

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT**

APPELLANTS  
(Appellants)

- and -

**THE LAW SOCIETY OF UPPER CANADA**

RESPONDENT  
(Respondent)

- and -

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NATIONAL COALITION OF CATHOLIC SCHOOL TRUSTEES',  
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CHRISTIAN LEGAL FELLOWSHIP, CANADIAN ASSOCIATION OF  
UNIVERSITY TEACHERS, START PROUD, OUTLAWS, CANADIAN  
COUNCIL OF CHRISTIAN CHARITIES, UNITED CHURCH OF  
CANADA, LAW STUDENTS' SOCIETY OF ONTARIO, CANADIAN  
CONFERENCE OF CATHOLIC BISHOPS, SEVENTH-DAY ADVENTIST  
CHURCH IN CANADA, EVANGELICAL FELLOWSHIP OF CANADA,  
CHRISTIAN HIGHER EDUCATION CANADA, LESBIANS GAYS  
BISEXUALS AND TRANS PEOPLE OF THE UNIVERSITY OF  
TORONTO, BRITISH COLUMBIA HUMANIST ASSOCIATION,  
CANADIAN SECULAR ALLIANCE, EGALE CANADA HUMAN RIGHTS  
TRUST, FAITH, FEALTY & CREED SOCIETY, ROMAN CATHOLIC  
ARCHDIOCESE OF VANCOUVER, CATHOLIC CIVIL RIGHTS  
LEAGUE, FAITH AND FREEDOM ALLIANCE, and WORLD SIKH  
ORGANIZATION OF CANADA**

INTERVENERS

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

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[Style of Cause continued]

S.C.C. File No. 37318

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

BETWEEN:

**THE LAW SOCIETY OF BRITISH COLUMBIA**

**APPELLANT  
(Respondent)**

- and -

**TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT**

**RESPONDENTS  
(Appellants)**

- and -

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## PART I. OVERVIEW AND STATEMENT OF FACTS

1. The Law Societies of Upper Canada and British Columbia (individually the “LSUC” and the “LSBC” and, collectively, the “Law Societies”) are required to safeguard the public interest. Equitable access to, and diversity within, law schools, and the legal profession, is in the public interest.

2. Accreditation<sup>1</sup> of Trinity Western University (“TWU”) would undermine equality rights by disadvantaging prospective students who are already members of historically disadvantaged groups. This discriminatory impact would undermine the Law Societies’ obligations, and professed commitments, to promote and protect equality<sup>2</sup> and diversity. Diversity in legal education serves the public interest by developing better lawyers, improving access to justice, and facilitating a more representative bench and bar.

3. The Law Societies were required to consider the promotion of equality within a broad array of other contextual factors. These factors included TWU’s assertion of religious freedom, the Law Societies’ overarching obligations not to discriminate and to maintain religious neutrality, as well as the need to promote public confidence in the cause of justice and its administration. The decisions not to accredit TWU promoted equality and diversity in legal education, in accordance with the public interest.

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<sup>1</sup> In British Columbia, the question before the Benchers was whether TWU would not be an “approved” faculty of law. In Ontario, the question was whether to “accredit” TWU. This factum uses the terms “accredit” and “accreditation” in relation to the matters before both Law Societies.

<sup>2</sup> The term “equality” refers to the concept of substantive equality, as opposed to formal equality, as explored in this Court’s jurisprudence on section 15 of the *Charter*.

**A. Facts**

4. The Advocates' Society represents over 5,700 advocates across Canada. It has an interest in ensuring that access to the legal profession is non-discriminatory and equality-promoting, and that legal education prepares the best future advocates and impartial decision-makers. The Advocates' Society accepts the statement of facts set out in the facts of the Law Societies.

**PART II. STATEMENT OF ISSUES**

5. The Advocates' Society submits that: (1) the Law Societies' public interest mandates include protecting the profession's commitment to non-discrimination, equality, and diversity; (2) promoting equal access to legal education and fostering diverse law school student populations advances the public interest; and (3) the Law Societies must identify and consider implicated *Charter* rights and values in regulating the profession.

**PART III. STATEMENT OF ARGUMENT**

**A. *The Law Societies' mandates include ensuring non-discrimination, equality, and diversity in the legal profession***

6. The Courts of Appeal rightly concluded that the Law Societies could consider their broad statutory objectives in deciding whether to accredit TWU.<sup>3</sup> Indeed, they were bound to do so. The Law Societies are charged with advancing the public interest in setting conditions for admission to the legal profession. The LSBC must act by "preserving and protecting the rights and freedoms of all persons", "ensuring the independence, integrity, honour and competence of lawyers" and

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<sup>3</sup> *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423 at para 58 [*TWU v LSBC*]; *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 at paras 106-108 [*TWU v LSUC*].

“regulating the practice of law”.<sup>4</sup> The LSUC must “maintain and advance the cause of justice and the rule of law” and “act so as to facilitate access to justice”.<sup>5</sup>

7. The Law Societies, like other public decision-makers, *always* have a legitimate interest in promoting and protecting equality.<sup>6</sup> Indeed, the Law Societies have special obligations to remedy discrimination and have adopted policies, programs, and procedures to promote equality and diversity.<sup>7</sup> The Law Societies would abdicate their responsibilities to protect the public interest were they to consider only academic competence concerns in setting conditions for admission to the profession, as TWU contends they ought to do.<sup>8</sup>

8. In this case, the decisions not to accredit properly reflected that equality would be undermined by accepting discriminatory admissions criteria. The Law Societies concluded they should exercise their discretion in accordance with *Charter* values and provincial human rights

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<sup>4</sup> *Legal Professions Act*, SBC 1998, c. 9, s. 3 [**LPA**].

<sup>5</sup> *Law Society Act*, RSO 1990, c. L.8, s. 4.2 [**LSA**].

<sup>6</sup> *Loyola High School v Québec (Attorney General)*, 2015 SCR 613 at para 47 [**Loyola**].

<sup>7</sup> For example, the LSUC recognizes that the policies it adopts should (a) actively promote the achievement of equity and diversity within the profession and (b) not have discriminatory impact: Bicentennial Report and Recommendations on Equity Issues in the Legal Profession; *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 (Div Ct) [**Divisional Court Decision**] (Factum of the Respondent, LSUC, at para 23). Likewise, the LSBC is committed “to the principles of equity and diversity [in the profession and that] ... the public is best served by a more inclusive and representative profession”; Affidavit #2 of Timothy McGee (Appeal Record, Vol. VI).

<sup>8</sup> Factum of the Appellants, Trinity Western University and Brayden Volkenant, at 125; *TWU v LSBC*, *supra* note 3 (Factum of the Respondents, Trinity Western University and Brayden Volkenant, at paras 126 and 127).

legislation, and take positive steps to ensure that professional admissions criteria reflect those values. They were entitled to do so.

***B. Equality and diversity in legal education protects the public interest***

9. The Law Societies are rightly concerned with law school admissions policies. It is in the public interest to promote equitable access to, and diversity in, law schools. As the late Chief Justice Brian Dickson observed over 30 years ago, “legal education ... is the *foundation* of the entire legal system and profession.”<sup>9</sup>

10. TWU’s purpose is to create an educational community of religiously like-minded individuals.<sup>10</sup> TWU intends to act “as an arm of the Church” and develop students with “thoroughly Christian minds”.<sup>11</sup> TWU’s approach necessarily excludes a variety of students and viewpoints. The Law Societies, as public actors, must not choose to favour one religious ideology over another by accrediting a school with exclusionary criteria. They must promote the broad public interest, which includes preventing discrimination, advancing equality, maintaining public confidence in the profession and justice system, and developing a representative bench and bar. Accrediting an exclusionary law school would undermine these important public interest objectives.

11. Law school diversity produces better lawyers. Law schools teach substantive law and procedure, but they also train prospective lawyers in advocacy and negotiation. These skills are enhanced when students appreciate different standpoints in an environment of thoughtful conflict

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<sup>9</sup> Brian Dickson, “Legal Education”, (1986) Can Bar Review 374 at 375.

<sup>10</sup> *TWU v LSUC*, *supra* note 3 at para 92; *TWU v LSBC*, *supra* note 3 at para 178.

<sup>11</sup> Factum of the Appellants, Trinity Western University and Brayden Volkenant, at para 7; Factum of the Respondents, Trinity Western University and Brayden Volkenant, at para 9; *TWU v LSUC*, *supra* note 3 at para 20.

and contestation.<sup>12</sup> Dedication to dialogue across differences, in service of our common rule of law, begins with diversity in legal education and continues into practice.

12. Equality requires that the law reflect the perspectives of those whose experiences have historically been excluded from legal consideration. Law schools with a wide range of students and teachers, who bring varied perspectives into the classroom, offer the best environments to question, analyze, explore change, and work together so that the law fully reflects and respects human diversity in furtherance of the cause of justice. The Law Societies rightly seek to improve the law by enhancing, rather than limiting, access to those who have traditionally experienced discrimination under the law, such as the LGBTQ community.

13. Adept lawyering requires communication, understanding and empathy. Similarly, judicial impartiality requires the recognition and appreciation of perspectives beyond the decision-maker's own. The empathetic disposition crucial to skilful communication, persuasion, and impartiality is best developed not through abstractions, but by direct engagement with others to better understand their *specific and concrete social and economic realities*. Exclusionary, segregated classrooms do not enhance the requisite "enlargement of mind"<sup>13</sup> that underlies good communication, judgment and impartiality.

14. The Law Societies were required to consider whether accrediting TWU would serve the public interest in a "secular, multicultural and democratic society with a strong interest in

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<sup>12</sup> S. Lyon & L. Sossin, "Data and Diversity in the Canadian Justice Community", (2014) 11 JL & Equality 85 at 91, 94-95; C. R. Calleros, "Training a Diverse Student Body for a Multicultural Society," (1995) 8 La Raza L.J. 140; E. M. Chen, "The Judiciary, Diversity, and Justice for All," (2003) 10 Asian Am. L.J. 127 at 133-142.

<sup>13</sup> *R v S.(R.D.)*, [1997] 3 SCR 484 at para 42.

protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights.”<sup>14</sup> A law school that reflects the *whole* society it serves, including the members of historically marginalized communities, enhances public confidence in the administration of justice. Contrary to TWU’s submission<sup>15</sup>, the fact that discrimination against LGBTQ persons is long-standing and widespread does not make its harms any less serious. As “so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned.”<sup>16</sup> In this context, the Law Societies could not condone the exclusion of persons on the basis of protected personal characteristics nor permit preferential access to the profession to adherents of one religious framework.

***C. The Law Societies’ decisions were polycentric in nature***

15. Administrative decisions *must* take into account and be consistent with *Charter* values.<sup>17</sup> In deciding whether to accredit TWU, the Law Societies were required to reconcile their overarching duties to regulate the profession in the public interest with the *Charter* rights and *Charter* values brought into play by TWU’s applications for accreditation.<sup>18</sup>

16. This Court has rejected a hierarchical approach to *Charter* rights and values and has said there are no bright-line rules for dealing with competing values claims: “reconciling competing

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<sup>14</sup> *Loyola*, *supra* note 6 at para 47.

<sup>15</sup> Factum of the Appellants, Trinity Western University and Brayden Volkenant, at para 166.

<sup>16</sup> *Vriend v Alberta*, [1998] 1 SCR 493 at para 69.

<sup>17</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 53 and 56; *Doré v Barreau du Québec*, 2012 SCC 12 at para 24 [**Doré**].

<sup>18</sup> *Ibid*, *Doré* at paras 55-56.

*Charter* values is necessarily fact-specific. Context is vital and context is variable”.<sup>19</sup> *Charter* rights and values do not exist in a societal or legislative vacuum.

17. Moreover, this Court has recently emphasized that “the purpose of a constitutional right is the realization of its constitutional values” and that, “in the context of decisions that implicate the *Charter*, to be defensible, a decision must accord with the fundamental values protected by the *Charter*”.<sup>20</sup>

18. Administrative decisions that engage contending *Charter* interests should attend to *all* pertinent factors in the legal analysis, including:

- (a) overarching legal obligations, such as:
  - (i) *Charter* obligations, e.g. the principle of state neutrality entailing the duty not to offer privileges to certain religious groups to the detriment of others;
  - (ii) maintaining public confidence that the administrative decision-maker will fulfill its statutory responsibilities; and
  - (iii) attention to all other applicable statutory obligations, such as those arising under provincial human rights legislation; and
- (b) case-specific factors, such as:
  - (i) the decision-maker’s pertinent statutory objectives;
  - (ii) where the decision-maker is a representative body, such as the regulator of a self-governing profession, the views and values of the members to whom the decision-maker is accountable;<sup>21</sup>

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<sup>19</sup> *R v NS*, 2012 SCC 72 at para 47; *R v Mills*, [1999] 3 SCR 668 at para 61; *Dagenais v CBC*, [1994] 3 SCR 385 at 877; *R v Crawford*, [1995] 1 SCR 858 at para 26; See also the Rt. Hon. Frank Iacobucci, “Reconciling Rights’ The Supreme Court of Canada’s Approach to Competing Charter Rights,” *Supreme Court Law Review* (2003), 20 SCLR (2d) 137 at 139.

<sup>20</sup> *Loyola*, *supra* note 6 at paras 36-37; emphasis added.

<sup>21</sup> *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at para 19; *Green v Law Society of Manitoba*, 2017 SCC 20 at para 23.

- (iii) the facts of the matter before the decision-maker; and
- (iv) the specific socio-economic and historical context of the issue.<sup>22</sup>

19. Where rights and values appear to conflict, the decision maker should:

- (a) consider the general and specific factors in order to establish the decision-making context;
- (b) assess the degree of interference with the *Charter* rights or values engaged;
- (c) seek to reconcile the contending rights or values in the decision-making; and
- (d) where appropriate, consider the prospective benefit of promoting some values, and potential detriment of restricting other values, in relation to the decision-maker's statutory mandate.

20. In this case, the Law Societies had to decide whether to accredit TWU. Acting in the public interest, the Law Societies were obliged to undertake a robust, context-specific balancing exercise to account for:

- (a) their *Charter* and statutory human rights obligations;
- (b) their existing policies to promote equality, diversity, and non-discrimination;
- (c) the prospective impact of religiously-defined law school classrooms on students' development as legal professionals;
- (d) the maintenance of public confidence in the legal system and professional self-governance; and
- (e) their duties to promote access to justice and advance the rule of law through a diverse, representative bar and bench.

21. Taking all relevant factors into account and considering these in relation to the Law Societies' mandates, the public interest militated against accreditation. Had the Law Societies accredited TWU, they would have sanctioned a discriminatory admissions policy. Declining to

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<sup>22</sup> *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 169.



do so was *not* a matter of attacking Evangelical Christian beliefs.<sup>23</sup> Rather, it acknowledged that the Law Societies, in exercising a statutory power of decision, could choose not to permit inequitable access to the profession, especially where doing so would weaken the education and training of prospective lawyers, undermine the promotion of an independent bar and bench, and damage public confidence in the administration of justice.

22. In contrast, the effect of non-accreditation on religious interests was minimal. Religious activity may occur on site, but the proposed law school, *qua* law school, is not fundamentally engaged in religious activity in furtherance of religious purposes. Its endeavour is public in nature: to train prospective lawyers to provide competent legal services to the public at large, including LGBTQ clients, persons of varied faiths, persons living in common law relationships, and those with no religious beliefs. Evangelical Christians are welcome to attend accredited law schools in Ontario, British Columbia, or elsewhere.

23. The Court of Appeal for Ontario rightly affirmed that the LSUC appropriately accounted for equality rights in deciding not to accredit TWU. It used a contextual approach that was alive to the interests at stake and the surrounding societal and legislative context. The LSUC performed its obligation as a public interest regulator, turning its mind to the fundamental values enshrined in the *Charter* and other provincial human rights legislation.

24. On the other hand, the British Columbia Court of Appeal, stepping into the shoes of the LSBC, diminished the significance of equality values in its analysis. The Court instead focused on TWU's freedom of religion claim in relation to the LSBC's mandate. With respect, this

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<sup>23</sup> *TWU v LSBC*, *supra* note 3 at para 183-184.

decision-making framework was unbalanced and failed to recognize that accreditation would undermine equality.

25. The Law Societies' overarching duty is to regulate the profession, including admission to the bar, in the public interest. This mandate may require the Law Societies to apply their statutory objectives in complex circumstances and to make value-laden decisions – such as whether to accredit TWU. Where, as in this case, polycentric decisions require consideration of contending *Charter* interests, the Law Societies must acknowledge and attempt to reconcile the competing interests in light of their statutory mandates. The Law Societies are obliged to protect the public interest, after weighing the prospective benefits and detriments of preferring some values over others. Here, the decisions not to accredit promoted and protected equality and diversity in legal education, the profession, and the administration of justice.

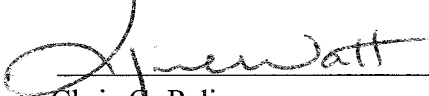
#### PART IV. SUBMISSIONS ON COSTS


26. The Advocates' Society does not seek costs, and asks that no costs be awarded against it.

#### PART V. ORDER SOUGHT

27. The Advocates' Society takes no position on the disposition of these appeals.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 5th day of September, 2017.

  
Chris G. Paliare

 Joanna Radbord

Monique Pongracic-Speier

Emily Lawrence

## PART VI. TABLE OF AUTHORITIES

<b><u>Case</u></b>	<b><u>Para.</u></b>
<a href="#"><i>Baker v. Canada (Minister of Citizenship and Immigration)</i></a> , [1999] 2 SCR 817	15
<a href="#"><i>Catalyst Paper Corp. v North Cowichan (District)</i></a> , 2012 SCC 2	18
<a href="#"><i>Dagenais v CBC</i></a> , [1994] 3 SCR 385	16
<a href="#"><i>Doré v Barreau du Quebec</i></a> , 2012 SCC 12	15
<a href="#"><i>Green v Law Society of Manitoba</i></a> , 2017 SCC 20	18
<a href="#"><i>Loyola High School v Quebec</i></a> , 2015 SCC 12	7, 14, 18
<a href="#"><i>R v Crawford</i></a> , [1995] 1 SCR 858	16
<a href="#"><i>R v Mills</i></a> , [1999] 3 SCR 668	16
<a href="#"><i>R v NS</i></a> , 2012 SCC 72	16
<a href="#"><i>R v S.(R.D.)</i></a> , [1997] 3 SCR 484	13
<a href="#"><i>Saskatchewan (Human Rights Commission) v Whatcott</i></a> , 2013 SCC 11	18
<a href="#"><i>Vriend v Alberta</i></a> , [1998] 1 SCR 493	14

<b><u>Secondary Authorities</u></b>	
C. R. Calleros, <a href="#">“Training a Diverse Student Body for a Multicultural Society,”</a> (1995) 8 La Raza L.J. 140	11
E. M. Chen, <a href="#">“The Judiciary, Diversity, and Justice for All,”</a> (2003) 10 Asian Am. L.J. 127 at 133-142.	11
Brian Dickson, <a href="#">“Legal Education,”</a> (1986) Can Bar Review 374 at 375	9
Rt. Hon. Frank Iacobucci, <a href="#">“Reconciling Rights’ The Supreme Court of Canada’s Approach to Competing Charter Rights,”</a> <i>Supreme Court Law Review</i> (2003), 20 SCLR (2d) 137	16
S. Lyon and L. Sossin, <a href="#">“Data and Diversity in the Canadian Justice Community,”</a> (2014) 11 JL & Equality 85 – 131	11

<b><u>Statutory Provisions</u></b>	
<p data-bbox="203 268 703 300"><b><u>Legal Professions Act, SBC 1998, c. 9</u></b></p> <p data-bbox="203 315 594 346"><b>3. Object and duty of society</b></p> <p data-bbox="203 367 1235 436">It is the object and duty of the society to uphold and protect the public interest in the administration of justice by</p> <ul style="list-style-type: none"> <li data-bbox="300 457 1166 489">(a) preserving and protecting the rights and freedoms of all persons,</li> <li data-bbox="300 525 1166 594">(b) ensuring the independence, integrity, honour and competence of lawyers,</li> <li data-bbox="300 630 1208 735">(c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,</li> <li data-bbox="300 770 781 802">(d) regulating the practice of law, and</li> <li data-bbox="300 840 1252 945">(e) supporting and assisting lawyers, articulated students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.</li> </ul>	6
<p data-bbox="203 982 654 1014"><b><u>Law Society Act, RSO 1990, c L.8</u></b></p> <p data-bbox="203 1050 769 1081"><b>4.2 Principles to be applied by the Society</b></p> <p data-bbox="203 1102 1219 1171">In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:</p> <ol style="list-style-type: none"> <li data-bbox="300 1192 1247 1262">1. The Society has a duty to maintain and advance the cause of justice and the rule of law.</li> <li data-bbox="300 1297 1230 1367">2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.</li> <li data-bbox="300 1402 997 1434">3. The Society has a duty to protect the public interest.</li> <li data-bbox="300 1470 1203 1501">4. The Society has a duty to act in a timely, open and efficient manner.</li> <li data-bbox="300 1537 1247 1682">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.</li> </ol> <p data-bbox="203 1753 721 1785"><b><u>Loi sur le Barreau, L.R.O. 1990, c. L.8</u></b></p> <p data-bbox="203 1820 704 1852"><b>4.2 Principes applicables au Barreau</b></p>	6

Lorsqu'il exerce ses fonctions, obligations et pouvoirs en application de la présente loi, le Barreau tient compte des principes suivants :

1. Le Barreau a l'obligation de maintenir et de faire avancer la cause de la justice et la primauté du droit.
2. Le Barreau a l'obligation d'agir de façon à faciliter l'accès à la justice pour la population ontarienne.
3. Le Barreau a l'obligation de protéger l'intérêt public.
4. Le Barreau a l'obligation d'agir de façon opportune, ouverte et efficiente.
5. Les normes de formation, de compétence professionnelle et de déontologie applicables aux titulaires de permis ainsi que les restrictions quant aux personnes qui peuvent fournir des services juridiques donnés devraient être fonction de l'importance des objectifs réglementaires visés.