In 2004 the government began to cultivate the voices of consumer groups to demonstrate the need for change in the industry. Expected benefits to consumers, such as lower prices and better service, whether explicitly demanded by consumer interest groups or not, were used to ultimately push ABS legislation to passage approximately two decades after the first government articulations of the idea.

c) The Government Makes its Move: The Office of Fair Trading Releases “Competition in the Professions”

MDPs only gained momentum again in March 2001 when the British government’s Office for Fair Trading (OFT) published a study entitled *Competition in the Professions*. This report has been called the “critical point of government intervention in the English MDP story.”⁸⁶ The report, overseen by John Vickers, the Director General of Fair Trading at the time, was again framed in terms of competition. It identified elements of the legal profession (and other professions) that acted as a hindrance to competition, including rules barring ABSs and MDPs from barristers’ and solicitors’ practices.⁸⁷

The Law Society, the Bar Council, large law firms, and business lobbyists, as well as a UK consumer advocacy group called Which?, among others, all contributed input to the report.⁸⁸ None of the findings in the report, however, show a particular demand for MDPs from consumers. Consumer groups responded to questions about the price and quality of services provided by lawyers, as well as to questions about innovation (or

⁸⁶ Paton, “Multidisciplinary Practice Redux,” *supra* note 27 at 2233

⁸⁷ LEGC Ltd, *Restrictions on Competition in the Provision of Professional Services* (London: Office of Fair Trading, 2001) at 62 and 81. The OFT conducted its own consultations and also engaged the global consultancy firm LECG to administer questionnaires and produce a report based on its findings. LECG operates worldwide with a staff of academics, former government officials and business-people conducting studies in the areas of economics, governance, and taxes. Its clients include Fortune 500 companies, law firms, and government agencies.

⁸⁸ A partial list of groups consulted is: the Consumers’ Association (also known as “Which?”); the Law Society; the Bar Council; CMS Cameron McKenna – the UK branch of a large European law firm; British Federation of Industry – a business lobby group that aims to “keep business interests at the heart of policy in Westminster;” the Department of Trade and Industry (now called Department for Business Innovation and Skills); HM Treasury; Leigh Day and Co – personal injury, employment and human rights solicitors; the Lord Chancellor’s Department; Morgan Lewis – a large, international law firm; and the Hundred Group – a body representing finance directors at the UK’s largest companies.

lack thereof) within the profession, without noting any serious concerns.⁸⁹ The report noted that this might be due to the fact consumers may be unable to judge the quality of service they are receiving against the price they are paying.⁹⁰ This marked the early stages of a seeming attempt on the government's behalf to use concern for consumer welfare as a driving force toward reform to the legal services industry. Although no overt demand from consumers for ABSs is apparent in the OFT report, consumers would later take on an important and persuasive role in the quest to introduce ABSs in the UK.⁹¹

Other stakeholders, however, were vocal in their opposition to MDPs. The Bar Council voiced similar concerns to barristers in Australia, arguing there was already an ideal competitive environment in its field. Because the Bar Council *Code of Conduct* prohibited partnerships between barristers and other professionals, each individual barrister was essentially in competition with all others – a healthy dynamic that managed fee levels and kept the number of conflicts of interest at bay.⁹² Solicitors, on the other hand, were divided in their support for new business structures.⁹³ Some were in favour of MDPs and the opportunities those could bring, while others raised concerns that partnerships between lawyers and other professionals could increase conflicts of interest, which would inevitably harm the public interest.⁹⁴

d) “In the Public Interest?” The Lord Chancellor’s Department Consultation Paper

Following the OFT report, the Lord Chancellor’s Department (more or less the equivalent to today’s Ministry of Justice in Britain) sought input on whether the Law Society’s powers to regulate solicitors should be broadened to include the ability to regulate non-solicitor partners and businesses of any structure that provide legal services. Broadly, the Lord Chancellor investigated what changes to legislation or solicitors’ rules would be required to adopt MDPs and how receptive various stakeholders were to these changes.⁹⁵ The British government, in stating that it was

⁸⁹ LEGC Ltd, *supra* note 27 at 6.

⁹⁰ *Ibid.*

⁹¹ See below, text associated with notes 100-110.

⁹² LEGC Ltd, *supra* note 87 at 81-82.

⁹³ *Ibid* at 61. The OFT report notes that the Law Society carried out consultations in 1987, 1993 and 1998 on the issue of multi-disciplinary practices. The response rate for the most recent consultation was low but most respondents favoured “relaxing the rules,” according to the OFT report.

⁹⁴ *Ibid* at 61-62.

⁹⁵ The investigation began by laying out findings from the OFT report and asking for opinions from consumer and industry groups, the Law Society and Bar Council, and

“keen to remove restrictive practices that are not in the public interest” and that “the professions should be fully subject to competition law,”⁹⁶ was quite open in its inclination toward the introduction of MDPs, despite the fact that the current restrictions’ hindrance of competition had not been weighed against their benefits to consumers. The preceding OFT report concluded simply that restrictions on the structure of legal practices were anti-competitive on their face, and did not examine whether that proposition could be justified for reasons of public interest. Despite this analysis not having been done, the government pushed ahead, noting that the public interest must be safeguarded and promoted, but presuming that this could be accomplished under rules that permitted MDPs better than it was being done under the current restrictions. The government even noted that “evidence of low demand” from potential providers of legal services “would not in itself be sufficient reason to justify a decision not to open up the market.”⁹⁷ It seemed a sure thing that rules permitting MDPs would eventually be approved, and the government was pursuing the logical next step – identifying the “impediments” to be removed in order to make that happen.⁹⁸

e) Enter Clementi

An escalation of consumer voices became apparent in the next one of the string of British reports and consultations. In 2004, Sir David Clementi, a former deputy governor of the Bank of England, reported to the Lord Chancellor on his *Review of the Regulatory Framework for Legal Services in England and Wales*. In a similar way to the OFT report, the Clementi Report, as it came to be known, canvassed the views of barristers and solicitors organizations, law firms, and consumer advocacy groups with the aim of drafting a proposed regulatory framework for alternative business structures.⁹⁹ What stands out here is that it was clear the

other government departments. A complete list of those bodies consulted is on page 1 of the report. It includes associations of local governments, the Confederation of British Industry, Which?, the National Association of Citizens Advice Bureaux, as well as the Cabinet Office, HM Treasury, the Legal Services Ombudsman, the Office of the Deputy Prime Minister, and OFT.

⁹⁶ Great Britain, Lord Chancellor’s Department, *In the Public Interest?* (London: Lord Chancellor’s Department, 2002) at 33.

⁹⁷ *Ibid* at 5.

⁹⁸ *Ibid* at 38.

⁹⁹ See Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales* (London: Department for Constitutional Affairs, 2004) at 140 [Clementi Report]. The full list of respondents is contained in Appendix A of the Clementi Report. Which? was again consulted, as well as Citizens’ Advice (a not-for-profit organization that helps people with legal, debt, employment and other issues), the OFT, various academics, a number of law firms, the law societies of Scotland, England

government was cultivating the consumer voice, noting that there was “considerable concern” over how consumers’ complaints were dealt with under the current legal regime, and that there was pressure for change from those who represent consumer interests, as well as those who represent the legal profession.¹⁰⁰ Although much of what consumer advocates actually articulated had to do with the problems with the process for handling client complaints,¹⁰¹ there were no direct links from those complaints to a demand for alternative business structures. Other research conducted by the Law Society showed consumers’ main problems with legal professionals concern “perceived unapproachability of solicitors and their apparent attitudes to their customers,” rather than any issues directly tied to business structure.¹⁰² Again, that link is made by the government in an attempt to show support for ABSs.¹⁰³

Despite the fact that benefit to consumers is heralded as one of the primary impetuses for the introduction of ABSs,¹⁰⁴ Clementi acknowledged that an “absence of consumer demand” for alternative business structures would not be a roadblock in the government’s path toward the reforms.¹⁰⁵ Consumer demand, or consumer voices that can be ventroloquized in support of ABSs are helpful though. In the end, Clementi used the

and Wales, the Law Society of Upper Canada, bar associations, and advocacy groups for access to justice.

¹⁰⁰ *Ibid* at 2-3

¹⁰¹ *Ibid* at 2 and 506. The report noted that a Which? summary of a survey the organization had conducted of those dissatisfied with legal services included comments such as: “The biggest cause of dissatisfaction was delay.” According to one respondent “it would have been quicker to do a course in conveyancing.” Cost also ranked highly: “We feel that we were misled as to costs from the very start.”

¹⁰² *Ibid* at 109.

¹⁰³ *Ibid* at 6, 3 and 23. The report stated, “Research shows that complaints arise as much from poor business service as from poor legal advice. If certain lawyers continue to reject the notion that they are in business, such complaints will continue until they are indeed out of business.” Clementi noted that there is some “pressure for change” to business structures from consumer groups, but that pressure for change was particularly vocalized by the Law Society, “who have made a strong case for liberalization of law practices.” However, the Clementi Report drew on a Department for Constitutional Affairs Scoping Study, which quoted Citizens’ Advice as saying there is a structural as well as cultural resistance to changing business structures among the legal profession.

¹⁰⁴ See e.g. *ibid* at 16; “Protection and promotion of consumer interests” was cited as one of six objectives for any regulator of any regulator of legal services.

¹⁰⁵ *Ibid* at 108. According to Clementi:

Demand for legal service provision through an LDP could come from two sources: the consumer and the provider. The absence of an articulated consumer demand, in the context of a market where restrictive practices operate as a barrier to innovative forms of service delivery, would not in itself be a persuasive argument that other forms of service delivery should not be permitted.

consumer voices in an attempt to show support for the introduction of ABSs, but closer reading of the report indicates his preference for ABSs stems largely from the government's ideological commitment to free competition and anti-monopolistic policies.¹⁰⁶

The power of the government to manipulate consumer voices in this way far surpasses what the consumer groups themselves could have achieved on their own toward the goal of permitting ABSs. The British government's ability to do this highlights their important position in the debate on ABSs. Government is a critical force whose absence from the conversation can be the death knell on ABSs – or whose support can mean assured success despite opposition from other major stakeholders.

In the UK, the Bar Council remained firm in its assertion that there was potential for conflict between company owners' commercial interests and lawyers' ethical duties. The Clementi Report also noted other unattributed concerns that the intrusion of outside capital into law practices would allow businesses to "cherry pick" the most profitable work to the detriment of smaller firms, potentially hindering access to justice for those who rely on high street lawyers. Clementi highlighted the Law Society's support for removing the restrictions on solicitors forming partnerships with other lawyers and non-lawyers (which was subject to certain unnamed conditions),¹⁰⁷ while persistently sweeping aside the Bar Council and others' concerns, answering that "most other respondents" (who remain unnamed) agreed with loosening the rules around law firm ownership, coupled with an assertion that increased capital means increased competition, followed inexorably by increased access to justice.¹⁰⁸

Bending to some concerns over possible risks associated with multi-discipline practices, however, Clementi's bottom line on ABSs was that change should happen gradually, beginning with the introduction of legal disciplinary practices (LDPs), which would bring together barristers and

¹⁰⁶ *Ibid* at 105. Department of Constitutional Affairs, *Competition and Regulation in the Legal Services Market*, (London: Department of Constitutional Affairs, 2003), reprinted in the Clementi Report, *supra* note 100. The Department of Constitutional Affairs report made clear that:

The Government supports in principle enabling legal services to be provided through alternative business structures. Such new structures would provide an opportunity for increased investment and therefore enhanced development and innovation, for improved efficiency and lower costs. ... The Government accepts in principle that new business entities such as multi-disciplinary partnerships and corporate bodies should be allowed to provide legal services.

¹⁰⁷ *Ibid* at 2-3, 107.

¹⁰⁸ *Ibid* at 117-119.

solicitors under one roof. Clementi described this as the “first step” to allowing the more dramatic change entailed in multi-disciplinary practices (MDPs), where professionals of various kinds can jointly own a company that offers legal among other services.¹⁰⁹

In fact, this recommended first step did not actually materialize, as the government took Clementi’s recommendations and then went even further in a plan outlined in the Ministry of Justice’s 2006 regulatory impact assessment.

f) Assessing Change and Then Some: The Ministry of Justice’s Regulatory Impact Assessment

Two years after the Clementi Report, in 2006, the Ministry of Justice issued a regulatory impact assessment that outlined the rationale for legal services reform and analyzed the probable effects on the stakeholders involved. Contained within it was a decision to go further than what Clementi had recommended, and to create a licensing regime to manage the creation of ABSs that were not limited to barrister-solicitor partnerships (LDPs), but contained provision for multi-disciplinary practices including a range of professionals.¹¹⁰ While Clementi indeed toed the government line in his recommendations, it appears the Ministry of Justice felt he did not go far enough – an indication of just how strongly the government felt about creating ABS policy that aligned its commitment to free market ideology.

Meanwhile, consumer advocacy groups’ responses in this assessment were similar to those expressed before – their primary concern was to call for changes to complaints handling processes, rather than for a drastic alteration to the way law firms are structured.¹¹¹ There is no indication that

¹⁰⁹ *Ibid* at 137.

¹¹⁰ Great Britain, Ministry of Justice, *Legal Services Bill: Full Regulatory Impact Assessment* (London: Ministry of Justice, 2006) at 70 and 7. By way of justification, the Ministry expressed a belief strongly in line with the rhetoric the government had earlier espoused: “By permitting this form of business structure in the legal services profession, ABS will encourage competition, innovation and efficiency in service delivery while simultaneously improving the quality of legal services for consumers.” There was no real mention of Bar Council’s voice - only one note to say that, largely in response to the recommendations made by Clementi, the Law Society and the Bar Council had recently announced that they would establish separate arms to deal with regulation of their respective professions, which would be ring-fenced from representative interests

¹¹¹ *Ibid* at 14. This perspective was attributed to the Consumer Advisory Panel, a group established to advise the government on how to implement legal services reform. The group’s membership was made up of Citizens Advice, Which?, the National

the Ministry's push for full-on introduction of ABSs including MDPs had anything to do with interest expressed by consumer groups.¹¹²

Business voices carry through to a certain degree in the impact assessment. The Federation of Small Business (FSB) was in broad support of the plan outlined, noting that alternative business structures could create an "excellent opportunity" for legal service providers in smaller firms to compete with larger firms by virtue of the ability to pool resources with other professional service providers. FSB made specific mention of the potential for ABSs to help smaller firms cope with the challenges of globalization. The Federation also saw benefits for businesses that consume legal services in terms of expected "efficiency savings" that could lower the cost of hiring a lawyer and the convenience of one-stop shopping for professional advice.¹¹³

In fact, the government conducted a "small firms impact test" to assess how the introduction of ABSs would affect small players, and broadly concluded that the government's preferred option of imposing a licensing regime would not burden small businesses with additional compliance costs. The exception would be for currently unregulated professions, and in those cases, the government promised to alter licensing conditions for some firms where it would be in the public interest to do so.¹¹⁴

g) Finally, the Legal Services Act is Introduced

After almost two decades of consultations and recommendations, material changes began to take place in late 2006. The *Legal Services Bill* was introduced as a government bill by Charles Falconer, a member of the governing Labour Party who was then Secretary of State for Constitutional Affairs and Lord Chancellor (and a former barrister). *Hansard* reveals that members of the House of Lords and House of Commons perceived real benefits to the consumer with the introduction of ABSs, which became known colloquially as "Tesco law," but that there were also serious concerns from those with ties to consumer advocacy about whether sufficient safeguards would be put in place to control for quality. Still others challenged the "optimistic" view that Tesco law would yield actual

Consumer Council, the Federation of Small Business, and the Equal Opportunities Commission. The group was assisted by the OFT.

¹¹² *Ibid* at 51. The former president of the Law Society, on the other hand, is quoted in the assessment as saying that the proposed licensing regime strategy to introduce ABS "will create a dynamic legal market offering a better deal for consumers and fresh opportunities for solicitors."

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

benefit to consumers. These members believed instead that ABSs would simply be a hazard to access to justice, allowing companies to “cherry pick” profitable business.¹¹⁵ In committee, Lord Whitty (then chair of the National Consumer Council) relayed his concern that the bill’s stated aim to advance the public interest “includes a big chunk of the interests of the legal profession itself.”¹¹⁶

Similar debates unfolded in the House of Commons. Simon Hughes of the Liberal Democrats agreed that better customer service was required from lawyers, but that the answer was not “an untrammelled free market.”¹¹⁷ At the same time, Labour member Bridget Prentice pushed for even less regulation, arguing for an amendment that would allow the licensing body to approve an ABS even if it determined the new company’s existence could hinder access to justice. “It may be that an ABS license will benefit the consumer because of the other objectives. For example, the objective of increasing competition might promote consumers’ interests,” she said.¹¹⁸

The back-and-forth reveals an ideological belief related to, but separate from, the concerns arising in the context of consumer interest. As

¹¹⁵ Great Britain, House of Lords, *Official Report of Debates (Hansard)*, 2006-07 Sess, Vol No 687 Part no 13 (6 December 2006) at 1188-1192. Baroness Henig, a member of the Labour Party and former dean of the faculty of arts and humanities at Lancaster University stated:

Alternative business structures will open the door to the provision of legal services by supermarket chains or high street banks. Your Lordships may refer dismissively to Tesco law, but Tesco has proved itself extremely adept at providing services in a way and at a cost that the consumer values. These proposals will lead to more choice for consumers; they will stimulate competition; and I believe that they will drive up standards.

Lord Kingsland, member of the Conservative Party, responded:

The noble Baroness, Lady Henig, was rather optimistic about the ability of alternative business structures to deliver better access to justice... But there is, by contrast, another view; that alternative business structures will effectively cherry pick in the legal area, going only to those areas which are most profitable.

Lord Whitty, Labour Party member and then chair of the National Consumer Council had this to say:

I have no objection if people find it easier to seek their legal services in Tesco or, preferably, the Co-op than with a high street solicitor, but it is important that there is some quality control on the licensing system introduced by the Bill.

¹¹⁶ Great Britain, House of Lords, *Official Report of Debates (Hansard)*, 2006-07 Sess, Vol No 688 Part no 23 (9 January 2007) at 121.

¹¹⁷ Great Britain, House of Commons, *Official Report of Debates (Hansard)*, 2006-07 Sess, Vol No 461 Part no 98 (4 June 2007) at 61.

¹¹⁸ Great Britain, House of Commons Legal Services Bill Committee, *Official Report of Debates (Hansard)*, 2006-07 Sess, 7th sitting (21 June 2007) at 282.

a member of the Labour Party, Lord Whitty supported the bill and introduction of ABSs based on his perception that unrestricted competition is often a force for good,¹¹⁹ but this was despite concerns that ABSs would not be good for consumers. Meanwhile, Conservative Lord Kingsland questioned the assumption that the competition created by ABSs will be a good thing at all. The driver for change then does not appear to be the consumer interest, but instead a free market ideology that is expected (largely without cited evidence) to be better for everyone, consumers included, over the long term.

Politicians in favour of ABSs picked up on support for this from lawyers and law firms themselves. Jonathan Djanogly, a Conservative member of the House of Commons, referenced an article in the *Law Society Gazette* that described the way a veteran Barclays bank executive was recruited to help a top law firm steer “through the challenges facing the legal profession today.”¹²⁰ Others challenged the relevance of law firm

¹¹⁹ Great Britain, House of Lords, *Official Report of Debates (Hansard)*, 2006-07 Sess, Vol No 688 Part no 31 (23 January 2007) at 1080. Lord Whitty later stated that “in general” consumer interest had been well-served over the preceding 30 years by an increase in competition as long as it was accompanied by regulation. He thought the bill before the house contained such regulations. See also Great Britain, House of Lords, *Official Report of Debates (Hansard)*, 2006-07 Sess, Vol No 692 Part no 86 (15 May 2007). Lord Thomas of Gresford, a Liberal Democrat, had a very different idea about the utility of the bill:

The public are better served by lawyers, who are absolutely independent and who stand against the legislation that may be put forward or government departments where people are seeking to secure their rights to social security, and so on. We are very much concerned that alternative business structures will see this service disappear to be replaced by something that is very much less of utility to the people of this country. ... The lawyer stands independent of government to protect the citizen. This Bill, with its suggestion of alternative business structures, without any examination of whether it is necessary or appropriate in a particular area, such as my own area in north-east Wales, undermines the principle of access to justice.

¹²⁰ Great Britain, House of Commons Legal Services Bill Committee, *Official Report of Debates (Hansard)*, 2006-07 Sess, 5th sitting (19 June 2007) at 203. Djanogly’s exact words were:

A non-lawyer, William Arthur, former director of professional practices at Barclays bank, was recruited as a non-executive director by a Kent firm, Cripps Harries Hall. His brief was comprehensive and demanding—to use his 30 years of top-end commercial experience to steer his firm through the challenges facing the legal profession today. Mr. Arthur observed: “Law firms are getting bigger and bigger and are not small businesses anymore. The market place is changing rapidly and they need to apply the best business principles to everything they do. Many firms are acknowledging that while they have exceptional professional skills, they don’t always have the full suite of business skills and experience to bring them to the front of the field.”

support for ABSs when the effect of new business structures on consumers was still unknown, essentially arguing that what might be good for business could still be harmful for customers.¹²¹

Ultimately, after a series of “ping pong” exchanges between the House of Commons and the House of Lords, the bill passed, setting in law the provisions for alternative business structures for UK lawyers.

h) First on the Agenda: the Legal Services Board’s “Wider Access, Better Value, Strong Protection”

Out of the *Legal Services Act* was born the Legal Services Board (LSB), tasked with ensuring the public interest is protected by regulation of the legal services industry. Soon after its creation, the LSB released a discussion paper to gather input on how to structure the licensing process for firms wishing to be recognized as ABSs. In soliciting responses, the Board espoused a now familiar ideological refrain: “The potential benefits to consumers from a liberalised legal services market-place include better value, improved information, increased choice, greater innovation, more flexible service delivery and new service combinations.”¹²²

The LSB presented a number of potential applications for ABSs, from a small town lawyer partnering with a local accountant or financial adviser, to an ABS set up within the British Printing Industries Federation for

See also Great Britain, House of Commons Legal Services Bill Committee, *Official Report of Debates (Hansard)*, 2006-07 Sess, 7th sitting (21 June 2007) David Kidney, a Labour member, said, “It is wrong to think that allowing alternative business structures will impact only negatively on access to justice. By offering extra commercial opportunities to small legal practices, and a reduction of back-office and marketing costs, they might aid the survival of such firms in an increasingly competitive market.”

¹²¹ Great Britain, House of Commons, *Official Report of Debates (Hansard)*, Vol no 464, Part no 143 (17 October 2007) at 742. Lord Thomas of Gresford, a Liberal Democrat, stated:

It is in the interests of large, commercial firms of solicitors to have additional capital and arms to their businesses. Since it is very influential, it is no surprise that the Law Society is not objecting to alternative business structures. It is also in the interests of commercial organisations which are not legal, which can add a legal arm to their activities nationwide.

¹²² Legal Services Board, *Wider Access, Better Value, Strong Protection* (London: Legal Services Board, 2009) at 19. As an example, the LSB describes the proliferation of varieties of spectacles that came on to the market when restrictions of advertising and supply of eyeglasses were removed. While this might be a simple, relatable example, drawing a parallel between a consumer product such as glasses and the provision of legal services neglects to consider the complexities inherent in providing legal advice and the importance of what is at stake if the services provided are subpar.

exclusive service of the federation's members.¹²³ The LSB also noted that the clients of these various new structures would be wide ranging as well, from individuals to small businesses or large international companies.¹²⁴

In answer to concerns from existing small law firms that they wouldn't be able to deal with the increased competition, the LSB responded by saying "it is arguable that the scope to innovate is potentially as great for smaller practices as for larger firms."¹²⁵ Concerns over reduced access to justice, to which the loss of some small firms could contribute, were similarly set aside. The LSB observed that since it would be difficult to tell if any one ABS application would impair access to justice as a whole, the Board was not in favour of restricting entry of any one company on those grounds when that company's presence in the market would strengthen competition.¹²⁶ This appears to be a clear preference for creating a competitive market at the potential expense of consumers' needs in terms of their overall access to justice. Essentially the Board was allowing potentially damaging applications for ABS status to be approved despite the fact that they may put the public's access to legal remedies at risk.

The LSB did give voice to barristers' concerns with ABSs in general, namely that there could be damage to barristers' reputations which are strongly associated with their tradition for self-employment, the higher risk of actual or perceived conflicts of interest, and the possibility that barristers would do less publicly-funded work if the ABSs lead to more higher-paying commercial work being available.¹²⁷ These concerns were passed on without the addition of the Board's perspective and left for respondents to address. The Bar Council highlighted these concerns and others in a much more aggressive way, noting that while in principle it supported ABSs, it was less optimistic than the LSB about the potential for serious risks associated with the tension between access to justice and innovation in legal services. The Bar Council challenged the assumptions contained in the LSB paper, specifically stating that

there is no proper evidential basis for the assumption that the liberalisation of the market for legal services by permitting such services to be delivered through ABSs will automatically further the regulatory objectives of the [Legal Services] Act. Liberalisation may achieve some or all of those objectives, but this is not inevitable, particularly given that the market for legal services is unlike the market for ordinary consumer goods or services ... In other words, the LSB here privileges the promotion

¹²³ *Ibid* at 20.

¹²⁴ *Ibid* at 3.

¹²⁵ *Ibid* at 21.

¹²⁶ *Ibid* at 27-28.

¹²⁷ *Ibid*.

of competition and market liberalisation over access to justice, notwithstanding recent failures of liberalised markets.¹²⁸

After attacking these basic premises upon which the LSB issued its discussion paper, the Bar Council advocated for a much more gradual introduction of ABSs,¹²⁹ compared with what the LSB had suggested.¹³⁰

Other responses to the LSB consultation revealed that consumer groups were interested in setting up their own ABSs in order to better serve the average consumer of legal services. Citizens' Advice focused much of its commentary on the regulation of "special bodies," the category described in the legislation within which an ABS run by not-for-profit organization would fall, and indicated their interest in setting up an ABS to provide legal and financial advice to consumers.¹³¹ A free market approach to the provision of legal services was also endorsed by another consumer advocacy group, Consumer Focus. It expressed hope that increased competition would remove the attitude within the legal services industry that "customer care is of secondary importance," as well as reduce prices and offer more convenience to average Britons. The response stated that despite some apparent risks associated with ABSs, "Overall we believe that ABS will improve access to justice."¹³² Consumer group Which? also

¹²⁸ The General Council of the Bar, *Response to the Legal Services Board's Discussion Paper "Wider Access, Better Value, Strong Protection" on Developing a Regulatory Regime for Alternative Business Structures* (London: General Council of the Bar, 2009) at 5-6.

¹²⁹ *Ibid* at 8. The Bar Council suggested a closer following of the Clementi Report, which recommended first introducing LDPs and excluding MDPs from the initial phase of ABSs in Britain.

¹³⁰ *Ibid*.

¹³¹ Citizens Advice, *Citizens Advice's Response to the Legal Services Board's Discussion Paper "Wider Access, Better Value, Strong Protection"* (London: Citizens Advice, 2009) at 2. See also *British Printing Industries Federation, Wider Access, Better Value, Strong Protection – BPIF Response* (London: British Printing Industries Federation, 2009) at 2, which expressed a similar idea. In its response, the organization broadly outlined its own plan to create an ABS to provide "industry-specific" legal services to its members, stating: "An ABS model enabling us to increase resources and thereby improve the legal services we offer is an exciting opportunity, and as such I would very much like to be involved in any consultation or other activities which you intend during the development phase."

¹³² Consumer Focus, *The Regulatory Regime for ABS – Consultation Response* (2009) at 4-6. On the topic of access to justice, Consumer Focus also noted that:

We agree that the concept of access to justice is broader than the geographical availability of face-to-face legal advice and representation. ..However, face-to-face advice is an important dimension of access to justice. Stephen Mayson makes the distinction between access to justice (the ability to pursue a legal remedy or defend oneself against criminal charges or civil claims) and access to legal services (where

expressed support for ABSs in its response to the LSB: “We consider this liberalisation to be firmly in the interests of consumers. The foundations were laid when Parliament passed the *Legal Services Act* in 2007 following the Clementi Review and now it’s the job of the Legal Services Board (LSB) to make it happen.”¹³³ Which? noted that it saw potential for particular benefits to individuals and small businesses from the introduction of ABSs. While informed clients of legal services, those Which? described as being part of “the ‘high’ end of the City,” have fared well under the traditional law firm model, individuals and small businesses – those with little or no knowledge of the legal services they want or need – have been having a hard time. ABSs should change that, according to Which?¹³⁴ The organization’s response acknowledged that it is hard to predict the exact way in which the market will react to change to business structures, but said that “in theory” prices should come down for consumers and allow more advice to be provided by telephone or Internet. Which? reiterated already-stated concerns about conflicts of interest that may be created by ABSs that combine accountancy, financial, and legal advice and noted again the requirement for strong consumer protection against these kinds of risks. Many of these risks, Which? noted, can be dealt with by “extending existing principles” that deal with managing conflicts of interest in the traditional law firm set-up.¹³⁵

legal services are desirable and a choice of the citizen, as in the case of moving house). We acknowledge the difference between these concepts, but we do not believe that lawmakers had this distinction in mind when drafting the ABS provisions in the *Legal Services Act*...We consider that a broad definition of access to justice encompassing both of the elements above would meet better the spirit of the legislation. Access to justice is an intangible concept that escapes easy definition ... [A]s a starting point we suggest a definition should include the impact on *vulnerable consumers* of issuing an ABS licence on the *availability* and *affordability* of legal advice or representation in areas of law where there is a significant *public interest* in ensuring its sustainable provision.

¹³³ Which?, *Consultation Response* (London: Economic Policy department, 2009) at 2. Which? explained:

We would anticipate that ABS will lead to many opportunities for greater efficiencies by, for example, enabling solicitors to join an accountancy practice or a financial adviser. There may also be business models that involve greater provision of advice by telephone and less reliance on face to face meetings...

However, at 18 Which? noted:

While there may be new methods of delivering access to justice in a meaningful way to a wider range of consumers, we should be careful to note the special needs of vulnerable consumers. Such consumers are still likely to depend on the traditional method of providing legal services face to face. In addition, there are some areas of the law, such as criminal or family law, that will be harder to deliver without face-to-face contact.

¹³⁴ *Ibid* at 5.

¹³⁵ *Ibid* at 6 and 9.

i) Today's Legal Landscape

Today in the UK, there is widespread adoption of alternative models for delivering legal services. October 6, 2011 marked the “start date” for the introduction of ABSs in the UK. Since the market for legal services has been opened up to non-lawyers, a number of new models have emerged.¹³⁶ There are franchised operations, such as the 250 QualitySolicitors (QS) branches that dot the UK,¹³⁷ each of which share a common brand and marketing expenses, and provide services out of what they term “legal access points.” In July 2011, QS partnered with ubiquitous stationery store WHSmith to set up access points in WHSmith locations. Later that year, a private equity firm Palamon Capital Partners invested to secure a majority stake in QS, “pav[ing] the way for significant expansion for the brand.”¹³⁸ Through the QS access points, people can connect with a QS lawyer for advice on all manner of legal issues, from simple wills to complex criminal defense cases. Some of these cases are taken on a no-win, no-fee basis.¹³⁹ Arguably this model, complete with flashy website and television advertising, creates a brand that consumers feel comfortable approaching when they have a legal problem and therefore has potential to increase access to justice.

Where QS aims to reach the person on the Clapham omnibus by providing commonly-needed legal services, other firms have used the new rules permitting ABSs to further their business in niche markets. Mishcon de Reya,¹⁴⁰ a law firm focusing on serving high net-worth individuals, intends to become an ABS by launching a new business to provide legal services in conjunction with private bank relationship management advice,

¹³⁶ At least one UK company is pondering the IPO route. Law firm Irwin Mitchell has hired Espirito Santo Investment Bank to advise on options for raising external investment; see John Flood, “Will There be Fallout from Clementi? The Repercussions for the Legal Profession after the Legal Services Act 2007” (2012) *Mich St L Rev* 537 at 559.

¹³⁷ See Quality Solicitors online: <<http://www.qualitysolicitors.com/>>.

¹³⁸ “Our History,” Quality Solicitors, online: <<http://www.qualitysolicitors.com/media-centre/about-us/our-history>>. See Flood, *supra* note 137 at 555, where the author comments that QS’s plan is to mirror the business models that emerged when opticians’ practices were deregulated in the 1980s.

¹³⁹ See e.g. “Can I bring a claim for assault by the police?” Quality Solicitors, online: <<http://www.qualitysolicitors.com/faq/criminal-defence/actions-against-the-police/can-i-bring-a-claim-for-assault-by-the-police>> for online advice to those concerned with a claim for assault against the police.

¹⁴⁰ See Mishcon de Reya online: <<http://www.mishcon.com/>>.

consolidated asset reporting, tax and restructuring advice, as well as 24-hour, global concierge services.¹⁴¹

Mishcon's services target a population that is already well-served by the legal services industry, but other niche services have also emerged that might encourage those who previously wouldn't have bothered to call a lawyer to now seek out legal advice. Smarta provides a range of services relevant to entrepreneurs in the start-up phase of their business, including legal advice.¹⁴² The Royal Bank of Scotland also offers a regulatory compliance service directed at small and medium-sized businesses called Mentor, as well as RiskRemedy, an online service for businesses with up to 20 employees. RiskRemedy offers legal documents online on a "pay-as-you-go" basis, 24-hour telephone advice, as well as legal expenses insurance coverage.¹⁴³ All of these services appear geared toward making legal services affordable and easy to use for busy and cash-strapped business owners.

In a sense the "Tesco law" prophecies did come true, as UK supermarket chain The Co-operative launched a legal services arm (Co-operative Legal Services) in 2007. The chain's strategy is "to make the law as accessible and unthreatening as possible."¹⁴⁴ The operation employed more than 370 lawyers in 2011, with plans to grow by more than 3000 in the short term.¹⁴⁵ With 12.8 per cent revenue growth in line with expectations for 2012,¹⁴⁶ the legal services arm appears to be achieving success – an indication of some demand for the "one-stop-shop" that includes legal advice (the Co-op provides everything from funeral services to motors, clothing and fresh fruit).

¹⁴¹ Mishcon de Reya, News Release, "Mishcon de Reya announces intention to launch high-net-worth private client business 2012" (24 February 2012) online: Mishcon de Reya <http://www.mishcon.com/news/firm_news/mishcon_de_reya_announces_intention_to_launch_high-net_private_client_business_02_2012>. Managing partner Kevin Gold commented in the press release:

With so many high-net-worth clients that themselves constitute the equivalent of multinational companies, we can see a market to service them as such, with an offering that goes beyond their legal needs. This will be dependent on us finding the best people in their field, but we are confident that we can attract the talent we need.

¹⁴² See Smarta, online: <<http://www.smarta.com/about-us>>.

¹⁴³ See Royal Bank of Scotland Mentor, online: <<http://www.rbsmentor.co.uk/>> and Royal Bank of Scotland Risk Remedy from Mentor, online: <<http://www.rbsriskremedy.co.uk/rbs/>>.

¹⁴⁴ The Co-op Group, "Specialist Business Performance in 2012," online: <<http://www.co-operative.coop/corporate/Investors/Annual-Results-2012/Performance/Specialist-Businesses-Performance/>>.

¹⁴⁵ Flood, *supra* note 137 at 557.

¹⁴⁶ The Co-op Group, *supra* note 145.

j) *What Minister Says Goes*

This review of the path to ABSs in the UK clearly demonstrates the power of the government to dictate the outcome on changes to regulatory reform in industries such as legal services: What the government says goes, and input from professional organizations and advocacy groups will be harnessed as justification where it suits – and dismissed where it does not. Bureaucrats nodding “Yes, Minister” allowed the adoption of ABSs in the UK to proceed smoothly, despite notable opposition from the Bar Council, which ultimately was forced to cave to higher powers. The story in the US, however, is very different.

3) *The United States: ABSs as Zombies*

There are approximately 1.3 million lawyers in the US,¹⁴⁷ or one lawyer for every 242 members of the population.¹⁴⁸ Unlike the UK or Australia, it is a unified profession, rallying under the banner of “attorney.” The regulatory regime for American lawyers is quite distinct from that of Australia or the UK. Formally, primary responsibility for the governance of lawyers lies with the judiciary in each of the 50 states. Judicial deployments of “the inherent jurisdiction of the court doctrine” as a dimension of the constitutional principle of the separation of powers has meant that legislatures have no authority to regulate the legal profession.¹⁴⁹ The pattern in the majority of states is for the Supreme Court to delegate this authority to state bar associations. This obviously creates significant problems of balkanization, co-ordination, efficiency, and communication.

To counteract these centrifugal dynamics, however, the American Bar Association (ABA) has for more than a century attempted to develop consensus on how the profession should be governed. Starting with a set of *Canons* in 1908, through several revisions in 1969, 1982 and 2002, to its current *Model Rules of Professional Conduct*,¹⁵⁰ the ABA has been the hegemonic voice in the governance of the American legal profession.

¹⁴⁷ American Bar Association, “Total National Lawyer Count 1878-2013,” online: <http://www.americanbar.org/content/dam/aba/administrative/market_research/total_national_lawyer_counts_1878_2013.authcheckdam.pdf>.

¹⁴⁸ Based on US Census estimate of the American population in August 2013 at approximately 314 million; see The United States Census Bureau, online: <<http://www.census.gov/>>.

¹⁴⁹ Maute, *supra* note 76 at 54, n 5.

¹⁵⁰ A copy of the Model Rules can be found online at American Bar Association, *Model Rules of Professional Conduct*, online: <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html>.

Normally, the judicially-delegated regulatory regime of each of the states adopts the positions articulated by the ABA.¹⁵¹

The upshot of all of this is that unlike the UK or Australia, governments in the US, both federal and state, have had only a marginal voice in the regulation of the legal profession.¹⁵² In fact, the ABA formally “opposes the regulation of the practice of law by executive or legislative bodies.”¹⁵³ On top of this, consumer groups and corporations have also been excluded from any genuine participation in the conversation. The consequence has been a monologue rather than a dialogue.

The story of ABSs in the US can be analogized to that great American film genre, the zombie movie. In fact, it is more like a quartet, with the prequel, *A Shot to the Heart* (early 1920s); Kutak: *The Zombie Stirrs* (early 1980s); MDP: *Return of the Undead* (late 1990s); and, ABSs: *The Final Nail in the Coffin* (?). Because the quartet has only one director (the ABA), it is all filmed in black and white, and there is little nuance as to who are the villains and who are the heroes.

a) The Prequel: A Shot to the Heart

The original ABA 1908 *Canons of Professional Ethics* did not explicitly address the question of who could own or invest in a law firm.¹⁵⁴ Thus, at least at the level of theory, ABSs were legitimate.¹⁵⁵ In 1928, however, the Canons were amended to include Canons 33, 34, and 35 “which barred the

¹⁵¹ Despite the fact that, as a professional association, the ABA “has absolutely no authority over the practice of law anywhere in the country;” see Thomas Andrews, “Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?” (1989) 40 *Hastings L J* 577 at 596. The organization “wields a powerful influence” over the entities directly responsible for controlling the legal profession, including the state court systems and legislatures; see John Matheson and Edward Adams, “Not ‘If’ but ‘How’: Reflecting on the ABA Commission’s Recommendations on Multidisciplinary Practice” (2000) 84 *Minn L Rev* 1269 at 1274-75.

¹⁵² Ted Schneyer, “The Future Structure and Regulation of Law Practice” (2009) 44 *Ariz L Rev* 521 at 524-25.

¹⁵³ ABA House of Delegates, “ABA Resolution” (1989) 114 *ABA Reports* No 1 at 35.

¹⁵⁴ However at least five states had legislation that barred non-lawyers from practicing law, effectively disallowing nonlawyer ownership of a law firm, that dated back to the mid-1800s, and another 17 states had similar legislation that was passed between 1870 and 1920. Andrews *supra* note 151 at 579, n 15.

¹⁵⁵ An anonymous reviewer emphasized that “[t]he original ABA Canons were hortatory and not regulatory. When bar association membership became mandatory in some states the Canons were suddenly enforceable, and they also started to be cited and applied by courts. This led to a series of amendments and tightenings of the canons, including the 1928 amendments.” See also Benjamin H Barton, “The ABA, the Rules,

sharing of legal fees with non-lawyers and the formation of partnerships, between lawyers and non-lawyers, that engage in the practice of law ...”¹⁵⁶ These new rules were described as a product of the “combined wisdom” of the legislature, bench, and bar, since the ABA Special Committee tasked with supplementing the original Canons drew from decisions and statutes on the unauthorized practice of law as main justification for the changes they made.¹⁵⁷ However, some lawyers disputed this “wisdom,” claiming there was nothing “inherently ‘unethical’” about partnering with other professionals.¹⁵⁸ Nevertheless, the rules were added, and the primary reasons in support appear to have been to further prohibit the unauthorized practice of law, as well as limit influence of those outside the legal profession.¹⁵⁹ These rules have remained in place and applied broadly through the various iterations of the ABA’s *Model Code of Professional Responsibility* until the late 1970s.¹⁶⁰ During this period, the justifications for barring non-lawyer involvement in the legal services industry were further developed and strengthened. The ABA justified the prohibition on non-lawyers as a means to assure the public of their independence and professional judgment.¹⁶¹ This discourse, now often framed in terms of the “core values” of the profession, has been repeatedly used since to block the introduction of ABSs in the US.¹⁶²

and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons” (2005) 83 NCL Rev 411, 426-34.

¹⁵⁶ Matthew Bish, “Revising Model Rule 5.4: Adopting a Regulatory Scheme that Permits Nonlawyer Ownership and Management of Law Firms” (2008) 48 Washburn L J 669 at 673. See also American Bar Association, “Opinions of the Committee on Professional Ethics” (1967), as quoted in Nathan Crystal, “Core Values: False and True” (2001) 70 Fordham L Rev 747 at 753, n 27. The Canons, last amended in 1963, can be found on the ABA website “ABA Canons of Professional Ethics,” online: <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf>.

¹⁵⁷ Andrews *supra* note 151 at 585.

¹⁵⁸ *Ibid* at 586; see also Matheson and Adams *supra* note 151 at 1276.

¹⁵⁹ Barton, *supra* note 156 at 427; see also Matheson and Adams, *ibid* at 1274.

¹⁶⁰ Matheson and Adams, *ibid* at 1276-78. The rules were used to put a stop to attorneys who wanted to partner with accountants on income tax work and limiting an attorney who wanted to partner with a patent officer only to work that would be done by “laypersons under patent office rules.” The ABA also “thwarted” the attempts of lawyers who tried to create non-partnership business relationships with those outside the practice of law.

¹⁶¹ James Jones and Bayless Manning, “Getting at the Root of Core Values: A ‘Radical’ Proposal to Extend the Model Rules to Changing Forms of Legal Practice” (2000) 84 Minn L Rev 1159 at 1192.

¹⁶² *Ibid* at 1162 and 1186; Crystal, *supra* note 156.

b) Kutak: The Zombie Stirs (aka Fear of Sears)

Then, in 1977, the ABA appointed the Kutak Commission¹⁶³ with a mandate to revise and modernize its Model Rules. In 1981, as one of its many proposed reforms, the Kutak Commission suggested a relaxation of the prohibition on fee sharing. The Commission's Proposed Rule 5.4 stated:

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a non-lawyer ... but only if ...

- (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
- (b) information relating to the representation of a client is protected as required ...
- (c) the arrangement does not involve advertising or personal contract with prospective clients prohibited by [the advertising and soliciting rules]; and
- (d) the arrangement does not result in charging a fee that violated [the rule of fees].¹⁶⁴

The Commission argued that "the Rules in this area should focus on the actual potential for abuse ... rather than the particular form of the law practice,"¹⁶⁵ and criticized the "at best tenuous" link between working for a non-lawyer and interference with a lawyer's professional judgment that the current rules relied on.¹⁶⁶ The Commission argued their modification only made sense given that law firms are increasingly reliant on professionals from other fields and that lawyers are increasingly working for non-law firm organizations.¹⁶⁷

When the proposal reached the ABA's House of Delegates in 1983, however, it was the only proposed rule to be completely rejected and rewritten.¹⁶⁸ Several reasons were proffered, including ethical objections such as concern for a loss of professional independence and freedom to properly represent the client.¹⁶⁹ However, the objection that seemed to hold most sway was the "fear of Sears,"¹⁷⁰ an objection that foreshadowed the dire warnings against "Tesco law" twenty years later in the UK. The

¹⁶³ Formally named the ABA Commission on Evaluation of Professional Standards; Robert Kutak was the Commission chair.

¹⁶⁴ Matheson and Adams *supra* note 151 at 1280.

¹⁶⁵ Bish, *supra* note 156 at 675.

¹⁶⁶ Andrews *supra* note 151 at 594.

¹⁶⁷ Stephen Gillers and Roy Simon, *Regulation of Lawyers: Statutes and Standards* (Boston: Little, Brown, 1998) at 299; Matheson and Adams, *supra* note 151 at 1280, n 51.

¹⁶⁸ Matheson and Adams, *ibid* at 1280; Gillers and Simon, *ibid* at 300.

¹⁶⁹ Matheson and Adams, *ibid* at 1282.

¹⁷⁰ Bish, *supra* note 156 at 675.

concern was that large retailers or large accountancy firms would put traditional small-scale legal practices out of business.¹⁷¹

Once it was heard in the House of Delegates that the proposed rule change would indeed allow a company like Sears to sell legal services the debate was more or less kaput.¹⁷² In lieu of a liberalized rule, the House of Delegates adopted Model Rule 5.4 and entrenched a robust and multipronged prohibition on any forms of alternative business models. Every jurisdiction in the US, except for the District of Columbia,¹⁷³ adopted Model Rule 5.4.

c) MDP: Return of the Undead

One of the most frustrating things about zombies is that they are shape shifters – just when you think you have killed off Sears, it returns as MDP. And, of course the hero, the ABA, was ready for the challenge.¹⁷⁴

In the latter part of the late 1980s and early 1990s, the “Big Five” accountancy firms began to broaden their horizons. In order to provide enhanced services to their sophisticated clients, particularly in the form of integrated one-stop-shopping for legal and financial needs, accountancy firms started to propose the idea of a “multi-disciplinary practice” (MDP), “an integrated entity that provides legal services as one of several professional offerings through a single firm or provider.”¹⁷⁵ The idea made large law firms nervous; MDPs could allow non-lawyer firms to steal away and control a large share of the professional services market, a risk these law firms needed only to look to Europe to confirm.¹⁷⁶

In response, in 1998 the ABA established a Commission on Multi-Disciplinary Practices with a mandate to “study and report on the extent to

¹⁷¹ Andrews *supra* note 151 at 595, n 107. See the questions put by Al Conant: “You each have a constituency. How will you explain to the sole practitioner who finds himself in competition with Sears why you voted for this? How will you explain to the man in the mid-size firm who is being put out of business by the big [accounting] firms?”

¹⁷² Bernard Sharfman, “Modifying Model Rule 5.4 to Allow for Minority Ownership of Law Firms by Nonlawyers” (2000) 130 Geo J Legal Ethics 477 at 481; Edward Adams and John Matheson, “Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms” (1998) 86 Cal L R at 11.

¹⁷³ DC’s Rule 5.4(b) allowed for a very limited form of lawyer-non-lawyer partnerships where the firm is essentially a legal practice and the non-lawyer partners provide “ancillary services.”

¹⁷⁴ The following paragraphs rely heavily on the excellent account of these developments by Paton, “Multidisciplinary Practice Redux,” *supra* note 28.

¹⁷⁵ *Ibid* at 2200.

¹⁷⁶ Matheson and Adams, *supra* note 151 at 1273-74 and 1300.

which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public.”¹⁷⁷ Unsurprisingly, its membership was exclusively composed of members of the ABA. The Commission engaged in a somewhat open consultation process, holding “town-hall” style meetings and creating an interactive website.¹⁷⁸ The process also comprised several hearings with witnesses including consumer advocates, partners at accounting firms, law professors, chairs of ABA sections and committees, domestic and foreign lawyers, and others.¹⁷⁹ Even before the Commission reported on its findings, a number of state bar associations announced they would not accept MDPs and pre-emptively passed resolutions barring lawyers in their states from participating in them.¹⁸⁰ In contrast, international law associations at the time were doing what they could to support the development of MDPs in the US and elsewhere.¹⁸¹

In August 1999, the Commission issued its report and, to the surprise of many, it advanced a cautious recommendation in favour of allowing MDPs. Big Accountancy was bigger and more powerful than Sears, and it was rapidly advancing. It had to be stopped, or at least stalled. A few months later, the ABA’s House of Delegates decided that a decision on the recommendation of the Commission would have to be deferred until there could be additional study “[on whether] such changes will further the public interest without ... compromising lawyer independence ... and loyalty to clients.”¹⁸² The study took four months and resulted in an “Updated Background Report.” This report found strong empirical support in favour of MDPs. As Paul Paton has argued:

¹⁷⁷ Paul Paton, “What Happens after ‘Happily Ever After’? Regulatory Resistance and Rule-Making after Canadian and American Bar Association Resolution on Multidisciplinary Practice” (2003) 36 UBC L Rev 259 at 274 [Paton, “Happily Ever After”].

¹⁷⁸ *Ibid.* The ABA Commission on Multi-Disciplinary Practices also held public hearings between 1998 and 2000 and witnesses included consumer interest advocates, partners from accounting firms, law professors, domestic and foreign lawyers, and ABA representatives.

¹⁷⁹ Paton, “Multidisciplinary Practice Redux,” *supra* note 27 at 2208.

¹⁸⁰ Matheson and Adams, *supra* note 151 at 1287-88.

¹⁸¹ *Ibid.* at 1288. The Union Internationale des Avocats proposed universal ethics rules to safeguard lawyers’ professional standards to provide assurance to lawyers and professional associations currently contemplating the switch to MDPs.

¹⁸² American Bar Association Commission on Multidisciplinary Practices, “Updated Background and Informational Report and Request for Comments” (December 1999), online: <http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/febmdp.html> [Background Report].

This accorded with the testimony before the Commission from consumer groups, business clients, and others, whose “support for change created an unusual alliance among disparate groups.” They “uniformly contended that the entry of a new, alternative provider of legal services was in the best interest of the public.” Support for change from solo practitioners and small firms was great, with the Council of the ABA General Practice, Solo, and Small Firm Section urging that the rules barring MDPs be relaxed. All of the consumers of legal services who voiced their opinions to the Commission – from Fortune 500 companies to consumer representatives – urged the ABA Commission to change the rules to permit MDPs.¹⁸³

As well, consumers of all kinds, from individuals to some of the country’s largest organizations, pushed for the ABA to allow MDPs.¹⁸⁴

In response, the Background Report did endorse MDPs, but only those that were “lawyer-controlled.” It imposed somewhat severe restrictions that prohibited “passive investment,”¹⁸⁵ and permitted fee sharing only if lawyers had “the control and authority necessary to assure lawyer independence in the rendering of legal services.”¹⁸⁶ But MDPs had only been slowed down. They would have to be killed off.

Consequently, a few months later at its July 2000 meeting, the ABA’s House of Delegates rejected the Background Report’s recommendation and after a “debate” that lasted less than an hour voted 314-106 to reject MDPs because they were incompatible with the “core values of the legal profession.”¹⁸⁷ MDPs were dead – American lawyers could rest easy in their beds.

d) ABSs: The Final Nail in the Coffin(?)

But it was an uneasy slumber; they had nightmares that the zombie had not been finally killed, but had simply decamped to other lands. When the ABA awoke, the nightmare turned out to be a reality: the ABS had been accepted – in fact embraced and celebrated – in both Australia and the UK. And again the zombie had changed its shape. In its new guise it presented

¹⁸³ Paton, “Multidisciplinary Practice Redux,” *supra* note 27 at 2209, footnotes omitted.

¹⁸⁴ Paton, “Happily Ever After,” *supra* note 177 at 275.

¹⁸⁵ Paton, “Multidisciplinary Practice Redux,” *supra* note 27 at 2209.

¹⁸⁶ American Bar Association, *Report to the House of Delegates Commission on Multidisciplinary Practice* (2000), online: <http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalrep2000.html>.

¹⁸⁷ “MDP Recommendation – Center for Professional Responsibility” American Bar Association, online: <http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html>.

itself as a rational, indeed noble, two-handed benefactor. In the one hand it held the gifts of efficiency, investment opportunities and global competitiveness for lawyers and law firms; in the other, it proffered innovation and enhanced access to justice for the general public. The only hope was to remove the ABS's mask, and to reveal what it really was, an illegal alien. The weapon of choice would be the ABA's Ethics 20/20 Commission.

In August 2009, the ABA decided that in the light of increased globalization and rapid technological developments, it would be appropriate to revisit its *Model Rules of Professional Responsibility* to make sure they were still relevant and pertinent. In particular, Ethics 20/20 would "review lawyer ethical rules and regulation across the United States in the context of the global legal services marketplace."¹⁸⁸ ABSs were part of the list of issues. The Commission framed the challenge as follows:

How can the core principles of client and public protection be satisfied while simultaneously permitting U.S. lawyers to participate on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures?¹⁸⁹

The ABA mandated that in seeking an answer to this challenge the Commission was to be directed by three core principles: "protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent and self-regulated profession."¹⁹⁰ With these principles it looked like the fight was rigged.

The Commission received more than 30, mostly negative, submissions from lawyers and bar associations.¹⁹¹ In November 2009, the Ethics 20/20

¹⁸⁸ American Bar Association, News Release, "ABA President Carolyn B Lamm Creates Ethics Commission" (4 August 2009).

¹⁸⁹ American Bar Association, "Preliminary Issues Outline" ABA Commission on Ethics 20/20 (19 November 2009) at 6, online: <<http://www.americanbar.org/content/dam/aba/migrated/ethics2020/outline.authcheckdam.pdf>>.

¹⁹⁰ *Ibid* at 2.

¹⁹¹ Schneyer, "Professionalism," *supra* note 28 at 118-19 and 120. Schneyer, a law professor emeritus who was a co-chair of the working group on ALPS, noted that many of those against the proposed changes used the "idiom of professionalism" to make their arguments, which led to a strong bias in favour of the status quo. There were some submissions in support of ABS and increasingly the permissible level of nonlawyer ownership of law practices, notably from the leadership of the National Federation of Paralegal Associations and from Tom Morgan, an expert in regulation of the practice of law. References to these submissions are in Schneyer, "Professionalism," *ibid* at 82, n 20-21. A number of comments to the ALPS working group are available at "Alternative Law Practice Structures Comments Chart – Last Updated 8/28/2012" American Bar

Commission issued a Preliminary Issues Outline, and in the context of ABSs identified five possible options:

- A) Limited Lawyer / Non-Lawyer Partnerships with a Cap on Non-Lawyer Ownership;
- B) Lawyer/Non-Lawyer Partnerships with No Cap on Non-Lawyers Ownership (the DC approach);
- C) MDPs that offer both Legal and Non-Legal Services;
- D) Capped Non-Lawyer Passive Investment;
- E) Publicly-Traded Law Firms.¹⁹²

A Working Group (again solely made up of ABA representatives) was established to consider these options and it noted the importance of access to justice.¹⁹³ What followed, however, was the equivalent of death by a thousand cuts.

First, in February 2011 without any genuine explanation, the Working Group simply “ruled out” options D and E. These were the options that most closely resembled developments in Australia and the UK. The Working Group noted, “Both have recently been adopted abroad but so far have little track record, [they] would depart sharply from U.S. traditions, and [they have] raised significant ethical concerns among Commission members and certain commentators.”¹⁹⁴ Soon thereafter, on April 5, 2011, the Commission presented an “Issues Paper Concerning ABS” calling for

Association, online: <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/alps_working_group_comments_chart.authcheckdam.pdf>.

¹⁹² American Bar Association, “For Comment: Issues Paper Concerning Alternative Business Structures” (Chicago: ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures, 5 April 2011) at 17 [ABA April 2011 Issues Paper].

¹⁹³ American Bar Association, “For Comment: Discussion Paper on Alternative Law Practice Structures” (2 December 2011) at 4, online: <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf> [ABA December Discussion Paper]. In its draft report, the Commission noted:

The Commission’s work was guided by the Association’s and the profession’s longstanding commitments to protecting the public; preserving core professional values; and maintaining a strong, independent and self-regulated profession. The Commission has also been mindful of the need to increase access to justice and to identify opportunities that might permit lawyers to innovate in order to respond to unmet legal needs and enhance the delivery of legal services to their clients (footnote omitted).

¹⁹⁴ *Ibid.*; ABA April 2011 Issues Paper, *supra* note 193 at 2, online: <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf>.

feedback on the three remaining options.¹⁹⁵ But within two months, in June 2011, it had taken option C off the table, again with little explanation.¹⁹⁶ While ABA President Carolyn Lamm stated that the Association “can’t ignore what happened in the UK and Australia,”¹⁹⁷ the Commission indicated that any change to current rules surrounding lawyer-nonlawyer partnerships would likely be limited in scope.¹⁹⁸ Accordingly, by December, the Commission had eliminated option A leaving only one possibility, option B,¹⁹⁹ a modified and narrowed version of the DC Rule that would allow for very restricted lawyer-controlled ABSs:

- Such law firms would be restricted to providing legal services;
- Non-lawyer owners would have to be active in the firm, providing services that support the delivery of legal services by the lawyers (so the firm could not be a multidisciplinary practice);
- Non-lawyer ownership and voting interests would be restricted by a percentage cap sufficient to ensure that lawyers retain control of the firm;
- Non-lawyer owners would be required to agree in writing to conduct themselves in a manner consistent with the *Rules of Professional Conduct* for lawyers; and
- Lawyer owners would be responsible for both ensuring that the non-lawyer owners in their firm were of good character and supervising the non-lawyers in regard to compliance with the *Rules of Professional Conduct*.²⁰⁰

¹⁹⁵ *Ibid.*

¹⁹⁶ Paton, “Multidisciplinary Practice Redux,” *supra* note 27. See also American Bar Association, News Release, “ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms” (16 April 2012).

¹⁹⁷ “Ethics 20/20 Panel Not Sold on Ownership Issue” (2012) 98 ABA Journal.

¹⁹⁸ James Podgers, “Tough Call: Ethics 20/20 Commission Ponders Limited Nonlawyer Ownership of Law Firms” (2012) 98 ABA Journal 1.

¹⁹⁹ *Ibid.* Jamie S Gorelick, one of the commission’s co-chairs and a partner at Wilmer Cutler Pickering Hale and Dorr in Washington, DC, is quoted as saying, “Though some advocated even greater flexibility in structuring relationships with nonlawyers, the commission has taken those proposals off the table, ... so that what remains for consideration is a version of the rule applicable in Washington, D.C., for many years, but with additional protections to ensure that law firms are run by lawyers and solely for the purpose of delivering legal services.”

²⁰⁰ ABA December Discussion Paper, *supra* note 193 at 2.

But even this very modest proposal was too much for some members of the ABA. In March 2012, the Illinois Bar Association in conjunction with the Senior Lawyers Division filed a resolution with the ABA reasserting the “core values of the legal profession” and condemning “the evils of fee sharing.” This core values rhetoric, it has been argued, is really nothing more than a tool “to maintain professional independence from other regulatory forces and to help sustain a professional monopoly over the delivery of legal services.”²⁰¹ Nevertheless, within a month, on April 16, 2012, by way of a news release, the co-chairs of the Ethics 20/20 Commission announced that it was abandoning any new rule that would allow for ABSs, including the modified DC Rule.²⁰² The co-chairs said this decision was made based on “feedback ... from other bar associations and individual members of the [legal] profession.”²⁰³ The rejection was affirmed by the House of Delegates in August 2012.²⁰⁴ The alien had been revealed, and the coffin had been nailed shut. The legal profession, through the ABA’s House of Delegates, had prevailed.

e) Yet Another Sequel?

But ... the story may not really be over in the US. In August 2013, the ABA Committee on Ethics and Professional Responsibility issued a formal opinion to the effect that American lawyers could split fees with law firms in other jurisdictions, such as the UK or District of Columbia, where fee-sharing with non-lawyers is allowed.²⁰⁵ The opinion stressed that sharing these fees still technically complied with the ABA rule prohibiting fee-sharing with non-lawyers, since the American firms would be dividing fees with only the lawyers in the another jurisdiction. Whether those other

²⁰¹ Crystal, *supra* note 156 at 773.

²⁰² American Bar Association, News Release, “ABA Commission On Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms” (16 April 2012).

²⁰³ James Podgers, “Summer Job” (2012) 98 ABA Journal 27.

²⁰⁴ Paul Paton, “Hear No Evil: Are Some Values so Fundamental to the Profession That They Can’t Even be Debated?” *Lexpert Magazine* (October 2012) at 80.

²⁰⁵ American Bar Association, “Division of Legal Fees with Other Lawyers Who May Lawfully Share Fees With Nonlawyers” Formal Opinion 464 by the Committee on Ethics and Professional Responsibility (19 August 2013), online: <http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_464.authcheckdam.pdf>. The opinion stated, “Lawyers subject to the Model Rules may work with other lawyers or law firms practicing in jurisdictions with rules that permit sharing legal fees with nonlawyers. Where there is a single billing to a client in such situations, a lawyer subject to the Model Rules may divide a legal fee with a lawyer or law firm in the other jurisdiction, even if the other lawyer or law firm might eventually distribute some portion of the fee to a nonlawyer, provided that there is no interference with the lawyer’s independent professional judgment.”

lawyers subsequently divided some of their share of the fee with non-lawyers is apparently seen as a separate transaction and therefore separate issue.²⁰⁶ An “important limitation” on the statements in the formal opinion is that “a lawyer must not permit a nonlawyer in the other firm to interfere with the lawyer’s own independent and professional judgment.”²⁰⁷ It’s back!

In sum, the protracted debates in the United States on the legitimacy of ABSs have been monopolized by the ABA, to the exclusion of governments, consumer groups and even corporations. The twin justifications in support of ABSs – increased competitiveness and enhanced access to justice – have been eclipsed by the ABA’s emphasis on the core values of the legal profession. But try as it might, the ABA has been unable to completely obliterate the idea of ABSs, and as the globalization of the legal profession continues, we expect that the calls for ABSs in the United States will become more insistent.²⁰⁸

Because governance of the Canadian legal profession is not dominated by a monolith like the ABA, the conversations around ABSs in this country are likely to more closely resemble the debate that preceded ABSs in the other commonwealth countries. However, the outcome of the debate in Canada is harder to predict. As has been demonstrated, the outcome essentially depends on the interaction between the professional societies, corporations, consumers, and importantly, government. The unique dynamics in Canada have so far yielded a uniquely, perhaps typically, Canadian outcome – compromise.

²⁰⁶ *Ibid* at 3-4.

²⁰⁷ *Ibid* at 5; see also Jacob Gershman, “Softening Stance On Fee Sharing With Non-Lawyers,” *The Wall Street Journal* (20 August 2013). James E Moliterno from Washington and Lee University School of Law, who has advocated for rules to permit fee-sharing, is quoted as saying, “This is a positive step. It’s not everything, but it’s certainly a step in the right direction.”

²⁰⁸ John Hyde, “UK is ‘living laboratory’ for ABS innovation, says US expert,” *The Law Society Gazette* (8 November 2013) online: <<http://www.lawgazette.co.uk/practice/uk-is-living-laboratory-for-abs-innovation-says-us-expert/5038617.article>>.

4) *Canada: Goldilocks (Not Too Hard, Not Too Soft)*

Currently in Canada, there are approximately 100,000 lawyers and 35,000 Quebec notaries,²⁰⁹ or one for every 260 people.²¹⁰ Unlike the UK and Australia, but like the US, it is a unified profession with no formal distinction between barristers and solicitors. As explained in Part 1, historically there have been two voices that have tended to speak for the Canadian legal profession, the law societies (the official voice) and the CBA (the unofficial voice). To elaborate, Canada is a federation of ten provinces and three territories and one federal government. Constitutionally, regulation of the legal profession falls under the jurisdiction of the provinces and territories, not the federal government. Consequently, it is more like Australia than the UK. Furthermore, authority in the provinces and territories to govern the profession rests primarily with the legislature and each jurisdiction has a legal profession act, which provides the basic statutory framework for the governance of the profession. That statutory framework, and regulations made pursuant to it, delegates primary responsibility to the law society of each province or territory. In this regard Canada is similar to Australia and the UK and distinct from the US where primary authority rests with the supreme court of the each state rather than a legislative body, or its delegate. This does not mean that the judiciary has no role to play in the governance of the legal profession – judges have inherent jurisdiction over what happens in their courtroom and they have, for example, taken the lead in articulating the principles on conflicts of interest – but it is a supplementary role to that of the legislature and the law societies.²¹¹

²⁰⁹ The role of notaries in Quebec dates back to French colonization of the province in the early seventeenth century. The notarial profession was imported from France, and remained when Britain took control of the colony in the late 1700s. At that time, the British instituted a division between lawyers and notaries that resembled the barrister/solicitor division in England. Notaries today work in the areas of real estate, succession, family, and commercial law; see “Chambre des notaires,” online: <<http://www.cmq.org/fr/profession-notaire.html>>.

²¹⁰ This is based on Statistics Canada’s population estimate of 35,141,542 for April 2013 and the Federation of Law Societies’ 2013 estimates of the number of legal professionals in Canada; see “Population Estimate,” Statistics Canada, online: <<http://www.statcan.gc.ca/start-debut-eng.html>> and “Canada’s Law Societies,” Federation of Law Societies of Canada, online: <<http://www.flsc.ca/en/canadas-law-societies/>>.

²¹¹ C.f. *Jabour v Law Society of British Columbia* (1979), 98 DLR (3d) 442 (BC SC); *Wallace v Canadian National Railway*, 2013 SCC 39, 446 NR 1. See Brent Cotter and Richard Devlin, “Three Strikes and You’re Out ... Or Maybe Not: A Comment on *Wallace v CN Railway*” (2014) 92 Can Bar Rev [forthcoming]. There are hints that this might be shifting. In 2013 in case involving money laundering legislation which imposed a duty to report on lawyers with reports to suspicious transactions, the BCCA elevated the principle of the independence of the legal profession to a fundamental constitutional

A system of thirteen distinct regulators has generated problems of coherence and consistency. Consequently the various law societies have established an umbrella organization, the Federation of Law Societies of Canada (FLSC), to serve as a co-ordinating body. The FLSC has no legal authority but over the last fifteen years it has, increasingly, exercised its influence on the regulation of the profession.

The CBA, as indicated in Part 1, has no formal authority in the regulation of the legal profession. It is a voluntary organization that represents approximately 37,000 lawyers, judges, notaries, law teachers, and law students from across Canada.²¹² Historically, however, it has played an influential role in articulating the standards of the legal profession. The CBA first adopted its *Canons of Professional Conduct* almost a century ago in 1920 and revised them on several occasions since that time culminating its current *Code of Professional Conduct (2009)*. Over the course of that century, many Canadian law societies adopted the CBA Code in whole or substantially as their own, while others drew heavily upon it in crafting their own codes, including the FLSC when it drafted its own *Model Code* in the mid to late 2000s. As we shall now see, that influence has been particularly stark in the Canadian conversation on whether to adopt ABSs.

In brief the Canadian response to ABSs has been, as in the US, a monologue within the Canadian legal profession. Neither governments nor consumers nor corporations have had much to say about the virtues or vices of ABSs. Again, like the US, the conversation can be broken down into two distinct phases – the MDP stage and the “emergent” ABS stage. The outcome on the MDP stage has been somewhat different from the US, however, and the ABS stage is very much a work in progress.

a) MDPs

In the previous paragraph we indicated that the conversation on MDPs took place entirely within the legal profession, similar to the US. A more accurate statement, however, might be that there were in fact three parallel (but intersecting) conversations – one among some of the law societies (specifically those of Ontario, British Columbia, and Quebec), another in the CBA, and a third in the FLSC. As a result the story is more complicated than the US, and it has resulted in a different outcome.

principle. The ramifications of this move are potentially far reaching; see *Federation of Law Societies of Canada v Canada (Attorney General)*, 2013 BCCA 147, 41 BCLR (5th) 283.

²¹² “About the Canadian Bar Association,” CBA, online: <<http://www.cba.org/CBA/about/main/>>.

MDPs were a popular topic of discussion within and amongst the provincial law societies in the late 1990s and early 2000s. Without drawing on the phrase “access to justice” explicitly, the law societies often cited related motivations for pursuing MDPs, such as consumer “convenience,”²¹³ increased competitiveness in the legal services market,²¹⁴ and protecting the public interest.²¹⁵ At the same time, another major motivation for law societies to address MDPs was the fear of competition from accounting firms, some of which were offering legal services in conjunction with their main business. Which profession would control MDPs was a contentious issue,²¹⁶ and therefore it wasn’t just the public interest, but also lawyer’s own professional interests, that were on the line. More recently, the CBA has released a report that endorses a “team” approach to provision of legal services that envisions lawyers working alongside other professionals.²¹⁷ We will begin with a discussion of developments at the provincial law societies, and then turn to the CBA and the FLSC.

i) Ontario

The regulator for lawyers in Ontario is officially called the Law Society of Upper Canada (LSUC), harking back to its pre-Confederation roots. In 1997, the LSUC set up a “Futures” Task Force to consider the regulations for, and the economic circumstances of, the legal profession and the marketplace for legal services. The idea was that as the legal profession evolved in Canada and across the world, the Law Society’s rules and regulations “should be responsive and should not unnecessarily impede creative practice.” A working group from within this Task Force was assigned to examine MDPs specifically and determine what the Law Society’s response to MDPs should be.²¹⁸ The working group consulted with lawyers and chartered accountants and surveyed Law Society members.²¹⁹ In 1998 the Task Force released its *Final Report*. It emphasized that the push for MDPs was primarily coming from “the Big

²¹³ The Law Society of British Columbia, “Consultation on Multi-Disciplinary Practice” *Bencher’s Bulletin* No 1 July-August Supplement, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=1904&t=Consultation-on-multi-disciplinary-practice>> [LSBC Consultation].

²¹⁴ The Law Society of Upper Canada, *The “Futures” Task Force – Final Report of the Working Group on Multi-Discipline Partnerships* (25 September 1998) at 11 [LSUC Working Group Report].

²¹⁵ *Ibid.*

²¹⁶ Kent Roach and Edward Iacobucci, “Multidisciplinary Practices and Partnerships: Prospects, Problems and Policy Options” (2000) 79 *Can Bar Rev* 1 at 7.

²¹⁷ E-mail from Jack Olsen, Staff Lawyer, Ethics, Law Society of British Columbia (15 August 2013) [on file with the authors].

²¹⁸ LSUC Working Group Report, *supra* note 215 at 10-11.

²¹⁹ *Ibid* at 12

Five” accounting firms.²²⁰ While it outlined several potential regulatory options it recommended only one – lawyer-controlled MDPs that only offered legal services – primarily on the basis that only this model would protect the independence of the legal profession.²²¹

At the same time as the Task Force was conducting its work, importantly and apparently uniquely, the government of Ontario in December 1998 amended the *Law Society Act* to expressly give the LSUC power to make by-laws:

62 (0.1) 32. governing the practice of law by any person, partnership, corporation or other organization that also practises another profession, including requiring the licensing of those persons partnerships, corporations and other organizations, governing the issuance, renewal, suspension and revocation of licenses and governing the terms and conditions that may be imposed on licenses.²²²

Hansard records show that the LSUC assisted in drafting the amendments and lobbied the government to pass this bill that would give them these powers.²²³ This appears to have been a pre-emptive move to secure control for the Law Society should MDPs or ABSs rear their head at any point in the future. While the LSUC may have been strategizing over its long-term interests, lawmakers appeared pre-occupied and no one publicly questioned why the Law Society sought ability to govern the practice of law by non-lawyer professionals. At a couple of points, the debate was halted for lack of quorum, and even when enough members were sitting, discussion of the bill focused on the government’s assertion that the bill improved consumer protection and devolved to other issues (some of which were tangentially related to the bill and some not: a backlog of cases in the courts, Cuban cigars, the venerable history of the Law Society of Upper Canada, and other topics). The Ontario section of the CBA was concerned “that the provisions give the law society perhaps more authority over the practising legal profession than is warranted,”²²⁴ particularly the provisions that pertained to search and seizures filed during an investigation.

²²⁰ *Ibid* at 16.

²²¹ *Ibid* at 54. See also The Law Society of Upper Canada, *The “Futures” Task Force – Report of the Working Group on Multi-Discipline Partnerships Implementation*

Phase – Report 2 – Report to Convocation, (28 May 1999) at 1, online: <<http://www.lsuc.on.ca/media/mdprepor.pdf>> [LSUC Working Group Report 2].

²²² *An Act to Amend the Law Society Act*, RSO 1998, c 21 s 29.

²²³ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (7 October 1998) (Peter Kormos).

²²⁴ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (7 October 1998) (John L Parker).

On April 30, 1999, under the authority of the recently passed amendments to the *Law Society Act*, the LSUC passed By-law 25,²²⁵ which accepted the core recommendations of the Futures Task Force and safeguarded a controlling role for the law society and lawyers: only persons, not corporations, could join a lawyer in an MDP, the MDP was to be a law practice “in which the services of non-lawyers support or enhance the delivery of the legal services,” and the MDPs had to be approved by the law society.²²⁶ The by-law was passed with relatively minimal discussion and little controversy.

In the course of its deliberations the Futures Task Force identified a particular concern with what it called “captive law firms” – referring to a law firm that was formally independent, but functionally a subcomponent of a large accounting practice.²²⁷ In response, in June 1999, the LSUC established a new “Multi-Disciplinary Task Force” to come up with proposals. The result was By-law 32 “Affiliations with Non-Members,”²²⁸ which instituted a series of restrictions that virtually eliminated the possibility of such captive firms. Again it was passed with little real discussion or debate in May 2001.

In 2007, the LSUC revoked By-laws 25 and 32 and created By-law 7 in their place, which provides for the restricted version of multi-disciplinary partnerships that are permitted in Ontario today.²²⁹ The licensed lawyer must provide professional liability insurance for their partners and six specific conditions outlined in Part III of By-law 7 have to be satisfied, including a requirement that the other professional be of good character and comply with all the same rules as lawyers do, such as the rules of practice and procedure and the Law Society’s professional conduct rules.²³⁰ Under this regime, the LSUC has approved 20 MDPs in Ontario.²³¹

In sum, the LSUC had determined that there could be MDPs, but if their scope of practice was to remain legal, control would remain with lawyers, and other professionals within the MDP would be subordinate.

²²⁵ See “Revoked By-laws,” The Law Society of Upper Canada, online: <<http://www.lsuc.on.ca/with.aspx?id=423>>

²²⁶ LSUC Working Group Report, *supra* note 215 at 1.

²²⁷ *Ibid* at 54-55.

²²⁸ “Revoked By-laws,” *supra* note 225.

²²⁹ “Multi-Discipline Practice and Multi-Discipline Partnership” The Law Society of Upper Canada, online: <<http://www.lsuc.on.ca/with.aspx?id=2147490461>>.

²³⁰ The Law Society of Upper Canada “By-Law 7: Business Entities” at 14, online: <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485808>>.

²³¹ E-mail from Juda Strawczynski, Counsel, Office of the Director, Policy & Tribunals, Law Society of Upper Canada, (20 August 2013).

ii) British Columbia

The Ontario approach was eventually copied in BC, but not without some debate and capitulation. Like every other province in Canada, BC initially had a prohibition on fee-sharing, and therefore MDPs were presumptively prohibited. In 1999, however, the Law Society of British Columbia (LSBC), again through a task force, began a series of consultations and discussions with BC lawyers on whether to allow MDPs. Unlike Ontario, these discussions were a little more nuanced and diverse: they explicitly identified three core issues – ethical principles, the economic aspirations of the profession and the needs of clients/consumers. On this last point the Task Force explicitly noted that

a client's problems can act across professional boundaries, and it is the potential convenience, lower cost, better and more comprehensive advice that may attract consumers to a multidisciplinary practice.²³²

This initial openness to MDPs that provide a variety of services stands in direct contrast to the LSUC's restriction that MDPs be engaged in the practice of law only. This expansive conception of MDPs was championed by the then president of the LSBC,²³³ and in December 2001, the Task Force presented a relatively open proposal that would allow for non-lawyer owned MDPs. The vote split 14:13 in favour of the proposal. The LSBC regulations required a two-thirds majority for a motion to succeed, however, so the motion failed.²³⁴

In 2007, the LSBC took notice of a report released by Canada's Competition Bureau, which suggested self-regulating professions consider relaxing restrictions on business structures.²³⁵ The report specifically noted that outright bans on MDPs among Canadian professionals could be impinging on the benefits of competition and called on the provincial law societies that did not yet permit MDPs to consider them.²³⁶ A couple of

²³² LSBC Consultation, *supra* note 213.

²³³ Paton, "Multidisciplinary Practice Redux," *supra* note 27 at 2224-25.

²³⁴ The Law Society of British Columbia, "Benchers say *no* to multi-disciplinary practice" (2001) *Bencher's Bulletin* No 6 November-December Supplement, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=1854&t=Benchers-say-no-to-multi-disciplinary-practice>>.

²³⁵ The Law Society of British Columbia, "Competition Bureau releases report on self-regulating professions" (2007) *Bencher's Bulletin* No 5 December Supplement, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=583&t=Competition-Bureau>>.

²³⁶ Canada, Competition Bureau, *Self-Regulating Professions – Balancing Competition and Regulation* (Ottawa: Competition Bureau, 2007) at Executive summary and Section 4: Lawyers, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02525.html>>: Multidisciplinary practices translate into cost efficiencies and

years later, on December 11, 2009, the Benchers of the LSBC approved amendments to permit a limited form of MDPs to exist in the province.²³⁷ This move was in response to a request from at least one law firm in BC (and perhaps others), which was already operating an MDP in Ontario and had asked the LSBC to allow MDPs in the same way they are permitted in Ontario. As a result, the MDP rules in BC also require that the non-lawyer's professional services "support or supplement the practice of law."²³⁸

Between 2001 and 2009, BC's original open approach to MDPs had been reversed, and an Ontario-like rule substituted in its place. The LSBC stated this permission of MDPs was a step toward achieving the goal of increasing public confidence in lawyers and emphasized that "[m]ultidisciplinary partnerships enable firms to reduce overhead while the public benefits by having a range of professional services in one

increased consumer choice and convenience. Restricting this form of business structure may cause harm to consumers, since they cannot take advantage of the numerous benefits of a one-stop-shop. The Law Society of Upper Canada and the Barreau du Québec, by allowing multidisciplinary practices, have demonstrated the feasibility of such structures. That they do allow multidisciplinary practices is evidence in itself that other law societies should reconsider the cost-benefit analysis of their restrictions on multidisciplinary practices.

Further, the report recommended

Law societies should consider less intrusive mechanisms than prohibiting multidisciplinary practices to circumvent possible conflicts of interests. Examples to follow are those of the Law Society of Upper Canada and the Barreau du Québec, both of which allow lawyers to form partnerships with non-lawyers, under certain conditions and appropriate regulation.... In order to allow for multidisciplinary practices, law societies will have to remove restrictions that currently prohibit or discourage lawyers from working in multidisciplinary arrangements with other professionals. Instead, they should allow the following: lawyers to split, share or divide clients' fees with non-lawyers; lawyers to enter into arrangements with non-lawyers regarding sharing fees or revenues generated by the practice of law; and law corporations to carry on activities other than providing legal services or services directly associated with providing legal services.

²³⁷ Telephone conversation with Jack Olsen, Staff Lawyer, Ethics, Law Society of British Columbia. (13 August 2013); The Law Society of British Columbia "Annual Review 2009" at 4, online: <<http://www.lawsociety.bc.ca/docs/publications/ar/2009-annualreview.pdf>>; see also David Bilinsky, "BC Authorizes Multi-Disciplinary Partnerships" *Slaw* (18 December 2009), online: <<http://www.slaw.ca/2009/12/18/bc-authorizes-multi-disciplinary-partnerships/>>.

²³⁸ The Law Society of British Columbia, "Law Society Rules: Part 2 – Membership and Authority to Practice Law, Division 1 – Practice of Law Rules 2-23.3," online: <<http://www.lawsociety.bc.ca/page.cfm?cid=979#mdp>>.

convenient location.”²³⁹ As of the spring of 2011, however, the Law Society had not received any MDP applications;²⁴⁰ as of August 2013, the LSBC is reviewing only a couple of applications, but no MDPs have yet been approved in BC.²⁴¹

iii) *Quebec*

The other Canadian jurisdiction where MDPs are permitted is Quebec, where the partnership must be controlled by lawyers, but there is no requirement that the other professionals support a primary practice of law. Since April 2004, Section 3.05.14 of Quebec’s *Code of Ethics* has permitted lawyers to share fees with any other member of a “professional order,” or those listed in Schedule I of the Code.²⁴² That list includes doctors, engineers, architects, and even acupuncturists.²⁴³ In addition, Schedule A of the *Règlement sur l’exercice de la profession d’avocat en société et en multidisciplinarité*, a regulation in force since May 2004, allows lawyers to share fees with members in good standing of a law society constituted outside Quebec, patent agents registered with the Commissioner of Patents under the *Patent Act*, members in good standing of the Canadian Institute of Actuaries, and with members of the *Chambre de l’assurance de dommages* [damage insurance adjusters and brokers], and the *Chambre de la sécurité financière* [financial planners and insurance agents].²⁴⁴ Importantly, the regulation stipulates 50 per cent ownership by either lawyers or those referred to in Schedule A, and also requires a majority of board members to be lawyers or else fall under the categories

²³⁹ Law Society of British Columbia, “Annual Review 2010” at 5, online: <<http://www.lawsociety.bc.ca/docs/publications/ar/2010-annualreview.pdf>>.

²⁴⁰ Dave Bilinsky, “Practice Tips: Multi-disciplinary Practice,” *Bencher’s Bulletin*. (2011) No 1, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=2111>>.

²⁴¹ E-mail from Jack Olsen, Staff Lawyer, Ethics, Law Society of British Columbia (15 August 2013).

²⁴² Rule 3.05.14 in *Advocates – Code of Ethics (Amend)*, OIC 351-2004, (2004) GOQ II, 1272. In Quebec, all professional orders must submit their regulations to the Office des professions du Québec, a five-member, government-appointed board comprised of professionals and one layperson, which in turn may recommend the regulation to the government, which may approve the regulation with or without amendment; see *Professional Code*, RSQ, c C-26 at s 95, online: <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_26/C26_A.HTM>.

²⁴³ *Ibid.*

²⁴⁴ RRQ 2011, c B-1, r 9, Schedule A. See also online: <<http://www.canlii.org/en/qc/laws/regu/rrq-c-b-1-r-9/latest/rrq-c-b-1-r-9.html>>. The regulation has been in force since 2004 and was amended in 2008 to remove the requirement that a notice be published in a newspaper whenever a new company was formed; see Barreau du Québec, “Pour les Avocats: Exercice en société et en multidisciplinarité (SPA-SENCRL),” online: <<http://www.barreau.qc.ca/fr/avocats/cabinet/spa-sencrl/>>.

in Schedule A. The lawyers must also make a pledge to the Barreau du Quebec that all members of the partnership comply with rules of law so as to permit the lawyer members to carry on their professional activities, especially with regard to lawyer-client confidentiality and other issues, including professional independence, prevention of conflicts of interest, activities reserved to lawyers, liability insurance, professional inspection, advertising, billing and trust accounts.²⁴⁵

iv) Other Canadian Jurisdictions

Some other provinces and territories in Canada explicitly prohibit fee-sharing with non-lawyers and therefore MDPs are prohibited (Manitoba, Nova Scotia, Newfoundland and Labrador, Northwest Territories, Yukon, and Nunavut). Others have professional codes that prohibit fee-sharing with non-lawyers, but make an explicit exception for partners in a multidisciplinary practice (Alberta, Saskatchewan, Prince Edward Island).²⁴⁶ These exceptions are to facilitate inter-jurisdictional practice for law firms that operate in jurisdictions that permit MDPs,²⁴⁷ and appear to be copied from the FLSC's model code of professional conduct. The *Professional Code* for lawyers in New Brunswick, while referring to the CBA's *Striking a Balance* report, permits MDPs so long as the lawyers involved "maintain ... all professional standards required of them as lawyers."²⁴⁸

In some of these provinces, committees were established to study MDPs in the early 2000s, but the committees' activities appear to have petered out by the middle of the decade. In Alberta, lack of demand from the profession and the potential to interfere with the profession's core values were cited as reasons to abandon the move toward MDPs.²⁴⁹ Susan Billington, Policy and Program Counsel at the Law Society of Alberta, said many of the obstacles to MDPs were resolved, such as ways to deal with

²⁴⁵ *Ibid* at Annex B (English translation).

²⁴⁶ The Law Society of Alberta, *Code of Conduct*, online: <<http://www.lawsociety.ab.ca/files/regulations/Code.pdf>>. See rules 2.06 (7) and 2.06 (8)>. The same rules are contained in the Law Society of Saskatchewan *Code of Professional Conduct*, and the Federation of Law Societies' *Model Code of Conduct*, as adopted by the Law Society of Prince Edward Island.

²⁴⁷ E-mail from Susan Billington, Policy and Program Counsel, Law Society of Alberta (15 August 2013).

²⁴⁸ Law Society of New Brunswick. *Code of Professional Conduct*, online: <http://www.lawsociety-barreau.nb.ca/assets/documents/CODEOFPROFESSIONALCONDUCT_February_2009.pdf>.

²⁴⁹ Susan Billington, "Benchers put MDP debate to rest" *The Advisory* (July/August 2003) at 7, online: The Law Society of Alberta <http://www.lawsociety.ab.ca/files/newsletters/Advisory_Volume_1_Issue_3_JulAug2003.pdf#page=7>.

conflicts of interest and manage professional liability insurance, but some issues could not be reconciled. Particularly, partnership law that deems knowledge between and amongst partners may cause inadvertent waivers of solicitor-client privilege.²⁵⁰

v) *CBA*

Initially, the CBA's foray into a discussion of MDPs was generated not by concerns about access to justice but rather whether Canadian law firms were flexible enough to respond to the needs of their international clients.

In 1997 the CBA created an International Practice of Law Committee (IPLC) to analyze the impact of globalization and the emergence of MDPs. The Committee was entirely populated by lawyers. In short order, in 1998, the IPLC issued an *Interim Report* that would allow MDPs but only if they were law-focused, lawyer-controlled and exclusively regulated by the legal regulator – the provincial law society. The door had been opened, but only narrowly.

There then ensued several more months of consultations with CBA branches, managing partners at law firms across the country, and the law societies (most of the Big Five accountancy firms declined to be involved).²⁵¹ Following this the IPLC issued a final report in August 1999 entitled *Striking a Balance* and surprised many by recommending open scope, non-lawyer controlled MDPs. It argued:

Choice, competition and freedom of association are aspects of the public interest that should be given more weight. At the same time, the Committee is not persuaded that the core values of the legal profession can be protected only by lawyers controlling MDPs or by MDPs only delivery legal services.²⁵²

The cracked door had become a barn door.

Paul Paton has described in detail what happened when the resolution supporting MDPs came up at the meeting of the CBA Council in August

²⁵⁰ E-mail from Susan Billington, Policy and Program Counsel, Law Society of Alberta (16 August 2013).

²⁵¹ Canadian Bar Association, *Striking a Balance: The Report of the International Practice of Law Committee on Multi-Disciplinary Practices and the Legal Profession*, (1999) at 14-15 (Chair: Thomas Heintzman) [CBA, *Striking a Balance*]. The exception was Ernst & Young. A representative from that company met with the CBA president in late June, 1999.

²⁵² *Ibid* at 5.

2000.²⁵³ Despite vociferous objections by the Ontario representatives, split positions within the CBA membership and leadership, procedural shenanigans, and petulant resignations, the Council voted in favour of a redesigned resolution that would allow for relatively open-ended, non-lawyer controlled MDPs so long as they pledged to adhere to the core values and ethical obligations of the legal profession. But then, as Paton recounts, six months later in February 2001, at its mid-winter meeting, the CBA Council passed a resolution that “clarified” the previous resolution, the impact of which was to ensure that only lawyers would have “effective control” over MDPs.²⁵⁴ This took the CBA back to its position in the Interim IPLC report and closer to the position of the LSUC. Arguably, these “clarifications” were really not necessary to meet the profession’s ethical standards nor protect consumers,²⁵⁵ and were motivated instead by a desire to protect the providers of legal and other professional services themselves. It was still, however, a permissible conception of an MDP that was larger than that accepted by the ABA in the United States, although smaller than that accepted by either the UK or Australia.

In 2013, the CBA again waded into discussion on lawyer and non-lawyer partnerships, this time explicitly in the context of access to justice. The summary of the final report of the Envisioning Equal Justice project, an initiative of the CBA’s Access to Justice Committee, proposes a euphemistic “team delivery of legal services” that would see “teams of lawyers, other legal service providers (like paralegals) and providers of related services (like social workers)” working together to deliver comprehensive services.²⁵⁶ The report notes, “There is growing consensus that this is a positive way forward, providing more affordable services to clients and adequate income to lawyers.”²⁵⁷ The report acknowledges that these “teams” will only be possible if the professional and ethical issues associated with lawyer/non-lawyer partnerships, such as confidentiality and solicitor-client privilege, are resolved.²⁵⁸ It therefore calls on the law societies to develop regulatory frameworks to support team practices.²⁵⁹ As a goal, the Committee says 80 per cent of lawyers who practice personal services law should work as part of these teams, in many cases

²⁵³ Paton, “Multidisciplinary Practice Redux,” *supra* note 27 at 2014-16; Paton, “Happily Ever After,” *supra* note 177 at 271.

²⁵⁴ Canadian Bar Association, News Release, “CBA Resolution says business of MDPs should be controlled by lawyers” (19 February 2001).

²⁵⁵ Michael Trebilcock and Lilla Csorgo, “Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective” (2001) 24 Dal L J 1 at 27.

²⁵⁶ Canadian Bar Association, *Reaching Equal Justice: An Invitation to Envision and Act* (August 2013) at 27 [CBA Equal Justice Report].

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.* at 28.

sharing their practice with non-lawyers.²⁶⁰ As a nearer-term step, the CBA plans to create a discussion paper and models for team delivery of legal services.²⁶¹ As well, the organization says it will host professional development webinars and online discussion groups for professionals to learn about alternative models for delivering legal services.²⁶² In response to the summary report, Chief Justice McLachlin, stressed that “we do need new approaches, some new structures, some new procedural approaches, perhaps, to really come to grips with what has been the growing problem of access to justice.”²⁶³

The results of the Envisioning Equal Justice project show the CBA believes that at a least a part of the solution to poor access to justice in Canada lies in the private sector. While the summary report makes numerous suggestions for improvements in the public sector delivery of legal aid services, the team model approach outlined above identifies a role for private law practices too. In addition, the summary report calls on all legal services organizations to “harness technology” toward the improvement of access to justice.²⁶⁴ The Access to Justice Committee also left open the possibility that there may be more the private sector can do beyond this, noting that more detailed account of “the extent to which law firms and practitioners can innovate to better serve ... legal needs is an issue for the CBA Legal Futures Initiative,”²⁶⁵ a study that seeks to understand current drivers of change in the legal marketplace.

vi) *FLSC*

Finally, it is also worth noting the position of the FLSC on MDPs. In the late 1990s and early 2000s the FLSC was still a fledgling institution. Consequently it did not take much of a leadership role in the MDP debate. In 2000, however, it did release its *Draft Model Rules* for MDPs, but there was no consensus among the individual law societies on the rules.²⁶⁶ The loudest voice against the rules came from the Law Society of Upper Canada, which called them “extremely broad.”²⁶⁷ Unlike the LSUC’s own rules, the FLSC model rule would not require lawyer control of the

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid* at 27.

²⁶³ Beverley McLachlin, video of news conference at CBA Legal Conference. 18 August, 2013, online: <<http://www.slw.ca/2013/08/18/cba-map-to-equal-justice/>>.

²⁶⁴ CBA Equal Justice Report, *supra* note 257 at 21.

²⁶⁵ *Ibid* at 25.

²⁶⁶ The Law Society of Upper Canada, “Report on Federation of Law Societies Mid-Winter Meeting, March 23, 2000: Report to Convocation” at 3, online: <<http://www.lsc.on.ca/media/flsript.PDF>>.

²⁶⁷ *Ibid.*

partnership, nor that the MDP be primarily engaged in the practice of law. Consequently, the LSUC was against the model rule and had support for its position from the law societies in the Atlantic provinces. However, the Law Societies of British Columbia and Saskatchewan were in favour of the more liberal FLSC model rules. Other provinces said they were adopting a “wait and see” approach.²⁶⁸

After the lack of consensus displayed at the 2000 Whitehorse meeting, the FLSC has not been very active on the topic of MDPs, leaving it up to the individual law societies to pursue their own sets of MDP rules and focusing on other priorities, such as creating national admission standards for law schools and a model code of conduct.²⁶⁹

In sum, Paul Paton has argued that this history of MDPs in Canada is an indication of an insular legal profession:

Held entirely within the profession, the MDP debate in Canada became a direct illustration of the perils of a “professional community that is too inward looking, that is content to regulate itself without checks from the outside”, prone to “precarious norms” and resistant to change. Lawyers were content to determine what was the public interest and to proceed in a position that was blatantly self-serving and exclusionary.²⁷⁰

While this might well be accurate, the fact remains that when it came to MDPs some provinces in Canada have adopted a position that is not too soft (like the UK or Australia) nor too hard (like the US); rather they have chosen what they believe is a form of MDPs that are just right!

Now the question is what to do about ABSs.

vii) ABSs in Canada

The fate of ABSs in Canada remains up for grabs at the moment, and the prospects are unclear. This seems to be the case for several reasons. First, not a single government in Canada seems to have shown any interest in ABSs as part of the solution to the problem of access to justice. In June 2013, the authors sent requests for information to the deputy minister of justice in each province. Those that responded indicated they were not

²⁶⁸ *Ibid.*

²⁶⁹ Phone conversation with Daphne Keevil Harrold, Policy Counsel, Federation of Law Societies of Canada (13 August 2013).

²⁷⁰ Paton, “Multidisciplinary Practice Redux,” *supra* note 27 at 2202-2203, quoting W Bradley Wendel, “Nonlegal Regulation of the Profession: Social Norms in Professional Communities” (2001) 54 Vand L Rev 1953 abstract.

actively considering ABSs as a potential solution to access to justice problems. Second, consumer groups in Canada have not been especially motivated to propose solutions to the problems of access to justice, despite the fact that there are relatively high levels of concern about access to justice. Third, the business community, apart from accountants, does not seem to be particularly vocal on the matter. Fourth, and finally, the lack of engagement by the foregoing three constituencies means that like the US, but unlike Australia and the UK, responsibility for the fate of ABSs will lie with the legal profession itself.

The signals are mixed. On the one hand, there are indicators that change is unlikely. For example, in October 2011, The Independence and Self Governance Committee of the LSBC issued *Alternative Business Structures in the Legal Profession: Preliminary Discussions and Recommendations*. The Report was comprehensive: it reviewed recent developments elsewhere in the world; it outlined some of the arguments for and against ABSs, including the business case, the access to justice argument and the ethical dimensions. It suggested that there was no reason in principle why ABSs might not be acceptable; but recommended a wait and see approach until there was “empirical evidence” available to prove that ABSs would enhance access to justice.²⁷¹ Moreover, the CBA’s Committee on Access to Justice did not explicitly discuss ABSs in its *Reaching Equal Justice Report* although, as we have seen, it has euphemistically referred to “team delivery of legal services.”

There are also several indications, however, that change might be on the horizon. For example, the FLSC is monitoring the ABSs in the UK and Australia and held a conference in 2012 that focused almost exclusively on ABS developments around the world.²⁷² In the summer of 2013, the CBA launched its “Futures Initiative,” and it has specifically identified “business structures and innovation” as an important area of focus. Curiously, and confusingly, it acknowledges that much of its work overlaps with issues being studied as part of the CBA’s access to justice initiative, even though the latter did not address ABSs.

In September 2012 the LSUC established a “Working Group on ABS” to determine whether the new regulatory models for law firms emerging in other jurisdictions “could improve the delivery of legal services in Ontario

²⁷¹ The problems with this argument are twofold: our inquiries have indicated that no one in Australia is attempting that form of research because access to justice was not one of the original motivations for the adoption of ABSs; any research in the UK will be a long way off given that the first ABSs only came on stream in 2012.

²⁷² E-mail from Jonathan Herman, CEO of the Federation of Law Societies of Canada (4 September 2013).

while protecting clients and the public interest.” The Working Group assessed these models based on a number of criteria, including their ability to increase access to justice.²⁷³ The Working Group also studied unmet legal needs in Ontario and legal services provided over the Internet, as well as articles discussing ABS and access to justice.²⁷⁴ In its first report, released in June 2013, the Working Group noted specifically that jurisdictions that allow ABSs believe the new structures will enhance access to justice, but that access to justice problems were not necessarily a motivating factor in the move to allow ABSs.²⁷⁵ After this first report’s “broad sweep” of ABSs in various jurisdictions, the Working Group’s next phase will be to identify the “value propositions” associated with ABS, including the potential to increase access to justice, “that merit the Law Society’s continued attention.”²⁷⁶ To this end in the summer of 2013 it held a one-day consultation with various participants representing the private practice constituency of small, medium, and large firms. This was followed by a one-day conference entitled “Symposium on Alternative Business Structures for Delivery of Legal Services.” In what appears a departure from previous practice, the Working Group says that the next steps require consultation outside of the Law Society and engagement with other professions.

Finally, the Nova Scotia Barristers’ Society is also evaluating potential change with respect to ABSs. Still in its early stages, a NSBS project titled “Transforming Regulation and Governance in the Public Interest”²⁷⁷ seeks to develop a new regulatory model for the Society that anticipates rapid change in the legal services industry, including the emergence of alternative business structures. The project is guided by the Society’s goal to “enhance access to legal services and the justice system” and so will be examining regulatory changes that promote access to justice, some of which, it notes, might require amendments to the province’s *Legal Profession Act*.²⁷⁸ Significantly, there is a promise of consultations with the public, lawyers and law firms, government and other key stakeholders, and community leaders in business and regulation – some of the very

²⁷³ The Law Society of Upper Canada, “Professional Regulation Committee: Report to Convocation” (27 June 2013) at 426, online: <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147495044>>.

²⁷⁴ *Ibid* at 428.

²⁷⁵ *Ibid* at 436.

²⁷⁶ *Ibid* at 438.

²⁷⁷ “Transforming Regulation and Governance in the Public Interest” (2013) The Nova Scotia Barristers’ Society, online: <<http://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf>>.

²⁷⁸ *Ibid*.

constituencies we have identified in this paper. At this stage, the project plan states that Council could approve a new regulatory framework in May 2014. Whether Nova Scotia will be the first Canadian province to endorse ABSs is an open question.²⁷⁹

5. Conclusion

Our findings are modest. Access to justice is a genuine problem in Canada. There is no silver bullet that can resolve the access to justice problem. ABSs may be a possible part of the solution, but it is not clear. While the normative arguments pro and con ABSs are significant, they are not determinative. This is because a comparative analysis of recent developments in Australia, the UK, the US and Canada indicates that much depends on the discrete political influences of governments, the legal professions, consumer groups and business interests in each jurisdiction. In Canada, these influences are such that any progress toward introducing ABSs depends on the legal professional societies. In the course of crafting this essay, and particularly in light of several recent developments in mid- to late 2013, we have come to believe that ABS's are likely to be permitted in Canada in the foreseeable future. The challenge will be for Canada's legal professional societies to develop appropriate regulatory mechanisms that ensure that ABS's, if endorsed, do not solely benefit the commercial interests of lawyers and other entrepreneurs, but also enhance the possibility of increased access to justice.²⁸⁰

²⁷⁹ The final report of the NACAJ, released in late summer 2013, also includes a brief passing reference to the possibility of adopting ABS. *Supra* note 15 at 14.

²⁸⁰ See also Malcolm Mercer, "Utopia, Dystopia and Alternative Business Structures," *Slaw* (11 November 2013) online: <<http://www.slaw.ca/2013/11/11/utopia-dystopia-and-alternative-business-structures/>>. See especially David Wiseman's comment to this blog post online: <<http://www.slaw.ca/2013/11/11/utopia-dystopia-and-alternative-business-structures/>>.