Speaker's Corner:

OTLA's ABS submission couches own interest as protecting the public

The Ontario Trial Lawyers Association's submission in response to the Law Society of Upper Canada's discussion paper on alternative business structures reads like a self-interested protectionist stance for the status quo for a cottage industry.

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But my assessment may be less than objective as I may have taken a personal slight from the OTLA's position that the public interest requires continued control by lawyers over the delivery of legal services; the assertion that the core value of conflict of interest means lawyers must maintain a controlling interest in law firms; and its support of law firm regulation in order to ensure oversight of the actions of employees for which a firm may be vicariously liable.

First, it is important to remove the largest single red herring from the OTLA and others opposing change for the sake of the status quo: The implementation of alternative business structures will not improve access to justice in and of itself. But that was never the goal, so why is it a platform for dishing alternative business structures?

I digress as perhaps the answer is simple. I remember chatting with a lawyer I greatly respect who shared a humorous line from his mother in response to a comment he made that went along the lines of “for such a smart man you can say some very dumb things.”

There is no question that the OTLA has a membership that has some of the brightest and best lawyers in Canada. But as their mothers know all too well, that does not automatically preclude them from making some dumb comments.

The access to justice issue existed before the first lawyer hung out a shingle and in the absence of alternative business structures, we have made little progress on solving it when you consider statistics that something like 80 per cent of those requiring access to legal knowledge or services still don’t have them. So we can say with certainty that the absence of alternative business structures has not solved the issue.

Again, I am not saying that embracing new models will in any way move the legal profession further up the curve of solving it. However, I would invite the readers to visit Slater & Gordon or, for that fact, any of the firms using alternative business structures in Britain and compare their *pro bono* programs and policies to laws firms in Canada. You can draw your own conclusions as to whether non-lawyer ownership has truly negatively affected the public’s interest.

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So let's move onto the next impeachable plank in the OTLA's submission. For this I have to take the following excerpt right from the submission: "All law firms are businesses, to be sure. And all have financial pressures and responsibilities, and must ensure a healthy cash flow in order to thrive or at least survive. However, a publicly traded company whose principal responsibility is to shareholders will necessarily operate in a way that sees the duties owed to clients yielding to the financial pressures on lawyers to meet the demands of the shareholders. OTLA is concerned that profits and dividends will trump professionalism and duty."

Excuse me, but has the OTLA not been privy to the exhaustive research and surveys that clearly indicate how clients are feeling underserviced now? Have they not seen what financial pressures exist already and the impact they are having on traditional firms such as Dewey & LeBoeuf and Heenan Blaikie LLP? Have they not heard about the push to return to 50-per-cent operating ratios and the likely impact on many of the sacred cows they raise in their submission? And the profession, public, clients, and others are getting better service? Just as isolationist policies have not served entities well in the past, I would suggest the OTLA is not helping itself by seeming to embrace the concept now.

Now let's turn the lamp up a little on one of the core values it espouses, conflict of interest and independence of counsel, that it says alternative business structures are likely to put at risk.

I don't mean to be a killjoy here, but one might say it took a judge's gavel to pound that degree of adherence and attention to conflict of interest and independence into the profession. It was not because the current structures of law firms initiated it.

While I am not an admirer of what the accounting profession has done to itself of late, I would draw the OTLA's attention to a small fact that the non-lawyers' grasp of conflicts sees those firms prohibiting their partners from having ownership in the public companies they audit because of the potential to have a conflict between personal and client interest. I think the same is not necessarily the case in the legal profession.

The last impeachable plank is the mindset displayed on the last page of the OTLA's submission. The following is how the excerpt in question actually reads: "There is, quite simply, a lack of any empirical evidence that shows:

1. Why ABS was introduced in the UK and Australia;

2. Whether the problems sought to be solved in other jurisdictions correlate in any way to the legal landscape in Ontario;

3. Whether the introduction of ABS has in fact solved the problems it presumably sought to resolve in the UK and Australia;

4. Whether there has been significantly improved access to justice (particularly in areas of practice where access to justice is a concern);

5. Whether core values such as avoiding conflicts of interest and the independence of counsel have been compromised to any extent with the introduction of ABS;

6. Whether the regulatory bodies in the UK and Australia have been effective in dealing with ABS-related issues as they arise (which includes an examination of the structure of the regulatory bodies and complaints reporting systems); and

7. What the overall impact has been for the profession and the public interest since the introduction of ABS in jurisdictions where it has been adopted.

“Until the type of empirical evidence referred to above is available for all ABS jurisdictions and has been fully and critically reviewed by the LSUC and members of the profession, OTLA submits that the introduction of ABS on any level would be premature and therefore illâ €advised. A more measured and considered approach would be the most reasonable one going forward.”

Is the focus on what the other firms are doing not one of the main causes for the state of the legal profession today? Should it not concern us that some segments of the legal profession are still doing that despite the reality of the day?

This posting is not an open ended endorsement of alternative business structures as there are pros and cons to them but it is a whole-hearted endorsement of innovation and a total condemnation of those who throw up fictional obstacles to serve their own interest and then label their efforts as being in the public’s best interest.

For more, see "**Why is personal injury bar so against ABS?**"

Comments or Questions?

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