# Not Tyranny: Reflections on the Law Society of Ontario Statement of Principles

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> *The Rule of Law is inextricably linked to and interdependent with the protection of human rights as guaranteed in international law and there can be no full realization of human rights without the operation of the Rule of Law, just as there can be no fully operational Rule of Law that does not accord with international human rights law and standards*.[1]

**INTRODUCTION**

**1** On December 2, 2016, the Challenges Faced by Racialized Licensees working group submitted its final report to LSO Convocation.[2]

**2** After debating this report, Convocation adopted the Equity, Diversity and Inclusion initiative by a vote of 47-0 with 3 abstentions. The Equality, Diversity and Inclusion initiative comprises five strategies

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[1] International Commission of Jurists, Tunis Declaration on Reinforcing the Rule of Law and Human Rights (March 2019) at para 4 [*the Declaration*].
[2] Challenges Faced by Racialized Licensees Working Group, *Final Report: Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions* (2016) at 2 [*Challenges Report*].

to address racism and discrimination in the professions, all recommended in the final report.[3] One of those strategies is the Statement of Principles, found at Recommendation 3(1) of the *Report.*

**3** Every licensee must adopt and abide by a Statement of Principles acknowledging the obligation to promote equality, diversity and inclusion in the professional conduct of the licensee, with other licensees, with employees, with clients and with members of the public.[4] The Society states that "The requirement calls on licensees to reflect on their professional context and on how they will uphold and observe human rights laws in force in Ontario in their professional relationships and interactions with colleagues, clients, employees and the public."[5] It emphasizes that the Statement sets out standards or criteria developed by the licensee to guide his or her conduct, and "need not include any statement of thought, belief or opinion."[6]The Society states that the required Statement "sets out standards or criteria developed by the licensee to guide his or her professional conduct taking into account applicable legal and professional obligations[7].

**4** With respect to the professional obligations the Society is referring to, the *Guide* specifically mentions the special obligations on lawyers in rule 6.3.1 to respect the requirements of human rights law in force in Ontario, and the duty in rule 2.1.2 to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions, set out in the *Rules of Professional Conduct.* It cites Rule 2.03 of the *Paralegal Rules of Conduct* necessitating respect for the requirements of human rights laws in force in Ontario and forbidding discrimination.[8]

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[3] Law Society of Ontario, *Equality Diversity and Inclusion: Working Together for Change – Summary of Recommendations* (n.d.) at 1 [*Report Summary*]. (The Society describes the purpose of the five strategies as "to break down barriers faced by racialized lawyers and paralegals").
[4] Law Society of Ontario, *Guide to the Application of Recommendation 3(1)* (n.d.) at 1 [*Guide*].
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid* at 2.

**5** Licensees are not required to make their Statements of Principle public, but must confirm annually to the Society that they have considered and implemented the requirement. Licensees are not required to disclose the content of their Statement of Principles to the Society but are only required to confirm its existence.[9] The LSO provided sample templates for licensees to use, but the exact language of the Statement is left up to the licensee.[10] Failure to complete a Statement of Principles leads to the LSO requiring the licensee to explain the omission or failure, but otherwise carries no penalty. In 2017, 98% of licensees indicated on their annual reports that they had prepared a Statement of Principles.[11]

**6** Recommendation 3 also requires that a representative of each legal workplace of at least 10 licensees in Ontario develop, implement and maintain a human rights/diversity policy for that workplace, addressing at the very least fair recruitment, retention and advancement, which will be available to members of the professions and the public upon request. Every two years, a licensee representative of each workplace of at least 10 licensees in Ontario must complete an equity, diversity and inclusion self-assessment for that workplace and provide it to the Law Society. This requirement to be proactive in implementing measures to promote diversity and inclusion was not imposed on legal workplaces with fewer than 10 licensees in Ontario. For those workplaces, the only requirement was that of each licensee completing a Statement of Principles.

**7** In the 2019 LSO Bencher election, a slate of 22 candidates (the StopSOP slate – hereafter "STOP") ran on the sole issue of opposing the Statement of Principles[12]. They argued that the Statement of Principles amounts to compelled speech[13] and is coercive[14], contending that the Statement of Principles imposes an

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[9] *Guide, supra* note 4 at 2.
[10] *Ibid* at 1-2.
[11] Law Society of Ontario, "Equity, Diversity and Inclusion: Frequently Asked Questions" (n.d.), online: *Law Society of Ontario* <lso.ca/about-lso/initiatives/edi/frequently-asked-questions>.
[12] Excluding paralegal candidates.
[13] "Problem #1: The SOP is Unjustified Compelled Speech" (n.d.), online: *StopSOP* <stopsop.ca/newsletters/problem-1-the-sop-is-unjustified-compelled-speech/> [*Problem #1*].
[14] "Problem #2: The SOP is Coercive" (n.d.), online: *StopSOP* <stopsop.ca/newsletters/problem-2-the-sop-is-coercive/>.

obligation on licensees "to express their personal valuing of the concepts of equality, diversity and inclusion, the definitions and interpretations of which will be in the exclusive domain of the LSO."[15]

**8** STOP maintained that "The SOP is indicative of mission creep and financial mismanagement,"[16] specifically targeting expenditures of the Equity Initiatives Department.

**9** STOP also stated that the SOP undermines the independence of lawyers and is against the public interest.[17] STOP argued that lawyers are the last line of defence "for the weak and the oppressed" and fulfilling this duty "requires independence -- of thought, belief and opinion". The Statement, it says, is inconsistent with independence because it "imposes a duty to express our concurrence with values that the regulator wishes to have embraced".[18] Their ultimate critique of the Statement is that it is "a symbol of submission" to the new orthodoxy of human rights protection. It cites the "bullying" experienced at Convocation by those opposed to the Statement, and the "bullying" experienced by members of STOP during the Bencher election campaign.[19] They proclaim: "When citizens...cannot ask questions, cannot bring motions without being bullied, cannot run in a democratic election without being vilified, then perhaps what you are questioning isn't an "initiative" but an "orthodoxy".[20]

**10** The STOP group did not publicly oppose the requirements for a workplace of at least 10 licensees in Ontario to prepare a diversity/inclusion policy and to complete a self-assessment every two years for filing with the Law Society.

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[15] *Problem #1, supra* note 12.
[16] "Problem #3: The SOP is Indicative of Mission Creep and Financial Mismanagement" (n.d.), online: *StopSOP* <stopsop.ca/newsletters/problem-3-the-sop-is-indicative-of-mission-creep-and-financial-mismanagement/>.
[17] "Problem #4: The SOP Undermines the Independence of Lawyers and is Against the Public Interest" (n.d.), online: *StopSOP* <stopsop.ca/newsletters/problem-4-the-sop-undermines-the-independence-of-lawyers-and-is-against-the-public-interest/> [*Problem #4*].
[18] *Ibid.*
[19] "Problem #5: The SOP is a Symbol of Submission" (n.d.), online: *StopSOP* <stopsop.ca/newsletters/problem-5-the-sop-is-a-symbol-of-submission/> [*Problem #5*].
[20] *Ibid.*

**11** All 22 STOP candidates were elected.[21] The turnout for the election was very low, with only 29.97% of eligible lawyers voting (approximately 16,000 lawyers), the lowest turnout of the period 1999-2019.[22]

**12** On May 23, 2019, notice was given by two members of STOP of a motion to repeal Recommendation 3(1). On June 4, 2019, notice was given to amend this motion in order to repeal and replace this mandatory requirement with voluntary provisions. Both are currently scheduled to be dealt with at Convocation on June 27, 2019.

**13** In speaking to his December 2017 motion to allow for conscientious objection to the requirements of Recommendation 3(1), Bencher Joseph Groia stated that those opposing it on principle "fully support the goals of greater equality and diversity, so I hope that no one will suggest that they do not."[23] The statements of the STOP, however, seem aimed at preserving the right not to "wrap themselves in the flag of equity, diversity, inclusion" and at characterizing this view as a threatened minority opinion deserving of protection from bullying, marginalization and exclusion[24].

**14** The attack and its success in the Bencher election call to mind a warning issued by the International Commission of Jurists, a respected international body of lawyers and judges of which Canada is a member. Established in 1951, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law, secure the realization of civil, cultural, economic, political and social rights, safeguard the separation of powers, and guarantee the independence of the judiciary and legal profession.

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[21] Law Society of Ontario, "Lawyer Tabulation 2019" (May 2019) at 1, online (pdf): *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/about/governance/2019-lawyer-tabulation.pdf>; "Candidate Profiles" (n.d.), online: *StopSOP* <stopsop.ca/bencher-election/candidate-profiles/>.

[22] Law Society of Ontario, "2019 Election Results and Voter Turnout Statistics for Lawyers, 1999-2019" (2019) at 49, online (pdf): *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/about/voting-results-for-2019-lawyer-bencher-election.pdf>.

[23] *Problem #5, supra* note 18.

[24] *Problem #5*, *supra* note 18.

**15** In issuing the *Tunis Declaration on Reinforcing the Rule of Law and Human Rights*[25] in March 2019, the ICJ expressed concern that "in recent years there have emerged manifest and widening cracks in the fealty and commitment of States and other powerful actors to the primacy of the Rule of Law and human rights as indispensable to the betterment of the human condition and a dignified life for all people."[26]

**16** We are deeply concerned that this resistance to the values of human rights, including equality diversity and inclusion, has now taken hold in the Law Society, and believe that it is time for informed reflection and a recommitment to the Law Society's undertaking to promote these values. We consider that a review of the Law Society's statutory mandate and its recent interpretation by the Supreme Court of Canada will verify that the Statement of Principles is not at all an instance of "mission creep". The promotion of equity diversity and inclusion has long been a part of the Society's work, and is part of the commitment to the Rule of Law which every barrister and solicitor undertakes upon being sworn in. The Barrister and Solicitor oath includes commitments to "seek to ensure access to justice", "champion the Rule of Law and safeguard the rights and freedoms of all persons", and "strictly observe and uphold the ethical standards that govern my profession."[27]

**17** We consider below the relevant provisions of the *Law Society Act*[28], and what the Supreme Court said in the *Trinity Western University* [29] decision about the Law Society's mandate The Court's observations about the role of self-regulation in defining the public interest, taken from the companion case of *Trinity Western University v. Law Society of British Columbia*[30], are also considered.

**18** There follows a brief history of the Law Society's activities to identify issues facing minority members of the professions and to promote equality, diversity and inclusion. Although the Supreme Court of

[25] *The Declaration, supra* note 1.
[26] *Ibid* at 1.
[27] Law Society of Ontario, by-law 4, *Licensing*, s 2(21).
[28] *Law Society Act*, RSO 1990, C L8.
[29] *Trinity Western University v. Law Society of Upper Canada*, [2018] 2 SCR 453 [*TWU v LSUC*].
[30] *Law Society of British Columbia v. Trinity Western University*, [2018] 2 SCR 293 [*LSBC v TWU*].

Canada notes that the Law Society has been working on the promotion of inclusion throughout its long history[31], the historical account given here begins in 1974, with the passage of the Society's first Rule of Professional Conduct forbidding discrimination[32]. We are indebted to the Equity Advisory Committee letter to Convocation of June 12, 2019 for its overview of this history, from which we have drawn quite heavily.[33]

**19** We do not survey all of the activities which the STOP group alleges are examples of "mission creep" at the Society. However, we do focus on the mandate of the Human Rights Monitoring Group, established in 2007. The activities of this Group highlight the essential role of the Law Society and lawyers in upholding the Rule of Law, both here and around the world. One cannot consider self-regulation in the public interest, which the Legislature has confided to the Law Society, without an understanding of the essential connection between the public interest and the Rule of Law, which the Supreme Court has described as one of the four foundational principles of the Canadian constitution.[34]

**20** Lastly, against the background of these important factors, we address the argument that Recommendation 3(1) amounts to unconstitutional compelled speech. We do not agree with this contention, and explore at least two ways of establishing the constitutionality of the Recommendation.

**SCOPE OF THE LAW SOCIETY MANDATE**

**21** In 2018, the Supreme Court of Canada undertook an extensive review of the scope of the Law Society of Ontario's mandate in *Trinity Western University v. Law Society of Upper Canada.* The Court first sets out the relevant provisions of sections 4.1 and 4.2 of *the Law Society Act*[35]:

> 15. **Function of the Society**

[31] *TWU v LSUC*, *supra* note 29 at para 24.
[32] Law Society of Upper Canada, *Professional Conduct Handbook*, Toronto: Law Society of Upper Canada, 1974, Rule 36 [*LSUC 1974 Rule 36*].
[33] Letter from the Law Society of Ontario Equity Advisory Group to Convocation (12 June 2019), signed by Equity Advisory Group Chair, Nima Hojjati.
[34] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32 [*Secession Reference*].
[35] RSO 1990, c. L.8.

**4.1** It is a function of the Society to ensure that,

a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and

b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.

**Principles to be applied by the Society**

**4.2** In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

1. The Society has a duty to maintain and advance the cause of justice and the Rule of Law.
2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
3. The Society has a duty to protect the public interest.
4. The Society has a duty to act in a timely, open and efficient manner.
5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.[36]

**22** The Court continues:

> 17. Section 4.1 of the *LSA* establishes that ensuring standards of professional competence and their application to lawyers and paralegals is a function of the LSUC. However, the very language of that provision indicates this to be "a function", not "the function" or "the only function" of the LSUC. That the LSUC's mandate is not confined to the function set out in s. 4.1 is confirmed by the language of s. 4.2, which refers to the "functions, duties and powers" of the LSUC. The breadth of the LSUC's mandate is further confirmed by the nature of the principles in s. 4.2, which task the LSUC with advancing the cause of justice, the Rule of Law, access to justice, and protection of the public interest.
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> 18. By the clear terms of s. 4.2 of the *LSA*, the LSUC must have regard to the principles set out in that section – including its duty to protect the public interest – in carrying out all of its "functions, duties and powers" under the *LSA*. The LSUC, as a regulator of the self-governing legal profession, is owed deference in its determination as to how these principles can best be furthered

[36] *TWU v LSUC*, *supra* note 29 at para 15.

> in the context of a particular discretionary decision (see *Law Society of B.C.*, at paras. 32 and 34-38).[37]

**23** After noting the LSO's concern that the TWU Mandatory Covenant imposes inequitable barriers on entry to the law school, the Court states:

> 20. In our view, the LSUC was entitled to conclude that equal access to the legal profession, diversity within the bar, and preventing harm to LGBTQ law students were all within the scope of its duty to uphold the public interest in the accreditation context, which necessarily includes upholding a positive public *perception* of the legal profession.
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> 21. To begin, it is inimical to the integrity of the legal profession to limit access on the basis of personal characteristics. This is especially so in light of the societal trust enjoyed by the legal profession. As a public actor, the LSUC has an overarching interest in protecting the values of equality and human rights in carrying out its functions (see *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 47).
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> 22. As well, eliminating inequitable barriers to legal training and the profession generally promotes the competence of the bar as a whole. The LSUC is not limited to enforcing minimum standards with respect to the individual competence of the lawyers it licenses; it is also entitled to consider whether accrediting law schools with inequitable admissions policies promotes the competence of the bar as a whole.
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> 23. The LSUC was also entitled to interpret the public interest as being furthered by promoting a diverse bar. Access to justice is facilitated where clients seeking legal services are able to access a legal profession that is reflective of a diverse population and responsive to its diverse needs. Accordingly, ensuring a diverse legal profession, which is facilitated when there are no inequitable barriers to those seeking to access legal education, furthers access to justice and promotes the public interest.
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> 24. The LSUC's determination that it was entitled to promote equal access to and diversity within the bar is supported by the fact that it has consistently done so throughout its history. Since its formation in 1797, the LSUC has had exclusive control over who could join the legal profession in Ontario. The Divisional Court considered the LSUC's long history and was satisfied that, in carrying out its mandate, the LSUC has "acted to remove obstacles based on considerations, other than ones based on merit, such as religious affiliation, race, and gender" (Div. Ct. reasons, at para. 96). That the LSUC has historically sought to uphold principles of diversity and equal access to the legal profession

[37] *TWU v LSUC*, *supra* note 29 at paras 17-18.

> supports the LSUC's pursuit of similar objectives in its decision to deny accreditation to TWU's proposed law school.[38]

**24** In *Law Society of British Columbia v. Trinity Western University*, argued at the same time as the *Trinity Western University v. Law Society of Upper Canada* case, the Supreme Court of Canada undertook a thorough review of the mandate of the LSBC. Finding in favour of the LSBC and its decision not to accredit TWU, the Court provides further observations concerning the discretion afforded the LSBC. The Court says:

> 32. The legal profession in British Columbia, as in other Canadian jurisdictions, has been granted the privilege of self-regulation. In exchange, the profession must exercise this privilege in the public interest (*Law Society of New Brunswick v. Ryan*), 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 36, quoting D. A. A. Stager and H. W. Arthurs in *Lawyers in Canada* (1990), at p. 31). ....
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> 35. This Court most recently considered the self-regulation of the legal profession in *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360. There, Wagner J. repeatedly noted the deference owed to law societies' interpretation of "public interest": that they have "broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest" (para. 22); that they must be afforded "considerable latitude in making rules based on [their] interpretation of the 'public interest' in the context of [their] enabling statute" (para. 24); and that they have "particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions" (para. 25).
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> 36. *Green* affirmed a long history of deference to law societies when they self-regulate in the public interest. For many years, this Court has recognized that law societies self-regulate in the public interest (*Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (*Canada (A.G.)*), at pp. 335-36; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 187-88; *Pearlman*, at p. 887; *Ryan*, at para. 36). As Iacobucci J. explained in *Pearlman*, the regulation of professional practice through a system of licensing is directed toward the protection of vulnerable interests -- those of clients and third parties.
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> 37. To that end, where a legislature has delegated aspects of professional regulation to the professional body itself, that body has primary responsibility for the development of structures, processes, and policies for regulation. This delegation recognizes the body's particular expertise and sensitivity to the conditions of practice. This delegation also maintains the independence of the

[38] *TWU v LSUC*, *supra* note 29 at paras 20-24.

bar; a hallmark of a free and democratic society (*Canada (A.G.)*, at pp. 335-36). Therefore, where a statute manifests a legislative intent to leave the governance of the legal profession to lawyers, "unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected" (*Pearlman*, at p. 888). As Iacobucci J. later explained in *Ryan*, we give deference to law society decisions to "giv[e] effect to the legislature's intention to protect the public interest by allowing the legal profession to be self- regulating" (para. 40).

38. In sum, where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society's institutional expertise, follows from the breadth of the "public interest", and promotes the independence of the bar.

40. In our view, it was reasonable for the LSBC to conclude that promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty: upholding and maintaining the public interest in the administration of justice, which necessarily includes upholding a positive public *perception* of the legal profession. We arrive at this conclusion for the following reasons.

41. Limiting access to membership in the legal profession on the basis of personal characteristics, unrelated to merit, is inherently inimical to the integrity of the legal profession. This is especially so in light of the societal trust placed in the legal profession and the explicit statutory direction that the LSBC should be concerned with "preserving and protecting the rights and freedoms of all persons" as a means to upholding the public interest in the administration of justice (*LPA*, s. 3(a)). Indeed, the LSBC, as a public actor, has an overarching interest in protecting the values of equality and human rights in carrying out its functions. As Abella J. wrote in *Loyola*, at para. 47, "shared values -- equality, human rights and democracy -- are values the state always has a legitimate interest in promoting and protecting". .....

42. Eliminating inequitable barriers to legal education, and thereby, to membership in the legal profession, also promotes the competence of the bar and improves the quality of legal services available to the public. The LSBC is statutorily mandated to ensure the competence of lawyers as a means of upholding and protecting the public interest in the administration of justice (*LPA*, s. 3(b)). The LSBC is not limited to enforcing minimum standards of competence for the individual lawyers it licenses; it is also entitled to consider how to promote the competence of the bar as a whole.

43. As well, the LSBC was entitled to interpret the public interest in the administration of justice as being furthered by promoting diversity in the legal profession -- or, more accurately, by avoiding the imposition of additional

> impediments to diversity in the profession in the form of inequitable barriers to entry. A bar that reflects the diversity of the public it serves undeniably promotes the administration of justice and the public's confidence in the same. A diverse bar is more responsive to the needs of the public it serves. A diverse bar is a more competent bar (see *LPA*, s. 3(b)).
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> 46. [The Society's...] consideration of equality values is consistent with law societies historically acting "to remove obstacles ... such as religious affiliation, race and gender, so as to provide previously excluded groups the opportunity to obtain a legal education and thus become members of the legal profession" (*Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1, at para. 96). In any case, it should be beyond dispute that administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority -- and may look to instruments such as the Charter or human rights legislation as sources of these values, even when not directly applying these instruments (see e.g. *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 (*TWU 2001*), at paras. 12-14 and 26-28). This is what the LSBC, quite properly, did. [39]

**25** We have quoted extensively from the Court's judgments in the *Trinity Western* cases because they represent the most recent expression of its views on the scope and mandate of professional self-regulation in the legal profession, particularly as it relates to the values of equality, diversity and inclusiveness. The reasoning reflects a view of the legal profession where competence is no longer measured simply on a lawyer-by-lawyer basis, or taking into account the lawyer's technical skill in particular areas. Rather, competence is seen as something relating to the profession as a whole, reflecting its ability to represent and do well by a diverse population of clients with diverse needs and experiences. Similarly, the concept of integrity of the legal profession is not confined to particular questions of legal ethics as determined by context; rather, the Court states that it is inimical to the integrity of the profession to limit access to it on the basis of personal characteristics. A diverse profession, it says, furthers access to justice and promotes the public interest.

[39] *LSBC v TWU*, *supra* note 30 at paras 32, 35-46.

**26** Significantly, the Court is not troubled that these expanded notions of competence and integrity somehow detract from the independence of the bar. Rather, it reaffirms that the legislature delegates regulatory responsibility to the profession, and that delegation entails judicial deference to the policy choices made by the regulatory body in the public interest. We observe that this is no less true now than it was twenty years ago, or more, when ideas of professional competence and integrity might have been more narrowly conceived.

**27** Given the Court's attitude of deference toward the Societies' interpretation of the public interest in the two *Trinity Western* cases, the question arises whether it would be similarly deferential to a Society's decision to roll back the clock, as it were, and embrace a narrow view of the public interest, professional competence and integrity. We suggest that it would not. This is because the Court's thinking on the issue of public interest and self-regulation is informed by *Charter* values and equality, and the advances in human rights of the past decades. The Court is careful to salute the long record of the Law Society of Ontario in advancing the interests of minority members of the profession. This record presents an important parallel. The Supreme Court identifies respect for minority rights as one of the four fundamental and organizing principles of the constitution and notes the long tradition of respect for minorities which is at least as old as Canada itself.[40] It observes in the *Secession Reference* that although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes.[41]

**28** By placing the Law Society of Ontario on the same historical trajectory of increasing efforts to respect minority rights as the Court has identified in the country as a whole, the Court is clearly signaling its approval of such efforts on the part of both the country and the Society. It is unlikely, then, that its

[40] *LSBC v TWU*, *supra* note 30 at para 82.
[41] *Ibid* at para 81.

deference to the discretion of a law society in interpreting the public interest would extend to a reversal or cessation of this evolving arc of respect.

**HISTORY**

**29** In an open letter to Convocation dated June 12, 2019, the Law Society of Ontario Equity Advisory Group provided important background by way of a history of the equity initiatives at the LSO. This section draws heavily on the helpful history set out in that letter.

**30** The first anti-discrimination Rule of Professional Conduct was passed in 1974. It stated:

> There shall be no discrimination by the lawyer on the grounds of race, creed, colour, national origin or sex in the employment of other lawyers or articled students or in other relations between him or her and other members of the profession.[42]

**31** In 1988, the LSO established the Women in the Legal Profession Subcommittee to consider emerging issues relating to women in the profession, and in 1990, the subcommittee became a standing committee of Convocation.[43] In 1989, Convocation appointed a special committee to study and make recommendations as to whether the Law Society should establish a program to encourage and assist persons from minority groups that were under-represented in the legal profession.[44] In 1991 a rule was added to the *Law Society Act* setting out the mandate and creation of the Equity in Legal Education and Practice Committee ("the Equity Committee").[45]

**32** The Equity Committee addressed discrimination on the basis of personal characteristics other than sex and family status. Its membership included benchers, government representatives and members of

[42] *LSUC 1974 Rule 36*, *supra* note 31.
[43] Law Society of Upper Canada, *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (1997) at para 8, online(pdf): *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/b/bicentennial.pdf> [*Bicentennial Report*].
[44] *Ibid* at para 10.
[45] *Ibid*.

the bar including Black and Aboriginal student associations, the Law Deans, and other stakeholders with an interest and commitment to equity in the legal profession.[46]

**33** In 1996, the committees were restructured and the Women in the Legal Profession Committee and the Equity Committee were merged into and became the Admissions and Equity Committee.[47]

**34** This move was seen by some equality-seeking representatives as a falling away from the LSO's commitment to seek equity in the legal professions; the merger was thus supported by some benchers on the condition that a full-time staff person would be employed to deal with equity and gender issues.[48] At the same time in 1996, the Treasurer appointed an Equity Advisory Group to act as an expert resource on equity issues facing the profession.[49]

**35** On three occasions over the period of 1989 to 1996 the LSO expressed its commitment to advancing equity and diversity within the legal profession.[50]

**36** In 1991, Convocation adopted a **Statement of Policy** with 14 principles, including:

> (i) The Law Society of Upper Canada is responsible for governing the legal profession in the public interest. Matters which relate to the professional careers of lawyers and their personal well-being inevitably affect the public interest: they are matters which have a direct impact upon the quality of legal services in Ontario. The Law Society has a responsibility to undertake research and to provide leadership in these areas.
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> (v) where there is evidence of significant dissatisfaction with the practice of law among members of the profession, the Law Society has a responsibility, both to the public and to its members, to study the issue and to propose solutions.
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> (vi) The Law Society has a responsibility to work towards the amelioration of conditions within the profession which lead to dissatisfaction with the practice of law.
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> (xi) The Law Society endorses the principles of the *Human Rights Code*, 1981, and accordingly affirms that every member of the Society has a right to equal treatment with respect to conditions of employment without discrimination

[46] *Bicentennial Report, supra* note 43 at para 11.
[47] *Ibid* at para 12.
[48] *Ibid*.
[49] *Ibid* at para 13.
[50] *Ibid* at para 25.

> because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.
>
> (xii) The Law Society acknowledges that there are members of the profession, particularly women, who perceive themselves or their colleagues to be subject to discrimination. The findings of the [Transitions Report] lead the Law Society to conclude that discrimination
>
> a. (whether it be individual or systemic, intentional or unintentional) continues to exist within the profession.
> b. Lawyers have a responsibility to take a lead in eliminating discrimination. The Law Society will intensify its efforts to eradicate discrimination in the profession.[51] [emphasis added]

**37** In 1995, Convocation adopted the following **Statement of Values**:

> The Law Society of Upper Canada declares that the legal profession in Ontario is enormously enriched by, and values deeply, the full participation of men and women in our profession regardless of age, disability, race, religion, marital or family status or sexual orientation.

**38** In 1996, Convocation adopted three recommendations from the Equity Group (with respect to the *Report of the Commission on Systemic Discrimination in the Ontario Criminal Justice System*[52]). The first recommendation was:

> To approve in principal the Law Society's commitment to combatting racism and systemic discrimination.[53]

**39** In 1996, the LSO conducted a follow-up study of over 1,500 lawyers over a 6-year period the results of which were reported in a document titled *Barriers and Opportunities Within Law: Women in a Changing Legal Profession* ("*the Barriers and Opportunities Report*").[54]

**40** In 1997, the LSO celebrated its bicentennial and the 100th anniversary of the admission of its first woman member.[55] In honour of these events, the *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* ("*Bicentennial Report*") was prepared to review the work done by the LSO

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[51] *Bicentennial Report, supra* note 43 at para 26.
[52] Commission on Systemic Discrimination in the Ontario Criminal Justice System, *Report*, December 1995. Queen's Printer for Ontario, 1995.
[53] *Bicentennial Report*, *supra* note 43 at para 28.
[54] *Ibid* at paras 30-32.
[55] *Ibid* at para 7.

over the previous decade and provide recommendations to guide the LSO's equity mandate for the years ahead.[56]

**41** The *Bicentennial Report* began with the recognition that like most institutions grappling with equality, the LSO's first challenge came from a critical mass of women joining the profession in record numbers during the period of 1975-1990.[57] Women began identifying a range of issues and barriers affecting their ability to perform to their maximum potential in the workplace.[58] Through research and consultation, hurdles faced by women were brought to the attention of the profession and the doors were opened for other equality-seeking groups to raise their own experiences of discrimination and harassment.[59]

**42** The *Bicentennial Report* noted:

> Men and women from all backgrounds and career stages came forward, identifying barriers they faced in entering and remaining in the profession. Aboriginal articling students spoke about the struggle to gain acceptance into mainstream legal fields. Lawyers of colour spoke about blatant examples of mistaken identity where clients, judges, and colleagues assumed they were not lawyers because they "didn't look the part". Gay and lesbian lawyers described job interview questions designed to elicit information about their health and sexual practices. Lawyers with disabilities spoke about watching themselves disappear as colleagues chose to exclude them from work because it was easier than accommodating their needs. Women explained their difficult choice to leave the profession because their firms couldn't provide them with a flexible workplace. Men spoke of the frustration they felt as they observed the different treatment accorded their colleagues, wives, and daughters.[60]

**43** The *Bicentennial Report* recognized the voices of lawyers who expressed the shock they felt when confronted with treatment which could only be explained by prejudice and stereotypes harboured by

[56] *Bicentennial Report, supra* note 43.
[57] *Ibid* at para 1.
[58] *Ibid* at para 2.
[59] *Ibid.*
[60] *Ibid* at para 3.

even well-intentioned colleagues.[61] Their stories shared a common theme: a desire to be treated with fairness, respect, and dignity:

> Many lawyers described the hurt and anger with which they were now scarred – that a profession that stands for truth and justice could perpetuate, through its preservation of the status quo, roadblocks to the full participation of all members.[62]

**44** After summarizing various reports, studies, surveys, and audits conducted at the Law Society in the period of 1987 to 1997, the *Bicentennial Report* concluded that *the Barriers and Opportunities Report* "once again confirmed the existence of systemic discrimination and inequality within the legal profession".[63] The *Bicentennial Report* recognized that between 1986 and 1991 the total estimated "visible minority" population in Canada had increased by 58% and that by 2006, visible minorities were expected to make up one-sixth of Canada's total population.[64] The *Bicentennial Report* noted that despite the LSO's commitments and changes to policy, "all the information received to date indicates that members of our profession continue regularly to face barriers because of personal characteristic unrelated to competence".[65]

**45** After assessing the Law Society's role and responsibility in the advancement of equity and diversity as the governor of the profession in the public interest, the *Bicentennial Report* provided 16 Recommendations for the Law Society to adopt, including recommendations to actively promote, fund, and study current and future equity and diversity initiatives.[66]

**46** In May 1997, the Law Society unanimously adopted all 16 Recommendations in the *Bicentennial Report* and they have since guided the Law Society as it seeks to advance the goals of equity and diversity

[61] *Bicentennial Report, supra* note 43 at para 4.
[62] *Ibid* at para 5.
[63] *Ibid* at para 58.
[64] *Ibid* at para 63.
[65] *Ibid* at para 70.
[66] *Ibid* at paras 70-113.

within the legal profession.[67] The adoption of the Bicentennial Report led to a series of systemic changes to promote equality and diversity, including the creation of the Equity and Aboriginal Issues Committee (EAIC) (a standing Committee of Convocation), the LSO's Equity Initiatives Department with five permanent staff members and one articling student, and the Equity Advisory Group (EAG).[68]

**47** In 1998, the LSO established the Discrimination and Harassment Counsel (DHC) program to provide services aimed at enabling and supporting individuals who believe they have been discriminated against and/or harassed by a lawyer.[69]

**48** The *Bicentennial Report* led to a significant legacy of research and policy at the LSO.

**49** In September 2011, the LSO identified the priority to "consider the development of programs to encourage law firms to enhance diversity within firms, based on identified needs, and create reporting mechanisms".[70] As a result, Convocation created the Working Group on Challenges Faced by Racialized Licensees.[71] Under the direction of this Working Group and managed by the LSO's Equity Initiatives Department, Stratcom Communications Inc. (Stratcom)[72] was hired to design and conduct research to identify:

i. challenges faced by racialized lawyers and paralegals in different practice environments, including entry into practice and advancement;
ii. factors and practice challenges that could increase the risk of regulatory complains and discipline; and

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[67] Law Society of Upper Canada, "Equity Initiatives at the Law Society: Report of the Director, Equity" (September 2014) at para 1, online(pdf): *Law Society of Ontario* < lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/t/tab_4.1_equity_director's_report_official_sept._2014.pdf> [*Equity Report*].
[68] *Ibid* at paras 2-4.
[69] *Ibid* at para 5.
[70] Law Society of Upper Canada, "Challenges Facing Racialized Licensees: Final Report" (2014) at 1, online(pdf): *Stratcom* <www.stratcom.ca/wp-content/uploads/manual/Racialized-Licensees_Full-Report.pdf> [*Stratcom Report].*
[71] *Ibid*
[72] Stratcom is a consulting firm that specialises in the creation and implementation of campaigns, political polling, engagement and targeting strategies, and large-scale donor based fundraising programs for non-profit sectors. Stratcom identifies its clients to include small grass roots organisations to large international NGOs and charities. See: http://www.stratcom.ca/about-us/

iii. perceptions of best practices for preventive remedial and/or support strategies.[73]

**50** Stratcom's final report was dated March 11, 2014 and was titled *Challenges Facing Racialized Licensees.*[74] For the purposes of their research and throughout their report, Stratcom defined "racialized" as follows:

> Racialized expresses race as the process by which groups are socially constructed, as well as to modes of self-identification related to race, and includes Arab, Black (e.g. African-Canadian, African, Caribbean), Chines, East-Asian (e.g. Indo-Canadian, Indian Subcontinent), South-East Asian (e.g. Vietnamese, Cambodian, Thai, Filipino) and West Asian (e.g. Iranian, Afghan) persons.[75]

**51** Stratcom considered "literally hundreds" of examples of discriminatory behaviours, language and assumptions that were common features of everyday professional experiences.[76] They noted that focus group participants in their study frequently described the types of discrimination they encountered as "subtle, "hidden" or "layered", many also describing overt racism, "in almost every group one or more participant was moved to tears or anger in describing such an experience".[77]

**52** Many racialized licensees also described being alienated from the dominant culture of firms or companies.[78] Participants noted that common features of the dominant (non-racialized) culture, such as social drinking, playing golf, going to the cottage, watching hockey, all represent points of contact, interaction, and social solidarity for their non-racialized colleagues, but reinforce their own feelings of isolation and "otherness".[79]

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[73] *Stratcom Report*, *supra* note 63 at 1.
[74] *Stratcom Report*, *supra* note 63.
[75] *Ibid* at 1.
[76] *Ibid* at 11.
[77] *Ibid* at 12.
[78] *Ibid* at 13.
[79] *Ibid.*

**53** Stratcom noted that the experiences of being out of place in one's surroundings also extends to the courtroom.[80] Racialized lawyers shared experiences of being mistaken as interpreters or as clients when representing non-racialized clients.[81]

**54** The focus group results demonstrated to Stratcom that racialization intersects with a wide variety of other factors.[82]

> The intersection of these and other factors – age, sexual orientation, disability, geographic location – yields an incredibly complex and highly individuated pattern of experiences and impacts associated with the challenges of racialization. [...] The intersection of race and gender multiplies the challenges for women.[83]

**55** At the end of an extensive 78-page report, Stratcom concluded:

> Findings of the survey research demonstrated the extent to which racialization establishes a measurable constellation of career challenges for racialized licensees that are distinct from those of their non-racialized colleagues: challenges that are rooted in their racialized status as well as many related challenges that are compounded and amplified as a consequence of the racialization process. In comparison with their non-racialized colleagues, racialized licenses and specific sub-groups, encounter qualitatively more severe challenges during and after entry into practice, yielding measurably greater negative impacts throughout their careers.
>
> As noted in this report not all non-racialized licensees acknowledge the significant and unique challenges associated with the process of racialization. However, one important finding, highlighted in the survey phase, was that a strong majority of non-racialized licensees recognise that "racialization exists", that the challenges faced by racialized licensees have negative consequences for the legal professions and the public, and that proactive measures are called for to enhance inclusiveness. Results reported in Section 7 demonstrate a substantial overlap across the racial divide, reflected both in shared opinions regarding the value, scope and direction of change, as well as endorsement for specific measures to address the challenges of racialization and make the legal professions more inclusive.
>
> The methodology and findings of this research will provide the basis for further targeted exploration of the issues associated with the challenges of racialization encountered by specific groups, career stages and practice environments. It is

[80] *Stratcom Report*, *supra* note 63 at 14.
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*

> hoped that these results will also lend support to the ongoing effort to design and implement practical measures to reduce the challenges associated with racialization and promote inclusiveness within the legal professions.[84]

**56** The Stratcom Report was one of the foundations for the *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions – Challenges Faced by Racialized Licensees Working Group Final Report* ("*the Challenges Report*").[85]

**57** The *Challenges Report* included 13 Recommendations which were all adopted by Convocation in December 2016.[86] It was the final stage of a lengthy consultation process.

**58** In 2012, the LSO created the Challenges Faced by Racialized Licensees Working Group (the Challenges Working Group) to identify challenges faced by racialized licensees and design preventative, remedial, enforcement, regulatory and/or support strategies for consideration by EIAC and other committees to address these challenges.[87]

**59** In April 2014, EAG provided submissions to the draft *Challenges Report* and continued to remain engaged with the Challenges Working Group.[88]

**60** In 2014, Convocation approved the Challenges Working Group's Consultation paper and between January and March 2015, the Working Group consulted with over 1,000 lawyers, paralegals, law students, articling students, and members of the public.[89] The Challenges Working Group also received written submissions from 45 individuals and organisations.[90]

**61** As a result of its consultations, the Challenges Working Group identified three objectives:

1. Inclusive legal workplaces in Ontario;

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[84] *Stratcom Report*, *supra* note 63 at 77-78.
[85] *Challenges Report*, *supra* note 2.
[86] "Equity, Diversity and Inclusion: Working Together for Change", *Law Society of Ontario Gazette* (22 June 2017), online: <www.lawsocietygazette.ca/news/equity-diversity-and-inclusion/>.
[87] *Challenges Report*, *supra* note 2 at 12.
[88] Letter from Members of the Equity Advisory Group Working Group to Members of the Challenges Faced by Racialized Licensees Working Group (17 April 2014), online(pdf): *Law Society of Ontario* < lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/s/submission-by-equity-advisory-committee-to-stratcom-challenges-report.pdf>.
[89] *Challenges Report*, *supra* note 2 at 12.
[90] *Ibid.*

2. Reduction of barriers created by racism, unconscious bias and discrimination; and
3. Better representation of racialized licensees, in proportion to the representation in the Ontario population, in the professions, in all legal workplaces and at all levels of seniority.[91]

**62** The Group's 13 Recommendations were intended to meet these objectives.[92]

**63** Recommendation 3 recognised that employers and employees in legal workplaces have obligations under the *Human Rights Code* but licensees have additional professional obligations with respect to human rights established by the *Rules of Professional Conduct* and the *Paralegal Rules of Conduct.*[93] To ensure consistent implementation as well as the changing realities of legal workplaces (such as in-house counsel), Recommendation 3 was flexible enough to minimize unnecessary burdens and recognise that many workplaces have already moved forward proactively with equality measures on their own.[94] Licensees were free to tailor Recommendation 3 to their specific contexts.[95]

**64** The Statement of Principles "comply or explain" approach was modeled after the practice of organisations such as the Ontario Securities Commission (OSC) which required:

> "companies regulated by the OSC to disclose the following gender-related information: the number of women on the board and in executive positions; policies regarding the representation of women on the board; the board or nominating committee's consideration of the representation of women in the director identification and selection process; and director term limits and other mechanisms of renewal on their board. The OSC requires companies to either report their implementation or consideration of the items listed above, or to explain their reasons for not doing so."[96]

**65** This long and consistent history of the LSO promoting equal access to and diversity within the bar was acknowledged by the Supreme Court of Canada in *Trinity Western University v. Law Society of Upper*

[91] *Challenges Report*, *supra* note 2 at 26.
[92] *Ibid.*
[93] *Ibid* at 28.
[94] *Ibid* at 29.
[95] *Ibid* at 42.
[96] *Ibid* at 30-31.

*Canada*. The Law Society has "historically sought to uphold principles of diversity and equal access to the legal profession…"[97]

**66** The *Bicentennial Report* was adopted 22 years ago. The Statement of Principles and the *Challenges Report* are the product of decades of consultation and reform by the Law Society.

**The Human Rights Monitoring Group**

**67** The Human Rights Monitoring Group was established in 2007, with a mandate to review and respond to human rights violations against members of the legal profession and the judiciary here and abroad as a result of the discharge of their legitimate professional duties. Based upon information received, usually from groups active in international human rights, the Monitoring Group determines whether a particular instance requires a response by the Law Society, and then prepares a response for review and approval by Convocation. The Monitoring Group works in collaboration with organizations like Lawyers' Rights Watch Canada, Amnesty International, the Law Society of England and Wales and Human Rights Watch.

**68** In its June 2014 report, *Facilitating International Access to Justice Through Intervention*[98]*,* the Monitoring Group provides an overview of its work since its founding. It reports that the types of clients represented by lawyers who have been persecuted by authorities are often advocates for human rights, or vulnerable clients who have no other access to the legal system. The Monitoring Group also reports that most often presiding judges who are persecuted in the course of their duties focus on facilitating access to justice by advocating for an independent judiciary and promoting the Rule of Law.[99]

[97] *TWU v LSUC*, *supra* note 29 at para 24.
[98] Updated February 2017
[99] Law Society of Ontario, "Human Rights Monitoring Group" (n.d.), online: *Law Society of Ontario* <https://lso.ca/about-lso/initiatives/human-rights-monitoring-group>.

**69** From time to time during its history the Monitoring Group and its work have been challenged as not being part of the Law Society's "core mandate". This criticism is being heard again, particularly from the STOP group.

**70** The term "core mandate" does not appear anywhere in the *Law Society Act,* regulations, by-laws or *Rules of Professional Conduct*, and there does not appear to be a definition of it readily at hand.

**71** The authority of the Human Rights Monitoring Group derives from the mandate of the Law Society "to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the Rule of Law."[100]

**72** The STOP argues that the Statement of Principles is inconsistent with the independence of lawyers, particularly their independence of thought, belief and opinion.[101] This interference hinders the ability of lawyers to be "the last line of defence for the weak and the oppressed".[102]

**73** The work of the Human Rights Monitoring Group sheds considerable light on the independence of the bar and the judiciary, within the overall context of the Rule of Law.

**74** The Human Rights Monitoring Group was born out of international human rights instruments, including the *Universal Declaration of Human Rights*[103]. The Rule of Law is woven into the structure of the *UDHR*, starting with the third clause of the Preamble:

> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law.[104]

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[100] Law Society of Upper Canada, "Comments of Law Society of Upper Canada on S7-45-02" (06 December 2002) at 1.
[101] *Problem #4*, *supra* note 16.
[102] *Ibid.*
[103] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at Preamble(3) (1948).
[104] Mary Ann Glendon, "The Rule of Law in the Universal Declaration of Human Rights" (2004) 2 *Northwestern University Journal of International Human Rights* at para 6.

**75** The Rule of Law is a foundational principle of the Canadian constitution.[105] It is at the root of our system of government.[106] It is explicitly recognized in the preamble to the *Constitution Act, 1982*, and impliedly recognized in section 1 of the *Charter*, requiring that the rights and freedoms set out in the Charter are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[107]

**76** At its meeting in Tunis on March 23-24, 2019, the International Commission of Jurists affirmed the inextricable link between the Rule of Law and human rights, and their relationship to the independence of the bench and bar, proclaiming:

> 4. The Rule of Law is inextricably linked to and interdependent with the protection of human rights, as guaranteed in international law and there can be no full realization of human rights without the operation of the Rule of Law, just as there can be no fully operational Rule of Law that does not accord with international human rights law and standards;
>
> 9. The principles that comprise the Rule of Law include the protection of human rights and, among other elements, the following:
>
> e) the independence of judges and lawyers, as well as their accountability,
>
> l) the principle of equality, equal protection of the law, and non-discrimination on the grounds of race, colour, sexual orientation or gender identity, age, gender, religion, language, political or other opinion, citizenship, nationality or migration status, national, social or ethnic origin, descent, health status, disability, property, socio-economic status, birth or other status.[108]

**77** In its discussion of the Independence of Judges and Lawyers, the International Commission of Jurists declares:

> 18. To ensure public confidence and promote human rights values, judiciaries, the legal profession, and prosecution services should reflect the diversity of the societies they serve. All forms of discrimination in the composition of judiciaries, legal profession and prosecution services, as well as in the

[105] *Roncarelli v. Duplessis*, [1959] SCR 121 at 142, cited in *British Columbia (AG) v. Christie*, [2007] 1 SCR 873 at para 19.
[106] *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 70, cited in *Christie*, at para. 19
[107] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 SCR 236 at para. 250 and *Christie*, at para. 19
[108] *The Declaration, supra* note 1 at paras 4, 9.

> administration of justice, must be eliminated. In this respect, particular attention is needed to direct or indirect exclusionary discrimination on the basis of such grounds as sex, gender, national or ethnic origin, religion, caste, language, race or sexual orientation, or against persons from frequently marginalized or disadvantaged groups such as people living in poverty, indigenous peoples, rural populations, refugees and migrants, and persons with disabilities. Continuing legal education for judges, lawyers and prosecutors should be organized by their respective professional associations or similar independent bodies.[109]

**78** The ICJ observes that worldwide, increasing attacks on the Rule of Law have intensified longstanding inequalities and compounded intersecting forms of discrimination against women and girls and persons from marginalized groups.[110] It urges judges and lawyers worldwide "to meet their responsibilities to uphold the universal and equal protection of human rights for all, in particular those subject to discrimination in national laws, policies or practices; to work to ensure the full implementation in national legal systems of the rights of those groups threatened by discriminatory laws or politices, and to work to end entrenched discrimination and discriminatory stereotypes and bias.[111]

**79** The work of the Human Rights Monitoring Group reminds us that the Law Society is part of a worldwide network in the legal profession, striving to uphold the values of human rights by securing preservation and application of the Rule of Law. The legal profession and the judiciary are two of the principal bulwarks of the Rule of Law both nationally and internationally; doing this essential work is totally consistent with the key value attached by the Canadian constitution to the Rule of Law itself. It is clearly in the public interest to work to support and uphold the Rule of Law.

**80** As described in the letter of the Equity Advisory Group, the Law Society has been deeply involved in promoting human rights within the legal profession for almost fifty years, since 1974. Promoting human rights within the profession makes the profession, in turn, more able to connect with those who need

[109] *The Declaration, supra* note 1 at para 18.
[110] *Ibid* at para 36.
[111] *Ibid* at para 141.

human rights protection in society, and to serve them ethically and competently with knowledge and commitment.

**81** It is useful to remember that under the Rule of Law, law is supreme over private individuals as well as over government.[112] This means, at least, that individual licensees of the Society are bound by the human rights laws in effect in Ontario. They do not have unbridled choice to disobey those laws with impunity. Their actions must be in accord with those laws, even if they have political and moral reservations against them. One might well ask, then, what is the incremental difference between the obligations imposed by the law of Ontario and the requirements of the Statement of Principles? Both address actions and behaviour, rather than thought and belief. Both leave the licensee free to believe whatever he or she wishes about human rights, as long as the licensees' actions accord with the law.

**82** In implementing the Statement of Principles, the Law Society was, once again, seeking to do its part in realizing human rights protections for licensees, and, in turn, the wider population which might seek legal services from those licensees. The goal of promoting equity, diversity and inclusion is one which the LSO shares with jurists and lawyers around the world, specifically through the Human Rights Monitoring Group and more generally through its rights-promoting activities of the past half century.

**COMPELLED SPEECH**

**The Argument that the Recommendation is compelled speech**

**83** The requirements of Recommendation 3(1) have been opposed as "unjustified compelled speech".[113] In brief, the contention is that Recommendation 3(1) "requires you to state your

[112] *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 743.
[113] *Problem #1*, *supra* note 12.

concurrence"[114] with the "political aims" [115] of the Society, namely equity, diversity and inclusion. It is said to be "not only coercive, but disturbingly tyrannical".[116]

**84** In support of the argument that Recommendation 3(1) is tyrannical, its opponents rely on the additional reasons of Beetz J (on behalf of himself and four other justices) in the case of *National Bank of Canada v. Retail Workers' International Union*[117]. The Canada Labour Relations Board heard complaints that the Bank had violated the *Canada Labour Code* by closing one branch which had unionized staff and opening another where the staff was not unionized. It ruled against the Bank, and issued an order that the Bank set up a trust fund to promote the objectives of the *Canada Labour Code*. It also ordered that the Bank distribute to its employees a letter, the text of which was written by the Labour Board, describing the creation of this trust fund and its support for the goals and provisions of the *Canada Labour Code*. The order stated that no changes could be made to the Board's imposed letter, and no additional documents could be sent with it. The letter would thus appear as if it were the creation of the Bank and expressed its own opinions.

**85** The central issue in that case was whether the Labour Board had the jurisdiction to issue punitive orders, which is how the Court characterized the requirements to set up the trust and send the letter. The Court's decision was that the Board did not have such jurisdiction and it invalidated the orders. In the additional reasons relied upon by the STOP group, five members of the Court emphasized that no one is obliged to approve of the objectives and provisions of the *Canada Labour Code*; anyone can criticize it and seek to have it repealed, albeit complying with the statute until it is repealed. The letter expressing support for the objectives of the *Canada Labour Code* is thus "misleading or untrue". Beetz J. continues, "This type of penalty is totalitarian and as such alien to the tradition of free nations like

[114] *Problem #2*, *supra* note 13.
[115] *Problem #4*, *supra* note 16.
[116] *Problem #2, supra* note 13.
[117] [1984] 1 SCR 269.

Canada, even for the suppression of the most serious crimes." He was not persuaded that Parliament would have given the Labour Board the power to impose such a penalty, "bearing in mind the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression." He continues, "These freedoms guarantee to every person the right to express the opinions he may have: *a fortiori* they must prohibit compelling any one to utter opinions that are not his own".

**86** The observations about the *Charter* are *obiter*; there was no actual *Charter* analysis in the National Bank case.

**87** There are no Supreme Court of Canada decisions dealing with compelled speech under section 2(b) of the *Charter*. Set out below is such an analysis, drawing upon the principles the Court uses to decide cases under section 2(d), and including a justification analysis under section 1 of the *Charter*.

**88** Before turning to that analysis, however, it is useful to consider the differences between the National Bank case and the Law Society's adoption of Recommendation 3(1). Unlike the Labour Board, the Law Society is an institution for self-regulation, not the source of state-imposed controls. Unlike the letter ordered by the Labour Board, the Statement of Principles is not to be distributed to the public or any segment of it. The licensee is allowed to choose his or her own language for the Statement of Principles. The Statement is not supposed to express concurrence with the ideas of equity, diversity and inclusion, but rather the licensees' ideas about how he or she will implement them in his or her professional life. In a regulated profession, it is not unusual for licensees to have to conform their behaviour to ideas with which they may not agree. The Statement requirement is not in the nature of a penalty, but rather a part of the larger project of professional self-regulation. As amply demonstrated by the Bencher election, the Statement of Principles requirement has not interfered in the least with the ability of licensees to express their opinions generally. That there was opposition to those opinions is, with respect, to be expected.

**Section 2(b) of the *Charter*[118]**

**89** Section 2(b) of the *Charter* provides that everyone has "freedom of thought, belief, opinion and expression, including freedom of the press and other media of expression."

**90** The Supreme Court has established a two-part test to determine whether a violation of freedom of expression has occurred. The first step asks whether the activity is within the protected sphere of freedom of expression. If it conveys or attempts to convey a meaning, or has expressive content, it prima facie falls within the guarantee. Once it is established that the activity is protected, the second step asks if the provision under review infringes that protection, either in purpose or effect.[119]

**91** If a violation of section 2(b) is established, the onus shifts to the Law Society to demonstrate that the offending provision is justified under section 1 of the Charter, which provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Justice McIntyre observes that in applying section 1, the Court must be guided by the values and principles essential to a free and democratic society, which embody, "to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[120]

**92** To succeed in a section 1 justification, it must be established by cogent and persuasive evidence that the objective of the measure is pressing and substantial, and that the means chosen to implement if are reasonable and demonstrably justified, called the "proportionality" requirement. Meeting this proportionality test means establishing that there is a rational connection between the objective and

[118] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 IUK), c 11.
[119] *Irwin Toy Ltd. v. Quebec Attorney General*), [1989] 1 SCR 927, cited at *Baier v. Alberta*, 2007 SCC 31, at para. 19.
[120] *R. v. Oakes*, [1986] 1 SCR 103 at 136-139.

the means (i.e. that the means are not arbitrary, unfair or based on irrational considerations), that the means impair as little as possible the rights in question ("minimal impairment"), and that there is proportionality between the effects of the measure and its objective. A final overriding concern is In *Dagenais v. Canadian Broadcasting Corporation*[121], the Supreme Court adds a further refinement to the proportionality test. It states that even if the objective of the measure is sufficiently important and the first two elements of the proportionality test are met, it is still necessary to prove that there is a proportionality between the deleterious and the salutary effects of the measure.[122]

**Analysis**

**93** Two approaches to analysis are set out here. One is based on the Society's regulatory functions, and focusses on the means the Society can use to encourage understanding of members' obligations and compliance with them. This approach has been explored by Alice Woolley[123]. The second approach concentrates on the Society's own goal of promotion of equity, diversity and inclusion, and reviews in light of that goal the measures embodied in the Statement of Principles.

**94** Alice Woolley argues that a law society can require licensees to acknowledge and abide by obligations that the law society has lawfully created, even when those obligations involve moral assessments of what is right and good. Compliance-based regulation depends on licensees acknowledging regulatory obligations, creating strategies for accomplishing them and reporting on the success of those strategies.

**95** This argument meets the *Charter* test with respect to section 2(b). Although the acknowledgement is speech required by the regulator, the objective of the requirement is pressing and substantial. In the

[121] [1994] 3 SCR 835 at pages 888-889.
[122] *Ibid* at 889.
[123] Alice Wooley, "Ontario's Law Society: Orwell's Big Brother or Fuller's Rex?" (13 September 2017), online: *Slaw* <http://www.slaw.ca/2017/10/31/ontarios-law-society-orwells-big-brother-or-fullers-rex/>.

case of the Law Society of Ontario, the objective would be to carry out the statutory function of ensuring that all persons who practise law or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide. The acknowledgment is rationally connected to the goal, aimed at ensuring that the licensee is aware of the obligations binding him or her. And the means are proportionate to the task, particularly if, as in the case of Recommendation 3(1), the acknowledgement is a matter between the licensee and the regulator and does not involve a requirement of speech to the public or a segment of it. The idea behind the Statement is to require the licensee to think about the implications for his or her own conduct of the special responsibility to obey human rights laws in force in Ontario, a rationale consistent with Woolley's model of compliance-based regulation.

**96** The compliance-based regulation model would, in theory, survive *Charter* scrutiny even if the licensee were personally opposed to his or her obligations under the Rules, or to the moral rationale for those obligations. Opposed or not, the licensee is bound by the obligations.

**97** Woolley argues, however, that in the case of Recommendation 3(1), the Law Society has not created an obligation on its licensees to *promote* equity, diversity and inclusiveness. Although both lawyers and paralegals are required by the Rules to obey the *Ontario Human Rights Code*, and other human rights law applicable in Ontario, Woolley maintains that such that obedience does not amount to promotion of equity, diversity and inclusiveness. Nor does she consider that the requirements In Commentary 4.1 to Rule 2 of the *Rules of Professional Conduct* with respect to integrity, amount to a requirement to “promote” equity, diversity and inclusion. The verbs used in Commentary 4.1 are “recognize” the diversity of the Ontario community, “protect” dignity and “respect” human rights laws.

**98** Contrary to this view, we assert that the combined obligations on licenses in the Rules of Professional Conduct, combined with the requirement for continuing professional education in the area of equity diversity and inclusiveness, are sufficient to amount to an obligation which the Society can

enforce by means of an acknowledgement requirement. This is particularly so given the modest requirements of the Statement: a licensee could simply state that he or she would respect the law and the requirements of the *Rules of Professional Conduct*.

**99** The second approach involves a focus on the Society's goal of promoting equity, diversity and inclusion. The Society would argue that its own objective of promoting equity, diversity and inclusion is so pressing and substantial that it justifies the requirement. In this, it would be aided by statements like that of the Supreme Court in *TWU v. LSBC* [124] that it was reasonable for the Law Society to conclude that promoting equality by ensuring equal access to the legal profession and supporting diversity within the bar were valid means by which it could pursue its overarching statutory duty.

**100** The Society would have to establish that the requirement to create and abide by a Statement of Principles is rationally related to the achievement of the Law Society's objective. In this connection, it might argue that requiring licensees to identify behaviour that would further that goal is rationally connected to it; with an emphasis on behaviour, rather than belief in the goal, the Society is, in effect, saying believe what you will, we are interested only in how you behave. The Society's argument with respect to the proportionality of the measure would be similar in this case to that used in the regulatory model. The rational connection could well be established by the Society's reasoning that creating a statement makes the licensee focus on actions he or she can take in furtherance of the objective. The fact that the speech is not prescribed by the Society but developed by the licensee, and that it is not meant to be distributed to the public, serve to distinguish the Statement from the letter at issue in the National Bank case, and support the argument that the Statement effects minimal impairment of the right to freedom of expression. Overall, the Society would also argue that the beneficial effects of the measure, contributing to the promotion of equality and diversity within the profession and thus making it better able to serve the diverse populace of Ontario, outweighs the requirement that licensees

[124] *Supra*, note 29 at para 40.

identify conduct in which they will engage in. This is particularly so as licensees are already obliged by the general law and by the Rules to obey human rights laws.

**101** The success of this *Charter* argument depends almost entirely on whether a Court would decide that the Society's own objective of promoting equality, diversity and inclusion is of sufficient importance to justify the Statement requirement. There are strong arguments in favour of such a finding, including the Court's reasoning in the *Trinity Western* cases, the long history of the Society's promotion of equality and diversity within the profession, and the fact that respect for minorities is recognized by the Supreme Court as one of the four foundational principles of the Canadian constitution.

**102** It is also important to this analysis that although licensees are not required by the Rules to promote equity diversity and inclusiveness, they are required to obey the human rights laws applicable in Ontario. "Conscientious objection" to human rights laws is thus not available to licensees as a basis for arguing that Recommendation 3(1) trenches too deeply on their freedom of expression. The conceptual gap which the Society must bridge in this analytical approach is only the gap between compliance with requirements for equity diversity and inclusion found in human rights laws and promotion of these concepts.

**CONCLUSION**

**103** We have surveyed the objections of the STOP to the Statement of Principles in light of the statutory mandate of the Law Society and its history of commitment to equity, diversity and inclusion. In its respect for human rights, and safeguarding those lawyers and judges who safeguard human rights around the world, the Society is a member of a broad community of jurists and lawyers dedicated to preserving these values. These are not shallow-rooted interests or flash-in-the-pan fads. Any observer of the Society over the past almost half a century would have perceived its commitment and the trajectory of its activities.

**104** In requiring all licensees to create a Statement of Principles, the Law Society is not behaving in a tyrannical manner as alleged by STOP. It is building upon licensees' existing obligations, under the law of Ontario and Canada, namely human rights Codes and the Charter. It is building further on Rules of Professional Conduct which require observance of human rights laws in effect in the province. It is invoking the Rule of Professional Conduct about the integrity of lawyers. Whatever speech may be required by licensees, in writing down their thoughts about how their behaviour toward employees, colleagues and the public can contribute to the Society's desire to promote human rights, is, we contend, amply justified by the regulatory role of the Society and by the tremendous importance of this objective. The Statement of Principles is an extremely modest requirement, for speech that is not communicated to the public or any segment of it, and that is written in the licensees' own words, rather than dictated by the society. This is the only part of Recommendation 3 that is required of all licensees; the more onerous requirements of filing a plan and self-reporting on it are not imposed on work places with fewer than 10 licensees in Ontario.

**105** The Law Society of Ontario is a powerful actor and leader in the commitment to the primacy of the Rule of Law and human rights. The degradation of that commitment by others has been "largely driven by a broad questioning of the value of universal human rights." That questioning has been "cynically exploited by…other powerful actors…" such as STOP to foment a wider backlash in the profession.[125]

**106** "Despite these retrograde tendencies, it is critical…"[126] that the Rule of Law and human rights law and standards such as the Statement of Principles be developed and upheld so that the Law Society of Ontario can continue its long history of effectively contributing to addressing the great challenges to the Rule of Law and human rights, in this Province and the world.

[125] *The Declaration*, *supra* note 1 at 1.
[126] *Ibid.*