

## Law Union of Ontario

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301 - 25 Cecil St., Toronto ON M5T 1N1  
law.union.of.ontario@gmail.com

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Jacqueline Horvat  
Treasurer  
Law Society of Ontario  
Osgoode Hall, 130 Queen Street West  
Toronto ON M5H 2N6

Diana Miles  
Chief Executive Officer  
Law Society of Ontario  
Osgoode Hall, 130 Queen Street West  
Toronto ON M5H 2N6

Dear Ms. Horvat and Ms. Miles;

**Re: *Mirza et al. v. Law Society of Ontario*, 2023 ONSC 6727 (CanLII)**

The recent decision of the Divisional Court in *Mirza et al. v. Law Society of Ontario*, 2023 ONSC 6727 (CanLII), <<https://canlii.ca/t/k1dzw>> exposed some deeply troubling conduct by the Law Society of Ontario. As the regulator of the legal profession, the Law Society ought to be a paragon of justice and fairness. Instead, it railroaded a whole class of potential future lawyers, denied them due process, harshly punished them in the absence of evidence of wrongdoing, tarnished their reputations, and wreaked emotional and financial havoc on them and their families. The Law Union of Ontario urges the Law Society to embrace the Divisional Court decision as an important teaching moment, ask itself some hard questions about what kind of culture within the organization could allow such a debacle to unfold the way it did, and make every effort to remedy the damage it has caused.

Summary of events

1. Following the barristers and solicitors licensing exams in November 2021, the Law Society discovered a security breach which compromised the integrity of its exams.

2. Allegedly, as a result of the Law Society security breach, a company called NCA Exam Guru (“NEG”) that offers exam prep courses had acquired copies of the exams. It is conceivable that NEG could have used some unauthorized content in some of its courses. However, even if that occurred, there is no evidence that those enrolled in those courses knew or could reasonably have known that any unauthorized content was being shared, except perhaps in some discrete instances. As such, individuals who were acting in good faith and working hard to do the right things in order to gain entry into the profession in an ethical manner were victims of the security breach rather than beneficiaries of it. They had no opportunity to report or detach themselves from the unethical conduct of NEG because they had no knowledge that the company was doing anything unethical.
3. In February 2022, about 150 prospective lawyers who had met all of their licensing requirements including passing their licensing examinations were told, on the eve of their scheduled call to the bar in some cases, that their call to the bar would be held “in abeyance” pending an assessment of their exams. This was obviously shocking and traumatic to these individuals who were hours away from the much anticipated launch of their careers as lawyers in Canada, and this inevitably has led to financial hardship for them and their families.
4. We understand that the targeted prospective lawyers were predominantly racial and ethnic minorities, largely of South Asian, Arab, or African descent.
5. The Law Society retained a third party to undertake a statistical analysis of the exam results in an effort to identify anomalies. The “Caveon Report” concluded that there were numerous test results that appeared statistically anomalous and it recommended the invalidation of about 11.1% of the barristers exam scores and 9.6% of the solicitors exam scores.
6. Notwithstanding the apparent anomalies, the Caveon Report appropriately cautioned: “a conclusion that a testing irregularity has occurred should not be presumed purely on the basis of the statistical results. The statistics should aid and assist, but not guide or replace, human judgment. If at all possible, other forms of evidence that confirm or explain the statistical observations should be sought and obtained.... Factors that contribute to tests with very similar test responses can be quite subtle. These might include intense pre-test review or classrooms that form highly collaborative study groups. Commonly held misunderstandings by a group of test takers may cause many of them to select the same particularly attractive incorrect answers. All of the above examples demonstrate the need to carefully consider unique situations as statistically inconsistent evidence is evaluated.”
7. In other words, the Caveon Report did not control for many variables, including things like ethnic or cultural factors, past exam-taking, enrolment in prep courses that could collectively skew participants’ answers, and so on. There was also no baseline identifying to what degree statistically anomalous results might naturally arise in any other bar exam. It is an obvious fallacy to assume that the baseline

for anomalies would be zero in any given exam; hence the caveat in the Caveon Report.

8. Notwithstanding the limitations and caveats of the Caveon Report, the Law Society relied almost exclusively on that report to target about 150 exam writers whose results had been flagged as being anomalous, instead of exercising “human judgment.”
9. The Law Society retained an external investigation team at significant expense, but it does not appear that the investigation uncovered evidence confirming *actual* large-scale cheating involving over 10% of the cohort.
10. The November 2021 exams were written remotely due to COVID-19 protocols in place at the time. The exams were closely monitored by proctors. It does not appear that proctors reported any observation of large-scale cheating involving over 10% of the cohort.
11. The Law Society initially communicated with the targeted individuals with form letters insinuating that their good character is being impugned.
12. In July and August 2022, without having held any hearings and solely based on the Caveon Report, the LSO licensing department determined that these individuals had engaged in “prohibited conduct” by making “a false or misleading representation or declaration.”
13. Consequently, the LSO voided their exam results, voided their registration in the licensing process entirely including voiding their articling terms, and disqualified the candidates from re-applying to be licensed for one year. Additionally, the LSO would share its sanction decision with other legal regulators in Canada, and required candidates to disclose these sanctions in the future..
14. The LSO further reserved its right to conduct further investigation and refer an applicant for a "good conduct" hearing before a Tribunal. However, it never did initiate “good conduct” hearings with respect to any of the individuals that it sanctioned.
15. Throughout the process, the Law Society issued public statements labelling these individuals as “cheating.” While it did not publicly identify them by name, it did require each of the sanctioned individuals to disclose the sanctions which would present a formidable barrier to finding employment in the profession anywhere in Canada even if they successfully rewrote the exams and were called to the bar. Thus, this “cheater” label would stain them forever in the profession. Even after the Divisional Court decision, the affected individuals are being derided as “cheaters” in some corners of the media and public discourse.
16. In November 2022, the Law Society licensing department apparently backed off from impugning the good character of the targeted individuals and stated that it

was making no finding as to each individual's knowledge or intention. Nevertheless, it affirmed the sanctions that were imposed without a hearing.

17. In 2023, some of the sanctioned candidates applied for judicial review of the Law Society's decisions.
18. On November 29, 2023, a panel of three judges of the Divisional Court quashed the LSO's punitive sanctions on the basis that the process was a violation of the applicants' "fundamental right to procedural fairness." The Court upheld one administrative measure taken by the Law Society, i.e., that the exam results would be invalidated and the exams could be re-written; but all of the punitive sanctions were invalidated.
19. Because the exams had in fact been compromised and because there was no evidence to determine whether or not the exam writers had received an unfair advantage, even unwittingly, the decision of the Divisional Court is manifestly reasonable, and strikes an appropriate balance between protecting the integrity of the licensing process and being as fair as possible to the applicants who were drawn into this debacle entirely innocently.
20. The Law Society could have spared the targeted candidates and their families a great deal of emotional and financial trauma had it taken this kind of fair and measured approach from the outset rather than rushing to judgment and proceeding through the process determined to exact punishment whether it was warranted or not.
21. The Law Society licensing department did ultimately realize, by November 2022, that it had no basis for alleging intentional wrongdoing in most cases. At that point, if not sooner, it was incumbent on the Law Society to take a sober look at the process that had unfolded to date, withdraw its punitive sanctions against individuals who did nothing wrong, and offer appropriate support to the applicants who were actually victims of the security breach that happened on the Law Society's watch. Instead, the Law Society barrelled ahead with tunnel vision and persisted with its punitive approach until the Divisional Court ruled against it.
22. Along the way, perhaps in an effort to save face following an embarrassing security breach, the LSO licensing department recklessly wielded its overwhelming power and authority in a manner that crushed many innocent people, while inexplicably eschewing respect for due process. It is incumbent on the Law Society to now remedy the consequences of its actions to the extent possible.

## Recommendations

The Law Society of Ontario, which is the self-regulated regulator of lawyers and paralegals, has utterly failed to regulate itself with respect to one of our most fundamental freedoms - the right to procedural fairness.

The Law Union of Ontario urges the Law Society to embrace the Divisional Court decision as an important teaching moment, ask itself some hard questions about what kind of culture within the organization could allow such a debacle to occur, and make every effort to undo the damage it has caused.

Among other things, the Law Union of Ontario demands that the Law Society take the following steps:

1. In the absence of sufficient provable evidence that each specific candidate intentionally or knowingly made use of a cheating key in writing the exams, issue a written apology to the candidates and their families for the trauma and damage resulting from the LSO conduct.
2. It is not yet apparent whether the LSO intends to apply the Divisional Court's decision to all candidates or just the parties to the application. This needs to be clarified for purposes of integrity and consistency across the board. The Law Society should advise all of the targeted candidates (in the absence of evidence of actual wrongdoing) that the punitive sanctions against them are withdrawn, that their exam results will remain invalidated as an administrative measure, and that they will have the opportunity to re-write the exams without having to pay any further fees. These candidates should not all be put to the additional financial burden of bringing their own court applications in order to seek the same relief. The LSO should also recall any notification it has issued to other legal regulators.
3. Immediately establish a procedure and dates for the re-writing of the exams and expedite the call to the Bar for all successful candidates.
4. Offer support and counselling to all of the candidates who were themselves victims of the Law Society security breach which led to them potentially being unwittingly exposed to unauthorized exam materials, and then further traumatized by the manner in which the Law Society punitively targeted them.
5. Financially reimburse the impugned candidates for all their financial consequences since February 2022 (including legal fees, lost income and opportunities, counselling expenses, etc), and establish an appropriate procedure for the affected candidates to make such claims;
6. Take steps to revise its approach to the issue of fundamental fairness with respect to all of its regulatory procedures and policies;

7. Audit or investigate the licensing department with a view to identifying the factors that led the department to conclude that it could circumvent the LSO's own by-laws and unilaterally exact sanctions without due process.

Yours very truly,

On behalf of the Steering Committee of the Law Union of Ontario

A handwritten signature in black ink, appearing to be a stylized combination of the initials 'H' and 'V' followed by a flourish.

Howard Morton and Vilko Zbogar