



May 11, 2021

Hon. Doug Downey, MA, LL.M.
Attorney General of Ontario
McMurtry-Scott Building
720 Bay Street, 11th floor
M7A 2S9

Barrister and Solicitor Examinations

Dear Mr. Downey:

My name is Adam Strömbergsson-DeNora. I am a candidate for lawyer licensing who has just started articles.

I have the privilege to request your intervention in the Law Society of Ontario's current conduct of its licensing examinations. Your intervention is requested pursuant to sub-section 5(c) of the *Ministry of the General Act* and sub-section 13(1) of the *Law Society Act*.

My request is admittedly unusual: that you intercede with the Law Society to cancel this year's licensing examinations, thus allowing candidates for admission to the bar to be admitted solely based on their clerkships.

I am alternatively requesting that you uphold the rule of law by making the appropriate *ex parte* application to the Superior Court to restrain the Law Society from administering licensing exams.

This letter sets out the reasons for this drastic course. Two arguments support your intervention:

1. The licensing exams in their current form are redundant and impose further costs on candidates for admission to the bar; and
2. The licensing exams in their current form create systemic adverse effect discrimination in the Law Society's admissions process, in contravention of the *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*.

These arguments amount to the same problem: the rule of law is adversely affected if the profession best placed to uphold this value is needlessly inhibited by its regulator. The Attorney General is responsible for safeguarding this precept, hence the present appeal.



Before embarking on my arguments, please recall the Supreme Court's comments in *Trinity Western University v Law Society of Upper Canada*. That case touched specifically on why you ought to intercede in the present matter. The majority in that case said that:

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.

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.¹

These words ring somewhat hollow if the Law Society is itself the purveyor of inequitable admissions policies in its approach to lawyer licensing. The Attorney General's interest in preserving the rule of law to ensure that the Society meets the standard laid down by the Supreme Court merits your intervention.

Please note, moreover, that candidates for admission to the Law Society are unrepresented in the Law Society's governance: they are entirely at the Law Society's mercy.

1. Redundancy and further costs

The licensing exams' redundancy obtains because they do not fulfill their purpose as 'objectively valid, reliable, and fair licensing examinations'.² This claim is borne out with reference to the exams' conception and with reference to the human rights concerns that I raise below.

¹ *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 at paras 21–2 [*TWU v. LSUC (SCC)*].

² Toronto, Law Society of Ontario, Convocation, *Minutes of Convocation*, (5 December 2003) at 283; see also Toronto, Law Society of Ontario, Convocation, *Minutes of Convocation*, (23 September 2004) at 398.



Redundancy

A redundant exam creates unnecessary costs to applicants. Unnecessary costs for entry into the profession mean that candidates, once licensed, pass the cost of entry onto their patrons. This economic reality raises the cost of legal services, which limits access to justice.

As the Law Society abandoned its educational function to universities in the Cold-War era, universities incorporated experiential learning and practical subjects in their approaches. Graduates of Canadian law schools now have the advantage of substantive legal knowledge and practical training.

Notwithstanding this historical change, the law society continues to administer exams that certify practical training. The quantity of knowledge required for licensing, however, has exponentially increased alongside the growth of the welfare state. The Law Society attempted to address this problem in 2004 with compulsory readings and examinations.

In 2003-4, the Law Society accepted that it should no longer teach substantive law. The Society rightly recognized that universities were doing this work. The Society instead imposed two examinations designed to test candidates' practical knowledge. This imposition was, from the start, seriously flawed. The Society created a dual system:

Reference Materials will contain examinable material designed to reflect the competencies, but they will also contain *non-examinable* information for reference after call to the bar.³

The system thus conceived created the conditions for intentionally unfair examinations. Information included in the Society's reference materials was at the outset conceived as redundant to the examinations.⁴ Examinations were implemented as a disciplinary mechanism to force candidates to read Law Society materials. (Note even at this stage that the Law Society may mandate its members and candidates for admission to the bar to read any text as part of continuing professional development.)

³ *Minutes of Convocation*, *supra* note 2 at 287 (emphasis original).

⁴ 5-10% of the exam questions were designed to be experimental, and thus not counting toward a candidate's passing score: *Minutes of Convocation*, *supra* note 2 at 409.



The Law Society's disingenuity in this regard does not meet the standard of a reasonable decision maker. It created a licensing system premised on forcing the acquisition of knowledge instead of testing candidates' actual knowledge. The reference materials that constitute the examination study guide, though valuable, are not now allowed to be disseminated to the profession. The laudable goal of preparing a primer for legal practise has thus been set aside. The remaining exams endure under the false pretence of testing lawyer competence.

The sheer volume of study materials, moreover, significantly overlaps with university curricula; the law has expanded at such a pace that the exams do not effectively test knowledge. They instead test candidates' ability to prepare an index to the study material. This skill is anathema to the common law, which promotes the application of legal principles over rote learning.

The resulting examination discloses some 2,100 pages of study materials broken into two examinations. The Society permits open-book examinations, but there is little hope for candidates to work with this unwieldy number of pages. Candidates instead prepare indices: much of the exam preparation goes toward learning where concepts are mentioned in a book. This approach is at odds with the Society's stated purpose, that barristers and solicitors demonstrate competency in fields of law. They instead show that they can find information in a book, which their university education already amply demonstrates.

This irreconcilable difference between competency and an ability to locate information amounts to arbitrariness. The examination does not fulfill its stated purpose, and the Society appears to have known that it could not possibly test candidates' knowledge as early as 2004.

The obtention, moreover, of a university degree in law, which is based on a curriculum set by the law societies of Canada, demonstrates that candidates have successfully mastered introductory concepts. The examinations do not add to this mastery, and, if the Law Society has any concerns with university education, it is empowered to mandate changes to universities' curricula.

2. Discrimination

Stress is a reality in the legal profession, but that reality does not extend to the regulator's tacit endorsement. The adverse effect discrimination mooted here occurs because the licensing exams



currently better test for a candidate's ability to manage high stress than they test legal knowledge or professional competence. Candidates who, because of their lived experience, are more sensitive to stress are less likely to do well than candidates whose experience insulates them from stressors.

This difference is made out with reference to socio-economic class and ethnicity.⁵

The present discussion speaks only to the stress created by the Society's examination process, but greater psychological harm and reduced well being are significant problems in the legal profession.⁶ The effects of licensing requirements must look beyond the absence of disease or infirmity to embrace a person's complete physical, mental, and social well-being.⁷ The licensing examinations may well be a symptom of the profession's historically poor track record when dealing with mental health concerns.

Psychological harm

The present examination system appears to endorse stress. The exam process is opaque—the Law Society, for example, refuses to publish a passing grade for its exams. It builds on the stress of obtaining legal education, which is financial, but also includes increasing levels of poor mental health in law schools. These stressors have themselves been labelled as systemic.⁸ Increasing numbers of students are being diagnosed with anxiety, depression, and other mood disorders while in law school.⁹ The bar exams build on this stress by creating another barrier to entry in the profession. As you are well aware, the exam is quite literally for all the marbles.

⁵ Natasha Bakht et al, "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45 Osgoode Hall Law Journal 667–732.

⁶ See Jonathan Koltai, Scott Schieman & Ronit Dinovitzer, "The Status–Health Paradox: Organizational Context, Stress Exposure, and Well-being in the Legal Profession" (2018) 59:1 Journal of Health and Social Behavior 20–37.

⁷ *Constitution of the World Health Organization*, Off Rec Wld Hlth Org 2, 100 1946, preamble; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 39.

⁸ Edward Rubin, "Curricular Stress" (2010) 60:1 Journal of Legal Education 110–121; Veronica Henderson, "Building on Strong Foundations: Rethinking Legal Education with a View to Improving Curricular Quality" (2006) 29 Dalhousie Law Journal 491, provides a useful review of Canadian legal education that by-and-large remains apposite.

⁹ Jerome M Organ, David B Jaffe & Katherine M Bender, "Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns" (2016) 66:1 Journal of Legal Education 116–156 at 144–5; Anna SP Wong, "Mental illness: Let's see it as a strength, not a liability" (2019) 38:1 The Advocates' Journal 16–21 at para 18.



Adverse effect discrimination comes into view when stress is linked to performance on the bar exams.

Students graduating with unreported, but high, anxiety are disadvantaged by the bar exams' time-sensitive requirements. Stress inhibits retention of information; working through the 2,100 pages necessary for the exams becomes more difficult. Stress interrupts concentration during the exam, making writing harder.

Testing more generally creates stress because the candidate loses perceived control over the outcome.¹⁰ Temporary stressors have been shown to lead to chronic stress,¹¹ and the greater this stress, the more somatic effects manifest.¹² Somatic effects occur when stress reaches a point where the body's voluntary nervous system begins reacting to the stress. Common symptoms include recurrent abdominal pain and headaches. Extreme cases of somatization can result in severe afflictions like sleep paralysis. The Law Society has an accommodations process in place, but this process does not disclose sensitivity to these afflictions.

Another worrying symptom of stress is reduced cognition.¹³ Cognition is a broad term; its import here relates to a person's memory recall, reading comprehension, and evaluative ability.¹⁴ Stress lowers these faculties. Lowered cognition has been theorized to be a cause of burnout, which points to long-term psychological harm caused by increased stress.¹⁵

In all cases, law students and, one may infer, candidates for admission to the bar are less likely to report mental health challenges due to perceived stigma.

This point is not to say that the Law Society is not entitled to create exams or to regulate exam conditions. Rather, the effect of these exams and their regulation creates unintended consequences that affect a far wider swath of candidates than is presently reported. This result is the hallmark of adverse effect discrimination: disadvantaged segments of law school graduates

¹⁰ Coltan Scrivner, "Correlation between acute psychosocial stress and decrease in perceived preparedness in exams" (2016) 87:3 Bios 104–109 at 108.

¹¹ *Ibid.*

¹² Christian Vajda, Josef Haas & Christian Fazekas, "Admission Exam at a Medical School: Correlation Between Symptoms of Somatization and Performance" (2017) 63:2 Zeitschrift für Psychosomatische Medizin und Psychotherapie 213–218 at 217.

¹³ Consult *Minutes of Convocation*, *supra* note 2 at 407, 448, for details regarding the importance of proper cognition during the exam.

¹⁴ Scrivner, *supra* note 10 at 108.

¹⁵ Bart G Oosterholt et al, "Burned out cognition — cognitive functioning of burnout patients before and after a period with psychological treatment" (2012) 38:4 Scandinavian Journal of Work, Environment & Health 358–369.



face further disadvantages in the licensing process. The Law Society has not accounted for these problems, despite publicly proclaiming to be more sensitive to these kinds of issues.

Discrimination

Pre-existing anxiety or other mental health conditions aside, candidates who have faced systemic stress due to their appurtenance to a minority group that faces discrimination are statistically more likely to face higher stress levels and attendant psychological distress.¹⁶ The present licensing exam scheme places a burden on these populations by creating a flashpoint for stress.¹⁷ These points disproportionately affect groups predisposed to stress, which confirms an historical implicit bias that benefits a perceived majority culture in Canadian society.¹⁸

This adverse effect on individuals hailing from diverse groups undermines the administration of justice and the rule of law; barriers to entry to the legal profession must demonstrably reflect the Law Society's and Ontario's commitment to diversity and the cultural competence that it expects of lawyers.

More critically still, adverse effect discrimination tending to affect subjects' mental health is a ground for *Charter* review of the Law Society's examinations. This task implicates sections 7 and 15 of the *Charter*.

Section 7 is implicated to the extent that the Law Society's examinations contribute to somatic symptoms, which constitute a level of serious bodily harm. The Supreme Court touched on this point in [Smith v Jones](#)—a case that, appropriately enough, dealt with solicitor-client privilege (para. 83). The Court also indicated in [R v McCraw](#) that 'there can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm' (p. 81).

¹⁶ Samuel Noh et al, "Perceived Racial Discrimination, Depression, and Coping: A Study of Southeast Asian Refugees in Canada" (1999) 40:3 *Journal of Health and Social Behavior* 193–207 at 201–3; Eric Anthony Grollman, "Multiple Disadvantaged Statuses and Health: The Role of Multiple Forms of Discrimination" (2014) 55:1 *Journal of Health and Social Behavior* 3–19 at 14; David R Williams, "Stress and the Mental Health of Populations of Color: Advancing Our Understanding of Race-related Stressors" (2018) 59:4 *Journal of Health and Social Behavior* 466–485 at 470–1.

¹⁷ Keith A Kaufman et al, "Passing the Bar Exam: Psychological, Educational, and Demographic Predictors of Success" (2007) 57:2 *Journal of Legal Education* 205–223 at 219.

¹⁸ *vide*. David Young, "Licensing and Minorities: A Question of Fairness" (1985) 4:3/4 *Business & Professional Ethics Journal* 185–193 at 185–6.



Section 15 is implicated because the Law Society's conduct violates enumerated grounds that are protected from discrimination. Ontario's *Human Rights Code* is implicated for similar reasons.

The rule of law and the administration of justice are tarnished if the legal profession's regulator is notorious for not abiding by constitutional human rights obligations. This fact saps the public's confidence in the profession and in the justice system.

Conclusion

Your office's intervention in this matter is warranted because the Law Society has had ample time to change its practice. The lawyer licensing process was [reviewed in 2018](#); the requirement for licensing examinations was maintained, and the Law Society nowhere noted up the program's discriminatory aspects, nor did it consider the significant overlap between licensing examinations and the required university education. It simply asserted, on the basis of [a single opinion piece](#), that its examinations scheme were 'psychometrically-defensible [*sic*] professional qualification assessments' (p. 16). Such a bald assertion does not properly consider or justify the Law Society's approach.

The public interest is not served by stressing lawyers with redundant examinations imposed under dubious pretences. The Law Society is required to take an evidence-based approach to its conduct rather than an anecdotal approach.

A self-regulating profession is desirable, but self-regulation is only useful in the measure that it responds to the community's needs. COVID-19 has exposed the mental health issues that are widespread and latent in the profession; it has also shown that major strides are needed to honour the *Charter's* promise of equality before and under the law. Intervention in the public interest effectively addresses the issues raised in this letter. The Attorney General is the statutory officer for this task.

Law students and candidates for the bar are not in an emotional or financial position to pursue the legal challenges necessary to resolve the above-mentioned issues. The Law Society has, moreover, rejected attempts from students and candidates to have a say in the Society's corporate governance. Your intervention *ex parte* is thus warranted to preserve the rights of an unrepresented group.



A final word on mental health is in order. The stress that candidates bring to the bar exam does not leave them in practise. A positive approach to mental health in the profession begins with legal education and licensing; it is not a task that should be placed on the individual alone.

Stressed lawyers, simply put, make bad practitioners. Justice Taschereau, speaking to the Law Society of Upper Canada's convocation on June 28, 1956, enjoined his audience to 'not try and become lawyers in a "hurry"'. He instead encouraged lawyers to 'let your hearts and your minds work together' to achieve greater wisdom over time. Financial strain and the stress of a legal education and licensing make for a poor start in this vein, which results in a profession that every year loses creative minds and caring souls to burnout and disillusionment. Ontarians deserve to have these lost lawyers at their service, and the administration of justice would stand in far better stead as a result.

I hope that you might consider this appeal, which relates to the rights that the Law Society has purported to uphold in other contexts. Admission to plead before Ontario's courts and to practise law is no longer a profession reserved to a privileged few; the Law Society is, with all the respect due to such a venerable institution, behind the times. Your intervention in this matter would make all the difference.

Should you have any questions or if you would like further details about the above, I am at your service.

Most sincerely,

Adam Strömbergsson-DeNora.

cc. Mr. Irwin Glasberg, Fairness Commissioner
Mr. David Corbett, Deputy Attorney General of Ontario
Ms. Teresa Donnelly, Law Society Treasurer