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BY EMAIL AND REGULAR MAIL

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Dear Ms Spears:

RE: Trinity Western University Accreditation Decision – Discretion and Public Interest

You have asked for some guidance on discretionary decision-making by Convocation in respect of the Trinity Western University ("TWU") accreditation decision. In particular, you have asked for guidance on the approach to section 4.2 of the Law Society Act ("*LSA*"), which provides that in carrying out its functions, duties and powers, the Society shall have regard to the principle that the Society has a duty to protect the public interest.

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A. Executive Summary

Convocation will be making a discretionary decision whether or not to accredit Trinity Western University ("TWU"). The *Law Society Act* ("LSA") and By-Laws provide little concrete guidance to Convocation on how to exercise its discretion.

General administrative law principles governing the exercise of discretion are relevant to Convocation's decision-making. Discretion must "be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law..., in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian *Charter of Rights and Freedoms*."¹

In exercising discretionary powers, principles of administrative law require decision-makers to use discretionary powers in good faith and for a proper purpose; consider only relevant considerations and not consider irrelevant considerations; exercise their discretion independently, not act under the dictation or at the behest of any third person or body; and give proper, genuine and realistic consideration to the merits of the particular case.

¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 53 (internal citations omitted)

The exercise of discretion is also constrained by the *Charter* and the Ontario *Human Rights Code*. Where legislation confers a broad discretion, it must be exercised in a manner consistent with the *Charter* and human rights legislation, and must take into account fundamental Canadian values including *Charter* and human rights values.

The statutory scheme is critical as it defines the context within which the power to accredit is exercised, and thus the factors relevant to the scope of discretion afforded to Convocation. The *LSA*, the By-Laws and regulations establish the framework governing the decision-making functions of the Society. The exercise of discretion must be consistent with the *LSA*'s purposes and principles, as well as the By-Laws and regulations. Section 4.1 of the *LSA* sets out the functions of the Society, which are essentially the purposes of the Society. In the context of accreditation, section 4.1 provides it is a function of the Society to ensure that persons practicing law in Ontario "meet standards of learning, professional competence and professional conduct". Section 62.01(4.1) gives Convocation the power to make by-laws governing licensing and prescribing the qualifications and requirements for licensing. By-Law 4 was enacted pursuant to this power. It establishes as a qualification for licensees a requirement either that (i) a licensee graduate from an accredited Canadian law school, or (b) have a certificate issued by the National Committee on Accreditation. An accredited law school is defined in By-Law 4 as "a law school that is accredited by the Society." There are no processes or criteria set out in the *LSA* or By-Laws relating to accreditation. Convocation has as a matter of policy approved the role of the Federation's Approval Committee in determining whether current and proposed law schools meet the national requirement. Policy is not binding on Convocation, although a failure to follow a policy may lead to concerns regarding the application of the administrative law doctrine of legitimate expectations.

Section 4.2 of the *LSA* establishes five principles to be applied by the Society in carrying out its functions, duties and powers, which includes the discretionary decision on accreditation. The principles include that the Society "has a duty to maintain and advance the cause of justice and the rule of law", and "a duty to protect the public interest."

The next step in Convocation's analysis is to determine what constitutes the "public interest" in the context of the accreditation decision. This can be done by looking at how the "public interest" has been interpreted in the context of the *LSA* and how courts have approached administrative decision-making in the "public interest" more broadly. With respect to the *LSA*, courts have determined that the Society must consider the members of the public who utilize legal services, as well as the public at large who may require legal services in the future. The public interest mandate of the Society has been relied on in the discipline jurisprudence as a means to ensure that the public has access to quality and reliable legal services, and that the public retains trust in the legal community.

Outside of the *LSA* context, courts have held that the discretion of administrative agencies and tribunals to act in the public interest is not unlimited. Where administrative decision-makers have the power to make decisions or orders in the public interest, courts have held that they must base their decisions on the facts of the case, must be consistent with the purposes of the statute granting power and the legislative and social context of the statute, and must not act in an arbitrary manner. Courts have also held that decision making in the public interest must take into

consideration the concerns of society generally, or at least those concerns relevant given the statutory scheme, and not merely the interests of one segment of society. *Charter* and human rights values such as equality, non-discrimination and religious freedom properly form part of the determination of what constitutes public interest.

Convocation may properly take into account various Law Society policies in approaching the discretionary decision. The Society has articulated the content and scope of its public interest mandate through studies and reports commissioned by the Society, and through a wide variety of documents and statements. The Society has policies dealing with religious freedom and non-discrimination, as well as mobility.

B. Introduction

Convocation will be making a discretionary decision whether or not to accredit TWU. In this opinion we commence with a review of general administrative law principles relevant to the exercise of discretionary decision-making powers, which includes the duty to consider *Charter* and human rights values. Since the statutory context is critical to the exercise of discretion, we review the statutory scheme within which the power to accredit is situated. We then examine the Society's articulation of its public interest mandate, and review case law with respect to the interpretation of the public interest in case law, both within and outside the Law Society context. Our goal is to provide Benchers with an overview of relevant issues they should consider as they exercise their discretion to accredit or not accredit TWU.

C. Accreditation is a Discretionary Decision

A discretionary decision is one where "the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries." The decision by Convocation is a discretionary decision, in that Convocation may decide to accredit or refuse to accredit TWU.

1. Administrative Law Principles

No administrative decision-maker has an unfettered discretionary power. Discretion must "be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms*."² We discuss the relevant sections of the Law Society Act ("*LSA*") and By-Laws below, since they are the legal source for the power to accredit, and define the scope and principles governing the exercise of discretion.

In exercising discretionary powers, principles of administrative law require decision-makers to:

² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 53.

- use discretionary powers in good faith and for a proper purpose (i.e., honestly and only within the scope of and for the purpose for which the power was given, and not arbitrarily);³
- consider only relevant considerations and not consider irrelevant considerations: the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration;⁴
- exercise their discretion independently and not act under the dictation or at the behest of any third person or body; and
- give proper, genuine and realistic consideration to the merits of the particular case, and not fetter their discretion by applying policies inflexibly without considering the merits of the application and the relevant criteria.⁵

2. Charter Values and Non-Discrimination

Discretion is also constrained by the *Charter* and human rights legislation. Administrative decision-makers, in exercising their discretion, are required to take into account fundamental Canadian values, including those in the *Charter*.⁶ In *Doré*, the Supreme Court held that "administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values".⁷ Further, where legislation confers a broad discretion, it must be exercised in a manner consistent with Charter rights.⁸

A decision-maker may not exercise its discretion for discriminatory purposes, unless authorized by statute.⁹ Convocation must also consider the Ontario *Human Rights Code* and protected grounds of non-discrimination.¹⁰

³*Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140-143; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, 2004 SCC 48 at paras. 6-7.

⁴*Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164 at pp. 174-175 per Wilson, J.

⁵See *Maple Lodge Farms Ltd. v. Canada*, [1980] F.C.J. No. 171 (F.C.A.); aff'd [1982] 2 S.C.R. 2.

⁶*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53-56; see also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

⁷*Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, at para. 24.

⁸*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *PHS Community Services Society*, 2011 SCC 44 at para. 117.

⁹*Montreal (City) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, at pp. 404-406.

¹⁰*Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87; *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, at paras. 26-28.

D. Factors to Consider From the Statutory Context

1. Statutory Scheme Generally

The exercise of a discretion, stated Rand J. in *Roncarelli*, “is to be based upon a weighing of considerations pertinent to the object of the [statute’s] administration.”¹¹ The *LSA*, the By-Laws and regulations establish the framework governing the decision-making functions of the Society. Administrative law principles require Convocation to consider proper purposes, and not consider improper or irrelevant purposes. The exercise of discretion must be consistent with the principles governing the application of the *LSA* and with the *LSA*'s purposes.¹² This requires a consideration of the statutory scheme.

The *LSA* vests Convocation with control over licensee education, admission, discipline and unauthorized practice.¹³ The courts have recognized that the Society regulates the legal profession, and now paralegals, in the public interest, and exercises discretionary public law powers. In *Edwards v. Law Society of Upper Canada*, the Supreme Court held that the Society did not owe a private law duty of care to members of the public when exercising statutory functions. The Court held:¹⁴

14 With reference to the Act, it is apparent that the Law Society regulates the legal profession. Specifically, its responsibilities include the admission standards of the profession (beginning at s. 27), the continuing education of its members (s. 60) and the formulation and enforcement of a code of professional ethics. ... The *Law Society Act* is geared for the protection of clients and thereby the public as a whole... Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties.

While there are no specific indications of the process for accreditation, or what should be considered in the determination of accreditation, the Society is guided by its governing statute. The functions of the Society and the principles to be applied by the Society, as set out in the *LSA*, provide guidance and terms of reference for the Society in carrying out its functions, duties and powers.

Section 4.1 of the *LSA* sets out the functions of the Society, which are essentially the purposes of the Society, and will help guide Convocation's determinations as to factors which are relevant to

¹¹ *Roncarelli*, *supra*, at p. 140.

¹² *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] 2 S.C.R. 108, at paras. 23-25, 40-41; see also *British Columbia (Workers' Compensation Board) v. Figliola*, [2011] 3 S.C.R. 422, at para. 541, and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at para. 66 ("This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. ...").

¹³ *Regina v. Lawrie and Pointts Ltd.*, 1987 CanLII 4173 (ON CA) for a discussion in the context of lawyers; similar powers now apply with respect to all licensees.

¹⁴ *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, at para. 14 (emphasis added).

the accreditation decision, and the purposes being furthered by the decision. Section 4.1 provides.¹⁵

Function of the Society

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.

The purposes are focussed on standards of learning, professional competence and professional conduct. The discretion conferred by the *LSA* "must be exercised consistently with the purposes underlying its grant."¹⁶

In addition to the purposes or functions of the Society, section 4.2 of the *LSA* also establishes five principles to be applied by the Society in carrying out its functions, duties and powers, which includes the discretionary decision on accreditation. The decision may not invoke all of these principles, but all those that are relevant must be considered:

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.

¹⁵ *LSA*, supra, at ss. 4.1-4.2.

¹⁶ *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, [2010] 1 S.C.R. 815, at para. 46

The inclusion of principles is a statement by the legislature that in exercising powers and duties that are consistent with the functions of the Society, the Society must take into consideration the principles enumerated in section 4.2. These are by definition "relevant factors" for the purposes of the exercise of discretion.

2. Statutory Scheme Relevant to Accreditation

The *LSA* does not refer to accreditation. Rather, accreditation arises pursuant to Convocation's power to make By-Laws with respect to licensing of persons to practise law in Ontario.

(a) By-Laws

Sub-section 62.01(4.1) provides that Convocation may make By-Laws:

[G]overning the licensing of persons to practise law in Ontario as barristers and solicitors and the licensing of persons to provide legal services in Ontario, including prescribing the qualifications and other requirements for the various classes of licence and governing applications for a licence.

This authority to prescribe "qualifications and other requirements" for licensing is in furtherance of section 27(3) of the *LSA* which provides that:

If a person who applies to the Society for a class of licence in accordance with the by-laws meets the qualifications and other requirements set out in this Act and the by-laws for the issuance of that class of licence, the Society shall issue a licence of that class to the applicant.

The Law Society is required to license persons who meet the qualifications prescribed in the By-Laws and in the *LSA*; it is mandatory rather than discretionary.

The concept of accreditation arises in By-Law 4, where it is related to the qualification required of licensees.¹⁷ Under By-Law 4, the requirement for the issuance of a Class L1 licence includes either:¹⁸

- i. A bachelor of laws or juris doctor degree from a law school in Canada that was, at the time the applicant graduated from the law school, **an accredited law school**.
- ii. A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.

¹⁷ The *LSA* provides that: "The by-laws made under this section shall be interpreted as if they formed part of this Act." *LSA, supra*, at s. 62(2).

¹⁸ By-Law 4, s. 9(1)1 (emphasis added).

An “accredited law school” is defined as “a law school in Canada that is accredited by the Society”.¹⁹

The primary effect of accreditation of a law school is that a graduate of an accredited Canadian common law school is entitled to be licensed subject to meeting three further requirements: (1) licensing examinations, (2) articling/law practice program, and (3) good character.²⁰ Accreditation is thus related to the core concerns of the Law Society, which include, as set out in section 4(1) of the Act, standards of learning and professional competence.

Graduates of international law schools must meet additional requirements. International graduates are required to apply to the National Committee on Accreditation (“NCA”) of the Federation of Law Societies of Canada. Candidates may be required to pass certain examinations or successfully complete specified courses at a law school before completing the licensing examination and articling/law practice program. Individual applicants from non-accredited international law schools thus face additional costs and delay when seeking entry into the profession in Ontario, when compared to applicants from accredited Canadian law schools.

Currently there is no process in place by which graduates of a non-accredited Canadian common law university may enter the Law Society's licensing process. The Federation's National Committee of Accreditation's (“NCA”) mandate is to evaluate the qualifications of those with degrees from outside Canada (international degrees) and from Quebec. It was not established to consider additional qualifications that graduates of non-accredited Canadian common law schools would have to meet.

(b) Mobility Issues

There are issues relating to inter-jurisdictional mobility for graduates of a non-accredited Canadian law school under the present statutory scheme.²¹ We discuss two aspects below: the National Mobility Agreement, and the Agreement on Internal Trade (“AIT”).

The permanent mobility²² or transfer provisions of the Federation of Law Societies National Mobility Agreement provide that:

32. A signatory governing body will require no further qualifications for a member of another governing body to be eligible for membership than the following:

¹⁹ *Ibid.* at sec. 7.

²⁰ The Society has accredited seven law schools in Ontario and eleven additional law schools throughout Canada.

²¹ For a more complete discussion of inter-jurisdictional mobility and links to the Agreements see LSUC, Background Information, Inter-jurisdiction Mobility of Lawyers in Canada, Federation of Law Societies of Canada National Mobility Agreements, <http://www.lsuc.on.ca/uploadedFiles/BackgroundInter-JurisdictionalMobilityReport.pdf>, accessed April 3, 2014.

²² Temporary mobility is discussed in the LSUC Background Information piece, *supra*.

- (a) entitlement to practise law in the lawyer's home jurisdiction;
- (b) good character and fitness to be a lawyer, on the standard ordinarily applied to applicants for membership; and
- (c) **any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction.**

“Entitled to practise” is defined in the Agreements to mean “allowed, under all of the legislation and regulation of a home jurisdiction, to engage in the practice of law in the home jurisdiction.” The requirement in By-Law 4 is graduation from an "accredited" Canadian law school. The accreditation requirement is thus one of the "qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction” provided for in section 32(c) of the National Mobility Agreement.

Accordingly, if the Law Society denies accreditation to TWU, a graduate of TWU called to the bar in any other jurisdiction in Canada would be unable to transfer to Ontario to become a member of the Law Society of Upper Canada under the National Mobility Agreement, unless By-Law 4 is amended to provide an exemption for transfer purposes from the accreditation requirement, or the AIT process discussed below is engaged.

Chapter 7 of the AIT requires that provinces and territories agree to certify²³ workers, already certified in another Canadian jurisdiction, without the imposition of further training, experience, examinations or assessment. A jurisdiction can impose additional requirements to certify a worker who is already certified elsewhere in Canada only if these additional requirements are in the service of a “legitimate objective”. A legitimate objective exemption must meet with the approval of government (s) in which the exemption is sought. Any additional requirements of, or conditions imposed on, a worker certified in another jurisdiction can be no more onerous than those demanded of workers already certified in the receiving jurisdiction or applying for certification for the first time within the jurisdiction. The AIT is a government to government regime requiring, for example, that legitimate objective exemptions and enforcement issues be pursued at the governmental level. If a Law Society were to refuse a mobility transfer to a TWU graduate called to the bar in another jurisdiction in Canada the AIT could potentially be resorted to challenge that decision, unless a legitimate objective exemption has been obtained. The Chapter 7 provisions of the AIT have been incorporated into the *Ontario Labour Mobility Act, 2009*.²⁴

(c) Policies

By-Law 4 does not specify any process or criteria by which the Society is to accredit law schools. There are no other policies or procedures in the *LSA* or By-laws directly relevant to the

²³ This is generic language that includes “license.”

²⁴ S.O. 2009, c. 24

accreditation decision. There are two policies relating to the role of the Federation regarding academic requirements for common law degree programs which have been approved by Convocation.

In 2010 Convocation approved the report of the Federation of Law Societies of Canada Task Force on the Canadian Common Law Degree that established the national requirement, which specifies the competencies graduates must have attained and the law school academic program and learning resources law schools must have in place. In 2011, Convocation approved the Federation Implementation Committee report that established and set out the mandate of the Federation's Approval Committee to determine whether current and proposed law programs meet the national requirement. The Approval Committee completed its review of the Trinity Western Faculty of Law application, and determined that, subject to concerns and comments contained in its report, if implemented as proposed, TWU's proposed program will meet the national requirement. The proposal has been granted preliminary approval.

As described above these policies do not bind Convocation in the same way as the *LSA* and By-Laws. However, policies like these which have been developed through a committee process, with due deliberation and appropriate input, should be considered and may be relied on in approaching the discretionary decision on the academic aspect of the national requirement, separate and apart from the "public interest" aspect of the accreditation decision. Generally, Convocation should only depart from such policies for good reason, and there may be issues relating to the administrative law doctrine of legitimate expectations with respect to process if Convocation departs from a process it approved for academic requirements after a participant has engaged in the process. This question of academic requirements is separate and apart from the public interest question presently before Convocation.

We now turn to the issue of the "public interest", reviewing Society policies and general jurisprudence on this point.

E. The Society's Articulation of Its Public Interest Mandate

Section 4.2 of the *LSA* sets out the five basic principles that guide the Society's actions. Of particular importance to the accreditation decision is the third principle, specifically that the "Society has a duty to protect the public interest."

The Society has articulated the content and scope of its public interest mandate through studies and reports commissioned by the Society, and through a wide variety of documents and statements. In the interests of consistency, transparency and accountability, it is important for the Society to consider its own articulation of the public interest.

For example, the requirements of governing lawyers in the public interest has been interpreted *inter alia* through a number of reports to Convocation as exercising regulatory authority in a timely and effective manner,²⁵ institutionalizing best practices and assuring accountability,²⁶

²⁵ Investigations Task Force, Law Society of Upper Canada, Final Report to Convocations (May 25, 2006), at paras. 2-4, available at http://www.lsuc.on.ca/media/convmay06_investigations.pdf.

expanding the pool of adjudicators to include additional non-bencher non-lawyer persons,²⁷ ensuring full disciplinary hearings on the merits where appropriate,²⁸ providing a hearing process that is fair, transparent and efficient,²⁹ and protecting the public through a competence based licensing process.³⁰ In the Society's own materials, regulating in the public interest has been understood as a mandate to integrate equity and diversity values and principles into the Society's model policies, services, programs and procedures,³¹ to ensure accessibility of services and the profession,³² and to advise clients of the French language rights.³³

We review below a number of documents and programmes implemented by the Society that describe the scope and content of the requirement to govern in the public interest, which we suggest are of greatest relevance to the accreditation decision.

1. Role Statement

On October 27, 1994, Convocation adopted a Role Statement. The Role Statement is a "mission statement" that provides guidance to the Society by: (a) defining the proper role of the Society and informing members of the profession and the public of that role; (b) assisting Convocation to

²⁶ Governance Task Force, Law Society of Upper Canada, Second Report to Convocation (March 29, 2007), at paras. 6-8, *available at* http://www.lsuc.on.ca/media/convmar2907_governance.pdf; Governance Task Force, Law Society of Upper Canada, Final Report to Convocation (Dec. 4, 2009), at p. 6, *available at* http://www.lsuc.on.ca/media/convdec09_governance.pdf.

²⁷ Tribunals Composition Task Force, Law Society of Upper Canada, Report to Convocation (April 26, 2007), at paras. 62-63, *available at* http://www.lsuc.on.ca/media/convapr07_tribunals_composition.pdf.

²⁸ Professional Regulation Committee, Law Society of Upper Canada, Report to Convocation (January 28, 2010), at paras. 9-10, *available at* http://www.lsuc.on.ca/media/conjan10_PRC.pdf.

²⁹ Tribunals Committee, Law Society of Upper Canada, Report to Convocation (June 28, 2012), at pg. 130, *available at* <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147488008>.

³⁰ Articling Task Force, Law Society of Upper Canada, Final Report – Pathways to the Profession: A Roadmap for the Reform of Lawyer Licensing in Ontario (Oct. 25, 2012), at p. 2 and para. 2 and 5, *available at* <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489848>.

³¹ Law Society of Upper Canada, Equity Initiatives Department, <http://www.lsuc.on.ca/faq.aspx?id=1034#q1213> (last visited March 3, 2014). *See also* Retention of Women in Private Practice Working Group, Law Society of Upper Canada, Report to Convocation (May 22, 2008), at p. 5, *available at* http://www.lsuc.on.ca/media/convmay08_retention_of_women_consultation.pdf; Law Society of Upper Canada, Respect for Religious and Spiritual Beliefs: A Statement of Principles of the Law Society of Upper Canada (March 10, 2005), *available at* <http://rc.lsuc.on.ca/pdf/equity/antiSemitism.pdf>; Law Society of Upper Canada, Guidelines for Lawyers Acting in Aboriginal Residential School Cases (Oct. 23, 2003).

³² Law Society of Upper Canada, Accessible Customer Service, <http://www.lsuc.on.ca/with.aspx?id=2147486355> (last visited March 3, 2014). *See also* Law Society of Upper Canada, Guide to Developing a Law Firm Policy Regarding Accommodation Requirements (May 2005), *available at* <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147487131>; Report of the Disability Working Group, Law Society of Upper Canada, Students and Lawyers with Disabilities – Increasing Access to the Legal Profession (Dec. 2005), *available at* <http://rc.lsuc.on.ca/pdf/equity/studentsandlawyerswithdisabilitiesreport.pdf>.

³³ Law Society of Upper Canada, Advising Your Clients About Access to Legal Services in French (2013), *available at* [http://www.lsuc.on.ca/uploadedFiles/Equity_and_Diversity/Members2/EQ-AJEFO-Brochure-French-Services\(1\).pdf](http://www.lsuc.on.ca/uploadedFiles/Equity_and_Diversity/Members2/EQ-AJEFO-Brochure-French-Services(1).pdf).

establish goals and to concentrate on policy issues at the core of the Society's responsibilities; and (c) assisting Convocation when discussing the continuation of established programs or the commencement of new activities.³⁴ The role statement was adopted before amendments to the *LSA* which introduced sections 4.1 and 4.2, but appears to be consistent with those sections, given the focus on governing the profession in the public interest.

The purpose of the Society is described in the Role Statement as follows:³⁵

The Law Society of Upper Canada exists to govern the legal profession in the public interest by,

- ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct; and
- upholding the independence, integrity and honour of the legal profession,

for the purpose of advancing the cause of justice and the rule of law.

In describing in greater detail what obligations and duties fall on the Society in governing the profession in the public interest, Convocation stated:³⁶

3.2 For example, it is in the interests of both public and profession that lawyers meet high standards of learning, competence and conduct.

...

3.6 In the final analysis, the public interest will always be paramount in determining the activities, policies and programs of the Law Society. It is only if the profession is seen to be serving the public interest that it will maintain public confidence and command public respect.

...

4.2 The concept that the Society must govern its members in the public interest is inseparable from the idea that one of the distinguishing features of a profession is that it exists to put its specialist skills at the service of the public. The obligation is more

³⁴ Law Society of Upper Canada, *Role Statement*, Oct. 27, 1994.

³⁵ *Ibid.* at p. 1.

³⁶ *Ibid.*, internal citations omitted (emphasis added).

compelling where the public has given the profession a monopoly on the delivery of those services

...

5.3 The Law Society has a public obligation, arising from this monopoly, to ensure that the people whom it admits to membership and on whom it confers the right to practise law, are indeed fit to practice and competent to offer legal services. The Law Society also has an obligation to ensure that its members *continue* to be fit, qualified and competent.

5.4 A member of the public will not necessarily be in a position to evaluate the competence of a person who claims to be qualified to practise law. Membership of the Law Society of Upper Canada certifies to the world at large that the person is fit, qualifies and competent.

...

7.1 ... the Law Society is to govern the legal profession in the public interest by upholding the *integrity and honour* of the legal profession. "Integrity" is a personal trait or attribute describing one's moral character: "honour" is the respect of esteem in which one is held by others.

...

7.3 The integrity and honour of the profession as a whole depend on the integrity of its individual members. Integrity is "the fundamental quality of any person who seeks to practice as a member of the legal profession." The Canadian Bar Association notes that the principle of integrity is a key element of each rule in its *Code of Professional Conduct*.

...

7.5 As with the duty to uphold the independence of the profession, so with the duty to uphold its integrity and honour: it is grounded in the public interest. The integrity of the legal profession is essential to the well-being of a free and democratic society. In the words of Iacobucci J., writing for a unanimous, nine-judge court in *Pearlman v. Manitoba Law Society* *Pearlman v. Manitoba Law Society*, "The general public has a vested interest in the ethical integrity of the legal profession." The integrity of the justice system depends on the integrity of lawyers: without lawyers of integrity there can be no system of justice properly so called.

8.1 The role statement concludes that the overriding purpose for which the Law Society exists is to advance the cause of justice and the rule of law.

While these provisions do not provide specific advice to Convocation today as it debates what constitutes the public interest, the provisions highlight Convocation's understanding that its role is to ensure that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional and ethical conduct.

2. 2005 Tribunals Task Force

A similar description of the public interest has been utilized in outlining what principles should underlie the Society's tribunals process and procedure.³⁷ In a May 2005 report to Convocation, the Society's Tribunals Task Force stated:

14. Self-regulation is essential to safeguard the public's access to justice and to an independent profession and judiciary, and to protect the public from state interference. The value and strength of this principle is undermined, however, where a professional regulator's operations are seen to interfere with the best interests of consumers.

17. Every branch of a law society's operation affects the public interest. The manner in which the Law Society discharges its conduct, capacity and competence responsibilities is critically important to how the public perceives it. The adjudicative process is an essential component of the Law Society's responsibilities.

3. 2013 Suitability to Practise Standard

In November, 2013 the Society approved the Submission responding to the Federation's Consultation Report on a Suitability to Practise National Standard, relevant to the Society's functions to ensure that those who are licensed in Ontario are of good character.

The Society considered the regulatory reasons for the good character requirement, noting that:³⁸

It is important to convey to the public and the profession that licensees are required to comply with standards of professional

³⁷ Tribunals Task Force, Report to Convocation – Final Report (May 26, 2005).

³⁸ Professional Regulation Committee, Law Society of Upper Canada, Report to Convocation (November 21, 2013), at pp. 70-71, available at http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2013/convnov2013_PRC.pdf.

conduct. One of the ways of doing so is to license those who, at the time of licensing, have demonstrated the behaviours discussed in the Consultation Report namely, respect for the rule of law and the administration of justice, honesty, governability and financial responsibility. Underlying these behaviours is the principle that the profession must be worthy of clients' and the public's trust. If an applicant's past conduct has raised some question about his or her respect for the behaviours integral to the profession, it is valuable for law societies to make further inquiries and determine whether the applicant should be licensed. In this way, the Law Society's commitment to maintaining standards of professional development is demonstrated.

The Society ultimately accepted that the good character requirement should focus on the four behaviours, which are:

- Respect for the rule of law and the administration of justice
- Honesty
- Governability
- Financial Responsibility

The Society also noted that within the behaviour "respect for the rule of law and the administration of justice", greater attention should be paid to specifying breaches of human rights codes as conduct that should be further investigated on a good character inquiry. The Report states:³⁹

Specific reference to respect for and adherence to human rights and equality principles sends an important message to those entering the legal profession.

4. **Law Society Statements on Religious Freedom**

The Law Society has made a number of statements and developed a number of policies regarding the intersection of religious and spiritual beliefs and the practice of law. As stated by the Law Society "There is great diversity in the religious and spiritual beliefs and practices of people in Ontario and in Canada. This diversity, together with the values and spirituality that are shared in Ontario, in Canada and throughout the world, should be celebrated."⁴⁰ In this section we highlight some of the statements and policies concerning religious freedom.

³⁹ *Ibid.* at p. 74.

⁴⁰ The Law Society of Upper Canada, *Dialogue with Lawyers: Religious and Spiritual Beliefs and the Practice of Law* (April 14, 2005), at p. 4, available at <http://rc.lsuc.on.ca/pdf/equity/dialogueLawyers.pdf>. See also The

In 1991, Convocation adopted a Statement of Policy, which *inter alia*, provided that "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 because of race, ancestry, place or origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability."⁴¹ As a specific statement of policy, Convocation stated that "Lawyers have a responsibility to take a lead in eliminating discrimination. The Law Society will intensify its efforts to eradicate discrimination in the profession."⁴²

The Statement of Policy was followed in 1995 with Convocation's adoption of a Statement of Values, which included the following reference: "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."⁴³

In May 1997, the Law Society unanimously adopted the Bicentennial Report and Recommendations on Equity Issues in the Legal Profession. In the Report, the Law Society recognized its commitment to the promotion of equality and diversity in the legal profession. Recommendation 1 of the Bicentennial Report provides "The Law Society should ensure that the policies it adopts actively promote the achievement of equality and diversity within the profession and do not have a discriminatory impact."⁴⁴

On March 24, 2005, Convocation adopted the document *Anti-Semitism and Respect for Religious and Spiritual Beliefs – Statement of Principles*, which specifically articulated principles for recognizing religious diversity in the profession. In the document the Law Society recognized that hatred and discrimination on the basis of creed or religion violates a number of federal and provincial statutes, as well as the Law Society of Upper Canada *Rules of Professional Conduct*, which contain provisions "that recognized the value of religious and spiritual beliefs and/or prohibit discrimination and the wilful promotion of hatred on the basis of religion or creed."⁴⁵ The document also noted that the "Law Society of Upper Canada recognizes

Law Society of Upper Canada, *Respect for Religious and Spiritual Beliefs: A Statement of Principles of the Law Society of Upper Canada* (May 10, 2005), at para. 2, *available at* <http://rc.lsuc.on.ca/pdf/equity/antiSemitism.pdf> ["Respect for Religious and Spiritual Beliefs"]

⁴¹ The Law Society of Upper Canada, *Statement of Policy* (1991) at para. xi, *as cited in* The Law Society of Upper Canada, *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*, Report to Bicentennial Convocation (May 1997), at para. 26, *available at* <http://www.lsuc.on.ca/with.aspx?id=2147487006> ["Bicentennial Report"].

⁴² *Ibid.*, at para. xii.

⁴³ The Law Society of Upper Canada, *Statement of Values* (April 1995), *as cited in* *Bicentennial Report*, *supra*.

⁴⁴ *Bicentennial Report*, *supra*, at Recommendation 1, at p. 25.

⁴⁵ *Respect for Religious and Spiritual Beliefs*, *supra*, at para. 3.

the importance of promoting religious diversity and respect for religious beliefs."⁴⁶ The Principles adopted are as follows:⁴⁷

50. The Law Society of Upper Canada, recognizing that:
 - a. Respect for religious diversity advances the cause of justice;
 - b. The rule of law is enhanced when religiously motivated discrimination or hatred is not tolerated;
 - c. There continues to be a disturbing number of incidents of religious discrimination and religiously motivated hate crimes in Ontario and in Canada, as well as in the world;
 - d. The laws of Ontario and Canada guarantee freedom of conscience and religion, and prohibit discrimination and the wilful promotion of hatred on the basis of religion or creed;
 - e. The international community has condemned religious discrimination as harmful and unacceptable, and has recommended that measures be undertaken to combat religious hatred and discrimination; and
 - f. Although particular groups may be frequent targets of religious discrimination, religious hatred and discrimination is problem of Canadian society as a whole;
51. The Law Society of Upper Canada condemns in the strongest terms all manifestations and forms of hatred and discrimination based upon religious and spiritual beliefs. Although current circumstances center predominantly on issues of anti-Semitism and Islamophobia, the Law Society condemns all forms of religious intolerance directed at any group or community.
52. The Law Society of Upper Canada undertakes to promote and support religious understanding and respect both inside and outside the legal profession.

⁴⁶ *Ibid.*, at para. 4.

⁴⁷ *Ibid.*, at paras. 50-52.

5. Law Society Statements on Non-Discrimination on the Ground of Sexual Orientation

The Law Society has a number of initiatives and policies directed at promoting equality for persons identifying as lesbian, gay, bisexual, transsexual, transgender, intersex, queer/questioning, two-spirited and allies within the legal profession.⁴⁸

In addition to the policy statements in the 1991 Statement of Policy, the 1995 Statement of Values and the 1997 Bicentennial Report and recommendations, summarized with respect to non-discrimination on the grounds of creed above, but equally relevant to non-discrimination on the basis of sexual orientation, the Law Society has made other public statements of direct or high relevance to non-discrimination on the ground of sexual orientation. For example, also contained in the Bicentennial Report is a recommendation with respect to education in the profession, highlighting that the Law Society "should continue to ensure that Bar Admissions ... encourages the participation of equality-seeking groups in its design, development and presentation."⁴⁹

The Law Society also has numerous initiatives aimed at addressing non-discrimination on the ground of sexual orientation, including (a) the Discrimination and Harassment Counsel, which provides confidential assistance to anyone who may have experienced discrimination or harassment by a lawyer or a paralegal; (b) the Equity and Diversity Mentorship Program, which encourages students from equity-seeking communities to consider law as a career and to assist in the transition into the profession; (c) the Equity Advisory Group, a group of lawyers, paralegals and legal organizations mandated to assist the Equity Committee in the development of policy options for the promotion of equity and diversity in the legal profession; and (d) the Equity Public Education Series, which presents lectures, seminars, workshops and consultations to address issues of equity and diversity in the legal profession and to build bridges between the legal profession and members of the public concerned about equality rights.⁵⁰

6. Rules of Professional Conduct

Convocation has adopted the Rules of Professional Conduct, which state that "a lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in for in Ontario." Rule 5.04 provides in part:

⁴⁸ See e.g. The Law Society of Upper Canada, *Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment, A Guide for Law Firms and Other Organizations* (October 2013), available at <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147487143>.

⁴⁹ Bicentennial Report, *supra*, at Recommendation 8, at p. 31.

⁵⁰ *Ibid.*, at fn. 23.

5.04 DISCRIMINATION

Special Responsibility

5.04 (1) A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identify, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

7. Mobility

Convocation has also adopted a number of policies and instruments with respect to mobility. These are summarized in Background Information provided by the Law Society and posted on the website.⁵¹

F. "Public Interest" in Case Law

The treatment of public interest mandates in Canadian jurisprudence provides quite limited guidance regarding what the Society might consider in its accreditation determination. The term "public interest" is used throughout Canadian federal and provincial statutes⁵² and governing in the public interest, has been seen as the only justification for self-governing or regulating professions.⁵³ However, the term, and what must be considered in decision-making with respect to the public interest, tends to be very case specific.

Courts have held that the discretion of administrative agencies and tribunals to act in the public interest is not unlimited.⁵⁴ Where administrative decision-makers have the power to make

⁵¹ Background Information, Inter-jurisdiction Mobility of Lawyers in Canada, Federation of Law Societies of Canada National Mobility Agreements, <http://www.lsuc.on.ca/uploadedFiles/BackgroundInter-JurisdictionalMobilityReport.pdf>, accessed April 3, 2014

⁵² In *R. v. Zundel*, [1992] 2 S.C.R. 731, at pg. 805 ["Zundel"], Cory and Iacobucci JJ, in their dissent noted that a "survey of federal statutes alone reveals that the term 'public interest' is mentioned 224 times in 84 federal statutes."

⁵³ *Royal Commission Inquiry into Civil Rights, Report Number One* (Toronto: Queen's Printer, 1968), Vol. 3, p. 1162 ("The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest. The power is not conferred to give or reinforce a professional occupational status. The relevant question is not 'do the practitioners of this occupation desire the power of self-government?' but 'is self-government necessary for the protection of the public?' No right of self-government should be claimed merely because the term 'profession' has been attached to the occupation. The power of self-government should not be extended beyond the present limitations, unless it is clearly established that the public interest demands it.")

⁵⁴ *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, at para. 45. See also Sara Blake, *Administrative Law in Canada* (5th ed., Lexis Nexis: 2011) at pg. 100.

decisions or orders in the public interest, courts have held that they must base their decisions on the facts of the case, must be consistent with the purposes of the statute granting power and must not act in an arbitrary manner.⁵⁵ In this way, the public interest requirement is often like the administrative law requirements for discretionary decision-making described above.

In fact, with respect to *Criminal Code* provisions, the Supreme Court has even expressed concern that the term can never be defined in a broad sense so as to be useful.⁵⁶ *R. v. Morales* is a case concerning the "public interest" component of pre-trial detention provisions in the *Criminal Code*. The Supreme Court held that the term "public interest" was unconstitutional as a criterion for pre-trial detention as it had no meaningful definition. On this point, the Court referred to the criterion of public interest as "vague and imprecise", holding:⁵⁷

As currently defined by the courts, the term "public interest" is incapable of framing the legal debate in any meaningful manner or structuring discretion in any way.

Nor would it be possible in my view to give the term "public interest" a constant or settled meaning. The term gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention. The term creates no criteria to define these circumstances. No amount of judicial interpretation of the term "public interest" would be capable of rendering it a provision which gives any guidance for legal debate.

Looking more broadly at decisions outside the context of the *LSA*, Courts have held that the scope of the phrase "public interest" must "be interpreted in the light of the legislative history of the particular provision in which it appears and the legislative and social context in which it is used."⁵⁸ For example, in *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, the Supreme Court looked to the purpose of the legislative provisions at issue in order to determine in the context of the statute what constituted the public interest.⁵⁹

⁵⁵ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, at paras. 6-7; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140 ("In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute."); *Lindsay v. Manitoba (Motor Transport Board)*, [1989] M.J. No. 432 (Man. C.A.), leave to appeal refused [1989] S.C.C.A. no. 396 ("While the determination of the public interest is a matter within the discretion of the Board, that determination must find justification in the facts.").

⁵⁶ *Zundel*, *supra*, at pp. 770-771; *R. v. Morales*, [1992] 3 S.C.R. 711, at pp. 726, 732 ["*Morales*"].

⁵⁷ *Morales*, *supra* at pp. 726, 732.

⁵⁸ *Stewart v. Canadian Broadcasting Corp.*, 1997 CanLII 12318 (ON SC), at para. 229.

⁵⁹ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at paras. 50, 53.

Courts have also held that decision making in the public interest must take into consideration the concerns of society generally, or at least those concerns relevant given the statutory scheme, and not merely the interests of one segment of society.⁶⁰

The Supreme Court has held that equality and human rights values properly form part of the determination of what constitutes the public interest. In *Trinity Western University v. College of Teachers*, the Supreme Court determined that the B.C. College of Teachers ("BCCT") had jurisdiction to consider discriminatory practices of TWU, and the BCCT was entitled to look to B.C. human rights legislation and the *Charter* to determine whether it would be in the public interest to allow public school teachers to be trained at TWU. On this, the Court stated:⁶¹

[26] This is not to say that the BCCT erred in considering equality concerns pursuant to its public interest jurisdiction. As we have already stated, concerns about equality were appropriately considered by the BCCT under the public interest component of s. 4 of the *Teaching Profession Act*. The importance of equality in Canadian society was discussed by Cory J. for the majority of this Court in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 67...

[28] At the same time, however, the BCCT is also required to consider issues of religious freedom. Section 15 of the *Charter* protects equally against "discrimination based on . . . religion". Similarly, s. 2(a) of the *Charter* guarantees that "[e]veryone has the following fundamental freedoms: . . . freedom of conscience and religion".

...

[34] Consideration of human rights values in these circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation.

Thus, there is little guidance as to the meaning of the "public interest" in a general sense. In each instance, the purpose for which powers are granted are critical in framing the public interest aspects to be considered.

1. Law Society Jurisprudence

The term "public interest" has been interpreted in other sections of the *LSA*. Specifically, the *LSA* describes the Attorney General as the guardian of the public interest in s. 13(1).⁶² The public

⁶⁰ *Waycobah First Nation v. Canada (Attorney General)*, [2010] F.C.J. No. 1486, at para. 31, aff'd [2011] F.C.J. No. 847 (F.C.A.); see also *Edwards*, *supra*.

⁶¹ *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, at paras. 26-28.

⁶² *Law Society Act*, RSO 1990, c L.8, at sec. 13.1 ("The Attorney General for Ontario shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario, and for this purpose he or she may at any time require the production of any document or thing pertaining to the affairs of the Society.").

interest in the context of s. 13(1) of the *LSA* addresses two forms of the public interest: the public interest in all matters within the scope of the *LSA* and the public interest in all matters having to do with the legal profession in any way.⁶³ The Ontario Superior Court has expanded on these two meanings:⁶⁴

[230] ... either specified form of public interest is intended to include the rights and protections which law and equity afford to members of the public who are clients of lawyers. The many members of the public who have lawyers acting for them are vitally concerned with clients' rights and protections in respect of members of this powerful self-governing profession, skilled in the disputatious arts. The rest of the public, blessed by the absence of problems larger than their own solutions, also has an interest in these rights and protections. That is because lawyer and client relationships are made frequent by the complexity of modern life, and made necessary by the clients' frequent lack of expertise in dealing with these complexities. The rights and protections which law and equity afford to clients support every client and every prospective client in the faith he or she invests, or may well have to invest in a lawyer and client relationship. From the clients' perspective, a lawyer and client relationship consists primarily of faith and fees. From the lawyers' perspective, without the first there will not be the second. Faith is the basis on which clients retain lawyers. It is a significant part of the trust which is the heart of lawyer and client relationships. Convocation does not have the power to regulate these aspects of client rights and protections even though it is empowered to impose on lawyers' constraints and obligations which may shape their duties.

This understanding of the public interest reinforces that the Society must consider the members of the public who utilize legal services, as well as the public at large who may need them one day.⁶⁵ It is also consistent with interpretations of the "public interest" with respect to the Society's mandate to regulate as articulated by the Supreme Court in *Edwards v. Law Society of Upper Canada*.⁶⁶

The discipline jurisprudence on the duty of the Society to protect the public interest has largely focused on the obligation of the Society to discipline members and the tensions between the rights of individual lawyers and the public at large. In this respect, Lederer J. has stated that "[i]t is incumbent on us to ensure that members of the public can trust the work of the lawyers they

⁶³ *Stewart v. Canadian Broadcasting Corp.*, 1997 CanLII 12318 (ON SC), at para. 229.

⁶⁴ *Ibid.* at para. 230.

⁶⁵ A similar sentiment has been expressed for the Crown in *Elder Advocates*, where the Supreme Court stated: "The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178." See *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 S.C.R. 26, at para. 44.

⁶⁶ *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, at para. 14.

retain and be sure that those who step outside the rules and ethical principles will be properly disciplined."⁶⁷

The definition of professional misconduct under the Rules provides in part as follows: "'professional misconduct' means conduct in a lawyer's professional capacity that tends to bring discredit upon the legal profession including ..."⁶⁸

The penalty jurisprudence is also instructive with respect to the public interest. In *Law Society of Upper Canada v. Jodi Lynne Feldman*, the Hearing Panel said:⁶⁹

[63] The parties agree that, as set out in *Law Society of Upper Canada v. Jonathan Wade Strug*, ... the four purposes served by making disciplinary orders are:

- a) To maintain public confidence in the legal profession;
- b) Specific deterrence, namely preventing a particular lawyer from continuing a course of conduct;
- c) General deterrence, namely deterring the profession at large from engaging in certain courses of conduct; and
- d) Rehabilitation, restitution, and improving the practice of a particular lawyer.

[64] The parties also agree that maintaining public confidence in the legal profession is the most important and that it is more important than the fortunes of any one lawyer. In *Law Society of Upper Canada v. Mary Martha Coady*, ...the panel stated that public confidence is based on "such matters as a licensee's credibility, integrity, character, repute, and fitness. While mitigating factors and compassion for the licensee have their place, they should not compromise an impartial adjudication of those matters."....

The duty of the Society to protect the public interest has been articulated as follows in disciplinary decisions:

⁶⁷ *Sandra Thompson Family Trust (Re)*, 2011 ONSC 7056, at para. 21.

⁶⁸ *Rules of Professional Conduct*, at rule 1.02 (emphasis added).

⁶⁹ *Law Society of Upper Canada v. Jodi Lynne Feldman*, 2014 ONLSHP 6, at paras. 63-64; internal citations omitted (emphasis added).

- "It is not in the public interest to allow lawyers to escape Society discipline by hiding behind their client's privilege."⁷⁰
- There is "public interest in preventing the unauthorized practice of law so as to protect the public."⁷¹
- "The public interest is best served when properly licensed legal professionals appear before administrative tribunals"⁷²
- "The Law Society's duty to protect the public interest involves an obligation to be neutral and to be rigorous in exercising its judgment at every stage of a proceeding about questions concerning the quality of the evidence at its disposal as well as the appropriate remedy available to it in any given situation. The Law Society's authority as guardian of the public interest is jeopardized as much by lack of rigour in using appropriate discretion based on solid evidence (which speaks to judgment) as it would be by its decision inspired by a partisan stance (which would speak to a collateral purpose or malicious intent). The Law Society cannot be permitted to slough off mistakes by saying that it meant well."⁷³
- "... the Society has a statutory duty to protect the public interest. That duty is cast upon it as a self-governing body. The public at large would be justly aggrieved and would properly demand that the right of self-governance be removed if it was found that hearing panels, on discovering acts of professional misconduct that had not been particularized, did not make a finding with respect to them. The public must be satisfied that the Society takes its duties seriously and does not overlook or excuse matters of professional misconduct when such matters are discovered."⁷⁴
- the Society's "powers to govern the profession in the public interest allow access to and use of solicitor/client privileged material in a number of contexts: investigation, trusteeship, trust audits and practice reviews."⁷⁵

From these examples, it can be discerned that the public interest mandate of the Society has been relied on in the discipline jurisprudence as a means to ensure that the public has access to quality and reliable legal services, and that the public retains trust in the legal community. This is largely in line with the Society's self-described purpose, to govern the legal profession "in the public

⁷⁰ *Law Society of Upper Canada v. Feldman*, [2012] L.S.D.D. No. 195, at para. 153

⁷¹ *Law Society of Upper Canada v. Chiarelli*, [2013] O.J. No. 1253, at para. 25.

⁷² *Ibid.* at para. 26.

⁷³ *Law Society of Upper Canada v. Shore*, [2007] L.S.D.D. No. 42, overturned on appeal with respect to costs only, *Law Society of Upper Canada v. Sharon Ellen Shore*, 2008 ONLSAP 0006.

⁷⁴ *Law Society of Upper Canada v. Kelly*, [2009] L.S.D.D. No. 103, at para. 152.

⁷⁵ *Law Society of Upper Canada v. Feldman*, [2012] L.S.D.D. No. 195, at para. 27.

interest by ensuring that the people of Ontario are served by lawyers and paralegals who meet high standards of learning, competence and professional conduct."⁷⁶

G. **Conclusion**

We summarize our guidance in the Executive Summary at the outset of this letter.

Please do not hesitate to contact us if you have further questions.

Yours very truly,

CAVALLUZZO SHILTON MCINTYRE CORNISH LLP



Freya Kristjanson

⁷⁶ Law Society of Upper Canada, About the Law Society, <http://www.lsuc.on.ca/with.aspx?id=905> (last visited March 5, 2014).