



February 26, 2016

Via email: ghume@harrisco.com; jstrawcz@flsc.ca

Gavin Hume, Q.C.
Chair, Standing Committee on the
Model Code of Professional Conduct
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON K1P 1A4

Frederica Wilson
Senior Director, Regulatory and Public Affairs
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON K1P 1A4

Dear Mr. Hume and Ms. Wilson:

Re: Entity Regulation

Entity regulation is under active consideration by several law societies across the country¹, in recognition that the way lawyers practice has changed dramatically since most current regulations were developed and, in response, regulatory reform may be needed in the public interest.

The CBA Ethics and Professional Responsibility Committee (the “CBA Committee”) has considered the underlying issues and offers to the Federation of Law Societies of Canada its input on the potential benefits and risks, and appropriate scope and application, of entity regulation. The CBA Committee’s mandate includes fostering and advancing ethical and professional conduct and standards in the legal profession. CBA Branches may provide additional input to the law societies in their jurisdictions in response to specific consultations.

The CBA Committee considered, when developing its input, feedback received following consultation with a wide range of CBA groups and law firms, including the Canadian Corporate Counsel Association, the Equality Committee, the Access to Justice Committee, the Futures Inquiry Steering Committee, the Public Sectors Lawyer Forum, the Small, Solo and General Practice Forum, all CBA Branches, and managing partners of all Canadian large and mid-sized law firms.

¹ See, for example, [Innovating Regulation: A Collaboration of the Prairie Law Societies, LSUC Call for Input: Promoting Better Legal Practices](#), [NSBS Transforming Regulation resources](#) and [LSBC Law Firm Regulation Consultation Brief](#).

Purpose of Entity Regulation

The CBA Committee supports the introduction of entity regulation to better reflect the reality that ethical practices of many Canadian lawyers are heavily influenced by the culture and ethical infrastructure of the entity in which they work. For that reason, the entities should also be subject to regulation, in the public interest.

Law firms have the potential to control behaviour more effectively than regulators in many situations. However, entity regulation must be proportionate and reflect where real risk lies. It should not add a significant regulatory compliance burden unless justified by a material risk.

In the CBA Committee's view, the goal is regulation that:

- reflects and responds to the way Canadian lawyers practice today, and
- results in better service and better protection for clients, fewer claims against individual lawyers and improved access to justice and diversity within law firms.²

Importance of Harmonized Regulation

The CBA Committee supports entity regulation being developed by Canadian law societies in a concerted and coordinated manner. We encourage law societies closer to implementation to adjust their processes, to allow a reasonable opportunity for a coordinated approach to be developed among at least those law societies actively considering entity regulation at this time.

Law societies in Nova Scotia, B.C., Saskatchewan and Manitoba³ already have specific legislative authority to regulate law firms and other entities providing legal services, and are considering implementation. Ontario and Alberta don't yet have specific legislative authority to regulate entities but are actively looking at the issue. The Prairie law societies have attempted to approach their assessment of entity regulation in a coordinated manner.⁴

The objective of more effective regulation requires harmonization of entity regulation across the country. The burden on law firms operating in more than one jurisdiction, and the heavy costs of compliance in that scenario (that will be passed on to clients), calls for a concerted effort by law societies and the leadership of the Federation to circumvent a patchwork of regulations.

Outcomes-focused Regulation – A Model for Entity Regulation

The CBA Committee supports the adoption of outcomes-focused regulation (similar to the model adopted in New South Wales, Australia) in the event that entity regulation is adopted, but also as a worthy regulatory reform on its own. While entity regulation refers to the object of the regulation (individual lawyer or organization), outcomes-focused regulation refers to a more proactive than

² The CBA Futures Initiative viewed entity regulation as a means for lawyers to take proactive steps toward a more representative profession; see [2014 CBA Futures report recommendations on entity regulation](#) (not approved as CBA policy), pp. 48-49, proposing that entity regulation expressly include the objectives of diversity and inclusivity in legal workplaces.

³ N.S. *Legal Profession Act*, [s. 27](#), B.C. *Legal Profession Act*, [s. 36](#), Saskatchewan *Legal Profession Act 1990*, [s. 2\(1\)\(h\)](#) and Manitoba *Legal Profession Act*, [s. 24.1](#). Quebec's *Règlement sur l'exercice de la profession en société et en multidisciplinarité* provides for self-assessment from LLP or incorporated law firms. N.B. has prepared draft legislation.

⁴ *Supra* 1: [Innovating Regulation: A Collaboration of the Prairie Law Societies](#).

reactive kind of regulation. It encourages establishing ethical infrastructure and engaging in ethical best practices both within law firms and by individual lawyers, rather than relying on complaints to drive regulatory discipline. Outcomes-focused regulation sets out regulatory objectives⁵ and leaves it to the lawyer, or entity subject to regulation, to determine how to most effectively achieve those objectives.

Outcomes-focused regulation encourages accountability and innovation in meeting ethical duties. We expect its adoption will alleviate rather than exacerbate the regulatory burden on the profession, increase engagement in ethical best practices, and potentially reduce client complaints significantly (as experienced in New South Wales⁶), as long as the regulatory objectives are matched to established (or possibly newly adopted) ethical duties, and sufficiently high level and flexible to be adapted to different kinds of practice.

Compliance with Entity Regulation

The CBA Committee supports outcomes-focused regulation that describes the regulatory objectives at a high level and provides examples of how a law firm might comply, not prescriptive rules for compliance.

Setting out prescriptive rules for compliance is contrary to the purpose and benefits of outcomes-focused regulation, will impose a costly new burden on Canadian lawyers and law firms, and will render outcomes-focused regulation insufficiently flexible to apply across practice contexts.

One potential benefit of entity regulation is that it may result in more efficient regulation of the profession, by diverting many reporting and other compliance requirements from multiple individual lawyers in an entity to the single entity. Where this is not the actual impact of entity regulation, such as in a solo or small firm practice, special care must be taken to ensure that any regulation of the entity is justified by a material risk.

We encourage law societies to support lawyers and law firms by providing examples of ways to comply with the regulatory objectives and to consult as needed to ensure the adequacy of the entity's ethical infrastructure, supplemented by law society audits. Small firms in particular, which may have fewer management resources, will benefit from tools and training to establish an ethical infrastructure appropriate for their firms. However, examples are useful as long as they are examples only, not prescribed measures. Firms will face an unreasonable new burden if required to meet regulatory objectives in prescribed ways. This is contrary to the flexibility that is the essence of proportionate, risk-based and outcomes-focused regulation.

Lawyers and law firms should be permitted to self-assess their compliance⁷, reporting to the regulator as required on their results, especially on plans to address areas where they are not fully

⁵ Examples from the CBA Committee's [Ethical Best Practices Self-Evaluation Tool](#) include competence, client communication, confidentiality, conflicts, preservation of client property/trust accounting/file transfers, fees and disbursements, hiring (including measures to promote diversity), supervision, retention and staff well-being (including measures to promote equity in the workplace), rule of law and administration of justice, and access to justice. See also [CBA Committee's 2013 paper](#) on ethical infrastructure and evaluating ethical best practices.

⁶ Christine Parker, Tahlia Gordon, and Steve Mark "Regulating Law Firms Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37(3) Journal of Law and Society 446 at 493

⁷ Reflecting the New South Wales model, and the CBA Committee's [Ethical Best Practices Self- Evaluation Tool](#).

compliant. This type of compliance system has proven to be effective because it promotes “mindfulness” in the regulated entity to their ethical obligations. It encourages proportionate regulation, accountability and innovation in determining the appropriate ethical infrastructure for each law firm’s unique circumstances.

Application to Public Sector Lawyers and In-house Counsel

The CBA Committee appreciates that public sector lawyers and in-house counsel are regulated by their law societies and should be held to high ethical standards, as are all other lawyers. However, the context in which they provide legal services is very different, to the point that many current regulations that apply to lawyers in these sectors are an awkward fit. Similarly, entity regulation, as envisioned to date in Canadian jurisdictions, appears to be designed specifically for law firms. More study and consultation must be undertaken before considering inclusion of public sector lawyers and in-house counsel in the scope of entity regulation. The CBA will continue to review the issue and welcomes the opportunity to be part of the discussion with the Federation and the law societies.

We hope that these comments are of use, in particular in encouraging the Federation to take a leadership role in the harmonization of entity regulation. Please let us know if you have any questions or comments on the CBA Committee’s input.

Yours truly,

(original letter signed by Sarah MacKenzie for Anthony J. Kavanagh)

Anthony J. Kavanagh
Chair, Ethics and Professional Responsibility Committee

cc. Jeff Hirsch, FLSC President; Janet M. Fuhrer, CBA President
jbh@tdslaw.com president@cba.org