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Ontario lawyers want facts before any decision on ABS

Concerns include professionalism, market share, conflicts of interest

CRISTIN SCHMITZ
OTTAWA

Ontario's law society should not permit non-lawyers to acquire majority control of law firms unless the regulator can point to persuasive evidence that such alternative business structures (ABS) help and not harm the public's interest in affordable, quality legal services, some lawyers say.

The Law Society of Upper Canada launched consultations on the ABS issue Sept. 26, including whether it is in the public interest to remove traditional prohibitions on non-lawyers owning law firms, in whole or in part.

Lawyers from various bar groups contacted by *The Lawyers Weekly* said they are open-minded but cautious about ABS—especially in the case of publicly traded law firms and other forms of non-lawyer majority ownership and control.

Mike Winward of the County and District Law Presidents Association said the organization had not come up with a position on ABS yet. But speaking for himself, Winward, a member of CDLPA's ABS committee, said



Charles Gluckstein, of Gluckstein Personal Injury Lawyers, wants to see potential conflicts of interest addressed if alternative business structures become a reality in Ontario. He is seen above at his Toronto office. TIM FRASER FOR THE LAWYERS WEEKLY

law society benchers should not decide whether to allow the establishment of ABS until they obtain credible and persuasive evidence on the probable impact on the profession and on the

public's choice in legal services, based on the actual experiences of Australia and the U.K., which de-regulated respectively in 2001 and 2012.

"Until that information is avail-

able it's like a hammer in search of a nail—what is the problem they are trying to solve, or are they just doing it because other jurisdictions are doing it?" said Waiting, Page 2

B.C. court fees tossed by SCC

CRISTIN SCHMITZ
OTTAWA

The Supreme Court has struck down onerous courtroom user fees in British Columbia, ruling that provinces cannot administer justice in a way that denies Canadians access to the superior courts.

In an expansive interpretation of superior courts' "core jurisdiction" that will affect government treasuries, Chief Justice Beverley McLachlin's groundbreaking Oct. 2 judgment, backed by four other judges, strikes down B.C.'s court hearing fees—the highest in the country—because they impose "undue hardship" on some middle-class litigants (i.e. at least some of those who don't qualify for an exemption under the Supreme Court Civil Rules because they are not "impoverished").

Because not everyone who is not impoverished can afford the hearing fees which escalate with the number of days in court, they unconstitutionally impede the right of at least some British Columbians to bring legitimate cases to court, the Chief Justice reasoned in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* [2014] S.C.J. No. 59. "In other words, the effect of the fees is unconstitutional because for many litigants bringing a claim would require sacrificing reason- Future, Page 23

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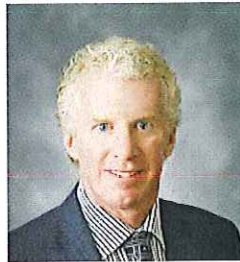
Winward, a personal injury litigator with Mackesy Smye in Hamilton and past president of the Hamilton Law Association. "It's like they're jumping on to a train, and nobody knows where it's going to go."

A recent Harvard Law School study concluded that ABS in Australia and the U.K. are posing "serious" challenges to lawyers' professionalism, especially in the lucrative personal injury field, while having done little to make legal services more affordable and accessible, especially in under-served areas such as family and criminal law.

The Ontario Trial Lawyers Association, with 1,500 personal injury practitioner-members, has many concerns based on the U.K. and Australian experience. Among other things, OTLA members worry that "big box" personal injury ABS will dominate the market with their large marketing budgets, while reducing clients' choice and quality of service.

Publicly traded law firms, and ABS owned by insurers, are the biggest players in the personal injury market in the U.K. and Australia. One result has been a series of conflicts of interest, such as insurers owning law firms, body shops, rehab clinics, and so on, said OTLA past president Charles Gluckstein, who chairs the organization's ABS working group.

"They want to control the whole equation," said Gluckstein, of Gluckstein Personal Injury Lawyers. "They close up the whole loop of business so that's a huge conflict of interest for the insurance company to not only control which lawyers [insured] go to, and which clinics [insured] go to, but essentially cost-contain the whole problem for the industry."



“It's like they're jumping on to a train, and nobody knows where it's going to go.”

Mike Winward
Mackesy Smye



Ross

he said. "There are certainly more things that we would want in there for protection of clients, and protection against consolidation [and] protection against these referral networks."

Winward said the CDLPA, the umbrella group for Ontario's 46 county law associations that represents the interests of more than 12,000 lawyers, will meet next month to determine how to respond to the LSUC consultation, which ends Dec. 31.

An introductory LSUC presentation on ABS to the CDLPA in May revealed trepidation within the bar about "where is this going to take the profession and what is it going to mean, particularly for lawyers in small communities or sole practitioners," Winward said. "I think the concern was that [ABS] is going to be like a corporate structure that is going to come in, and basically take their market away from them."

Patrick Brown, a personal injury practitioner with Toronto's McLeish Orlando and member of the Ontario Bar Association's ABS task force which plans to consult widely with lawyers before devising its submission for LSUC, said his sense is the group is open-minded.

"So far I don't think anybody has made any definitive type of conclusions at all but I do get a feeling, obviously, that there is a lot of concern about alternative business structures: how it's going to impact the legal profession and as well how it's going to impact our client bases, and everybody has kind of a take on it but everybody, I suspect, will have strong views on it."

Speaking personally, Brown said contingency fees and the stiff competition for work in the personal injury field means "we don't see, *per se*, any kind of access to justice issue at this time involving

our practices, and we're there on the front lines."

Brown has been involved in many issues and task forces around insurance law over the past two decades, but said "this is the one that concerns me the most. Not just from...being a personal injury lawyer, and how it's going to impact the practice and the people that work with me, but I also see it as a huge issue in relation to the client base and the services that they are going to be given if this went through."

"I also see it as a huge issue in relation to foreign ownership of [Canadian] law firms. I think, at the doors, you've got accounting firms wanting to get into the legal industry. You've got different entities, all waiting, just trying to get into this [personal injury] area of practice and I think, from my initial review of this, it will be negative."

Quinn Ross, chair of the OBA's task force on ABS, said the association's members are being asked via a questionnaire about fundamental practical issues underlying the ABS discussion.

"Gathering the views of our members on these questions will allow us to determine what additional inquiries need to be undertaken to reach our conclusions/recommendations," said Ross, who practises real estate, estates and corporate/commercial law at The Ross Firm in Goderich, Ont.

He said he anticipates particular interest from lawyers practising personal injury, family, wills, estates and trusts, real estate, incorporations and small business assistance.

"This type of practice area...has been described, even by the law society...as 'low-hanging fruit,' so I think we'll hear a lot more from those sections in terms of their concerns and how it's going to affect their practice."

Speaking personally, OBA task force member Robert Shawyer, a Toronto family law lawyer, said he doubts that large and publicly traded ABS will be much attracted to family law.

"Family law is not apt to commoditization," he said. "You can't standardize family law because family law is individualized, based on the facts and the individual client. It's not like a back injury which has got the similar fact scenario, and it's got the similar evidence that you need in each and every single case."

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The OTLA has asked a law professor to investigate the quality of services provided by ABS, as well as look into reports that the consolidation of the personal injury legal industry in the U.K. and Australia has sharply reduced employment for lawyers, Gluckstein said.

"Another area that is controversial is [the ABS] say they go to court as often as everyone else, and yet we hear that they rarely go to court in that [personal injury cases] are just granted to a settlement."

Gluckstein said his members would probably view opening the regulatory doors to minority ownership of legal services by non-lawyers as "workable," and potentially beneficial, provided that conflict of interest issues are addressed.

"If [the law society] restricted it...we could be in favour of ABS,"