FIAT: Let the within Surreply Brief be filed notwithstanding that it is being filed late

J.C.K.B.A

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APPLICANT	Yue Song
RESPONDENTS	The Law Society of Alberta
DOCUMENT	**APPLICANT'S SURREPLY BRIEF**

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APPLICANT'S

SURREPLY BRIEF

FIAT: Let the within be filed, this 23rd day of April, 2025.

DPM.

J.C.K.B.A.

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I. INTRODUCTION

1. The facts of this case were already extraordinary. The applicant alleged and cogently demonstrated, on the basis of evidence and law, that:

   a. the LSA is in direct violation of its duties and exceeding its jurisdiction;

   b. the LSA is encroaching upon the bar's independence through the imposition of political objectives anathema to the *Constitution*; and

   c. the LSA is doing so by use of those tools at its disposal; "competence" and "ethics."

2. The LSA's response is more extraordinary still, both for what the LSA says and for the LSA does not say.

3. The LSA says that, indeed, it has political objectives, but refuses to say what those political objectives are. It calls its objectives "competence", "ethics" and the "public interest", seemingly oblivious to the applicant's allegation that the terms "competence" and "ethics" are being abused.

4. The LSA says that how the LSA is utilizing these terms should not be demonstrated, is none of this Honourable Court's business, and is beyond the Court's faculties.

5. As to the obvious question, "then how is the Court to scrutinize the legality of the LSA's conduct?" the LSA has nothing to say at all – at least not directly.

6. Indirectly, the LSA is saying – nay, shouting – that this Court should assume what the LSA means by such terms. The Court should assume that the LSA means by these terms something that is within the LSA's jurisdiction and concordant with the *Constitution*.

7. In other words, the LSA seems to be asking this Court to conduct a judicial review in form but not substance.

8. Given the allegations, there could be no worse time for the Court to abandon its Constitutional post.

9. The LSA has little to say, too, about the independence of the bar – the central column of the applicant's complaint. And what little it has to say is, in effect, that the independence of the bar means giving the Benchers lots of power, subject to little oversight.

10. The applicant hopes the argument below elucidates these and other fundamental flaws in the LSA's extraordinary position.

II. THE LSA'S ADMISSIONS AND OMISSIONS

A. Admissions

i. Political Objectives

11. The LSA admits:

> *… the Profile, the CPD Tool, the "Political Objective" [and] the "Political Objectives" are … political …*[1]

12. It admits:

> *.. the Profile and the CPD Tool involve moral, strategic, ideological, historical, and policy considerations.*[2]

13. It cautions the Court against second-guessing:

> *… matter[s] of individual (including political) preference …*[3]

14. It admits:

> *… the Profile and the CPD Tool are essentially matters of preference – they represent the Benchers' preferred methods of ensuring CPD …*[4]

15. It cautions the Court from any inquiry into:

> *… underlying political, economic, social or partisan considerations …* [5]

16. In other words, the LSA admits (in a roundabout way) that it is exercising its statutory powers in pursuit of "ideological" and "political" objects, including when it implemented the Profile and CPD Tool.

17. That should be a shocking admission. It is a fundamental breach of the LSA's primary objective to protect the bar's independence including, most especially, from political interference.

18. The LSA, however, may claim that this is not a shocking admission at all – that by "politics" the LSA only meant the ordinary exercise of statutory discretion, for example, the

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[1] Respondent's brief at para.102: Such is the case here. None of the Profile, the CPD Tool, the "Political Objective" or the "Political Objectives" are subject to judicial review. They are political and are simply not justiciable."
[2] Respondent's brief at paras. 99.c.
[3] Respondent's brief at paras. 97.a. and 101.
[4] Respondent's brief at para. 99.a.
[5] Respondent's brief at paras.122b; see also paras.119.c. and 182.d.

setting of fees under *Legal Profession Act (*"***LPA***") s. 7(2)(g) – that by "ideology" it meant only the postulates of our *Constitution*.[6]

19. To answer the jurisdictional and *Charter* questions before this Court, it is therefore necessary to know exactly what the LSA's "political" and "ideological" preferences are.

20. But, of course, the premise of the LSA's argument is that the Court is not allowed to know that. The LSA's argument is a convenient "Catch-22":

    a. while the LSA's political and ideological objectives are:

        i. illegal if they are the Political Objectives; and

        ii. legal if they are the proper exercise of statutory discretion,

    b. it is illegal[7] to figure-out what its preferences are.

21. The obvious upshot, as evidenced throughout the CRP, is that the LSA wants this Court to essentially assume that the LSA's political and ideological objects are *intra vires*. In other words, the LSA's proposal is that this Court can satisfy its duty of "robust"[8] judicial review by assuming the LSA is within its jurisdiction.

22. The LSA's (i.e. the Benchers') political and ideological preferences are not some intangible state of mind with only a loose connection to the Court's judicial function. They are:

    a. the objects for which the LSA exercises its statutory discretion – improper objects:

        i. are a nullifying abuse of discretion;[9]

        ii. are not a "pressing and substantial objective" under the *Charter*'s s. 1[10]; and

    b. set-out in the Profile, the Impugned Code and the Path so knowing what they are provides definitional clarity to the vague terminology used in those and other LSA Resources, where:

        i. the LSA has no jurisdiction to impose improper "competence" and "ethics" including "competence" and "ethics" which incorporates the Theories; and

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[6] Which would be a misnomer, as the term generally excludes empiricism.
[7] i.e. Beyond the Court's constitutional legitimacy and institutional capacity.
[8] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("***Vavilov****")* at para. 72.
[9] Applicant's brief at para. 289.
[10] See below.

ii. if "competence" and "ethics" mean what Song demonstrates, he proves important parts of his *Charter* claims; and

c. objects still pursued by the LSA and are the subject, therefore, of the applicant's request for *prohibition* and for an injunction under the *Charter*.

23. The applicant argues below that the LSA's suggestion[11] that this Court should assume that various nomenclature bears its superficial meaning[12] risks this Court falling into a motte-and-bailey fallacy – the Court will assume these terms evidence a defensible position (the motte: the proper governance of the legal profession) when in fact they evidence an indefensible position (the bailey: hostility to the Constitution).

24. The Court must, therefore, find out what the LSA's guiding political and ideological objects are (see below at section II.B.ii. (What the LSA's Political Objectives Are).

ii. Public Interest Objective

25. Throughout the brief the LSA admits that its decisions were made for the object of the "public interest" suggesting the LSA is operating as if the LSA contains the same type of public interest clauses as the legislation in British Columbia and Manitoba. It does not. The LSA admits, therefore, pursuing a statutory objective which is far more general and broad than can be discerned from the text and scheme of the *LPA*. The LSA admits, therefore, an Abuse of Improper Objectives.[13]

B. Omissions

i. The Independence of the Bar

26. The thrust of the applicant's application is that the LSA is illegitimately interfering with the independence of the bar undermining the rule of law.

27. It is incredible, therefore, that the LSA has so little to say on the matter.

28. Equally incredible are the uses to which the LSA puts the little-referenced concept. Rather than recognizing that its statutory duty to protect the independence of the bar is an overriding limit on its discretion, the LSA only conceives of the bar's independence as something which necessitates expansive powers and limited judicial oversight.

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[11] Undeniably implied by the scheme of the LSA's argument.
[12] Especially "competence", "cultural competence", "harassment" and "discrimination".
[13] Respondent's brief at paras. 6, 99.b., 138, 139, 161 and 174. At times the LSA will phrase its objects in more narrow terms (for example, "competence") but that does not cure the problem.

29. The LSA, therefore, seriously misses the point – or, rather, refuses to address it.

30. In its first sentence, the LSA asserts:

> *This case is not about … the independence of lawyers or the rule of law.*[14]

31. Yes, it is. This describes almost the entirety of the applicant's evidence and legal argument.

32. The LSA references the relationship between the privilege of self-governance and the concomitant duty to govern in the public interest:

> *… the purpose of an independently regulating profession is to uphold and protect the public.* [15]

33. The purpose of this observation, however, is to reinforce the LSA's argument that the LSA's statutory objective is, therefore, to pursue the statutory objective of:

> *… the "public interest" [which] is "for the Law Society to determine" …*[16]

which, as discussed below, is wrong because it ignores the words of the statute. Regardless, as can be seen, the LSA employs the concept of independence in support of the LSA's powers being interpreted as broad and expansive.

34. Finally, the LSA references the bar's independence where it discusses the relationship between deference and freedom as follows:

> *As the governing body of an independently regulating profession, the Law Society of Alberta's determination of the way its broad public interest mandate will best be furthered is entitled to deference. This deference maintains the independence of the bar; a hallmark of a free and democratic society.*[17]

35. Here the LSA references the independence of the bar to justify its broad and expansive powers being exercised with broad deference.

36. In other words, the LSA uses "the independence of the bar" only as a rhetorical means to an end.

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[14] Respondent's brief at para. 1, a claim repeated at para. 116.
[15] Respondent's brief at para. 134.a., reproduced at paras. 135 and 136.
[16] Respondent's brief at para. 138.
[17] Respondent's brief at para. 6, see also para. 138.

37. The LSA politically interfering with the self-governing bar of Alberta lawyers – and immune from judicial oversight in such interference – is not a "hallmark of a free and democratic society" it is a hallmark of authoritarianism.

38. The rule of law requires an independent bar, not independent Benchers.

ii. What the LSA's Political Objectives Are

39. While the nature of the LSA's political and ideological objects are essential to answering the legal questions before this Court, the LSA refuses to tell the Court what they are and tells the Court the entire topic is simply off-limits.

40. It should be noted, however, that the LSA nowhere squarely denies that its objectives are the Political Objectives. Rather, it seems only to squarely deny that its objectives are exactly the Political Objectives:

> *As it relates to the "Political Objective" or the "Political Objectives", the LSA disagrees with the Applicant's characterizations.*[18]
>
> *The Applicant repeatedly suggests that the LSA was motivated by its "Political Objective" or "Political Objectives". However, these assertions are not supported by the evidence. Rather, the record indicates that the LSA's motives were to increase the competence of the profession and hold the profession to higher and clearer ethical standards.*[19]

41. Given the applicant's brief, which demonstrates that the LSA's Political Objectives are directly hostile to virtually the entire *Constitution* and represent a profound violation of the LSA's prime duties, the Court should have expected a robust denial and fulsome explanation. Instead, the LSA simply repeats "competence", "ethics" etc. without any acknowledgment that the meaning of those terms is, really, the issue in dispute.

42. In any case, the LSA admits that its objectives include:

    a. "diversity"[20];

    b. "preventing harm to vulnerable populations"[21];

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[18] Respondent's brief at para. 100.
[19] Respondent's brief at para. 129; see also paras. 62 and 93.c.
[20] Respondent's brief at paras. 147, 176.d.,177 and 203.
[21] Respondent's brief at paras.176 and 203.

c. avoiding "violence" (by which it means "psychological injury or harm")[22],

which, as evidenced in a review of the Impugned Code, the Profile and the Path undeniably include the Theories.

43. In addition to the applicant's comprehensive demonstration that the LSA, indeed, is pursuing the Political Objectives (including the incorporation of the Theories into its regulation of competence and ethics), in the applicant's submission it would be reasonable to draw the inference, given the LSA's failure to produce a comprehensive CRP, that the LSA's political and ideological preferences are, essentially, the Political Objectives.

III. AVOID THE MOTTE-AND-BAILEY FALLACY

44. To effectively review the legality and constitutionality of the LSA's Impugned Conduct this Honourable Court must correctly understand what the LSA actually means when it uses anodyne seeming terms like "discrimination" and what the LSA is actually doing when it implements familiar sounding programs like professional "competence".

45. It is obvious from (even) the CRP that the LSA employs terminology not according to commonly understood definitions, but as specialized terms of art. "Competence", for example, is used by the LSA to include "cultural competence" which means the pursuit of a "transformative agenda"[23] and "anti-racism."[24]

46. The CRP does not explain what "transformative agenda" lawyers ought to pursue or what a lawyer must think and say to qualify as an "anti-racist" and, therefore, to be "competent" lawyers with a "safe, effective and sustainable" 21st century professional practice.

47. In its brief, the LSA neither explains these concepts (they are not even mentioned!) nor provides coherent, rational, and intelligible reasons as to how these constitute "competence" within the LSA's proper legal jurisdiction. In fact, rather than the rational transparency demanded by *Vavilov (*and the rule of law), the LSA's incredible position is that these matters are simply none of the Court's business and beyond its capacity.[25]

48. In other words, the LSA's CRP and brief invite this Court to view matters in an utterly superficial and misleading way – to accept the motte for the bailey.

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[22] Respondent's brief at paras.149 and 190.d.
[23] Applicant's brief at para. 46; CRP at A-290.
[24] CRP at A-263.
[25] Respondent's brief at s. III.C.

49. As warned in the application itself:

> *The Anti-Constitutional Ideologies [the Theories] … appear, superficially, to embody the values, principles, and guarantees of the Canadian Constitution including, most especially: a. recognition of the inherent and equal dignity of each individual; b. respect for minorities; c. the rules of equity; d. the principles of fundamental justice; and e. equality before and under the law without discrimination, but are, in fact, subversive to the Canadian Constitution including hostile to those same values, principals, and guarantees.*[26]

50. To do justice in this action it is critical that the Court review the evidence and arguments which demonstrate how the LSA is actually exercising its statutory powers and not rely, instead, on superficial appearance and arguments.

IV. THE LSA'S PLEAS TO IGNORE ITS POLITICAL OBJECTIVES – EVIDENCE

51. The LSA's first argument in support of a superficial review is that this Court should put no or limited use to the affidavits filed in support of the motion: the Song Affidavit, the Song Affidavit 2 and the Williams Affidavit (the "**Affidavits**").

52. In the next two sections the applicant will review the rules on the use of evidence in judicial review, including where *Charter* claims are advanced, and will then summarize what categories of evidence the LSA asks this Court to ignore and explain its obvious importance to a just decision.

A. Evidence in Judicial Review

53. This action could not be filed in the form of a simple originating application – as would have been a proper[27], fair, just, timely and cost-effective means of resolving the claims[28] – because the *Rules* required that it be filed in the form of an originating application for judicial review.[29]

54. "Judicial review" is a broad and varied mechanism. At base, it is the exercise of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers.[30]

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[26] Application at para.16(a).
[27] *Rule* 3.2(2).
[28] *Rule* 1.2(1).
[29] *Rule* 3.15(1).
[30] *Dunsmuir v New Brunswick*, 2008 SCC 9 ("***Dunsmuir***") at para. 29.

Given the variety of statutory delegates subject to judicial review (traditional tribunals as well as the Governor in Council, ministers, government officials, agencies, boards, municipalities and professional regulators) the nature of judicial review depends on context.[31]

55. In keeping with the theme of superficiality, the LSA's arguments on evidence in judicial review ignore all nuance. The LSA's argument rests on the premise that the LSA is a quasi-judicial decision-maker subject only to "traditional" judicial review (where an applicant typically seeks the prerogative remedy of *certiorari*) and that Song's claim arises following a tribunal hearing. That is incorrect. Clarity about the nature of the respondent, this application, and the "record" is essential for a proper determination of, both, substantive and procedural issues.

56. The evidentiary *Rules* in Part 3, Division 2, Subdivision 2 contemplate, both, such "traditional" judicial reviews (where the procedural record is a complete set of the evidence and arguments submitted by participating parties to the tribunal) and non-traditional judicial reviews (such as this application).

57. This is obvious from the *Rules* themselves. Pursuant to *Rule* 3.18(2)(d), for example, the respondent is required to include in the CRP, *inter alia*, all "evidence and exhibits filed with the person or body." In the case at bar, there was no hearing prior to or during which the party (i.e. the applicant) might have "file" evidence and exhibits.

58. *Rule* 3.22 restricts evidence in judicial review. *Rule* 3.22 "…as originally drafted, contemplated applications for orders in the nature of *certiorari* quashing decisions of tribunals."[32] In such "traditional" judicial review hearings, the prohibition on "fresh evidence" safeguards against the applicable standard of review being subverted by the introduction, on review, of evidence which could have been submitted by the party in the original tribunal, lest the fresh evidence effect a sort of *de novo* hearing.[33]

59. When deciding to implement its statutory powers by the Impugned Conduct, the LSA was not a tribunal exercising quasi-judicial or adjudicative functions. There was nothing resembling a hearing in which Song enjoyed the rights of *audi alterem partem* including

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[31] See, for example, *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 21 and *Vavilov* at paras. 88 to 90.
[32] *Oleynik v University of Calgary*, 2023 ABCA 265, ("***Oleynik***") at para 8.
[33] *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 ("***Alberta Liquor***") at para 46.

notice, disclosure and participatory rights, and there was no adversarial system of evidence and argument.

60. The "traditional" judicial review procedural framework is, obviously, a poor fit.

61. For this reason[34] the *Rules* also contemplate the kind of "non-traditional" judicial review represented by this action – including *Rule* 3.22(b.1) (added in 2022) which permits affidavit evidence in judicial review applications where relief other than *certiorari* is claimed.

62. On a plain reading of the *Rules*, therefore, the applicant is permitted to file affidavit evidence in support of his claims for prohibition, declarations, and *Charter* remedies. The Affidavits are plainly admissible.

63. Prior to the 2022 amendment, Alberta courts readily acknowledged that judicial review procedures, including the admission of evidence, had to be sensitive to context. For example, *C.M. v Alberta* dealt with a COVID-19 order of a Public Health Officer ("**PHO**"). The Crown respondent argued that the PHO materials should constitute the entire record, and that affidavits submitted by the applicants were inadmissible. The Court disagreed, holding that the PHO's orders were not the product of a typical hearing in which evidence and arguments were made by two or more parties. Instead, the *Public Health Act* allowed the PHO to make orders without formal hearings and without parties. The Court held "…there is not a discrete and well-defined body of material available to the Court to assess the reasonableness of the Order. In such circumstances, it may be necessary to reconstruct the record … "[35]

64. Similarly, in *Alberta's Free Roaming Horses Society v Alberta*[36] the Court held that in cases which are not "typical judicial reviews" (where there is a record of proceedings which shows materials submitted to a tribunal by affected parties, along with reasons for decision) the court can permits additional evidence. The case dealt with a minister's discretion, and the record of proceedings only contained an order, a briefing note and a memorandum. No reasons were provided (nor were they required). In such circumstances, the Court held that the record was inadequate and that a common law exception (no or inadequate record) was satisfied.

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[34] *Oleynik* at para 8.
[35] *C.M. v Alberta*, 2022 ABKB 716 at para. 28.
[36] 2019 ABQB 714.

65. Even if this were a traditional judicial review the Affidavits would be admissible. As the LSA properly observes, evidence may be filed "where an adequate record of the proceedings does not exist"[37] including, as expressed in *Alberta Liquor*, "where a tribunal makes no, or an inadequate, record of its proceedings."[38] In this case the CRP is deficient for both of these reasons. There was no hearing in which Song could submit evidence, so there is no "adequate record" and, to the extent materials were before the LSA when exercising its powers, many (if not most) of those materials are conspicuously absent from the CRP (see below at section IV.B (The Evidence the LSA Asks This Court to Ignore)).

66. In a traditional judicial review, the parties generally have both control over and knowledge of the "record." In this case the LSA has superior knowledge as to what the CRP should contain. It also has an interest in ensuring that the contents of the CRP are helpful to its position. Indeed, the CRP is missing many records which were before the LSA when it made the decisions impugned here (and unhelpful to its position) including its Regulatory Objectives which state, *inter alia*:

> *The Law Society will use these regulatory objectives as a guide when making regulatory, governance and operational decisions.*[39]

67. Even in traditional judicial review the right to file affidavits is broader than set-out in the LSA brief. Affidavits may also be filed:

    a. where the evidence provides necessary background and context to the judicial review application, such as explaining the operation of a complex licensing system;

    b. to show a complete absence of evidence before the decision maker on an essential point; and

    c. where the evidence provides necessary background and context to a related constitutional argument under the *Charter*.[40]

68. As explained below, the Affidavits would also be admissible on these grounds.

69. In the following sections the applicant will briefly survey what evidence the LSA asks this Court to ignore, why it is important, and on what common law exception it would have been admissible (had reliance on any exception been necessary – which it is not).

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[37] Respondent's brief at para. 73, quoting *Bergman v Innisfree (Village)*, 2020 ABQB 661 at para. 45.
[38] *Alberta Liquor* at para. 41.
[39] Song Affidavit, Exhibit "E", p. 104.
[40] *Syncrude v Alberta (Minister of Energy)*, 2023 ABKB 317 ("***Syncrude***"), at para. 57.

B. The Evidence the LSA Asks This Court to Ignore

70. There are 6 broad categories of evidence in the Affidavits. Much of the affidavit evidence fits within more than one category.

i. Meeting Materials Not Disclosed by the LSA

71. Throughout the CRP decision makers are frequently provided materials in advance of meetings which materials the LSA failed to produce. The failure was so frequent the applicant defined the term "Meeting Materials" for efficiency.[41] The CRP likewise makes reference to various other materials on which LSA's decision makers expressly relied but which are absent from the CRP.[42] The CRP is clearly "inadequate."[43]

72. The Affidavits fill these gaps by putting into evidence, *inter alia*:

a. The Furlong Report which is central to the LSA's new model of "competence" and program of CPD and which demonstrates that to the LSA "competence" is an application of the Theories that no Due Diligence seems to have been done by Furlong on the Path.

b. The above articles, including the "excellent" Parmar article specifically referenced in the CRP and included within the LSA's Online Resources.

c. Amazingly, the Path itself. Instead the LSA has chosen to include in its CRP an "information sheet" and "description" of the Path (the motte)[44] from which is absent all of the Path's most pernicious political content (the bailey). For example, the "description" advises that lawyers will be able to "summarize scientific theories"[45] (the motte), whereas the Path actually gives a lesson in epistemological relativism (the bailey).[46] The "description" suggests lawyers will be able to "highlight the failure of the Canadian justice system towards Indigenous peoples" (the motte) but actually gives a lesson in postcolonialism and CRT (i.e. the Path teaches the key concept of systemic discrimination / colonialism that Canada's *Constitution* is itself anti-indigenous racism). In fact, virtually none of the applicant's various observations about the Path's improper

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[41] See applicant's brief at paras. 35, 36, 37, 42, 50, 55, 66, 67, 69, 70, 73, 74, 78, 105 and 111.
[42] See, for example, applicant's brief at paras. 24, 25, 38, 49, 52, 53, 58, 61, 63, 65, 76, 84, 85, 86, and 102.
[43] *Alberta Liquor* at para. 41.
[44] CRP at A-311.
[45] CRP at A-316.
[46] See, for example, applicant's brief at para. 337.

content are evident from the "description" provided in the LSA's CRP. Nor does the LSA's "description" include the Path's accuracy warning.[47]

d. The motte-and-bailey problem with the Path is aggravated in the LSA's brief which provides only part of the TRC's call to action no. 27[48], excluding the sentence: "This [i.e. "cultural competency"] will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism."[49]

e. The Path, being the LSA's only use of its powers under *Rule* 67.4 to date, as well as an expression of what the LSA means by the term "cultural competence", was provided to and relied on by Williams to prepare her expert Report.

f. The articling survey which is referenced throughout the CRP as part of "considerable empirical and anecdotal evidence"[50] or as showing "alarming levels" of harassment and discrimination[51] (the motte) but is not disclosed. A review of the survey reveals that it is actually evidence of very little at all (the bailey).[52]

73. The LSA's CRP also entirely omits the Bencher's February 4, 2022, minutes in which CEO, Elizabeth Osler, admits a disconnect between the "outdated" *LPA* and the LSA's "work."[53]

74. Had this been a traditional judicial review in which affidavits were not otherwise permitted, the Affidavits would be admissible to supplement the LSA's highly deficient CRP. In addition, the Affidavits provide necessary background and context for both the judicial review application and for an assessment of Song's *Charter* claims.[54]

ii. Reasons Not Disclosed by the LSA

75. The CRP contains little in the form of "reasons" in support of LSA's various Impugned Conduct. The LSA, for example, cites as its "motives and reasons" for *Rules* 67.2 and 67.3, (then) President Teskey's 2020 memorandum[55] issued 3 years before the amendments the applicant seeks to quash.[56]

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[47] Applicant's brief at para. 632.
[48] Respondent's brief at paras. 48 and 127.
[49] Song Affidavit, Exhibit "EE", p. 624.
[50] Applicant's brief at para. 113.
[51] Applicant's brief at paras. 58 and 59.
[52] Applicant's brief at para. 24.
[53] Applicant's brief at para. 70.
[54] *Syncrude* at para. 57.
[55] Respondent's brief at para. 126.
[56] Applicant's brief at para. 102.

76. The Affidavits contain further evidence as to the LSA's "reasons" including Osler's outline of the LSA's jurisdiction to impose CPD[57], and the Bencher's letter to the bar.[58]

77. Had this been a traditional judicial review in which affidavits were not otherwise permitted, the Affidavits would be admissible to supplement the LSA's deficient CRP.

iii. Strategic Materials Not Disclosed by the LSA

78. There are other materials in the Affidavits which inform Bencher decision making all of which (but one) are referenced in the CRP but not disclosed.

1. Regulatory Objectives

79. As observed above at paragraph , the LSA "…use[s] these regulatory objectives as a guide when making regulatory, governance and operational decisions."

80. In direct contradiction the LSA argues that the (full) Regulatory Objectives are not, in fact, relevant to their decision-making.

81. The Regulatory Objectives are very important evidence because, *inter alia*, the LSA expressly admits that its Political Objectives may take priority over its other objectives including the one assigned to it by the legislature: safeguarding the rule of law. Likewise, the Regulatory Objectives evidence the LSA's facilitation of a racially segregated legal system and its view that its "public interest" mandate extends to affecting "society at large." For this reason the Regulatory Objectives were provided to and were relied on by Williams to prepare her expert report.

82. The Regulatory Objectives (including the "full" version of them, which the LSA infers it has in its possession) should clearly have been included in the CRP. It is deficient. In addition, the Regulatory Objectives provide necessary background and context for the judicial review application (they evidence the LSA's guiding objectives and explain the nature of the LSA's Political Objectives) and for an assessment of Song's *Charter* claims.

2. Acknowledgment

83. The Acknowledgment includes further information as to the Bencher's decision-making process including, contrary to the Regulatory Objectives (which suggests the LSA's various objectives are co-equal) a public acknowledgement that the Benchers received

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[57] Song Affidavit, Exhibit "EE", p. 624.
[58] Song Affidavit, Exhibit "HH", p. 798.

training to ensure they "centre" their Political Objectives when exercising statutory power.[59]

84. It should, therefore, have been included in the CRP.

85. The Acknowledgment is also very important evidence in this action because, *inter alia*, it is a clear expression of the LSA's Political Objectives and one of the very few instances in which the LSA directly defines a term ("systemic discrimination"). For this reason the Acknowledgment was provided to and was relied on by Williams to prepare her expert report.

86. The Acknowledgment provides necessary background and context for the judicial review application (including as reference material on which the Williams Report is based) and for an assessment of Song's Charter claims.

3. Other Strategic Materials

87. The Affidavits also contain the LSA's 2010 Annual Accountability Report in which it reveals that Albertans were very satisfied with legal services in Alberta.[60] Following this (and, on the basis of no apparent evidence which explain it) the Affidavits demonstrate a significant strategic shift by the LSA in 2019 towards its Political Objectives including new core values, new strategic goals, and a new definition of the familiar seeming term "fairness."[61]

88. The LSA's core values, strategic goals, and definitions for the terminology used in that respect is clearly relevant to its decision making. The materials should have been included in the CRP. Further these materials provide necessary background and context for the judicial review application and for an assessment of Song's Charter claims.

iv. Guidance Materials Not Disclosed by the LSA

89. Throughout the CRP and the Affidavits it is clear that a proper understanding of the LSA's nomenclature and underlying ideological concepts is critical to understanding the true nature of the LSA's Impugned Conduct.

90. The LSA itself acknowledges this. For example, to ""support lawyers in creating meaningful and effective CPD plans"[62] (i.e. to assist lawyers to understand the meaning

[59] Applicant's brief at paras. 340 and 532,
[60] Applicant's brief at para. 20.
[61] Applicant's brief at paras. 24 to 32.
[62] CPD at A-183.

and content of various "competencies" in the Profile) it directs lawyers to the Online Resources.[63]

91. The importance of one such resource, the Glossary, is explained in the LSA's Online Resources as follows:

> *The CARED Collective maintains a glossary with definitions of key terms related to your work in anti-racism. These terms are crucial to the system of thought that works to combat individual, institutional and systemic racism. This list is by no means exhaustive. Moreover, history has shown us that terminology tends to shift over time, particularly as marginalized groups and individuals are increasingly heard.*[64]

92. As observed by Williams, "the very fact that a glossary is needed speaks to a project of either introducing new theory-inspired terminology or redefining existing terms."[65]

93. The LCC confirmed that tools would be made available to assist lawyers to understand elements of the Profile because they include "niche areas."[66]

94. The PRRC even discussed not providing a definition for "discrimination" "as the evolution of the word is ongoing."[67]

95. When the LSA determined that it should "acknowledge" the existence of systemic discrimination in the justice system it felt it necessary to, first, define the term.[68]

96. Cleary, then, the LSA's Online Resources, the Furlong report (and references articles), the Path, the Regulatory Objectives, the LSA's strategic documents, and many other records contained within the Affidavits should have been included at first instance in the CRP. If they are a necessary roadmap for lawyers to understand the LSA's nomenclature, they are equally necessary to the Court.

97. Without this "guidance" the Court may mistake the motte (for example, "prejudice") with the bailey ("racial prejudice … directed at white people … is not considered racism …").[69]

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[63] Song Affidavit, Exhibit "CCC", p. 736 and
[64] Song Affidavit 2, Exhibit "N", p. 341; see also the Glossary (Song Affidavit, Exhibit "LLL", p. 806).
[65] Report at p. 9.
[66] Applicant's brief at paras. 76, 306, 307, and 667.
[67] Applicant's brief at para. 105.
[68] Applicant's brief at paras. 529 and 556.
[69] Applicant's brief at para. 593. Recall also Osler's purported attempt to distance the LSA from its own Online Resources. When confronted with the Glossary's attack on colorblindness she is reported to have

98. For this reason, some of these materials (the Path, the Regulatory Objectives and the Glossary) were provided to and were relied on by Williams to prepare her expert report.

99. The admissibility of the Williams Report itself is discussed in the applicant's brief at paragraphs 305 to 311. The Report is a critical roadmap for the Court to understand the LSA's Political Objectives because the Theories are opaque and poorly explained in the Online Resources (to the extent they are explained at all).

100. For example, the LSA's view that cultural competence includes, "unlearning colonial logics, hierarchies of legal cultures, and the disregard of particular knowledges" is virtually meaningless without the Report's overview of postcolonialism. Likewise, the meaning of the Path's observation that "we can look at science and origin stories as simply different ways to describe where we've come from"[70] is seemingly benign (if inaccurate) without the Report's explanation of the relativistic core of the Theories.

101. For these reasons the applicant makes extensive use of the Williams Report in his brief.

102. It should also be recalled that, according to the LSA, this Honourable Court lacks the institutional capacity to even consider the LSA's Political Objectives. While this is obviously incorrect, it does (correctly) suggest that the Court will benefit from expert assistance.

103. In any case, the LSA's only objection to the Report (apart from the LSA's broad objections to all affidavit evidence) is that the Report, "not being from the Applicant, would be of limited use in helping the Court to understand the Applicant's position."[71] Given the obvious utility of the Report to the applicant's brief, this is patently incorrect.

104. The Online Resources were wrongly excluded from the CRP and they and the Report provide necessary background and context for the judicial review application and for an assessment of Song's *Charter* claims.

v. Evidence in Support of Song's Charter Claims

105. The applicant advances *Charter* claims. It is essential that *Charter* claimants establish an evidentiary basis; *Charter* claims cannot be advanced or decided in a factual vacuum.[72]

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said the Online Resources "are not required reading and lawyers can choose their own resources." – Applicant's brief at para. 670.

[70] Applicant's brief at para. 337.

[71] Respondent's brief at para. 87.

[72] *Mackay v Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 SCR 357.

106. In the present case, the applicant advances *Charter* claims under ss. 2(a) and 2(b). These claims require evidence of:

    a. the fact that the LSA's Political Objectives include the promotion of the Theories, making many of the exhibits to the Affidavits necessary, including the Report;

    b. the ideological content of the Theories, making many of the exhibits to the Affidavits necessary, including the Report;

    c. the applicant's sincerely held religious and secular beliefs and desired expression, making much of the body of the Song Affidavit necessary (it should be noted here that, contrary to the LSA's claim that Song's "feelings … around the merits"[73] of the Law Society's Political Objectives are not relevant, Song's "feelings" are a necessary component of his s. 2(a) and 2(b) claims – he must evidence how he wants to manifest his religious and secular beliefs, what he wants to say, and that the LSA is interfering with such freedoms);

    d. objective interference with Song's beliefs and desired expression, making the balance of the Song Affidavit and the Report necessary evidence;

    e. a breach of the LSA's duty of religious neutrality, making much of the Affidavits necessary;

    f. the scope of the LSA's proper jurisdiction to support Song's argument that the LSA's *Charter* infringements are for an *ultra vires* purpose (as opposed to a "pressing and substantial" objective consistent with freedom and democracy), making much of the Affidavits necessary; and

    g. that the LSA's *Charter* infringements are not "reasonable limits" in a free and democratic society, making much of the Affidavits necessary.

107. There is, in fact, nothing the applicant can identify in the Affidavits which are evidence solely in support of the jurisdictional arguments.

108. Contrary to all this, however, the LSA goes so far as to suggest that the Court is (somehow) "capable of determining the *Charter* issues in this matter without the Affidavits."[74] That is plainly wrong.

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[73] Respondent's brief at para. 4.
[74] Respondent's brief at para. 88.

vi. Other Evidence Demonstrating the Nature and Scope of the LSA's Political Objectives

109. The Affidavits also contain other evidence which demonstrates the nature of the LSA's Political Objectives and the manner in which it has pursued those objectives (i.e. evidence of the Impugned Conduct).

110. For example, the Affidavits include the LSA's My Experience Project (referenced throughout the CRP) including sample submissions and the accompanying "qualitative analysis" about which the applicant makes a significant argument.[75]

111. The Affidavits include the LSA's articling placement program which evidences the LSA's rejection of the innocence principle[76], relevant to the applicant's arguments as to practical consequences flowing from the broader rejection of objectivity[77] and as to the inherent uncertainty of the LSA's subjective definition of harassment.[78]

112. The Affidavits contain evidence that the LSA's Specified Mandatory CPD contained misinformation, relevant to the nature of the LSA's Political Objectives[79] and to the reasonableness of *Charter* infringements if the ostensible purpose of such infringements is enhancing historical competence.[80]

113. The Affidavits include Act, Inc.'s mission (which is referenced in the CPD but not disclosed) which shows the organization responsible for the development of the Profile (including advising on "industry practice" for the interpretation of survey results) also has, as its mission, the advancement of the Theories.[81]

V. THE LSA'S PLEAS TO IGNORE ITS POLITICAL OBJECTIVES - SUBSTANCE

114. The LSA argues the Court should entirely ignore the fact that it has assumed a political objective (one which is antithetical to the *Constitution*), including as it relates to the questions of whether the Profile, the CPD Tool, and the Political Objectives are *ultra vires,* on two bases.

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[75] See especially, applicant's brief at paras. 349 and 646.
[76] Applicant's brief at para. 67
[77] Applicant's brief at para. 371
[78] Applicant's brief at para. 710.
[79] Applicant's brief at para. 394.
[80] Applicant's brief at paras. 631 to 635,
[81] Applicant's brief at paras. 82 to 84.

A. The LSA Claims Judicial Review Does Not Relate to Discretionary Decisions

115. The LSA first seems to argue that this Court only has supervisory jurisdiction over the LSA insofar as it promulgates formal "subordinate legislation."[82] It relies on *Okotoks (Town) v Foothills (Municipal District) No. 31*, 2013 ABCA 222 ("***Okotoks***")[83], but the Court in that case found a municipal bylaw was a "decision or act" under *Rule* 3.15(2)[84], not that bylaws were the only form of delegate action subject to judicial review.

116. While the applicant does not agree with (or fully understand)[85] the LSA's categorizations, it suffices to note that this narrow and formalistic framing of the ambit of judicial review is completely at odds with judicial review's purpose: to "… ensure that exercises of state power are subject to the rule of law …"[86]. Judicial review plainly relates also to discretionary decision making under legislation and subordinate legislation. For example:

a. *Roncarelli* related to the abuse of powers under statute by means of an improper "dictate" from Premier Duplessis to the liquor commissioner; and[87]

b. *TWU* related to a Bencher's resolution under its rules to declare the applicant school not approved.[88]

B. The LSA Claims its Politics are Non-Justiciable

117. The LSA next argues that this Honourable Court should ignore the Profile, the CPD Tool, and the Political Objectives because the court has neither the Constitutional legitimacy nor institutional capacity[89] to answer the basic questions:

a. Is it legal and constitutional for the LSA, pursuant to its powers to regulate the legal "competence" and legal "ethics" of the bar, to assume a political objective?

b. What if such a political objective contradicts and is hostile to the *Constitution*, including the rule of law?

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[82] Respondent's brief at paras. 92 and 93.
[83] Respondent's brief at para. 9, citing *Okotoks* at para. 9.
[84] *Okotoks* at para. 9.
[85] For example, if the Profile is not an "act" reviewable in judicial review – what is it?
[86] *Vavilov* at para. 82; all emphasis and edits in this brief are added.
[87] *Roncarelli* at para. 36.
[88] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 ("***Trinity***") at para. 22.
[89] Respondent's brief at Section IV.C.

c. Is it legal and constitutional for the LSA, pursuant to its powers to regulate the legal "competence" and legal "ethics" of the bar, to advance its political objective in the manner it has?

d. Do the: 1) assumption of the political objective; and 2) means chosen to advance it (including the Profile, the CPD Tool, the Acknowledgment, the Regulatory Objectives, the Online Resources, the Impugned Code, and Specified Mandatory CPD including the Path), infringe the applicant's *Charter* rights?

e. Has the LSA "prescribed" such limits on Charter rights "by law"?

f. Has the LSA demonstrably justified that the *Charter* infringements are reasonable in a free and democratic society?

118. These might be summarized as:

> *Is it legal and constitutional for the LSA to adopt and promote, in the manner it has, anti-Constitutional Political Objectives?*

i. Constitutional Legitimacy

119. The concept of "justiciability" has procedural aspects (standing, mootness, and ripeness) and substantive aspects (constitutional legitimacy and institutional capacity).[90] The LSA rests its argument on substantive justiciability. Justiciability pertains to several factors:

> *… notably: (1) the capacities and legitimacy of the judicial process; (2) the constitutional separation of powers; and (3) the nature of the dispute before the court, including the nature and text of the legal instruments as the basis of the dispute.*[91]

120. The LSA quotes the SCC in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*[92] with respect to justiciability. The SCC continues:

> *… The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that*

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[90] Lorne M. Sossin & Gerard Kennedy, Boundaries of Judicial Review; The Law of Justiciability in Canada, 3rd ed (Carswell, 2012) ("**Sossin**") at s. 1.2.
[91] Sossin at s. 1:2.
[92] [2018] 1 S.C.R. 750 ("***Highwood***") at para. 34; quoted, in part, by the LSA at Respondent's Brief, para. 96.

> *there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (ibid.).*

121. Arising from Canada's constitutional separation of powers[93] the justiciability rule prohibits a court itself making "political" decisions. Such decisions are, according to our constitutional structure (a constitutional democracy), made by the legislature and (duly authorized) executive.[94] It is constitutionally illegitimate for the courts to usurp the function of the legislature – just as it is constitutionally illegitimate for a legal regulator to usurp that function (which, if course, is the applicant's fundamental complaint).

122. When conducting a *Charter* s. 1 analysis the court comes very close to assessing legislative wisdom:

> *Central to the section 1 analysis is a decision as to the purpose of the impugned legislation and the importance of this purpose …*
>
> *Determining the importance of a law's objective perhaps is not identical to adjudicating the wisdom of legislation, but it inherently involves the court judging the "political" means that the government has employed …*
>
> *…*
>
> *Determining whether a law is or is not worth overriding a Charter right calls upon the Court to consider many of the elements that are constitutive of the "wisdom" of legislation - these are variations on a single theme: does the law further the public interest in a reasonable fashion? ...*[95]

123. Except with respect to s. 1, the same holds true in the United Kingdom.[96]

124. However, that the legislature is the only entity with constitutional legitimacy to make political decisions (including insofar as it delegates statutory discretion, however broad and no matter the nature of such discretion[97]), obviously does <u>not mean</u> that the exercise of legislative or statutory discretion is immune to judicial review.

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[93] See Sossin at s. 6:8 [GBCR3].
[94] See Sossin at s. 2:20.
[95] Sossin at s. 6:9.
[96] Lord Woolf, et al, *De Smith's Judicial Review*, 7th ed (London: Sweet and Maxwell, 2013) ("**De Smith's**") at ss. 1-032 to 1-037.
[97] Political, national security, emergencies, etc.

125. As nicely stated in De Smith's (in respect of the law of the United Kingdom):

> *Discretion has been described as the "hole in the [legal] doughnut", but that hole is not automatically a lawless void.*[98]

126. De Smith's makes this point with respect to the United Kingdom (describing a legal framework of deference and justification in the United Kingdom very similar to *Vavilov*, *Oakes* and *Doré*):

> *The constitutional status of the judiciary should not, however, excuse the courts from any scrutiny of policy decisions. Courts are able, and indeed obliged, to require that decisions, even in the realm of "high policy" are within the scope of the relevant legal power or duty … The courts display reserve in impinging upon the substance of policy decisions, but even here they may legitimately intervene if the decision is devoid of reason and not properly justified. Judges always possess the capacity to probe the evidence and assess whether the reasons and motives for decisions are rationally related to their aims … public law has rapidly advanced recently from a "culture of authority" to a "culture of justification".*[99]

127. The same observation applies in Canada. As Sossin & Kennedy state:

> *… courts must not conflate whether a matter is per se justiciable with giving decision-makers considerable deference ...*[100]

128. Justiciability means the court should not make the political decision itself (as expressed in De Smith's, "the primary decisions of policy"[101]). It is constitutionally illegitimate for the court to decide whether or not the LSA's Political Objectives are wise policy – just as was constitutionally illegitimate for the LSA to have decided that its Political Objectives are wise policy.

129. The court's constitutional role is, instead, to review political decisions (and exercises of statutory discretion) to ensure they are constitutional and legal (as expressed in De Smith,

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[98] De Smith's at s. 1-033, footnote 94.
[99] De Smith's.
[100] Sossin at s. 6:1.
[101] De Smith's at p. 21.

the "secondary function of probing the quality of the reasoning"[102]). As stated by Dickson J. for the SCC:

> *A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.*[103]

130. However the LSA may wish to frame the application[104], as is obvious from a review of the application itself and the applicant's brief the applicant does not question the wisdom of the LSA's Political Objectives and other Impugned Conduct[105]. Rather, the applicant disputes the LSA's jurisdiction to assume a political objective, especially one which is hostile to the *Constitution*. Song's argument is one of jurisdiction.

131. This Court has not only the constitutional legitimacy to ensure the LSA's regulation of the profession is legal and constitutional, it has the constitutional duty to do so.

132. On a related matter, the Court must be wary of another way in which the LSA conflates a concept in its brief (that of "policy"). While a statutory delegate exercising discretion may be characterized as making "policy", such policy-making function is confined to matters within the delegates proper legal and constitutional jurisdiction. In this sense, the LSA obviously has the discretion to make "policy"[106] (for example, its rules[107] and a "code of

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[102] De Smith's at p. 21.
[103] *Amax Potash Ltd. Etc. v The Government of Saskatchewan*, 1976 CanLII 15 (SCC), [1977] 2 SCR 576 at p 590, quoted in the applicant's brief at para. 139 and in Sossin. See also Sossin at pp. and *Operation Dismantle v The Queen*, [1985] 1 S.C.R. 441 at para. 62 (Wilson J.'s dissenting opinion, approved on this point by the majority at para. 38).
[104] For example, as about what the "Applicant disagrees with or doesn't like" (Respondent's brief at paras. 3 and 173).
[105] Apart from his claims under the *Charter.* Song does evidence and discuss his contradictory subjective beliefs and desired expression, as is necessary to ground his claims under ss. 2(a) and 2(b) of the *Charter*. As discussed above, the "wisdom" of the legislation is also relevant to the *Charter* s. 1 inquiry.
[106] A concept repeatedly cited by the LSA; see, for example, respondent's brief at sections. IV.C, IV.E.i. ("The policy merits of the subordinate legislation"); IV.E.v. ("Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code are reasonable"); and IV.F.ii. ("The balancing exercise").
[107] *LPA* at s. 7.

ethical standards"[108]). The "policy" at issue in *Green* was the LSM's policy of automatic suspension which policy "appl[ied] only to members of the profession."[109] However, the court must distinguish the LSA's limited "policy-making" function from the much-broader kind of policy-making which is the subject of the applicant's complaint: an attempt to modify (i.e. pervert) laws of general application, including the *Constitution*, by "shift[ing] the culture within the profession"[110] - it is illegal and unconstitutional for the LSA to engage in that kind of policy-making.

ii. Institutional Capacity

133. A question is likewise not substantively "justiciable" if the court lacks the institutional capacity to answer it. For example, a court may not decide matters of religious dogma – although, again, "[the] fact that a dispute has a religious aspect does not by itself make it non-justiciable."[111]

134. That the LSA's argument here is plainly wrong can be demonstrated easily. By the logic of the LSA's argument, if it adopted a *religious* objective, the Court would have no institutional capacity to conduct judicial review because the Court may not "decide matters of religious dogma."

135. Obviously, the LSA is again confusing the primary question (Are the LSA's Political Objectives wise policy?) with the secondary question (Are they legal and constitutional?).

136. The LSA claims the matter is not justiciable (for lack of institutional capacity) on two bases. First, the LSA claims the question (Is it legal and constitutional for the LSA to adopt and promote, in the manner it has, anti-Constitutional Political Objectives?) cannot be answered by a court on "any objective standard" as the question is "essentially a matter of individual (including political) preference."[112]

1. Objective Standards

137. There are clearly objective standards which apply to the questions before this Court, including the objective standards imposed by the *LPA* (i.e. the LSA's legal duties and powers); the objective standards imposed by the *Charter* (i.e. the constitutional constraints

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[108] *LPA* at s. 6(l).
[109] *Green v Law Society of Manitoba*, [2017] 1 S.C.R. 360 ("***Green***") at para. 23.
[110] See the applicant's brief at paras. 36, 374, 377 and 404.
[111] *Highwood* at 36, referencing the "primary" / "secondary" dichotomy.
[112] Respondent's brief at paras. 97.a. and 99.a.

placed on the LSA's discretion); and the objective standards imposed by the evidence (including the nature of the LPA's Political Objectives).

138. The LSA's argument here[113] reflects other fundamental errors. The LSA's statutory discretion may not in fact be exercised in accordance with the Benchers' "individual (including political) preference." Neither may the Benchers (*qua* Benchers) have any political preference[114] nor may their statutory powers be exercised according to "personal preference":

> *… there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption …*[115]

2. Polycentric Matters

139. The LSA seems to argue that this matter is "polycentric" because the LSA exercises broad policy-making discretion in the public interest. The applicant addresses some of this argument in section VIII. (Statutory Interpretation and Purported "Constraints"). In addition, this is not a "polycentric" matter.

140. Following the quote provided by the LSA, De Smith goes on to give examples of polycentric matters with respect to which a court lacks institutional capacity. It cites, for example, allocation decisions like electoral boundaries where judicial intervention sets up a "chain reaction, requiring a rearrangement of other decisions with which the original has interacting points of influence."[116] To adjust the boundaries of one electoral district (to ensure no "excessive disparity" between electors and electoral quota) is to set-off a cascade of changes to all other electoral districts. De Smith also cites as an example of a polycentric decision the allocation of scarce resources amongst competing claims, including those not represented in Court.

141. There is nothing "polycentric" about the questions before this Court.

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[113] Which repeats throughout the respondent's brief.
[114] Unless loyalty to the *Constitution* and laws promulgated thereunder is characterized as a "political preference."
[115] *Roncarelli* at para. 41.
[116] De Smith's at p. 26.

iii. Test for Justiciability of Political Matters

142. While, as the LSA observes, the concept of justiciability is applied in a contextual and flexible manner, some guidance is available in the caselaw. As summarized by Sossin, referencing *Reference re Secession of Quebec*[117]:

> *The Court proceeded to articulate something approaching a political questions test: (1) First, the Court is to determine if there is a legal question posed; if not, the matter should be dismissed; (2) If there is a legal question, the Court must then consider whether that legal question has a significant extralegal component. If not, the question should be answered. (3) If the question does have a significant extralegal component, and the Court can answer the question narrowly, severing the extralegal aspects of the question, then it should answer the question; however, if the extralegal component cannot be severed, then the Court should decline to answer the question.*[118]

143. Applying that test:

    a. Purely legal questions are posed: is the LSA's Impugned Conduct *ultra vires* and does the LSA's Impugned Conduct infringe Song's *Charter* rights?

    b. The legal questions have no extra-legal components.

144. The questions posed of the Court are justiciable.

145. This is true (not *despite* but) *because of* the fact that the LSA's Impugned Conduct is political and hostile to the *Constitution*.

146. To return to the donut analogy, there is a statutory donut (the *LPA*) with a hole (discretionary powers assigned to the LSA as limited by the *Charter*). It is the Court's legitimate duty and within its institutional capacity to compare the size of the donut hole to the size of the LSA's Impugned Conduct.

147. To frame this with reference to institutional capacity, this Court has full institutional capacity to understand and determine the legality and constitutionality of what the LSA characterizes as "core legal competence" and "legal ethics" (which ethics "very closely

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[117] At paras. 26 to 28.
[118] Sossin at s. 6:6.

mirror other statutory and common law."[119]) If the Court lacks such institutional capacity, *ipso facto*, it cannot be the proper purview of a legal regulator.

iv. Justiciability – Conclusion

148. For the above reasons, the Court has both the duty, legitimacy, and capacity to consider the LSA's Profile, CPD Tool and Political Objectives.

149. The Court must also remain cognizant of the integral connection between, on the one hand, the Impugned Rules and, on the other hand, the Profile, CPD Tool and Political Objectives.

150. Rules 67.2 and 67.3 require that lawyers prepare their plans "in a form acceptable to the Executive Director" and "submit" them. According to the LSA (obviously) these Rules grant the Executive Director discretion and power to select as the necessary "form" a plan prepared only with reference to the Profile (by which the LSA pursues its Political Objectives) using the CPD Tool (by which the LSA also pursues its Political Objectives). Of course, the Profile and CPD Tool are the "form" which has, in fact, been chosen by the Executive Director under the Rules. It is impossible to review the *vires* of these Rules without knowing or considering what they, in fact, permit the LSA to do. The scope of the Executive Director's discretion under these Rules becomes relevant to the argument at section IX.C.iii (The Impugned Rules), below.

151. The same observation applies to Rule 67.4. According to the LSA, Rule 67.4 is sufficient authority for the LSA to prescribe the Path, as they did. It is impossible to review the *vires* of Rule 67.4 without knowing or considering what the Rule, in fact, permits the LSA to do. The scope of the Bencher's discretion under this Rule becomes relevant to the argument at section IX.C.iii (The Impugned Rules), below.

152. Finally, as observed in section III (Avoid the Motte-and-Bailey Fallacy), without knowledge, analysis, and understanding of the LSA's Political Objectives (including as expressed in the Profile, the Code, and the Path) this Court's review of the LSA's alleged jurisdictional abuses would not be "robust" but would, instead, be virtually neutered. The Court would seemingly have to restrict itself to the superficial realm of "public interest", "competence", "cultural competence", and "ethics" (the motte) without acknowledging that these terms actually bear a very different and inconsistent meaning to the LSA (the bailey).

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[119] Respondent's brief at para. 149.

VI. STANDARD OF REVIEW

153. The LSA argues that the standard of review should be "reasonableness" but fails to provide any response to almost any of the applicant's arguments as to why correctness applies.[120]

154. The LSA's argument proceeds on the basis of three fundamental errors.

155. First, as is discussed below at section VIII.i (The LSA's Statutory Interpretation of the LPA), the LSA proceeds on the erroneous assumption that its statutory duties and powers are the same as other Canadian law societies notwithstanding major differences in governing legislation. The LSA does not have "extremely broad authority"[121] to do whatever it deems to be in the "public interest." The LSA's reliance on *Green* is, therefore, misplaced. The reasonableness standard was applied in *Green* because, unlike the *LPA*, the *LPAM* does contain broad public interest clauses and because, unlike the case here, the rule at issue was highly particularized, related to administrative matters within the LSM's discretion and area of expertise, and affected only members of the bar.[122]

156. As this relates to the standard of review, the LSA effectively ignores *Vavilov* which stated:

> *… where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language …*[123]

157. Second, the LSA seems to have misunderstood *Vavilov*. In *Vavilov,* the SCC moved away from *Dunsmuir*'s treatment of "true questions of jurisdiction" as a separate category for the purpose of determining the appropriate standard. The LSA flips *Vavilov* on its head and argues, in essence, that true questions of a law society's jurisdiction are, as a separate category, reviewed on the basis of reasonableness.

158. The correct approach is set-out in the applicant's brief: there is a "single standard that accounts for context", which is reasonableness unless, *inter alia*, the rule of law demands correctness.[124]

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[120] See applicant's brief at sections III.C and IV.A.i.3.
[121] Respondent's brief at para. 183.
[122] See applicant's brief at pp. 58 to 61.
[123] *Vavilov* at para. 110.
[124] See applicant's brief at sections III.C and IV.A.i.3.

159. *Morris v Law Society of Alberta (Trust Safety Committee)* ("***Morris***")[125] is consistent with *Vavilov.* The reasonableness standard was selected in *Morris* because the application did not raise a general question of law of central importance to the justice system but, instead, raised a narrow issue of jurisdiction.[126]

160. To the extent *Shaulov v Law Society of Ontario*, 2023 ONSC 5242, conflicts with *Vavilov*, it is wrong and should not be followed.

161. Third and finally, the LSA claims that that the applicant "simply assert[s]" and merely "mentions" the rule of law, which is not enough to rebut the presumption.[127] Only one who did not read the applicant's brief could arrive at this conclusion. The applicant explains, in painstaking detail, exactly how and why the LSA's Impugned Conduct undermines the rule of law. In just the introduction alone, the nature of the threat to the rule of law is explained at paragraphs 3, 4, 5, 6, 7, 8 and 9.

162. The appropriate standard of review is correctness although the applicant repeats: it does not matter.[128] "Reasonableness" does not mean the court just gives the statutory delegate a pass. The LSA cannot – and has not attempted to – offer any reason which might justify its use of regulatory powers to politically interfere with the bar.

VII. THE LSA'S REASONS AND OBJECTIVES

A. The LSA Fails to Identify Reasons

163. In section IV.E.i. (How to conduct a reasonableness review …) and section IV.E.iii. (The reasons), the LSA's brief misses two key points.

164. First, while it is true that a reasonableness review may be possible in the absence of formal reasons, the court is still to locate and review records which evidence the delegate's reasoning process which "will not usually be opaque."[129]

165. With respect to the LSA's Impugned Conduct, the LSA does not identify what seems to constitute the LSA's reasoning process.

166. For example, take the LSA's adoption of "cultural competence" as a relevant and necessary form of legal competence for the purpose of Rule 67.4, the Profile and the

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[125] 2020 ABQB 137.
[126] *Morris* at 42 and 43.
[127] Respondent's brief at para. 114.
[128] Applicant's brief at para. 190.
[129] *Vavilov* at para. 137.

Code. Cultural competence, along with the rest of the LSA's Political Objectives, became a strategic goal in the LSA's 2020 Plan (excluded from the CRP) on December 5, 2019. The decision, therefore, came two months before Teskey's February 11, 2020, memorandum cited by the LSA as its "reasons" for seeking to improve, *inter alia*, cultural competence.[130] Teskey likewise observes that the LSA had decided 5 years previously to become more "proactive" in regulation.

167. Further, there is no evidence that Teskey's memo reflects the Bencher's reasons for adopting Rules 67.2, 67.3 and 67.4, the Profile, the Path and, generally, adopting its Political Objectives (all decisions which were made at another time). Assuming for a moment that these are the Bencher's reasons for such earlier or later decisions, the memo fails to include any reasons in the sense of a jurisdictional analysis. There seems to simply be an assumption that the LSA can do whatever it likes as long as it relates to something the LSA might conceive of as "competence." The memo actually summarizes, to use the LSA's term, the LSA's purported "motives". Further problems discerning "reasons" from Teskey's memo are discussed in the brief.[131]

168. If, instead, the Furlong Report is taken to represent the LSA's reasons[132] for such Impugned Conduct, Furlong's "reasons" are: "… it is becoming more widely accepted …"; and the TRC requested it – no jurisdictional analysis at all.

169. Similarly, the LSA cites the Freund memo as the LSA's reasons for adopting Rule 67.4.[133] However, the memo does not provide any "reasons" in the sense of a jurisdictional analysis (i.e. it does not conduct any statutory interpretation, so much as mention *Green*, discuss the LSA's proper statutory objectives, discuss the *Charter* rights that are engaged, etc.). Instead, the memo (and Bencher's meeting) simply proceeds on the assumption that the LSA has jurisdiction to do all things "competence" and provides a summary of various motives (including, primarily, the motive to promote "reconciliation" (undefined except as including implementing the TRC's call to action no. 27)). Nor, again, does the memo outline the Bencher's reasons. All that can be discerned from the Benchers' minutes is that some Benchers liked the content of the Path and that they had already committed to responding to the TRC's call to action no. 27. Finally, the Freund memo as "reasons" is entirely opaque. She fails to say even what she means by "cultural competence" including,

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[130] Respondent's brief at para. 126; Applicant's brief at para. 102.
[131] Applicant's brief at paras. 31 and 32.
[132] Which the LSA must deny, because it is not included in the CRP.
[133] Respondent's brief at para. 127.

for example, identifying the "transformative agenda" the "culturally competent" bar is to pursue.

170. Finally, the LSA cites as its "reasons" in support of the Impugned Code a memo from Elizabeth Aspinall dated September 6, 2023 (with many attachments). The LSA then distills from this the LSA's "motivations" which might be summarized as "do more because we thought harassment and discrimination was a serious problem." Again, it is not obvious which part of these 121 pages were the Bencher's reasons for adopting the Impugned Code.

171. Given all of this, the reasons cited by the LSA do not demonstrate the LSA's "reasons" for its various Impugned Conduct.

172. To what reasons is the Court to defer if no reasons are discernable?

173. The second key point the LSA misses is that a reasonableness analysis should start with the LSA's reasons: are the reasons reasonable in process and outcome.[134] However, having summarized its purported "reasons" in section 4.E.iii (The reasons), the LSA then moves on to make a number of jurisdictional arguments which are nowhere reflected in the "reasons." This, of course, is the logical result of the LSA having actually identified no reasons (as opposed to motives) in the record.

174. As observed in *Vavilov*, in the absence of reasons discernable from the record the reasonableness review changes character and the focus becomes one, solely of outcome.[135]

175. The foregoing further supports a standard of correctness being applied. The LSA appears (according to the reasons now cited by the LSA) not to have even turned its mind to the question of its legal or *Constitutional* jurisdiction. The LSA is owed no deference.

B. The LSA Ignores Other "Reasons"

176. The CRP does contain the following conclusion in respect of the *vires* of Rule 67.4 (within the materials provided to the Benchers in advance of their April 27, 2023, meeting):

> *The Law Society of Alberta (Law Society) established a mandatory continuing professional development (CPD) program and developed Rules for the implementation and administration of the program. The ability of*

[134] *Vavilov* at para. 83.
[135] *Vavilov* at para. 138.

> *Canadian Law Societies to establish such programs and administer them through Rules was confirmed by the Supreme Court of Canada in Green v. Law Society of Manitoba, 2017 SCC 20, [2017] 1 SCR 360.*[136]

177. This is not cited as reasons by the LSA.

178. This seems to be the sum total of the LSA's jurisdictional reasons (as to any of its Impugned Conduct) in the CRP.

179. In the applicant's Affidavits there is more (but still an alarming paucity) of LSA consideration of its jurisdiction (all of which is absent from the CRP) including:

    a. The fact that the LSA announced that the Path would be mandatory before the LSA had even passed Rule 67.4;[137]

    b. The President's statement in the annual general meeting that the LSA had obtained an opinion that rule 67.4 was *intra vires*;

    c. A Bencher's Meeting, absent from the CRP, at which Osler stated, "the Law Society continues to utilize the Rules to advance its work where the legislation is outdated".[138]

180. The Affidavits also includes Osler's December 6, 2022, letter refusing to provide the Opinion but explaining why Rule 67.4 was *intra vires.*[139] This is the most comprehensive record of the LSA's reasoning process as to why Rule 67.4 was *intra vires* (but is absent from the CRP). In 2022 Osler identified the LSA's reasons as to why Rule 67.4 was *intra vire*s as including:

    a. LPA s. 6;

    b. LPA s. 7(2)(v); and

    c. The TRC's call to action no. 27.

C. "Our Objective was Competence, But Never Mind What That Means"

181. Where the LSA says "reasons"[140] it actually seems to mean "objectives."

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[136] CRP at p. A-157.
[137] Applicant's brief at paras. 53 and 55.
[138] Applicant's brief at para. 70.
[139] Applicant's brief at para. 113 and section IV.A.iv.
[140] Respondent's brief at section IV.E.iii. (The reasons).

182. At paragraph 129 of its brief it draws a critical (and wholly unsupported) conclusion: the LSA claims its objectives were "competence", "cultural competence", "harassment", "discrimination" and "ethics" and, therefore, not the Political Objectives.[141]

183. It would be impossible, however, for the Court to assess this argument without having:

    a. reviewed the evidence as to the nature of the LSA's Political Objectives – which the LSA argues should be ignored; and

    b. considered whether the Political Objectives are being advanced within the framework of "competence", "cultural competence", "harassment", and "discrimination" – which the LSA says is beyond this Court's constitutional legitimacy and institutional capacity.

184. The applicant argues that it is accurate to claim that the LSA has an objective of "competence" (the motte) but only if it is understood that "competence" means belief in, compliance with, and active advancement of the Theories (the bailey).

185. How, then, does the LSA expect the Court to assess its argument (that it is not pursuing the Political Objectives) without knowing what those Political Objectives are (and, therefore, how they are being pursued or not pursued within the LSA's "competence" framework)?

186. The answer seems to be: the Court is being asked to assume that where the LSA says "competence" in the CRP, it means "something within the LSA's jurisdiction."

187. This is little more than an invitation for the Court to abandon its duty of ensuring that the LSA is pursuing proper statutory objectives and operating within its jurisdiction. The Court must admit, review and consider the evidence and arguments as to the LSA's Political Objectives.

D. The LSA Was Clearly Pursuing the Political Objectives

188. The applicant is not going to rehash, here, the brief the comprehensive demonstration that the LSA is most certainly pursuing Political Objectives, which it pursues under the headings "competence", "cultural competence", "ethics", etc.

189. However, the applicant will demonstrate that, just in connection with the "reasons" discussed in sections VIII.A (The LSA Fails to Identify Reasons) and VII.B (The LSA Ignores Other "Reasons") above, the LSA's pursuit of Political Objectives is obvious.

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[141] Respondent's brief at para. 129.

190. For example, the LSA takes (then) President Teskey's February 11, 2020, memorandum as the only evidence of its various "competence" motives for Rules 67.2 and 67.3, but fails to:

    a. explain what the LSA means by "competence", especially given that the CRP contains no evidence (or even reference to) any lawyer negligence or defalcation;

    b. note Teskey's reference to "proactive" regulation including not simply receiving CPD plans but doing something "material with it" (which would explain why, when Rules 67.2 and 67.3 were adopted, they included the requirement that lawyers send their plans to the LSA and participate in reviews);

    c. note Teskey's various references to "harassment" in connection with his proposed "competence" initiative;

    d. note that, to Teskey, "competence" included complying with the TRC's call to action to impose Specified Mandatory CPD;

    e. reference the LSA's Regulatory Objectives[142] which "the Law Society will have regard for … when discharging its regulatory functions"[143] and which include its Political Objectives as an objective distinct from the objectives of ethics, competence, and access to justice (and which Political Objectives the LSA expressly contemplated taking priority over other objectives including, even, the protection of the rule of law);[144] and

    f. reference the LSA's Acknowledgement[145] in which the LSA advises that the Benchers had participated in "training focused on unconscious bias and centering equity in their governance and decision-making roles".[146]

191. The LSA's summary of its "motives and reasons" for Rules 67.2 and 67.3 are therefore superficial and incomplete. Even in Teskey's memo itself we see the Political Objectives manifest – the LSA just fails to acknowledge them.

192. The LSA asserts a "competence" and "cultural competence" objective for Rule 67.4 on the basis of Fruend's October 1, 2020, memorandum, but fails to:

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[142] Which the LSA would keep from the Court.
[143] Song Affidavit, Exhibit "B", p. 103.
[144] Applicant's brief at para. 29.
[145] Which the LSA would keep from the Court.
[146] Applicant's brief at para. 340; See also applicant's brief at paras. 31 and 32.

a. explain what the LSA means by "cultural competence";

b. acknowledge that Fruend's memo references an "excellent piece of academic writing in this area … from Pooja Parmar" arguing that "cultural competence" (properly understood) means "enable[ing] professionals to pursue a transformative agenda" and "radical" transformation of the legal system (i.e. the Political Objectives);[147]

c. acknowledge that the Parmar Article is an application of postcolonialism;[148]

d. acknowledge that according to parts of the Parmar Article (which have been excluded from the CRP):

   i. "reconciliation" means "acknowledgment of the foundational violence of colonialism that has shaped Canada, Canadian laws, and Canadians" and "unlearning colonial logics", etc.;[149]

   ii. "decolonization" might be a more useful term "than 'cultural understanding' when the goal is systemic change."[150]

e. mention the Furlong report, which is improperly excluded from the CRP and which memo includes further evidence that the LSA was pursuing the Political Objectives;[151]

f. include, where the LSA lists the Path's subject matter, the entire last sentence of call to action no. 27:

   [this] will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism;[152]

g. mention that the Path includes the Theories and misinformation which tends to denigrate Canada's first Prime Minister[153]; or

h. reference the Regulatory Objectives, the Acknowledgement and the Bencher's training to "centre equity" in governance decisions.

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[147] See applicant's brief at paras. 43 to 47 and 444 to 447.
[148] Applicant's brief at para. 445.
[149] Applicant's brief at para. 447.
[150] Applicant's brief at para. 450(a).
[151] See applicant's brief at paras. 444 to 449.
[152] CRP at A-281.
[153] Applicant's brief at paras. 632 to 634.

193. Again, the LSA's summary of its "motives and reasons" for Rule 67.4 is superficial and incomplete. Rule 67.4 was obviously done in pursuit of the Political Objectives. The LSA simply ignores those parts of the record (or omits them from the CRP).

194. As for the LSA's stated motives and reasons for the Impugned Code provisions, the LSA fails to:

    a. explain that, according to the PRRC, it was the Alberta articling survey which "demonstrate[d] why the regulator needs to respond"[154] (which survey the LSA has kept from the Court so that what it "demonstrates" can not be assessed objectively)[155];

    b. explain how the Impugned Code's references to, for example, "systemic biases", "colonization", "ongoing repercussions of the colonial legacy", "systemic factors, and implicit biases", "systemic discrimination", "distinct needs", and "unconscious biases" are not a reflection of and advancement of the LSA's Political Objectives;

    c. explain how the Impugned Code was significantly overhauled without materially altering it;[156]

    d. mention and explain that LSA's motives and reasons included assuming jurisdiction over matters it viewed as being mishandled by the Alberta Human Rights Commission and labour organizations;[157]

    e. mention (here) that the FSLC's model code was the brainchild of the Law Societies Equity Network (the "**LSEN**") and fails to mention here or earlier[158] that the LSEN's mandate included the promotion of "diversity and inclusion" (i.e. the Political Objectives);

    f. explain on what basis the LSEN concluded the existing rules were insufficient (including on what basis the "commentary may not adequately reflect the importance of preventing discrimination and harassment");[159]

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[154] Applicant's brief at para. 63.
[155] Applicant's brief at para. 24.
[156] See the respondent's brief at paras. 23 and 24 (which suggest the amendments only resulted in the addition of a non-reprisal clause) as compared to CRP A-095 – A-100 which show the addition of an enormous amount of language.
[157] CRP at C-404.
[158] Respondent's brief at para. 19.
[159] CRP at A-058

g. disclose in the CRP any of the (allegedly) "considerable empirical and anecdotal evidence that discrimination, harassment and bullying remain prevalent in the legal profession";[160]

h. address the applicant's observations that (at least) Alberta's contribution to the articling surveys (which was also excluded from the CRP) was highly flawed[161] and was used by the LSA to "inform our work on advancing EDI"[162] (i.e. to advance the Political Objectives); or

i. reference the Regulatory Objectives, the Acknowledgement and the Bencher's training to "centre equity" in governance decisions.

195. Instead, again, the LSA provides a series of "motives and reasons" by superficial and cherry-picked references to the CRP, while simply ignoring the political dimensions of LSA's actions (which are comprehensively catalogued in the applicant's brief).

196. It is accurate to say the LSA's objectives were "competence", "cultural competence" and reducing "discrimination and harassment" only insofar as those terms and objectives are defined according to the ideologies which informs the LSA's Political Objectives (i.e the Theories).

197. Simply put, the LSA claims easily defensible "motives and reasons" (the motte: competence and ethics) while simply refusing to disclose, acknowledge, or defend the indefensible (the bailey: its Political Objectives).

E. <u>The Policy Merits of the Subordinate Legislation</u>

198. As explained at section V.B (The LSA Claims its Politics are Non-Justiciable), the applicant does not inquire into the policy merits of the LSA's Impugned Conduct.

F. <u>The Presumption of Validity</u>

199. The presumption of validity, as expressed in *Auer v Auer*[163] is that:

> *… the burden [is] on challengers to demonstrate the invalidity of [subordinate legislation]" and … "it favours an interpretive approach that reconciles the*

[160] CRP at A-059.
[161] Applicant's brief at para. 24.
[162] CRP at A-123.
[163] 2024 SCC 36 at para. 37.

[subordinate legislation] with its enabling statute so that, <u>where possible</u>, the [subordinate legislation] is construed in a manner which renders it intra vires"

[emphasis in original]

200. The LSA is incorrect, therefore, where it claims that the Impugned Rules and Impugned Code "should be interpreted in a manner that renders the subordinate legislation *intra vires*"[164] (but states the rule correctly elsewhere[165]).

201. However, the presumption has no application here. The LSA offers no <u>interpretation</u> of its Impugned Conduct, including the Impugned Rules and Impugned Code, which might render it *intra vires*.

G. <u>Opinion and Regulatory Objectives</u>

202. With respect to the Regulatory Objectives, please see above at section IV.B.iii.1 (Regulatory Objectives). The CRP is clearly deficient for the LSA's failure to include, within it, the Regulatory Objectives (which are actually an "executive summary" only). The LSA has now implicitly acknowledged that it has a fuller version of the Regulatory Objectives (it would not waste the Court's resources with argument as to why they should not be disclosed if they did not exist). The full Regulatory Objectives should, therefore, be ordered disclosed.

203. The respondent resists disclosing the Legal Opinion it received purporting to find that Rule 67.4 was intra vires, despite the fact that on December 1, 2022, at its annual general meeting, its then-President Ken Warren K.C. publicly advised members both of its existence and its substance.[166] The respondent relies on a statement in *Manson Insulation Products Ltd. v Crossroads C&I Distributors* where Justice Poelman stated that he was not aware of authority holding that "mere reference to a legal opinion, or even a statement of its bare conclusion, requires a finding of waiver."[167] In *Manson*, the defendant's witnesses "did not describe [the legal opinion's] contents"[168] and Justice Poelman held that the defendant "cannot be said to have voluntarily waived privilege by

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[164] Respondent's brief at para. 119(d).
[165] Respondent's brief at para. 124.
[166] Song Affidavit, para 124.
[167] Respondent's brief para. 79 (quoting *Manson Insulation Products Ltd v Crossroads C&I Distributors*, 2014 ABQB 634 ("***Manson***"), para 62).
[168] *Manson* at para 64. See F.P. Bourgault Industries Seeder Division Ltd. v. Flexi-Coil Ltd. (1995), 1995 CanLII 19325 (FC), 64 C.P.R. (3d) 70 (F.C.T.D.) at para. 72: "Reference to the terms of a document as such will usually waive privilege in the document."

telling the plaintiffs it had received two legal opinions, without even referring to what they said."[169] Justice Poelman's comment concerning his lack of awareness of other caselaw finding waiver based on "a statement of [a legal opinion's] bare conclusion" was, therefore, obiter.

204. In *Canadian Council of Professional Engineers v Memoria University of Newfoundland*, There, Justice Rothstein held that the University had waived privilege over a legal opinion.[170] The University's in-house counsel had commented during cross examination about University meeting minutes that referred to a legal opinion that "the University may lose" a potential case. The University counsel made brief comments attempting to temper the minute's reference to the legal opinion, saying that the University may lose or it may win a potential case.

205. The comments of (then) President Ken Warren K.C. in the present matter are analogous. In a meeting where the jurisdiction of the LSA to impose mandatory CPD requirements was at issue, Mr. Warren, chose not merely to say that the respondent had received legal advice for its position, but also to unequivocally disclose the substance of the opinion: that Rule 67.4 was *intra vires*. The choice of the respondent's president to disclose a legal opinion and its specific conclusion to justify to the members the adoption of a controversial rule was an express (or at least implied) waiver of the privilege over that opinion.[171]

206. A finding of waiver is also required for the purpose of ensuring fairness and consistency. The respondent relied on the Legal Opinion in adopting rule 67.4 and in justifying that adoption to its members; fairness and consistency require that the Legal Opinion be disclosed to this Court, which is being called upon by the respondent to find that its adoption of Rule 67.4 was reasonable.[172]

207. An example of fairness and consistency demanding a finding of waiver can be seen in *Imperial Tobacco Co v Newfoundland and Labrador (Attorney General)*.[173] There Chief Justice Green of the Newfoundland and Labrador Supreme Court commented on a government actor making public partial disclosure of its retainer agreement with its legal

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[169] *Manson* at para 63.
[170] *Canadian Council of Professional Engineers v Memoria University of Newfoundland*, 1998 CarswellNat 2364, [1998] FCJ No 1703.
[171] See *Biehl v. Strang*, 2011 BCSC 213 at paras 39-40.
[172] *Ibid*.
[173] *Imperial Tobacco Co v Newfoundland and Labrador (Attorney General)*, 2007 NLTD 172 (CanLII).

counsel, and then resisting disclosure by asserting-solicitor client privilege over the retainer agreement:

> *Here, the partial disclosure was not inadvertent. It was done deliberately to achieve a political result - to demonstrate to the public that the government was acting in a fiscally responsible manner in the way in which it was conducting the litigation. It was ostensibly promoting itself as complying with principles of transparency. In fact, in Stevens, Linden, J.A. at para. 52 acknowledged that "a government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity". The problem, however, with releasing only selected parts of a fee agreement in these circumstances is that the public whom the government is trying to reassure about its fiscal responsibility, has no way of judging whether the government's assertions are correct unless they see the whole document. Other provisions of the document might contain terms that detract from what has been disclosed or make the overall arrangement not as advantageous or fiscally responsible as represented.*
>
> *Having decided to go down the road of wrapping itself in the twin flags of fiscal responsibility and transparency with a view to convincing the public of the appropriateness of its actions, it is not unreasonable to assume that the government was essentially saying that its financial arrangements with its lawyers were an "open book" and should be used as a basis for public judgment on its decisions.*
>
> *. . .*
>
> *In the circumstances of this case, I conclude that even if the contingency fee agreement was a privileged communication, there has been a subsequent waiver of the privilege.*[174]

208. The present case is analogous: the respondent by its intentional public partial disclosure of the Legal Opinion waived its solicitor-client privilege over the Legal Opinion. This Honourable Court should order that it be produced.

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[174] *Ibid.* at paras 112-13, 115.

VIII. STATUTORY INTERPRETATION AND PURPORTED "CONSTRAINTS"

209. At paragraph 132 of the respondent's brief it conflates the modern rule of statutory interpretation (the first sentence) with the reasonableness analysis in *Vavilov* (the second sentence).

210. *Vavilov* indicates that what is "reasonable" depends on factual and legal constraints which "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt."[175] The first such constraint is the words of the enabling statute.[176] *Vavilov* also references, "other relevant statutory or common law [and] the principles of statutory interpretation."[177]

211. The LSA flips the concept of "constraint" on its head, deploying the concept in an attempt to expand the LSA's powers beyond the constraints actually imposed by the words of its enabling statute.

212. Specifically, the LSA claims that caselaw interpreting British Columbia's and Manitoba's legislation (where each provincial "legislature [chose] to use broad, open-ended or highly qualitative language — for example, 'in the public interest'"[178]) is a "constraint" which permits Alberta's legislation (where the provincial legislature "precisely circumscribe[d] an administrative decision maker's power … by using precise and narrow language"[179]) to be "interpreted" to mean the same thing.

213. The LSA uses this supposed "constraint" to justify its conclusion that LSA's statutory mandate is to decide the meaning of "public interest" and then to deploy "extremely broad" regulatory powers to pursue such "public interest."[180]

214. As to the glaring fact that the words chosen by Alberta's legislature are far narrower than the words chosen by the legislatures of British Columbia and Manitoba[181] the LSA argues, in essence, that:

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[175] *Vavilov* at para. 90.
[176] *Vavilov* at para. 68.
[177] *Vavilov* at para. 106.
[178] *Vavilov* at para. 110 – public interest clauses of the sort at issue in *Trinity* (s. 3 of the BC LPA) and *Green* (ss. 3(1) and 4(5) of the LPAM) shall be referred to herein as "**Public Interest Clauses**".
[179] *Vavilov* at para. 110.
[180] Respondent's brief at paras. 134 and 183.
[181] The LPA, for example, contains no public interest clause, no public interest powers, and no duty to operate a program of CPD; see applicant's brief at section IV.A.i.2. (Legislative Distinctions).

a. because the LSA also operates in the "public interest" the statutory differences (i.e. the constraints placed on its powers and duties by the *LPA)* are irrelevant; and

b. therefore, whatever the *LPA* may actually say, the LSA can decide what is in the "public interest" and then exercise any *de facto* powers it has over the bar to pursue such "public interest".[182]

215. The applicant warns against this "false syllogism" at section IV.A.i.4 of its brief (*Green* and the Public Interest). As stated in the applicant's brief:

> *… it would appear that the LSA is simply operating as if the LPA contains a public interest clause. Of course, it does not. The applicant submits that this legislative choice should be given effect.*[183]

216. The LSA expresses continued confusion as to the difference between a delegate operating in the public interest and the delegate's enabling legislation containing Public Interest Clauses.[184]

217. It may help to recall that (so far as the applicant can determine) <u>every</u> statutory delegate known to Canadian law is assigned its duties and powers in the public interest. Should, then, the constating legislation throughout the entire administrative state be "interpreted" to include the following Public Interest Clauses (modeled on the Public Interest Clauses in the LPAM)?

> *The purpose of the delegate is to uphold and protect the public interest.*
>
> *In addition to any specific power or requirement, the delegate may make rules to pursue its purpose and carry out its duties.*

218. Obviously not. To do so would be to render statutory <u>interpretation</u> and judicial review practically meaningless.

219. Contrary to the LSA's assertions that:

> *… what is in the 'public interest' is "for the Law Society to determine" and also that "the law society's interpretation of the public interest is owed deference" …*

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[182] Respondent's brief at paras. 154 to 156 and 168 to 171.
[183] Applicant's brief at para. 205.
[184] Respondent's brief at paras. 168 to 169.

> *Furthermore, a law society must be afforded "considerable latitude in making rules based on [their][185] interpretation of the 'public interest' in the context of [their][186] enabling statute …*[187]

Green and *TWU* are abundantly clear that the law societies before the court had the power and duty only to interpret the Public Interest Clauses actually contained their enabling statutes, not to interpret the "public interest" *simpliciter*.[188]

220. Alberta's legislature chose not to include Public Interest Clauses in the LPA. For this reason, presumably, the LSA considers the act "outdated". The *LPA* uses far narrower wording than in British Columbia and Manitoba. To find that the *LPA*, nonetheless, contains Public Interest Clauses would be to simply ignore the Alberta legislature.

221. The LSA relies heavily on a statement from *Morris*[189] that, "the Legislature has given the LSA a broad public interest authority and broad regulatory powers to accomplish its mandate."[190] The LSA's reliance on this statement is misplaced for several reasons:

   a. The applicant does not dispute that the LSA has a "public interest authority" and "regulatory powers." That Justice Loparco describes such authority and powers with the adjective "broad" does not mean that Alberta's legislation grants an authority and powers as broad as British Columbia's and Manitoba's – the Justice engages in no legislative comparisons. A legislative comparison instantly reveals major textual differences (most obviously, the absence of the Public Interest Clauses in the *LPA*).

   b. Nor does Loparco J.'s use of the adjective "broad" have any interpretive utility. Her use of the adjective "broad" does not permit later courts to interpret the *LPA* to be "broader" than the constraints imposed by the legislature's chosen statutory language.

   c. In any case, Loparco J's observations as to the LSA's "broad" powers must be understood in their context. The case related to the LSA's trust audit authority and powers (LPA ss. 7(2)(p) and (q)) which, the court found, by necessary implication required the LSA to breach solicitor client privilege.[191] This is the *ratio* of *Morris*, not

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[185] In original.
[186] In original.
[187] Respondent's brief at para 138.
[188] *Trinity* at paras. 32 to 38 and *Green* at paras. 28 to 37.
[189] *Morris*.
[190] *Morris* at para. 63.
[191] *Morris* at paras. 29, 79, 81 and 91.

that Alberta's legislation contains Public Interest Clauses like those at issue in *TWU* and *Green*.

222. It is also noteworthy that in the "constraint" section, the LSA argues that its statutory objective is to protect the "public interest" as it determines, but the LSA hardly explores what that "public interest" includes according to caselaw.[192]

223. Critically, the LSA discusses the "public interest" while entirely ignoring the applicant's main point: that the maintenance of the rule of law (the "sinew which binds together Canada's entire constitutional project") is in the public interest – which necessitates that lawyers "so far as by human ingenuity it can be so designed" be independent of state or political interference.[193]

224. The LSA makes passing reference to the concept of legal independence only to support its claim that "delegation also maintains the independence of the bar; a hallmark of a free and democratic society." The LSA obviously confuses itself for the bar of lawyers it regulates. If the LSA (as statutory delegate) politically interferes with the bar, then delegation (and deference) works to destroy the bar's independence.

225. The LSA's proper statutory objectives are summarized in the applicants brief at paragraphs 250 and 251.

i. The LSA's Statutory Interpretation of the LPA[194]

1. General Errors in the LSA's Interpretation

226. The LSA has elected to abandon any arguments to demonstrate the *vires* of the Profile, the CPD Tool and the LSA's entire political enterprise (the Political Objectives) except the argument that, in essence, these matters are none of the Court's business.

227. It, therefore, offers no arguments that the Profile, the CPD Tool and any political objectives (much less the LSA's Political Objectives) are properly within the LSA's statutory jurisdiction. Of course, they are not for the comprehensive reasons provided in the applicant's brief. But, even if the standard of review is "reasonableness" the LSA's election to say nothing on these points falls well short of the required standard: transparent, intelligible and justified.

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[192] By comparison, see the applicant's brief at section III.B. (The Justice System).
[193] See applicant's brief, especially paras. 4, 149, 168, and 250.
[194] Respondent's brief at section IV.E.iv (Statutory Interpretation).

228. In response to the applicant's review of the scheme of the *LPA* (which shows heavy LSA involvement at admission, the guidance of an ethical code, and the bar's independence thereafter to "practice law in their professional discretion barring future misconduct, just as the LSA operated, to the satisfaction of the public for its first century."[195]) the LSA asserts that:

> *The LSA is <u>necessarily</u> involved in the ongoing monitoring, supervision, and education of members of the profession and is given the authority to <u>proactively</u> manage the competency and conduct of lawyers.*[196]

229. The LSA fails to:

    a. show that supposed "necessity" by reference to the statutory scheme;

    b. explain how the *LPA* "necessarily" requires such direct supervision now (in the "21st century"[197]) whereas it did not "necessarily" require such direct supervision throughout the 20th century; or

    c. evidence in the CRP or to demonstrate the correctness or reasonableness of the LSA decision to "commi[t] to the goal of proactive regulation" in the 2015[198] to 2019[199] timeframe.

230. In other words, the LSA baldly asserts that "proactive" regulation is "necessary". The LSA has, therefore, failed to demonstrate that the scheme of the act includes any "proactive" supervision.

231. The LSA also claims that, because Mandatory CPD is "necessary", the *LPA* must be interpreted so as to empower the LSA to impose Mandatory CPD as a matter of "necessary implication."[200] In addition to the LSA having failed to establish that Mandatory CPD is "necessary" (and a century of successful operation evidencing very clearly that it is not) this argument seriously overstates the principle. In *Green* the principle was employed as follows: "… since the Law Society has the power to create a CPD scheme, it necessarily has the power to enforce the scheme's standards."[201] In *Morris* it was

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[195] Applicant's brief at para. 248.
[196] Respondent's brief at paras. 133 and 153.
[197] A-338.
[198] A-338.
[199] The Affidavits evidence that the LSA adopted its goal of proactive regulation (publicly) only in December of 2019 – see applicant's brief at paras. 25 and 26.
[200] Respondent's brief at paras 170 and 171.
[201] *Green* at para. 42.

employed as follows: “Since the LSA has the authority to regulate … trust accounts, it has the power to determine what data points are necessary to permit it to test the integrity and proper use of such accounts.”[202] In other words, the principle only operates where a power or duty is granted in the legislation and, as a matter of practical necessity, the power or duty cannot be accomplished without some ancillary power which must be implied. The principle does not permit the addition to the delegate’s statutory authority whatever new powers the delegate deems “necessary” from time to time.

232. In the LSA’s view the legislation is “outdated.” It is not within the LSA’s powers, however, to “update” the *LPA* by the simple expedient of deeming certain powers “necessary.”

233. Finally, in keeping with the motte-and-bailey theme of the LSA’s brief, the LSA employs, throughout its analysis, concepts of “competence”, “cultural competence”, “ethics”, “discrimination” and “harassment” without telling the Court what it means by these terms. The upshot being, the Court is being asked to assume that where the LSA says “competence” and “ethics” that the LSA must mean a type of competence appropriate to Canada’s Constitutional structure (i.e. one governed by the rule of law which supports freedom and democracy). The Court is to assume that the LSA does not, by “competent and ethical”, mean the bailey; a lawyer who:

    a. views her role, not as the client’s loyal advocate, but as the advocate for social justice - an agent pursuing the “’radical transformation’ of the legal system”;[203]

    b. has “unlearn[ed] colonial logics, hierarchies of legal cultures” and has learned, in their place, indigenous law and epistemologies; and

    c. generally, views the Western legal system and its notion of justice as mere instruments of oppression, relying on various “sham” assumptions (like empiricism, objectivity, and reason) to effect racial hegemony.[204]

234. The Court is even asked to make such assumptions where the CPR itself indicates that these terms are used as specialized terms of art with seriously problematic meanings.

235. The Court can simply not do justice in this matter on the basis of such assumptions.

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[202] *Morris* at para. 66.
[203] Applicant’s brief at para. 447.
[204] Applicant’s brief at para. 338.

236. The LSA's entire legislative interpretive exercise must be reviewed with knowledge that where the LSA says "competent" and "ethical" it means (in essence) belief in, obedience to, and the promotion of the Political Objectives.

237. Once the meaning of such terms are properly understood (i.e. how does the LSA understand these terms) the wheels fall off of the LSA's interpretive bus.

2. LSA's Arguments Re: Part 6.3 of the Code

238. In addition to the arguments provided in section VIII.i.1 (General Errors in the LSA's Interpretation), the LSA claims, with respect to s. 6(l) if the LPA:

> *There are no prescription*s or restrictions concerning the code of ethical standards. Rather, the content and s*ubstance of the code of ethical standards are left for the Benchers to decide.*[205]

239. That is wrong. As observed by the applicant, the text itself includes many restrictions:

a. It permits a code of ethics, not a code of competence (the LSA now claims the Profile relates to competence, rendering it *ultra vires* as the *LPA* does not empower the LSA to impose a "code of competence");[206]

b. It permits only one code, not two;[207] and

c. It only permits the creation of a "standard", not a "menu of uncertain aspirations".[208]

240. Also as observed by the applicant, the common law and, of course, the *Constitution* (including the *Charter)* impose further "prescriptions and restrictions" including:

a. the Benchers must always exercise their statutory discretion in accordance with the objectives discernible from the text and scheme of the legislation:

> *… there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.*[209]

b. those objectives include insulating lawyers from political interference, not subjecting lawyers to political interference;

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[205] Respondent's brief at para. 158.
[206] Applicant's brief at section D.i.1 (No Code of Competence); Respondent's brief at para. 93(a).
[207] Applicant's brief at section D.i.2 (One Code Not Two).
[208] Applicant's brief at section D.i.3 (Menu of Uncertain Aspirations).
[209] *Roncarelli* at para. 41.

c. where rules abut constitutional freedoms they must be drafted to a high degree of predictability; and

d. *Charter* infringements must be: for *intra vires* purposes; prescribed by law; and reasonable in a free and democratic society.[210]

241. When the substantive content of Part 6.3 of the Code is reviewed (and especially when it is understood) it becomes clear that the LSA has violated each of the "prescriptions and restrictions" set-out in the preceding paragraph.

242. Rather than address these arguments in its brief, the LSA's analysis is superficial, simply claiming that the Code's "harassment" and "discrimination" provisions do "exactly what section 6(l) of the *LPA* permits." The LSA uses labels ("discrimination" and "harassment"), without so much as discussing the substantive content of the Code provisions.

243. None of the applicant's arguments as to the *vires* of the Impugned Code have been addressed by the LSA including, of course, the fact that the Code now incorporates concepts from the Theories which are anathema to the Canadian *Constitution*.

244. For the reasons given in the applicant's brief, the LSA's reasons are wrong and the reasons now given are not a justification in relation to the facts and law that constrain the decision maker by means of a transparent, intelligible, internally coherent and rational chain of analysis.[211]

245. The LSA's *Charter* arguments as to the Code are discussed below.

246. The LSA's observation that the Code now closely "mirrors" the *Alberta Human Rights Act* and *Occupational Health and Safety Act*[212] raise two issues. First, the LSA has failed to prove the Code "mirrors" these acts at all. The Code contains a significant volume of explanation as to the meaning of "discrimination" and "harassment" absent from those pieces of legislation and, so far as the applicant is aware, largely absent from the associated common law.

247. Second, the "mirror" argument suggests the LSA is intruding into the jurisdiction of other statutory entities. Indeed, the LSA's CRP indicates this was the intention. Although:

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[210] Applicant's brief at paras. 709 to 719; *Charter* at s. 1.
[211] *Vavilov* at 85.
[212] Respondent's brief s. 149 and 190.d.

> *Concern was expressed with duplicating the Human Rights Commission discrimination complaint process …*[213]

The PRRC seems to have proceeded on the basis that:

> *Human Rights and Labour Relations bodies have not been dealing with harassment and discrimination effectively.*[214]

248. Having admitted this, the LSA should (but fails to) give reasons in support of its assumption of the jurisdiction of these other statutory delegates.

3. LSA's Arguments Re: the Impugned Rules[215]

249. In addition to the arguments provided in section VIII.i.1 (General Errors in the LSA's Interpretation), in the LSA's argument it mentions but then fails to give the following underlined words any meaning:

> *7(1) The Benchers may make rules for the government of the Society, for the management and conduct of its business and affairs and for the exercise or carrying out of the powers and duties conferred or imposed on the Society or the Benchers under this or any other Act.*

250. As observed by the applicant in its brief, this basket clause does not expand the LSA's powers, it facilitates the exercise of powers and compliance with duties elsewhere granted to the LSA. Its meaning is no different than section 25(2) of the *Interpretation Act*.[216]

251. In other words, to rely on this provision the LSA must identify elsewhere a power or duty to impose Mandatory CPD.[217] The LSA says the LSA's "powers and duty to regulate the profession"[218] include "CPD" but, rather than locating such CPD power or duty in the LPA,[219] it observes, "the establishment of mandatory CPD requirements is compatible with the LSA's purpose and duties."[220] The fact of power being "compatible with" the LSA's

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[213] C-408.
[214] C-404.
[215] Respondent's brief at paras. 161 to 167.
[216] Applicant's brief at para. 71.
[217] See definition at applicant's brief at para. 203.
[218] Respondent's brief at para. 163.
[219] In *Green*, for example, the court notes (at para. 33) the Manitoba statute's express grant of power to "establish and maintain … a continuing legal education program" (bearing in mind that the LSM's jurisdiction to impose Unspecified Mandatory CPD was (wisely) conceded by the applicant in *Green* and was not in issue). *Green's ratio* has nothing to do with jurisdiction to impose CPD, it is solely about the LSM's ability to automatically suspend.
[220] Respondent's brief at para. 163.

purposes and duties is not the same as that power being legislatively granted. Also, a Mandatory CPD requirement is in no sense "compatible with" the LSA's purposes and duties (its duty is to maintain the bar's professional independence) especially the Mandatory CPD the LSA has in mind (which is hostile to the *Constitution*).

252. The LSA argues[221] that the applicant contradicts himself by saying the LSA has no authority to impose CPD (the applicant said "Mandatory CPD" – see section IV.A.iii (The LSA has no Power to Mandate CPD")) while admitting that the LSA may impose some sorts of CPD obligation (the applicant said "Voluntary CPD" under the Code – see paragraph 201). There is no contradiction. In making these respective statements the applicant expressly differentiated between different types of CPD (Mandatory CPD and Voluntary CPD, defined at paragraph 203). Even if the applicant had contradicted himself, such contradiction does not "reveal the truth" that the applicant's "position" is not that the LSA lacks jurisdiction. That is very much the applicant's position. Nor is the applicant somehow hiding that the LSA's conception of "competence" and "ethics" grossly violates his sincerely held religious and secular beliefs. In fact, this is the premise of his *Charter* claims.

253. The LSA also seems to argue that the provision permits the LSA to do what it would like "provided that such rule making authority upholds and protects the public interest."[222] In other words, the LSA interprets s. 7(1) of the *LPA* to be the same as the Public Interest Clauses included in the Manitoba and British Columbia legislation but excluded from Alberta's LPA: "the LSA is simply operating as if the LPA contains Public Interest Clauses.[223]

254. The LSA has failed to provide any response to the arguments in the applicant's brief with respect to this provision.[224]

255. The LSA also relies on *LPA* s. 6(n) which, again, it simply treats as (a second) set of Public Interest Clauses – despite the fact that the text of the respective clauses are entirely different.

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[221] Respondent's brief at paras. 172 to 173.
[222] Respondent's brief at para. 161.
[223] At para. 205.
[224] Applicant's brief at para. 276.

256. With respect to the LSA's argument that the LSA has no "independent interests"[225] the LSA is overlooking the legislative text which expressly references the "interest … of the Society."[226] The LSA's continued conflation of the interests "of the Society" with the interests "of society" can be resolved if it is recalled that "… even public bodies make some decisions that are private in nature – such as renting premises and hiring staff …"[227] In other words, where the *LPA* references the "interests … of the Society" it is referencing such "private" interests (although it remains true that the LSA's ultimate purpose is to serve the public interest (legally and constitutionally)).

257. For the reasons given in the applicant's brief, the LSA's reasons are wrong and the reasons now given are not a justification in relation to the facts and law that constrain the decision maker by means of a transparent, intelligible, internally coherent and rational chain of analysis.[228] The LSA's *Charter* arguments as to the Impugned Rules are discussed below.

4. The LSA's Summary re: Impugned Rules and the Impugned Code

258. At paragraph 176 of its brief, the LSA provides the following summary, with the applicant's inexhaustive clarifications and corrections provided in parenthesis:

> *By way of summary:*
>
> *a. the evidence indicates that the LSA was motivated to increase the competence and ethics of the profession* ***[the accuracy of this statement depends entirely on definitions of "competence" and "ethics" which the LSA claims is outside of the Court's supervisory legitimacy and capacity]****;*
>
> *b. the purpose and object of the LSA, as set out in the LPA, is to protect the public interest [****the LPA contains no Public Interest Clauses. The LSA's proper objectives are set out in the applicant's brief at paragraps 250 and 251. To overstate the LSA's "objects" generally and without qualification as "to protect the public interest" ignores the text of the LPA and invites the very mischief now before the Court – a regulator***

[225] Respondent's brief at para. 167.
[226] *LPA* at s. 6(n).
[227] *Highwood* at para 14.
[228] *Vavilov* at para. 85.

which believes it may regulate according to "personal political preference."];

c. the meaning of public interest is for the LSA to decide and is owed deference ***[the LSA is relying on TWU where such discretion related solely to the Public Interest Clauses which are absent from the LPA]***;

d. the Supreme Court of Canada has ruled that:

*i. the establishment of mandatory standards, for both CPD and conduct, is compatible with the purpose and duty of a law society; [****This is obiter from Green involving the LPAM's express power to maintain and operate a program of CPD which is absent from the LPA. It is obviously not compatible with the LSA's legal duties to assume a power the LPA does not grant. The LSA's definitions of "competence" and "ethics" to which its CPD and conduct rules relate are political and hostile to the Constitution and, as such, the substance of the LSA's "CPD" grossly violates the LSA's purpose and duty****]*;

*ii. mandatory standards which, in the benchers' view, serve to protect the public are in keeping with the duties given to a law society [****The Bencher's have not been empowered by the legislature with Public Interest Clauses. The Bencher's view of the "public interest" is irrelevant to a determination of the Bencher's legal and constitutional jurisdiction. The Bencher's discretion must always be exercised for the proper and constitutional objectives envisioned by the LPA, "any clear departure from its lines or objects is just as objectionable as fraud or corruption." The Benchers may in no manner mandate standards which affect political interference with the bar and especially political interference anathema to the Constitution****.]*

*iii. to ensure that those standards have an effect, a law society must be able to establish consequences for those who fail to adhere to them; [****irrelevant****]*

*iv. a suspension is a reasonable way to ensure that lawyers comply with the CPD program [****irrelevant****]*;

v. promoting equality, ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to vulnerable

*populations are valid things for a law society to consider [**This is a misinterpretation of TWU. In that case the Court found that the LSBC's interpretation of its Public Interest Clause to include such objectives was reasonable. The LPA does not contain Public Interest Clauses. The LSA's Resources suggest that it uses different definitions for these terms than does the SCC. For example, the majority in TWU cites equality rights and diversity as supporting the "merit" of the bar (the larger the talent pool, the higher the bar's talent) but the concept of "merit" conflicts with the LSA's Political Objectives[229]**]; and*

*vi. the public interest may include protecting the values of equality and human rights [**irrelevant**];*

*e. the LSA has broad regulatory powers to accomplish its mandate of protecting the public interest [**The LPA contains no Public Interest Clauses**.]*

*f. the Benchers have a broad and open-ended authority in section 6(l) of the LPA to establish a code of ethical standards for members [**The power is not open ended. It is highly constrained by both the text of the LPA including the provision itself, the common law and the Constitution. It is a violation of the LSA's duties to have or advance any political objective by means of the Code, much less the Political Objectives which are hostile to the Constitution.**]*

*g. the Benchers have a broad authority in section 7(1) to establish rules for the exercise or carrying out of the powers and duties conferred or imposed on the LSA or the Benchers under the LPA, which includes upholding and protecting the public interest, including CPD [**The LPA does not contain Public Interest Clauses and s. 7(1) can not be reasonably interpreted to be a Public Interest Clause. Section 7(1) can only be relied on where a duty or power is elsewhere granted. The LPA nowhere grants the LSA the power to operate a program of CPD. Even if the LSA had such***

[229] See, for example, the Report at p. 26: "Proponents of CRT reject Enlightenment-derived values of objectivity, neutrality, equality and meritocracy as a particular perspective imposed on others under the guise of universalism." See also, for example, para. 425 of the brief where Parmar explains that cultural competence means "making exceptions for … one's in group" and "what is right is right." See also section IV.B.i. (The LSA's Political Objectives – An Attack on Empiricism, Objectivity, Reason, and Science).

> ***power, CPD can not be used by the LSA to advance any political objectives, much less objectives which are hostile to the Constitution.****]*
>
> *h. the Benchers also have an explicit authority in section 7(2)(g) to make rules respecting the suspension of a member if the member fails to do any act within a specified timeline [**irrelevant**]; and*
>
> *i. section 6(n) gives the Benchers have the power to take any action and incur any expenses the Benchers consider necessary for the promotion, protection, interest or welfare of the LSA [**The LSA confuses the interests of the "Law Society of Alberta" with the interests of "society." This clause relates to the LSA's "private" interests. The LPA does not contain Public Interest Clauses and s. 6(n) can not be reasonably interpreted to be Public Interest Clauses. The LSA can not exercise any power for political purposes, much less political purposes hostile to the Constitution**].*

259. At paragraphs 176 d.v. and 177 to 181 the LSA is trying to "have its cake and eat it too." The LSA's position is that its admitted political objectives are non-justiciable (because the Court has no constitutional legitimacy or institutional capacity to review its political objectives).[230] It seeks to exclude the evidence by which the Court may come to know and understand the LSA's Political Objectives including the meaning and substantive content of the LSA's nomenclature[231]. And yet, in these paragraphs (and elsewhere) the LSA argues that its Political Objectives are actually in keeping with the "public interest." The argument is vacuous and impossible. The LSA cannot, both, refuse to disclose or discuss the meaning of its nomenclature and then make arguments as if its nomenclature means what it superficially seems to.

260. A bar with cultural competency is irrefutably <u>less</u> responsive to the needs of the public it serves if cultural competence means the pursuit of a "transformative agenda" or "unlearning colonial logics." It manifestly does not serve the needs of the democratic electorate to pervert the law and, thereby, assume the role of legislator. It manifestly does not serve the needs of racial minorities in a multicultural pluralism to insulate them from

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[230] See respondent's brief section IV.C. (The Court should not directly consider whether the Profile, the CPD Tool, or the "Political Objective" or the "Political Objectives" are ultra vires)
[231] See respondent's brief section IV.B. (The Affidavits should be put to no or limited use).

the Western legal system on the theory the Western legal system is not "appropriate" for their race.

B. <u>The LSA Can Discern No Charter Infringements</u>

261. The LSA denies any *Charter* infringements, going so far as to claim that it is "difficult, if not impossible," to see how there could be one.[232]

262. The LSA finds it "impossible", in other words, to imagine that prohibiting the applicant, on pain of regulatory sanction under the Code, from proscribed forms of speech could constitute a limit of the applicant's fundamental freedom of speech. Surely that infringement is rather obvious.

263. The LSA's argument that there are no *Charter* infringements is highly superficial. For example, the LSA entirely fails to address the applicant's argument that its Impugned Conduct constitutes a breach of state neutrality, given that it vilifies the Christian worldview as a "sham" intended to oppress, *inter alia*, racial minorities.[233]

264. Likewise, the LSA's argument is superficial, using terms like "sustainable", "competence", "community appropriate services and outcomes", "discrimination" and "harassment" without:

    a. acknowledging these terms are nomenclature from "niche areas" requiring "tools" to understand, which are constantly evolving, etc. (see above at paragraphs 89 to 97); or

    b. acknowledging the political content of these terms (i.e. that they incorporate the Theories and are manifestations of the LSA's Political Objectives) arising, of course, from the LSA's overall position that this Court has no constitutional legitimacy or institutional capacity to inform itself as to the LSA's Political Objectives.

265. The applicant did not fail to apply the *Charter* tests.[234] In very summary fashion:

    a. Section 2(a) and 2(b) (religious and secular belief):

        i. the applicant describes his sincerely held religious and secular beliefs and demonstrates that his beliefs have a nexus with religion and his perception of himself, humankind, nature, and metaphysics; and

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[232] Respondent's brief at para. 189.
[233] Applicant's brief at paras. 772 to 777.
[234] Respondent's brief at para. 187.

ii. the applicant demonstrates that the Impugned Conduct interferes with his ability to act in accordance with his religious and secular beliefs in a manner that is more than trivial or insubstantial including compelled apostacy.[235]

b. Section 2(a) (religious neutrality):

i. the applicant demonstrates that the LSA has taken a religious position: it disfavors and hinders the applicant's beliefs by vilifying the Christian worldview as an oppressive "sham"; and

ii. the applicant demonstrates resulting interference including those above, fear of hindrance and reprisals, and public vilification.[236]

c. Section 2(b) (expression):

i. the applicant describes his desired expression which is manifestly not violence or otherwise categorically unprotected speech;[237]

ii. the applicant observes that the legal profession is obviously a "location" in which one expects – and requires – the constitutional protection for free expression[238]

iii. the applicant demonstrates that the Impugned Conduct in both purpose and effect restricts freedom of expression including through compelled speech.[239]

266. The LSA's purported summary of Song's *Charter* claims at paragraph 187 of its brief is, therefore, woefully incomplete. It is also incorrect:

a. Song does not argue that the Political Objectives are "in conflict" with his beliefs, he demonstrates the LSA's Political Objectives are <u>hostile</u> to his religion <u>and desired expression</u> and <u>hostile</u> to his belief in <u>and desire to express</u> his belief that the Canadian *Constitution* is objectively superior to regimes which prioritize ideology and dogma;

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[235] Applicant's brief at sections II.A (Song), II.C (The Law Society of Alberta's Strategic Shift), III.B. (The Justice System), IV.B. (The Applied Post Modern Theories), IV.C. The LSA's Political Objectives – An Attack on Human Dignity); IV.D. (The Profile, The Code and The Requirement to Comply With the Theories) and paras. 739 to 771.
[236] *Ibid* and paras. 772 to 778.
[237] Applicant's brief at sections II.A (Song), IV.B.ii (The LSA's Political Objectives – An Attack on Loyalty to the Law); and paras. 739 to 771.
[238] Applicant's brief at para. 737.
[239] Applicant's brief at sections II.C (The Law Society of Alberta's Strategic Shift), III.B. (The Justice System), IV.B. (The Applied Post Modern Theories), IV.C. The LSA's Political Objectives – An Attack on Human Dignity); IV.D. (The Profile, The Code and The Requirement to Comply With the Theories) and paras. 739 to 771.

b. Song proves the Path contains misinformation, objects to the Path's incorporation of the Theories, and denies the LSA has jurisdiction, either, to impose Mandatory CPD or to redefine "competence" to include matters of history, politics, economics or epistemology; and

c. Song does not object to prohibitions on "harassment and discrimination" *writ* large[240], Song objects to such prohibitions as defined by the LSA (i.e. its incorporation of the Theories into such prohibitions) and objects to restrictions on fundamental freedoms by vague and subjective language.

267. At paragraph 187 the LSA purports to summarize "what actions or measures the LSA has *actually*[241] taken" which is, again, superficial and incomplete. For example:

a. The LSA employs its usual nomenclature, the definitions of which the Court is expected to assume (which assumption will likely lead to a motte-and-bailey fallacy);

b. The LSA claims that under Rules 67.2 and 67.3 the lawyer is "asked to" reference the Profile. It is more correct and complete to say that the lawyer is required to reference the Profile, that the Profile incorporates the Theories and "… is not intended to … address substantive legal knowledge and procedures specific to different areas of legal practice;"[242]

c. The LSA says Rule 67.4 allows it to prescribe additional "CPD" (suggesting the purpose of the rule is "professional" development) but fails to mention that Rule 67.4 operates "independent of Rule 67.1" including its requirement that CPD be a "learning activity that is: … relevant to the professional needs of a lawyer … related to … professional ethics … [or that it] must contain significant substantive, technical, practical or intellectual content.").

d. The LSA, again, summarizes the Path's topics without mentioning:

i. That the relevant TRC call to action was:

1. not "understanding intercultural communication" but to mandate "training in intercultural competency"";
2. to mandate "training in … anti-racism";

[240] Although Song does not concede the LSA has jurisdiction to regulate harassment and discrimination even on a traditional definition of such terms.
[241] Emphasis in original.
[242] A-184.

ii. That the Path included that content as well as:

1. disparaging misinformation about Canada's first Prime Minister;
2. lessons in epistemological relativism (i.e. the Theories);
3. assertions that every socioeconomic disparity between indigenous and other Canadians was a "legacy of colonialism" (i.e. the Theories);
4. an accusation that Gerald Stanley being found "not guilty" was a miscarriage of justice;
5. the accusation that 80% of indigenous inmates are incarcerated for no reason other than the "legacy of colonialism" (i.e. the Theories);
6. encouragement to incorporate "reconciliation" into legal practice including in government, law enforcement and in the judiciary;
7. instructions to apply *Gladue* at bail hearings;
8. advice to see every indigenous person as a person "who's in conflict with themselves", who is in trauma, and whose trauma is to blame for their behaviour;
9. advice to stop treating alcoholism as a problem;
10. calls for the broad overhaul of the Canadian legal system to segregate indigenous people (including non-status indigenous and Metis children living off-reserve in foster care) into a parallel system of government and law (laws which are being "made visible" by academic "research units") (i.e. the Theories and the Political Objectives);
11. the premise that the history of European - indigenous contact has been one of uninterrupted and conscious attempts at cultural genocide including by use of law;
12. the work of research Angela Day, connected with an organization which characterizes the Canadian *Constitution* as a continued theft which lawyers should fix in the way they practice law; and
13. etc.

e. The LSA summarizes the Impugned Code, again, with superficial references to "discrimination" and "harassment" without:

i. acknowledging that these are nomenclature of the Theories including the Impugned Code's references to "internal bias", "colonization", "systemic factors", "systemic discrimination", "organizational cultures", "distinct needs" etc.; and

ii. acknowledging or addressing the applicant's observation that the Code abuts *Charter* freedoms but is vague and defines proscriptions subjectively.

268. This demonstrates the importance of an informed and robust judicial review. When reviewed superficially "what actions or measures the LSA has actually taken" may seem unobjectionable – it may be "difficult, if not impossible, to see how any of these things could interfere" with Song's *Charter* rights. When reviewed with some degree of rigor, however, the LSA's actions take on an entirely different hue.

269. At paragraph 187.b. the LSA makes the argument presaged in the words of the Profile – that the CPD scheme does not actually define competence or require anything in particular of lawyers. The Profile tells lawyers that it is "not a checklist of requirements" but a source of "inspiration and aspiration" and that it does not "set threshold standards for purposes of discipline." Similarly, the CPD Guidelines (not the Profile) say, "lawyers are not required to demonstrate competency in every area of the Profile each year." The LSA's approach might be described as "light-touch" regulation with the LSA "phasing in greater accountability … during the early days of the program."[243]

270. The applicant deals with these predicted arguments at section IV.D. of his brief and will not restate those observations here. The LSA simply makes the arguments with no recognition whatsoever that the applicant has already addressed them. Those parts of the applicant's brief are begging for a cogent response. None has been provided.

271. However, it must be observed that the LSA first claims that the Profile "sets out … areas of competency that the LSA <u>believes are</u> important to maintain safe, effective, and sustainable legal practice." The Profile's Forward says, instead, that the Profile, "… sets out the competencies that <u>are</u> important to maintain a safe, effective and sustainable legal practice in Alberta today." The Profile is not an expression of the LSA's "beliefs", it is the regulator's definition of competence. As for the LSA's observation that the LSA "does not declare the member's practice to be unsafe, ineffective, or unsustainable"[244] this is exactly what the Profile says and does.

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[243] C-366.
[244] Respondent's brief at 190.c.

272. As to the LSA's observation that the lawyer "is not required to demonstrate competency in every area of the Profile each year"[245] the LSA fails to answer the obvious questions (addressed in the applicant's brief) including, primarily:

    a. How can it be consistent with the LSA's statutory mandate to permit the continuation of an incompetent, unsafe, ineffective and, therefore, unsustainable legal practice?

    b. Now that the LSA has taken the position that the Profile represents a code of competence[246], how can it not "set threshold standards for purposes of discipline" given that the *LPA* defines "conduct deserving of sanction" to include "incompetence" (and automatically initiates conduct proceedings)?

    c. What does it matter whether the Profile "set[s] threshold standards for purposes of discipline" if the Code does? For example, the Code sets a "threshold standard for purposes of discipline": "discrimination". Is it "discrimination" to advance social justice by not hiring, promoting, or provide services to whites because they are white? The Profile says the "competent" lawyer "practise[s] anti-discrimination and anti-racism" meaning the lawyer discriminates against oppressive identity groups (including whites) to achieve social justice. Given the Profile's definition of competence, therefore, it would appear that the LSA cannot sanction a lawyer under the Code for discrimination against whites. The Code and Profile are inextricably related. The Profile may not "set threshold standards for purposes of discipline" but it necessarily informs those standards.

    d. Likewise, the Code sets another "threshold standard for purposes of discipline": "A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer."[247] Like the Profile, the Code does not require that Song be competent in every area of law – only in the areas in which he would practice. While the LSA insists that Song need not "demonstrate competency in every area of the Profile each year" that does not mean that Song is free to practice where he is incompetent and that does not mean that he is free to demonstrate his incompetence publicly and thereby "harm the standing of the legal profession generally." Surely Song is prohibited from taking on files where the Profile indicates that to take on that file

[245] Respondent's brief at s. 188.b and 190.c.
[246] Respondent's brief at 93.a.
[247] Code at s. 3.1-2.

would be gross incompetence.[248] For example, Song may remain "competent" to represent white Anglo Saxon Protestant males but, given his beliefs, desired expression, and past expression, he does not seem "competent" to professionally interact with any other race, sex, or religion.

273. To similar effect, the LSA's observation that the lawyer "is not required to demonstrate competency in every area of the Profile each year", must be clarified. That means "in the lawyer's annual CPD self-assessment." Nowhere in the record is it suggested that it is acceptable to the LSA that a lawyer practice incompetently.

274. More broadly, as to the LSA's:

    a. argument that the Profile is, but is not really, a definition of competence;

    b. representations that it will not intervene if lawyers are incompetent;

    c. representations that the LSA will not intervene if a lawyer's practice is unsafe, ineffective and unsustainable;

    d. characterizations of the "competencies" in the Profile as only a set of "beliefs", "inspirations", and "aspirations", and not required standards; and

    e. etc.

    we need to step back and ask: "what on earth is going on here?"

275. If the LSA's statutory duty is to ensure competence, and it has so carefully and comprehensively defined competency in the Profile, why does the LSA now argue, in essence, that it is okay to be incompetent? In a more legal framing, the *LPA* grants the LSA jurisdiction to pass "rules"[249] (which must be followed) and a code of ethics (which must be followed, in letter and spirit)[250], but where in the *LPA* is the LSA granted jurisdiction to promulgate something like the Profile?

276. The LSA argues at paragraph 190 of its brief that by "Political Objectives" Song only means "what he believes the LSA's political persuasions and motivating ideologies are." First, this is wrong. Song has carefully proven that the LSA's "political persuasions and motivating ideologies" are the Political Objectives. Second, it is the LSA, not Song, that seeks to evade an objective analysis of its politics by its position on the Affidavits and

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[248] Applicant's brief at section IV.B.iii.2. ("Cultural Competence" Undermines Access to Justice).
[249] *LPA* s. 7.
[250] *LPA* s. 6(l).

justiciability. Finally, the LSA here, again, references its "political persuasions and motivating ideologies" without addressing the elephant in the room: the LSA may not have <u>any</u> political persuasion or ideology.

277. That Song can "educate himself" on the "required topics" is a *non-sequiter*. The applicant's objection is that he is "required" to receive the "education" at all.

278. Finally, as to the LSA's ultimate conclusion that it has not "ordered or required the Applicant to think, believe, say, or do anything …" this is both wrong (the Code is a clear "order" to not say things and not do things, the Rules are a clear "order" to complete a CPD plan annually with reference to the Profile, Song would have been suspended had he failed to complete the Path including providing "correct" answers during a test, etc.) and besides the point. An "order" or "requirement" is not the threshold for constitutional infringements:

> *Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others …*[251]

279. The LSA's ultimate conclusion, therefore, that there are no *Charter* infringements is premised entirely on a superficial, misleading, and incomplete analysis. The LSA fails to acknowledge or address most of the "actions or measures it has actually taken", refuses to evidence or discuss the nature of its "political persuasions and motivating ideologies", employs nomenclature without providing comprehensive definitions, summarizes the Path ignoring entirely the objectionable content of the Path, fails to dispute the applicant's arguments demonstrating that the LSA's Impugned Conduct substantially interferes with Song's *Charter* rights, etc.

280. Like the accounting adage "garbage in, garbage out", the LSA's purported "balancing exercise" is, therefore, meaningless. Nonethless, the applicant will respond to it briefly.

IX. <u>THE CHARTER</u>

A. <u>The Appropriate Section 1 Standard</u>

281. Where a Law Society makes a rule of general application to the members of the profession, it is acting in a legislative capacity, rather than in an administrative capacity,

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[251] *R. v Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295 ("***Big M***") at para. 95.

such as when it makes a specific decision applying such rules to a member.[252] In analyzing *Charter* issues, rules of general application are subject to section 52(1) of the *Constitution Act*, 1982 and an *Oakes* analysis (on a standard of correctness) is applied,[253] whereas administrative decisions addressing specific facts of a case are subject to section 24(1) and the Doré framework is applied on a reasonableness standard[254] (subject to issues of constitutionality where the rule of law requires correctness[255]).

282. As set out in *Greater Vancouver*, "[a] binding rule of general application is not an individualized form of government action like an adjudicator's decision or a decision by a government agency concerning a particular individual or a particular set of circumstances."[256] In *Greater Vancouver*, the SCC found that it was appropriate to view a transit authority's advertising policies—which it described as "binding rules of general application that establish the rights of members of the public who seek to advertise on the transit authorities' buses"[257] — as "law" subject to section 52 of the *Constitution Act*, 1982. The applicant seeks remedies, *inter alia*, under section 52.

283. For these reasons the appropriate section 1 test is *Oakes*. *Oakes* is also required in this action because, whereas the *Doré* test takes the "statutory objective" as a given, Oakes first assesses the "objective" to ensure it is "pressing and substantial in a free and

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[252] See *Green* at paras 22, 54.
[253] See *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 579, paras. 51-69, which applied the *Oakes* test rather than the *Doré* reasonableness analysis where the issue was constitutionality of particular provisions in administrative policies of general application to all physicians. The Court of Appeal applied the same approach without deciding the issue: see *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 at paras. 58-60
[254] *Doré* at paras. 2 ("The lawyer does not challenge the constitutionality of the provision in the Code of ethics under which he was reprimanded. Nor, before us, does he challenge the length of the suspension he received. What he does challenge, is the constitutionality of the decision itself, claiming that it violates his freedom of expression under the *Canadian Charter of Rights and Freedoms*."), 5-6, 37 ("Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be "prescribed by law" has been held by this Court to apply to norms where "their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply" (*Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component,* 2009 SCC 31, [2009] 2 S.C.R. 295 ("***Greater Vancouver***"), at para. 53).", 54 ("Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values on the specific facts of the case. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.")
[255] *York Region District School Board v Elementary Teachers Federation of Ontario*, 2024 SCC 22 ("***York Region***") at paras 62-71.
[256] *Greater Vancouver* at para 88.
[257] Greater Vancouver at para 90.

democratic society".[258] It is the applicant's submission that the LSA's Political Objectives are subversive to the *Constitution*.

284. The LSA asserts that its Impugned Conduct is "somewhat like a law, but also somewhat like an adjudicative decision."[259] The LSA's Impugned Conduct is nothing like an adjudicative decision. As observed above in section IV.A (Evidence in Judicial Review) "the LSA was not a tribunal exercising quasi-judicial or adjudicative functions."

285. It must also be recalled that the applicant's argument, now admitted by the LSA, is that the LSA has adopted a political objective. The applicant demonstrates that the Impugned Code, the Impugned Rules, and the Profile all advance and incorporate the LSA's overarching Political Objectives. As to the Political Objectives themselves, they are "to effect 'radical transformation' of the legal system"[260] through the means of changes to "legal culture."[261] While not legislation in form, it is legislation in substance.

286. The *Dor*é standard is likewise inappropriate because the "reasons" which the LSA would have this Court review with deference are:

    a. To the extent they relate to the Impugned Code and Impugned Rules, neither identified nor properly summarized in the LSA's brief (see sections V.E (The LSA Fails to Identify Reasons) to section V.H (The LSA Was Clearly Pursuing the Political Objectives) above); and

    b. To the extent they relate to all other Impugned Conduct, including the Profile, the CPD Tool, and the Political Objectives more broadly, the LSA has elected to leave all argument as to those matters absent from its brief on the premise that the Court has no right to consider that evidence or those matters.

287. The Court can obviously not assess whether the LSA "considered"[262] all matters relevant to the *Charter* balancing exercise when the LSA's considerations are either absent from the record or not identified.

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[258] *R v Oakes,* [1986] 1 SCR 103 ("***Oakes***") at para. 73.
[259] Respondent's brief at para 200.
[260] Applicant's brief at para. 447.
[261] Applicant's brief at paras. 374 to 379, 404 to 406, 450, etc.
[262] *Doré* at paras. 55 to 56.

B. Threshold Failures

i. York and the Failure to Consider the Charter

288. If the Court is to proceed on the basis of *Doré,* the LSA immediately hits a fatal snag: nowhere in the CRP (or even its brief) does the LSA recognize that a *Charter* right even applies much less is there any clear acknowledgement of and analysis of that right.[263]

ii. Improper Objectives

289. The LSA cannot justify the infringement of fundamental *Charter* freedoms on the basis of asserted objectives which are "discordant with the principles integral to a free and democratic society".[264] To be justified, the Impugned Conduct must "relat[e] to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important".[265]

290. As demonstrated in the applicant's brief, the LSA's Political Objectives (including as expressed in the Profile, the Code and the Path) are not merely "discordant" with a free and democratic society, they are positively hostile to it.[266] The LSA cannot justify *Charter* infringements in pursuit of such objectives. The LSA cannot justify *Charter* infringements, for example, so as to promote the harmful stereotypes that:

a. white Anglo Saxon Protestant males use the "shams" of universalism, empiricism, objectivity, reason and science to oppress minorities; and

b. indigenous Canadians are inherently traumatized, lack agency, and are cognitively incompatible with a Western worldview including legal system.

291. The LSA cannot justify *Charter* infringements in pursuit of racial segregation.

292. Of course, the LSA offers no argument to the contrary, having instead taken the position that this Court has no legitimacy or capacity to even know the LSA's political objectives.

293. Where the LSA argues, therefore, that its objectives included "equality", "diversity", "access", and the "prevent[ion of] harm to the vulnerable"[267], those terms are empty labels. The LSA may as well have claimed, as its objectives, "good things" or "legal stuff."

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[263] *York Region* at paras. 68 and 94.
[264] *Oakes* at para. 69.
[265] *R. v Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697 at para. 62.
[266] Applicant's brief at section IV.B. (The Applied Postmodern Theories) and IV.C. (C. The LSA's Political Objectives – An Attack On Human Dignity).
[267] Respondent's brief at para. 203.

iii. Ultra Vires Objectives

294. In *Big M*, the SCC cautioned that "Parliament cannot rely upon an *ultra vires* purpose under section 1 of the *Charter*" to justify the limitation of a *Charter* right. There, compelling religious observance was found to be an illegitimate purpose incapable of justifying the limitation of *Charter* freedoms.

295. The LSA simply has no legal jurisdiction under the *LPA* to have as a purpose:

a. any political objective including the Political Objectives;

b. political interference with the independence of the bar;

c. division of the lawyer's loyalty to the client;

d. undermining the lawyer's loyalty to the law;

e. the prescription of dogma in matters of epistemology, morality, metaphysics, history, economics, sociology, spirituality, psychology, race, gender, or culture[268]; or

f. the prescription of the contents of the lawyer's conscience[269].

296. Again, the LSA offers no argument to the contrary.

C. The LSA's Failure to Prescribe Charter Limits by Law

297. *Charter* rights may only be restricted by "clear and explicit" laws, meaning standards that are intelligible to a citizen of common intelligence without guesswork with "tolerable certainty" and, where constitutional rights are abutted, to "a very high degree of predictability". Failing which, there is no *Charter* limit "prescribed by law" and no resort may be made to section 1.[270] In other words, the "law" is void for vagueness.

298. The SCC elsewhere phrased the test as requiring, at least, a sufficient delineation of an area of risk which provides an intelligible standard sufficient for legal debate.[271]

i. The Profile

299. As discussed above at section IV.B.iv (Guidance Materials Not Disclosed by the LSA) and in the applicant's brief at section IV.D.3. (No Statutory Authority to Establish a Menu of

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[268] Except insofar as Core Competence and Ethics relates to such matters.
[269] Except insofar as the LSA must ensure lawyers make and comply with their oaths.
[270] Committee for the Commonwealth of Canada v Canada, 1991 CanLII 119 (SCC), [1991] 1 SCR 139 ("***Committee***") at paras. 158, 161, 163, 164, 170, and 172.
[271] R. v Nova Scotia Pharmaceutical Society, 1992 CanLII 72 (SCC), [1992] 2 SCR 606, at paras. 59, 63, 64, and 72.

Uncertain Aspirations) the Profile's meaning is largely opaque without the guidance of the LSA's various "Key Resources" and without the benefit of an expert's assistance (i.e. the Williams Report).

300. Having spent considerable effort analyzing and summarizing the content of the LSA's Political Objectives (including as manifest in the Profile) the LSA now claims (incorrectly, it is submitted) that the applicant has merely summarized "what he believes [are] the LSA's political persuasions."[272] According to the LSA, then, neither the expert (Williams) nor the applicant has yet to understand the true meaning of the competencies set out in Profile. The Profile, in other words and according to the LSA, is extremely vague.

301. To compound the uncertainty of what the Profile actually means, when the LSA was publicly confronted with just a single comment from one of its "key resources", it sought to distance itself from that resource saying it was "not required reading and lawyers can choose their own resources."[273]

302. In fact, whether in the LSA's view the Profile truly incorporates the Theories is somewhat irrelevant. The relevant inquiry is whether the Profile might; whether it is expressed in such broad and vague language so as to permit that interpretation. As explained in *Saumur*:

> *Assuming, for the purposes of argument, that the by-law here in question might, in actual administration by the official mentioned therein, be administered solely to prevent literature reaching the streets which might cause disturbance or nuisance therein, and that a by-law expressly so limited would be within provincial competence, the present by-law is not so limited in its terms. Its validity is not to be judged from the standpoint of matters to which it might be limited, but upon the completely general terms in which it in fact is couched.*[274]

303. To compound the uncertainty even further, the LSA now seems to assert that it is acceptable to the LSA that a lawyer practice incompetently (as defined by the Profile).

304. A lawyer of common intelligence is left in a place of intolerable uncertainty and no clue as to the zone of risk. Given that the Profile clearly abuts constitutional freedoms (it

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[272] Respondent's brief at para. 190.a.
[273] Applicant's brief at para. 670.
[274] *Saumur v City of Quebec*, 1953 CanLII 3 (SCC), [1953] 2 SCR 299 at para. 128.

prescribes and proscribes thoughts, words, and conduct including in matters of self-perception, humankind, nature, and metaphysics) this uncertainty aggravates the constitutional violations because the lawyer's expression and conduct is seriously "chilled"[275]: better to just say nothing than to hazard a guess as to where the LSA's Hearing Committee will draw the line between free speech and "incompetence."

305. The Profile does not, therefore, "prescribe by law" constitutional rights and may not be saved under the *Charter*'s section 1.

ii. The Code

306. The same observations apply with respect to the Impugned Code. The Code also incorporates opaque nomenclature, requiring guidance to understand and follow the rules, but the LSA insists that its Political Objectives remain misunderstood.

307. In addition, the Code suffers from uncertainty stemming from its use of a would-be-complainant's subjective mindset to define proscribed behavior.[276] As stated in Luscher v Revenue Canada, a limit which is vague, ambiguous, uncertain, and subject to discretionary determination is, by that fact alone, an unreasonable limit."[277]

308. The Code does not, therefore, "prescribe by law" constitutional rights and may not be saved under the *Charter*'s section 1.

iii. The Impugned Rules

309. So too do such observations apply to the Impugned Rules.

310. Rules 67.2 and 67.3 require lawyers to prepare and submit CPD plans in the "form acceptable to the Executive Director." That provides a seemingly unlimited discretion to the Executive Director to determine such form. In fact, the Executive Director has chosen, as the prescribed form, a CPD plan prepared in accordance with the Profile and within the LSA's CPD Tool. While it may be a surprising result that Rules 67.2 and 67.3 give the Executive Director discretion to choose a form which:

    a. defines competence as including, for example:

        i. being conscious of the contents of one's unconscious mind[278]; and

[275] Applicant's brief at para. 696.
[276] Applicant's brief at paras. 712 to 718.
[277] Applicant's brief at para. 696.
[278] The Profile at s. 3.1.

ii. having and promoting a deeper understanding of sexual orientation and gender identity,[279] and

b. "is not intended to … address substantive legal knowledge and procedures specific to different areas of legal practice",

the Rules (according to the LSA's interpretation) permit just that.

311. In other words, the Rules Grant the Executive Director a virtually unlimited plenary discretion which is not a "limit prescribed by law."[280]

312. Rule 67.4 is more vague still because it starts with the words, "Independent of Rules 67.1 through 67.3" – meaning it (expressly) operates independent of Rule 67.1's substantive definition of CPD which requires that it be "relevant to the professional needs of a lawyer" etc. While the Executive Director's discretion would at least seem[281] to be limited by Rule 67.1, the Benchers' discretion under Rule 67.4 has no such limit. The Rule is so broad as to permit the Bencher's to mandate "education" including that Gerald Stanley's not guilty verdict was a miscarriage of justice, that our national anthem's phrase "our home and native land" is a fraud, that "surrender" means "share", that Canada's history of providing to indigenous Canadians education, child protection, health care, and peace and order in the form of land titles and criminal justice is really cultural genocide.

313. The Impugned Rules do not, therefore, "prescribe by law" constitutional rights and may not be saved under the *Charter*'s section 1.

D. The Balancing Exercise

i. The LSA's Failure to Weigh

314. In order to meaningfully "balance" *Charter* rights against governmental objectives, the Court (or statutory delegate) must "weigh" each against one another.[282]

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[279] The Profile at s. 3.2.
[280] *Committee* at p. 209.
[281] The Profile contains some "competencies" which might meet the definition in Rule 67.1, many clearly do not.
[282] See, for example, *Canada (Attorney General) v JTI-Macdonald Corp.*, [2007] 2 SCR 610, at para. 45.

315. In the CRP the LSA (i.e. the Benchers) failed entirely to identify any *Charter* engagement[283] or conduct any balancing exercise and now maintains that a *Charter* infringement is impossible even to imagine.

316. Therefore, the LSA placed, and continues to place, on the "freedom" side of the scale exactly nothing. Whatever it now places on the other side of the scale will necessarily "outweigh" this nothingness.

317. The LSA has not, therefore, met its burden of proof. In the words of *Oakes*, it has not demonstrated its measures impair "as little as possible" and has not demonstrated proportionality between the effects of the measures and the objective. In the words of *Doré* the LSA has not considered how the *Charter* will "best be protected" because it recognizes no material *Charter* rights in the first place.

318. On the "state objective" side of the scale, the LSA has likewise failed to properly "weigh" the relevant items for two main reasons.

319. First, the LSA denies the Court's jurisdiction to scrutinize its political objectives and, concomitantly, refuses any meaningful evidence or analysis of the substantive content of its nomenclature (including as reflected in the Profile and Code). It has, therefore, chosen not to discuss its objectives at all (at least, not in any meaningful sense).

320. Rather, the LSA shelters behind the empty labels "competence", "ethics", "professionalism", "diversity", etc. and expects this Court to <u>assume</u> that those labels relate to something concordant with the Constitution and that they are "pressing and

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[283] Contrary to the LSA's assertions at para. 53 of its brief, the <u>only</u> person who appears to have even considered the concept of freedom of conscience and speech was Fruend where, with respect to mandating the Path she (not the Benchers) observes: "A concern raised by lawyers, in another context, is that of compelled speech and compelled thinking. There is a risk that lawyers will be unreceptive to mandatory training, believing it to force another's views and perspectives on their own. Rather than fostering a broader perspective and critical thinking, some may see it as narrowing the acceptable worldview. These are the types of arguments that arose in Ontario in the debate over the Statement of Principles. The Statement of Principles was a statement to be produced by every licensee in Ontario, where each licensee was to acknowledge their obligation to promote equality, diversity and inclusion generally, and in their behaviour towards colleagues, employees, clients and the public. This caused tremendous debate and rancour in Ontario and was eventually repealed.
The analogy between the "compelled speech" that was the subject of debate in Ontario and the question here around mandatory Indigenous education is not a strong one. Distinct from requiring an individual commitment to equality, diversity and inclusion, the point of mandatory education is to ensure that Alberta lawyers have training in an area that has been determined by the regulator to be a core competency." In other words, Fruend say no violation of freedom of conscience because (according to Fruend) the LSA had determined the entire contents of the Path to be core competency.

substantial." This despite the fact that it is very obvious, and strenuously advocated by the applicant, that the LSA's Political Objectives are constitutionally subversive.

321. Related to the LSA's refusal to define its terminology (and thereby elucidate the nature of its objectives) is the LSA's attempt to frame its objectives far too generally. As stated by Chief Justice McLachlin in *Sauvé v Canada (Chief Electoral Officer)*[284], Courts must be careful not to countenance "vague and symbolic objectives":

> *This leaves the question of whether the objectives of enhancing respect for law and appropriate punishment are constitutionally valid and sufficiently significant to warrant a rights violation. Vague and symbolic objectives such as these almost guarantee a positive answer to this question. Who can argue that respect for the law is not pressing? Who can argue that proper sentences are not important? Who can argue that either of these goals, taken at face value, contradicts democratic principles? However, precisely because they leave so little room for argument, vague and symbolic objectives make the justification analysis more difficult. Their terms carry many meanings, yet tell us little about why the limitation on the right is necessary, and what it is expected to achieve in concrete terms. The broader and more abstract the objective, the more susceptible it is to different meanings in different contexts, and hence to distortion and manipulation. One articulation of the objective might inflate the importance of the objective; another might make the legislative measure appear more narrowly tailored. The Court is left to sort the matter out.*
>
> *… Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process. As this Court has stated, the objective "must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective"… If Parliament can infringe a crucial right such as the right to vote simply by offering symbolic and abstract reasons, judicial review either becomes vacuously constrained or reduces to a contest of "our symbols are better than your*

[284] [2002] 3 S.C.R. 519, 2002 SCC 68.

> *symbols". Neither outcome is compatible with the vigorous justification analysis required by the Charter.*
>
> *The rhetorical nature of the government objectives advanced in this case renders them suspect … To establish justification, one needs to know what problem the government is targeting, and why it is so pressing and important that it warrants limiting a Charter right. Without this, it is difficult if not impossible to weigh whether the infringement of the right is justifiable or proportionate.* [285]

322. *Andrews* provides an example of appropriate characterization and the impact mischaracterization has on the balancing exercise. The majority found the objectives (for the citizenship requirement) were, *inter alia*, ensuring familiarity with Canadian institutions and customs and commitment to Canadian society, which were insufficiently pressing and substantial to justify *Charter* infringement. The dissent would have saved the legislation under Section 1, however, on the basis of its for more broadly framed objective ("the due regulation and qualification of the legal profession").[286]

323. Here the LSA asserts objectives which are patently misleading (see, for example, paragraph 267 above) but also framed in vague and symbolic terms, for example "equality" – who can argue with that?

324. The LSA has failed, therefore, to properly weigh anything in the balance. It has failed to meet its burden.

ii. Nothing Demonstrated

325. In order to justify a *Charter* infringement the LSA must generally present "cogent and persuasive evidence" to "demonstrably justify" an infringement[287]. Scientific and social science evidence which is available is required.

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[285] At para. 22 to 24; see also Justice McLachlin in *RJR-MacDonald Inc. v Canada*, [1995] 3 S.C.R. 199, 1995 CarswellQue 119: "Care must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised."

[286] *Andrews v. Law Society (British Columbia)* [1989] 1 S.C.R. 143, 1989 CarswellBC 1659-63; 83-90.

[287] *Oakes*.

326. The LSA provides no evidence whatsoever. Worse, to the extent the record includes evidence (specifically, the articling survey[288] and the My Experiences survey[289]) the LSA's position is that it should be ignored.

327. Instead, the Court is asked to accept the bald assertion that another organization "considered empirical and anecdotal evidence that discrimination, harassment, and bullying were prevalent in the legal profession."[290] That's not evidence, that's a reference to evidence (which should be in the CRP).

328. The record also contains much evidence the LSA would prefer be ignored which tends to show the LSA's objectives are not "competence" or "ethics" in any traditional sense of those words including the 2010 consumer survey[291], the actual contents of the Path, evidence that it contains misinformation, evidence about is primary researcher, the Williams Report which explains the LSA's terminology and ideological content, the LSA's own Regulatory Objectives and Acknowledgment that subordinate "the independence of the legal profession, the administration of justice and the rule of law" to "equity, diversity and inclusion", and the Furlong report and referenced articles.

329. Likewise the record contains evidence the LSA ignores or insists be ignored which tend to demonstrate the LSA's Impugned Conduct is not likely to advance any public interest, including the items in the paragraph above, the Profile's competencies failing to validate (the validation survey having been excluded), the public shellacking the applicant took for merely asking members to repeal Rule 67.4 (is Song's dissent not the kind of "diversity" the LSA claims as its objective?).

330. The Court is left with the LSA's bald assertion that "the LSA's actions, rules, standards, and programs have significantly advanced the public interest …" without any "demonstration" of any sort. The LSA has failed to meet its burden.

iii. Conclusion

331. The LSA's "balancing" of the applicant's fundamental *Charter* freedoms against the LSA's purported "objectives" in this context and in this manner is totally devoid of substance.

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[288] Applicant's brief at para. 24.
[289] Applicant's brief at para. 41.
[290] Respondent's brief at paras. 20 and 128.
[291] Applicant's brief at para. 20.

X. REMEDIES

332. Therefore, the applicant prays that this Honourable Court grant the remedies requested in his brief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of April 2025.

Glenn Blackett
Counsel for the Applicant

XI. LIST OF AUTHORITIES

Tab	*Caselaw*
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2.	*Alberta's Free Roaming Horses Society v Alberta*, 2019 ABQB 714
3.	*Amax Potash Ltd. Etc. v The Government of Saskatchewan*, 1976 CanLII 15 (SCC), [1977] 2 SCR 576
4.	*Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143
5.	*Auer v Auer*, 2024 SCC 36
6.	*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817
7.	*Bergman v Innisfree (Village)*, 2020 ABQB 661
8.	*Biehl v. Strang*, 2011 BCSC 213
9.	*C.M. v Alberta*, 2022 ABKB 716
10.	*Canada (Attorney General) v JTI-Macdonald Corp.*, [2007] 2 SCR 610
11.	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
12.	*Canadian Council of Professional Engineers v Memorial University of Newfoundland*, 1998 CarswellNat 2364, [1998] FCJ No 1703
13.	*Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579

14.	*Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393
15.	*Committee for the Commonwealth of Canada v Canada*, 1991 CanLII 119 (SCC), [1991] 1 SCR 139
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17.	*Dunsmuir v. New Brunswick*, 2008 SCC 9
18.	*F.P. Bourgault Industries Seeder Division Ltd. v. Flexi-Coil Ltd. (1995)*, 1995 CanLII 19325 (FC), 64 C.P.R. (3d) 70 (F.C.T.D.)
19.	*Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295
20.	*Green v Law Society of Manitoba*, [2017] 1 S.C.R. 360
21.	*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, [2018] 1 S.C.R. 750
22.	Imperial Tobacco Co v Newfoundland and Labrador (Attorney General), 2007 NLTD 172 (CanLII)
23.	Law Society of British Columbia v Trinity Western University, 2018 SCC 32
24.	*Mackay v Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 SCR 357
25.	*Manson Insulation Products Ltd v Crossroads C&I Distributors*, 2014 ABQB 634
26.	*Morris v Law Society of Alberta (Trust Safety Committee)*, 2020 ABQB 137
27.	*Okotoks (Town) v Foothills (Municipal District) No. 31*, 2013 ABCA 222
28.	*Oleynik v University of Calgary*, 2023 ABCA 265

29.	*Operation Dismantle v The Queen*, [1985] 1 S.C.R. 441
30.	*R. v Nova Scotia Pharmaceutical Society,* 1992 CanLII 72 (SCC), [1992] 2 SCR 606
31.	*RJR-MacDonald Inc. v Canada*, [1995] 3 S.C.R. 199, 1995 CarswellQue 119
32.	Reference re Secession of Quebec, [1998] 2 SCR 217
33.	*Roncarelli v Duplessis*, [1959] SCR 121
34.	*Saumur v City of Quebec*, 1953 CanLII 3 (SCC), [1953] 2 SCR 299
35.	*Sauvé v Canada (Chief Electoral Officer),* [2002] 3 S.C.R. 519, 2002 SCC 68
36.	*Shaulov v Law Society of Ontario*, 2023 ONSC 5242
37.	*Syncrude v Alberta (Minister of Energy)*, 2023 ABKB 317
38.	*York Region District School Board v Elementary Teachers Federation of Ontario*, 2024 SCC 22
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39.	*Legal Profession Act,* RSA 2000, c L-8
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40.	Lorne M. Sossin & Gerard Kennedy, Boundaries of Judicial Review; The Law of Justiciability in Canada, 3rd ed (Carswell, 2012)
41.	Lord Woolf, et al, *De Smith's Judicial Review*, 7th ed (London: Sweet and Maxwell, 2013)