

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

RYAN ALFORD

Applicant

- and -

THE LAW SOCIETY OF UPPER CANADA

Respondent

AMENDED THIS
 MODIFIÉ CE
 RULE/LA RÉGLE 28.02 (a)

PURSUANT TO
 CONFORMÉMENT À

THE ORDER OF
 L'ORDONNANCE DU
 DATED / FAIT LE

REC. ISTRAR
 SUPERIOR COURT OF JUSTICE
 GREFFIER
 COUR SUPÉRIEURE DE JUSTICE

Feb 5, 2018

**APPLICATION UNDER Rules 14.05(3)(d),(g),(g.1) and (h)
of the Rules of Civil Procedure.**

AMENDED AMENDED NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on _____, at 393 University Avenue, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS

APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: November 6, 2017

Issued by

"G. Jolly"

G. Findlay

Local registrar
393 University Avenue
Toronto, Ontario

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Lawyers for the respondent

APPLICATION

THE APPLICANT MAKES AN APPLICATION FOR:

- 1) A Declaration that the Law Society of Upper Canada's requirement that licensees are required to create and abide by an individual Statement of Principles that acknowledges licensees' obligation to promote equality, diversity and inclusion generally and in licensees' behaviour towards colleagues, employees, clients and the public (the "Statement of Principles") is not supported by the *Rules of Professional Conduct*.
- 2) A Declaration that licensees do not have an obligation under the *Rules of Professional Conduct*, or otherwise to promote equality, diversity and inclusion generally and in licensees' behaviour towards colleagues, employees, clients and the public.
- ~~3) A Declaration that the requirement to complete the Statement of Principles is contrary to the rule of law in that it lacks a proper legal foundation.~~
- 3) In addition and in the alternative, a Declaration that the requirement to complete the Statement of Principles, and the obligation on the part of licensees to promote equality, diversity and inclusion generally and in licensees' behaviour towards colleagues, employees, clients and the public, to the extent that there exists such an obligation under the *Rules of Professional Conduct*, are each *ultra vires* the *Law Society Act*, R.S.O. 1990, c. L.8 (the "LSA").
- 4) In addition and in the alternative, a Declaration that the requirement to complete the Statement of Principles, and the obligation on the part of licensees to promote equality, diversity and inclusion generally and in licensees' behaviour towards colleagues, employees, clients and the public, to the extent that there exists such an obligation under the *Rules of Professional Conduct*, each constitute a vague and/or unintelligible requirement and is therefore inoperative.

- 5) In addition and in the alternative, a Declaration that the requirement to complete the Statement of Principles, and the obligation on the part of licensees to promote equality, diversity and inclusion generally and in licensees' behaviour towards colleagues, employees, clients and the public, to the extent that there exists such an obligation under the *Rules of Professional Conduct*, are each contrary to sections 2(a) and 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"); are not prescribed by law; and do not constitute a reasonable limit as can be demonstrably justified in a free and democratic society.
- 6) An interim injunction estopping the Respondent from enforcing or relying upon the requirement to complete the Statement of Principles until such time as this Application can proceed on the merits.
- 7) In the alternative, a Declaration that the requirement to complete the Statement of Principles shall be interpreted as follows:
- a. The requirement requires licensees to affirm existing obligations under the *Rules of Professional Conduct* and the *Paralegal Rules of Conduct* to comply with human rights laws.
 - b. The requirement shall not be interpreted to mean that licensees have an obligation to endorse, demonstrate a personal valuing of, or profess any specific belief or value, or that licensees have an obligation to persuade anyone about anything or be persuaded by anyone about anything;
 - c. The requirement applies only to the professional conduct of licensees with each other, with employees, with clients and with the public.

- d. The requirement shall not be interpreted as imposing any new obligation that licensees will or must take, or any specific actions that licensees will or must take.
- e. No licensee will ever be required to make the licensee's Statement of Principles available to any person, including the Law Society of Upper Canada, for any reason, and the contents of a licensee's Statement of Principles shall not be used as evidence, produced or relied upon in any disciplinary or punitive proceeding.
- 8) An order, if necessary, abridging the time for service of this Notice of Application.
- 9) The costs of this Application on a substantial indemnity basis, if opposed.
- 10) Such further and other relief as counsel may request and this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE

The Parties

- 11) The Applicant, Dr. Ryan Alford, is an Associate Professor of Law at Lakehead University, Bora Laskin Faculty of Law. Dr. Alford received his doctorate in public, constitutional, and international law from the University of South Africa. Dr. Alford's research focuses on the rule of law and legal rights during public emergencies.
- 12) Dr. Alford was called to the Ontario Bar in June 2015. He remains a lawyer licensed to practise law by the Law Society of Upper Canada and remains a licensee in good standing.
- 13) The Respondent, The Law Society of Upper Canada ("The LSUC"), governs Ontario's lawyers and paralegals. The LSUC is a creature of statute. Its mandate is established

by and pursuant to the LSA, which grants it a monopoly over the governance and regulation of Ontario's lawyers and paralegals.

The LSA

- 14) Pursuant to s.4.1 of the LSA, it is a function of the LSUC to ensure that 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.
- 15) Pursuant to s.4.2 of the LSA, in carrying out its functions, duties and powers under the LSA, the LSUC has a duty to protect the public interest, to maintain and advance the cause of justice and the rule of law, to facilitate access to justice for the people of Ontario, and to act in a timely, open and efficient manner.
- ~~16) Pursuant to s.4.2.5 of the LSA, 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.~~

The Rules of Professional Conduct

- 16) Pursuant to the LSA, the LSUC has adopted the *Rules of Professional Conduct*, which set out lawyer licensees' professional and ethical obligations and the manner in which they are regulated by the LSUC.
- 17) Rule 2.1-1 states: "A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession

honourably and with integrity.” The Commentary under rule 2.1-1 states, *inter alia*, as follows:

[4.1] 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 force in Ontario.

18) Rule 5.6-1 states: “A lawyer shall encourage public respect for and try to improve the administration of justice.” The Commentary under rule 5.1-1 states, *inter alia*, as follows:

[1] The obligation set out in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason, a lawyer should not hesitate to speak out against an injustice.

[4] A lawyer, by training, opportunity, and experience is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions, and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

19) Rule 6.3.1-1 states: “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 identity, 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, articulated students, or any other person or in professional dealings with other licensees or any other person.” The Commentary under rule 6.3.1-1 states, *inter alia*, as follows:

[1] The Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

[2] This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

20) Rule 6.3.1-2 states: “A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.” Rule 6.3.1-3 states: “A lawyer shall ensure that their employment practices do not offend rule 6.3.1-1 and 6.3.1-2.”

21) The *Human Rights Code*, R.S.O. 1990, c. H.19 (the “Code”) applies to certain specified economic relationships. It requires, *inter alia*, employers and employees in the Province of Ontario to refrain from discrimination or harassment of employees based on certain specified enumerated grounds. The *Code* does not impose a positive obligation on employers or employees to “promote” any value, and specifically does not require employers or employees to promote, either in the workplace or generally, equality, diversity and inclusion.

The Requirement for a Statement of Principles

22) In or around September 2017, as part of its “Accelerating Culture Shift” initiative, the LSUC established a requirement that all licensees “create and abide by an individual Statement of Principles that acknowledges your obligation to promote equality, diversity and inclusion generally and in your behaviour towards colleagues, employees, clients and the public.” Licensees will be required to report on their compliance with this requirement in their 2017 Annual Report as of December 31, 2017, which must be filed by March 31, 2018.

- 23) The drafting of an individual Statement of Principles is a standing requirement imposed on all licensees regardless of whether or not they are currently practicing law or providing legal services, retired, or residing outside Ontario.
- 24) The terms "promote" and "generally" in the LSUC requirement are not defined or explained.
- 25) The LSUC adopted the requirement for a Statement of Principles based entirely upon *Recommendation 3(1)* in the *Challenges Faced by Racialized Licensees Working Group's Final Report*, which was prepared by the Equity Initiatives Department.
- 26) The LSUC does not require licensees to submit their Statement of Principles to the LSUC or distribute them to other lawyers, to clients, or to any other member of the legal community or the public. Licensees are required to keep a copy of their Statement of Principles on file.
- 27) Should licensees fail to create and abide by an individual Statement of Principles by December 31, 2017, they will be unable to fulfill the requirements of their 2017 annual report and may, in the future, be subject to disciplinary sanction, including administrative suspension, by the LSUC.
- 28) The LSUC has not moved to amend the *Rules of Professional Conduct* following the delivery of the *Challenges Faced by Racialized Licensees Working Group's Final Report*, ~~nor has it engaged in an open and transparent consultative process with licensees on the issue.~~
- 29) The LSUC has created a page to accompany the requirement to complete the Statement of Principles entitled "Key Concepts of a Statement of Principles." It states: "The **intention** of the statement of principles is to demonstrate a personal valuing of equality, diversity, and inclusion with respect to the employment of others, or in

professional dealings with other licensees or any other person" [emphasis in original]. The Statement of Principles is therefore intended to be more than simply a reporting requirement. The requirement to complete the Statement of Principles is a requirement to "demonstrate a personal valuing" of certain values and the underlying obligation to promote equality, diversity and inclusion, to the extent one exists, which is denied, is an obligation to personally value equality, diversity and inclusion. The intention of the Statement of Principles requirement and the supposed underlying obligation to promote equality, diversity and inclusion is therefore to compel the expression of, the adherence to, and the belief in certain values.

The LSUC's Requirement is Ultra Vires

- 30) The Statement of Principles requires licensees to acknowledge and abide by an obligation that does not exist and has no legal foundation. The *Rules of Professional Conduct* and the Code do not currently impose an obligation upon licensees to "promote" diversity, equality or inclusion. The Statement of Principles therefore ~~constitutes~~ relies upon an incorrect or, alternatively, an unreasonable interpretation of the *Rules of Professional Conduct* and the Code.
- 31) The requirement that licensees complete the Statement of Principles, and the obligation to promote equality, inclusion and diversity generally and in a licensee's behaviour towards colleagues, employees, clients and the public, to the extent that such an obligation exists under the *Rules of Professional Conduct*, which is denied, each constitute an incorrect or, alternatively, an unreasonable interpretation of the LSUC's function to ensure an appropriate standard of learning, competence and professional

conduct, and/or constitute an unreasonable interpretation of the LSUC's duties under s.4.2 of the LSA.

The LSUC's Requirement is Disproportionate

~~33) In the alternative, the requirement that licensees complete the Statement of Principles, and the obligation to promote equality, inclusion and diversity generally and in a licensee's behaviour towards colleagues, employees, clients and the public, to the extent that such an obligation exists under the *Rules of Professional Conduct*, which is denied, each constitute a disproportionate standard of learning, competence and/or professional conduct, having regard to the significance of the LSUC's regulatory objective.~~

The LSUC's Requirement is Inoperable

32) The requirement that licensees complete the Statement of Principles, and the obligation to promote equality, inclusion and diversity generally and in a licensee's behaviour towards colleagues, employees, clients and the public, to the extent such an obligation exists under the *Rules of Professional Conduct*, which is denied, are each vague and unintelligible. An unintelligible mandate is inoperable.

33) The LSUC's own legal opinion dated November 16, 2016 acknowledged that the terms "promote" and "generally" were vague and recommended that the LSUC clarify each term. The LSUC neglected to do so.

The LSUC's Requirement is Unconstitutional

- 34) The requirement that licensees complete the Statement of Principles, and the obligation to promote equality, inclusion and diversity generally and in a licensee's behaviour towards colleagues, employees, clients and the public, to the extent such an obligation exists under the *Rules of Professional Conduct*, which is denied, each violate s.2(b) of the *Charter*. They compel licensees to communicate ideas, and in particular compel licensees to communicate political expression. They will also have a chilling effect on licensees' expression more broadly. Compelled expression is alien to Canada's political traditions and the traditions of all free states.
- 35) A state-sanctioned mandate that compels licensees to personally adopt and promote a particular set of values is unconstitutional. The requirement that licensees complete the Statement of Principles, and the obligation to promote equality, inclusion and diversity generally and in a licensee's behaviour towards colleagues, employees, clients and the public, to the extent such an obligation exists under the *Rules of Professional Conduct*, which is denied, each violate s.2(a) of the *Charter*. They compel licensees to adopt and promote values, which is contrary to freedom of conscience and religion.
- 36) The violations of ss.2(a) & (b) of the *Charter* cannot be upheld under s.1 of the *Charter*. The requirement that licensees complete the Statement of Principles, and the obligation to promote equality, inclusion and diversity generally and in a licensee's behaviour towards colleagues, employees, clients and the public, to the extent such an obligation exists, which is denied, are not prescribed by law and are vague and unintelligible. They do not deal with a pressing and substantial concern, they are not rationally connected to its objective, they do not minimally impair the rights and freedoms of licensees, and their deleterious effects significantly outweigh any salutary effects.

37) The Applicant pleads that the so-called “Doré test” does not apply to the current application. In the alternative, if the Doré test applies, then the applicant submits the
 The LSUC has not sufficiently balanced its statutory objectives against the *Charter* rights to freedom of conscience and religion and freedom of opinion and expression.

An Interim Injunction Should be Ordered

38) Until the application is granted, an interim injunction should be granted for the following reasons:

- a) There are serious issues to be tried in this Application;
- b) Irreparable harm will occur if an interim injunction is not ordered; and
- c) The balance of convenience favours issuing an interim injunction until such time as the Application can be heard.

An Intra Vires and Charter-Compliant Interpretation

39) In the alternative, the applicant submits that the requirement to complete the Statement of Principles must be interpreted in the manner that allows it to remain *intra vires* and in accordance with the *Charter*. In particular,

- a. The requirement requires licensees to affirm existing obligations under the *Rules of Professional Conduct* and the *Paralegal Rules of Conduct* to comply with human rights laws.
- b. The requirement shall not be interpreted to mean that licensees have an obligation to endorse, demonstrate a personal valuing of, or profess any specific belief or value, or that licensees have an obligation to persuade anyone about anything or be persuaded by anyone about anything;

- c. The requirement applies only to the professional conduct of licensees with each other, with employees, with clients and with the public.
- d. The requirement shall not be interpreted as imposing any new obligation that licensees will or must take, or any specific actions that licensees will or must take.
- e. No licensee will ever be required to make the licensee's Statement of Principles available to any person, including the Law Society of Upper Canada, for any reason, and the contents of a licensee's Statement of Principles shall not be used as evidence, produced or relied upon in any disciplinary or punitive proceeding.

Statutes and Regulations Relied Upon

- 40) The *Charter, supra*.
- 41) The LSA, *supra*, as amended and all regulations, rules and by-laws passed thereunder, including, but not limited to, the *Rules of Professional Conduct*,
- 42) The Code, supra.
- 43) The *Courts of Justice Act*, R.S.O. 1990, c. C.43.
- 44) Rules 1.04, 1.05, 2.01, 14.05(3)(d),(g),(g.1),(h) & 57.01 of the *Rules of Civil Procedure*.
- 45) Such further and other grounds as the lawyers may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION

- 1) The affidavit of Dr. Ryan Alford, to be sworn.
- 2) The factum of the Applicant.
- 3) Such further and other materials as counsel may present and this Honourable Court may permit.

November 6, 2017

RYAN ALFORD

- afd - THE LAW SOCIETY OF UPPER CANADA

Applicant

Respondent

Court File No. CV-17-585937

**ONTARIO
SUPERIOR COURT OF JUSTICE**
Proceedings commenced at Toronto

**AMENDED AMENDED NOTICE OF
APPLICATION**

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