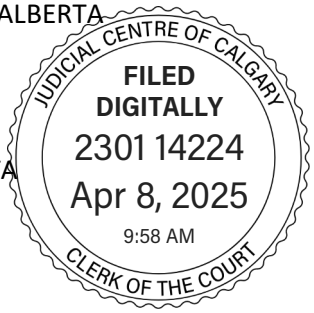
COURT FILE NUMBER:	2301 14224
COURT:	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE:	CALGARY
APPLICANT:	YUE SONG
RESPONDENT:	THE LAW SOCIETY OF ALBERTA
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PERSON FILING THIS DOCUMENT:	**Field LLP** Barristers and Solicitors [redacted] File No. 59201-23 **Attention: Jason J. Kully / Leanne Monsma**



WRITTEN SUBMISSIONS OF THE RESPONDENT, THE LAW SOCIETY OF ALBERTA, FOR A JUDICIAL REVIEW APPLICATION ON MAY 6, 2025

Submitted by:	To:
Jason J. Kully / Leanne Monsma **FIELD LLP** Barristers and Solicitors [redacted]	**Glenn Blackett** **GLENN BLACKETT LAW** [redacted]
Counsel for the Respondent, the Law Society of Alberta	Counsel for the Applicant, Yue Song

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I. INTRODUCTION

1. This case is not about post-modernism, post-colonialism, critical race theory, or "diversity, equity, and inclusion". It is also not about the independence of lawyers or the rule of law. This case is about the Law Society of Alberta's authority to establish a continuing professional development program and to set ethical standards for its members in accordance with its rule making authority and broad public interest mandate.

2. The Applicant, Yue Song, argues that the Law Society of Alberta lacks the statutory authority to do either of these things. As a second argument, the Applicant suggests that the Law Society of Alberta, in doing these things, has violated the *Canadian Charter of Rights and Freedoms*.[1]

3. There is a difference between the Law Society of Alberta doing something that the Applicant disagrees with or does not like and the Law Society of Alberta not having the statutory authority to do something or violating the *Charter*. This is what this case comes down to – the Applicant does not agree with and does not like certain parts of the continuing professional development program and ethical standards selected by the Law Society of Alberta.

4. The Applicant's reasons for not liking the continuing professional development program and the ethical standards are due in part to his assumptions and beliefs about why the Law Society of Alberta has implemented them. However, his assumptions and beliefs are not only mostly wrong, but they are also irrelevant. Also irrelevant are the Applicant's feelings around the appropriateness, relevance, applicability, and merits of the continuing professional development program and the ethical standards.

5. In this case, what must be determined is:

    a. whether the Law Society of Alberta was acting reasonably within its statutory authority when it established the continuing professional development program and the ethical standards; and

    b. whether the Law Society of Alberta has infringed upon the Applicant's *Charter* rights to freedom of conscience, religion, and expression.

6. The Law Society of Alberta has acted reasonably within the scope of its statutory authority and has not violated any of the Applicant's *Charter* rights. The Law Society of Alberta determined that the form of the continuing professional development program and the ethical standards were necessary to uphold and protect the public interest, which is the overriding purpose of the Law Society of Alberta under the legislation. As the governing body of an independently regulating profession, the Law Society of Alberta's determination of the way its broad public

[1] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982* (UK), 1982, c 11 [*Charter*].

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.

7. Accordingly, the Applicant's application should be dismissed.

II. FACTS

A. The Law Society of Alberta and the *Legal Profession Act*

8. The *Legal Profession Act* (the "LPA") grants the privilege of independent regulation to the legal profession in Alberta.[2] More specifically, the LPA recognizes the Law Society of Alberta (the "LSA") and establishes a governing body of the LSA called the Benchers.[3]

9. For the most part, Benchers are elected by active members of the LSA.[4] Benchers conduct their work during meetings and, at a meeting of the Benchers, matters are typically determined by a majority of votes of the Benchers present at the meeting.[5]

10. The LPA bestows the Benchers with a very broad authority to "take any action … the Benchers consider necessary for the promotion, protection, interest or welfare of the Society".[6]

11. The Benchers also have the authority to establish committees.[7] In exercise of this power, the LSA currently has 13 committees. The committees include:

    a. the Lawyer Competence Committee;

    b. the Policy and Regulatory Reform Committee; and

    c. the Equity, Diversity and Inclusion Committee.

12. From February of 2019 to August of 2023, the LSA also had an Indigenous Advisory Committee. The Committee worked closely with the Indigenous Initiatives representative of the Law Society staff on initiatives relating to truth and reconciliation, access to justice for Indigenous Peoples, and cultural competency development for lawyers.

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[2] *Legal Profession Act,* RSA 2000, c. L-8, as amended.
[3] *Ibid*, s 5(1).
[4] *Ibid*, s 14(3).
[5] *Ibid*, ss 20-21.
[6] *Ibid*, s 6(n).
[7] *Ibid*, s 6(c).

B. Code of Conduct

13. The LPA gives the Benchers the specific authority to "authorize or establish a code of ethical standards for members".[8] Pursuant to this authority, the Benchers have established the Code of Conduct (the "Code").

14. The Code defines and clarifies expectations and standards of behaviour that apply to lawyers. Each standard is typically accompanied by commentary which is intended to help members better understand the expectation and standard.

15. The Code is intended to serve a practical as well as a motivational function. If the LSA receives a complaint about one of its members, then the next step in the process is for the LSA to decide whether to dismiss the complaint or refer the matter to a practice review or conduct committee. In making this decision, the LSA will consider whether the conduct complained of in the complaint could constitute a violation of the Code. If the LSA decides to refer the matter to a conduct committee, then the conduct committee might eventually determine that the member's conduct violated the Code and is deserving of sanction.

16. The Code is based on a model code (the "Model Code") developed by the Federation of Law Societies of Canada (the "Federation"), a national association of the 14 law societies mandated by the provinces and territories to regulate Canada's legal profession in the public interest.[9]

17. The Federation has a standing committee which reviews the Model Code on a regular basis.[10] During the review process, the 14 law societies across Canada are asked to provide feedback on the Model Code and any proposed amendments. When changes are made to the Model Code, individual law societies can decide whether or not to amend their codes of conduct to align with the Model Code. However, the Federation's goal is that all law societies will implement the amendments so that the rules of conduct are harmonized across Canada.

18. Between 2020 and 2022, the Federation's standing committee was reviewing the Model Code.[11] The LSA, primarily through work done by the Policy and Regulatory Reform Committee, was heavily involved in the review process.[12]

19. The Law Societies Equity Network (the "LSEN") provided the initial impetus for the examination of Part 6.3 of the Code on Harassment and Discrimination. The LSEN is a network of law society staff engaged in efforts to prevent discrimination and harassment in Canadian legal workplaces.

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[8] *Ibid*, s 6(l).
[9] Certified Record of Proceedings [CRP], Vol A & B, pp 21-142. See especially p 22.
[10] *Ibid*.
[11] *Ibid*.
[12] See for example, CRP, Vol C, pp 342-344, 345-348, 352-354, 383-385, 402-405, 406-409, 410-413.

In June of 2019, the LSEN suggested to the Federation that the current Model Code rules concerning harassment and discrimination were insufficient.[13]

20. In response to the LSEN's suggestion, the Federation's standing committee considered empirical and anecdotal evidence that discrimination, harassment, and bullying were prevalent in the legal profession. The sources of this evidence included: a consultation paper from the Law Society of Ontario, results of articling student surveys done by the LSA, the Law Society of Ontario, the Law Society of Saskatchewan, and the Law Society of Manitoba, and a report from the International Bar Association.[14]

21. In October of 2022, the Federation amended the Model Code.[15] According to the Federation, the amendments were to "provide significantly greater guidance on the duties of non-discrimination and non-harassment" and also to "include specific guidance regarding bullying".[16]

22. Subsequently, on October 5, 2023, the Benchers passed a resolution to amend the Code to reflect the amendments made by the Federation to the Model Code.[17]

23. Before the amendments were adopted, the standards set out in Part 6.3 of the Code included:

    a. a prohibition on sexual harassment of any person;

    b. a prohibition on any other form of harassment of any person; and

    c. a prohibition on discriminating against any person.[18]

24. Following the amendments, Part 6.3 includes:

    a. a prohibition on sexually harassing a colleague, employee, client, or any other person;

    b. a prohibition on harassment of a colleague, employee, client, or any other person;

    c. a prohibition on discrimination against a colleague, employee, client, or any other person;

    d. a prohibition on engaging in reprisals against a colleague, employee, client, or any other person.[19]

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[13] CRP, Vol A & B, pp 21-142. See especially p 58.
[14] *Ibid*. See especially pp 58-59.
[15] *Ibid*.
[16] *Ibid*.
[17] *Ibid*, pp 19-21. See especially p 20. At the same time, the Benchers passed a resolution to make some slight amendments to the provisions. Thus, Part 6.3 of the Code is very similar to but not exactly the same as Part 6.3 of the Model Code.
[18] *Ibid*, pp 21-142. See especially pp 104-114.
[19] *Ibid*.

25. The amendments also include updated commentary on each of these standards.

C. The Rules of the Law Society of Alberta

26. The LPA also bestows the Benchers with rule making authority.

27. Pursuant to section 7(1) of the LPA, the Benchers have broad authority to make rules "for the government of the [LSA], 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 [LSA] or the Benchers" under the LPA or any other statute.

28. Section 7(2) goes on to specifically list topics that the Benchers may make rules in relation to. Section 7(2) explicitly states that it does not restrict the generality of section 7(1).

29. In addition, the Benchers are authorized to make rules:

    a. governing the election of Benchers (section 14);

    b. dealing with enrollment or admission in the LSA (section 37);

    c. regarding the authorization of individuals enrolled as a member of a law society outside of Alberta to act as counsel in Alberta (section 48);

    d. respecting the powers and duties of persons conducting hearings and the various committees established by the LPA (section 52);

    e. respecting the Assurance Fund (section 89); and

    f. respecting professional liability claims (section 101).

30. The overall legislative scheme in the LPA evidences an intention by the Legislature to grant the LPA extensive and broad rule making authority and discretion.

31. Pursuant to its rule making power, the LSA has established the Rules of the Law Society of Alberta (the "Rules"). The Rules set out specific regulations, responsibilities, and professional standards that all lawyers are required to meet and uphold.

32. Rule 67 concerns continuing professional development. By way of summary:

    a. Rule 67.1 starts by defining the term "continuing professional development" ("CPD");

    b. Rule 67.2 goes on to require every active member to prepare and submit to the LSA an annual CPD plan;

c. Rule 67.3 provides that if an active member fails to submit their annual CPD plan to the LSA by the required deadline, then they will be automatically suspended; and

d. Rule 67.4 gives the Benchers the ability to prescribe additional specific CPD requirements in a form and manner and time frame acceptable to the Benchers. Section 67.4 also provides that if an active member fails to comply, then they will be automatically suspended.

i. <u>The history of Rules 67.2 to 67.3 and the new CPD program</u>

33. Rules 67.2 (the requirement to prepare and submit an annual CPD plan) and 67.3 (the automatic suspension of members who filed to submit an annual CPD plan by the deadline) have been in place since November 29, 2008.

34. Between 2008 and 2020, the LSA's CPD program required its members to prepare a plan for their CPD.

35. The first iteration of the CPD program required a member to complete a personalized CPD plan and then declare to the LSA that they had completed their plan. A self-assessment tool, resources, and a CPD template were available to help members with their plans.

36. In 2016, several changes were made to the CPD program. A CPD planning tool and declaration were added to the LSA Member Portal, such that members were required to use the CPD planning tool to create and submit their CPD plans online. The CPD planning tool required members to consider a number of different "types" of competencies and also to include a learning activity related to ethics and professionalism.

37. Then, in 2020, the Benchers set out to update the LSA's CPD program. The purpose of the update was described by President Kent Teskey (as he then was) as follows:

> a 21st century modern regulator [can] create the most impact on the profession and the public interest by prioritizing competence initiatives.
>
> In many ways, the key control that the regulator has over the effectiveness, wellness and ethics of the profession is [the] power to drive competence. Simply put, a competent lawyer is more likely to be happy, profitable, ethical and effective.[20]

38. President Kent Teskey went on to identify two shortcomings of the CPD program then in place:

> First, it treats all practitioners the same no matter their experience, level of practice or access to firm-based competence programming. Second, while we collect substantial amounts of information, we do not do anything material

[20] *Ibid*, pp 338-341. See especially pp 338-339.

> with it, outside of considering it if a lawyer is in our regulatory stream. The risk is that this could create a substantial credibility gap within the profession.

39. President Kent Teskey then identified his vision for the new CPD program:

> a system that accomplishes the following:
>
> 1. A competence model that supports practitioners at all points of practice proportionately and responsively, and takes into account wellness as part of the competence framework.
>
> 2. That the Law Society of Alberta become a model for protecting the public interest by raising competence across the profession by not only encouraging competence but providing lawyer competence educational programming, where appropriate.
>
> 3. That through a young lawyer competence program covering the first five years that our reliance on the current articling model is substantially reduced.[21]

40. In February of 2020, while work on the new CPD program was underway, the Benchers suspended the application of Rules 67.2 (the annual CPD plan requirement rule) and 67.3 (the suspension for failing to comply with the requirement rule).[22] In October of 2021, the Benchers further suspended the application of the two Rules so that the LSA would have more time to finalize the updates to the CPD program.[23]

41. The LSA finalized the new CPD program in approximately April of 2023.[24]

42. Under the new CPD program, each member is to develop a personalized learning plan for the CPD program year.[25] In developing a plan, the member is required to reference the Professional Development Profile for Alberta Lawyers (the "Profile").[26] The Profile is a document that sets out nine domains or areas of competency that the LSA believes are important to maintain safe, effective, and sustainable legal practice in Alberta today. The domains include the following:

    a. legal practice;

    b. continuous improvement;

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[21] *Ibid*, pp 338-341. See especially pp 338-339.
[22] *Ibid*, pp 330-337. See especially pp 333-334. See also pp 322-329. See especially p 324.
[23] CRP, Vol C, pp 242-248. See especially pp 246-247.
[24] CRP, Vol A & B, pp 150-166.
[25] *Ibid*, pp 150-166. See especially p 158.
[26] *Ibid*, pp 150-166. See especially pp 159-161.

c. cultural competence, equity, diversity and inclusion;

d. lawyer-client relationships;

e. professional conduct;

f. professional contributions;

g. truth and reconciliation; and

h. well-being.[27]

43. Under each domain, there are more specific "competencies" as well as a list of performance indicators for each competency. For example, the specific competencies listed under the domain of "well-being" are:

a. build resilience;

b. maintain personal health;

c. demonstrate self-awareness; and

d. support well-being of others,

and the specific competencies listed under the domain of "cultural competence, equity, diversity and inclusion" are:

a. build intelligence related to cultural competence, equity, diversity, and inclusion;

b. incorporate equity, diversity, and inclusion in practice; and

c. champion enumerated groups in professional activities.[28]

44. While the LSA requires its members to complete a CPD plan in relation to the Profile, "lawyers are not required to demonstrate competency in every area of the Profile each year".[29] Rather, a member is required to select two or more competencies (not domains) contained within the Profile to focus on in developing their learning plan. Once a member's CPD plan is complete, the member is to use the CPD Tool to submit their plan to the LSA. The CPD Tool was created based on the Profile.

[27] *Ibid*, pp 188-196.
[28] *Ibid*, pp 188-196. See especially pp 190, 196.
[29] *Ibid*, pp 150-166. See especially p 159.

45. On April 27, 2023 (while the application of Rules 67.2 and 67.3 was still suspended), the LSA made minor amendments to Rule 67.2 and 67.3.[30] More specifically, Rules 67.2 and 67.3 were amended so that a member is required to submit their CPD plan to the LSA and, on request by the LSA, produce a copy of the CPD plan and participate in a review of the CPD plan by the LSA.

46. On May 1, 2023, Rules 67.2 and 67.3 (as they were amended on April 27, 2023) came into effect.[31]

ii. *The history of Rule 67.4 and The Path*

47. Rule 67.4 (the ability to prescribe additional specific CPD requirements) was added to the Rules on December 3, 2020.[32]

48. Before Rule 67.4 was added, the Truth and Reconciliation Commission of Canada released its Calls to Action. The 27th Call to Action is as follows:

> We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law and Aboriginal-Crown relations.[33]

49. In response to the Call to Action, the Federation urged its constituent law societies (as the entities actually responsible for lawyer CPD) to "[c]onsider mandatory Indigenous cultural competency training".[34] In making this recommendation, the Federation further stated that "a one-size-fits-all approach may not meet the needs of all lawyers, however, 'all members of the legal profession need a baseline knowledge of the issues outlined in Call to Action 27'".[35]

50. In February of 2020, the Benchers, in response to the Call to Action and the suggestion of the Federation, passed a resolution asking that the Lawyer Competence Committee and the Indigenous Advisory Committee work with staff at the LSA to create a competence program to provide the "appropriate cultural competency training".[36]

51. While work was still being done to come up with the appropriate cultural competency training, the Benchers considered whether Indigenous cultural competency education ought to be mandatory for all active members.

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[30] *Ibid*, pp 143-149. See especially pp 146-147.
[31] CRP, Vol C, pp 242-248. See especially pp 246-247.
[32] CRP, Vol A & B, pp 249-258. See especially p 256. See also pp 259-261.
[33] *Ibid*, pp 279-296.
[34] *Ibid*, pp 279-296. See especially p 284.
[35] *Ibid*, pp 279-296. See especially p 284.
[36] *Ibid*, pp 330-337. See especially p 333. See also pp 338-341.

52. On October 1, 2020, the Benchers passed a motion to make the Indigenous cultural competency education mandatory.[37] In reaching this decision, the Benchers considered, among other things:

a. the Federation's recommendation mentioned above;

b. the Lawyer Competence Committee's and the Indigenous Advisory Committee's recommendations that such training be mandatory;

c. the Law Society of British Columbia's conclusion that such training ought to be mandatory as "the objectives of intercultural competence education, including reconciliation, cannot be fully achieved unless all lawyers have a baseline understanding of the skills and topics identified in Call to Action 27"; and

d. a legal academic perspective from Pooja Parmar, Assistant Professor at the University of Victoria Faculty of Law.[38]

53. The Benchers also specifically considered concerns around "compelled speech and compelled thinking" and "a risk that lawyers will be unreceptive to mandatory training, believing it to force another's views and perspectives on their own".[39] In response, however, the Benchers noted that "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".[40]

54. The Lawyer Competence Committee and the Indigenous Advisory Committee eventually identified a program called the "The Path" as a means to provide Indigenous cultural competency education.[41]

55. The Path is an online course comprised of five modules which cover the topics of education set out in the 27th Call to Action. The five modules are as follows:

a. What's in a name: this module covers the use of the terms Indians, Inuit, Metis, and more;

b. Defining moments in history: this module covers the creation and origin stories of First Nations and Inuit, introduces pre-contact Inuit culture and talks about the early history of the fur trade in Alberta, residential schools, and the *Indian Act*;

[37] *Ibid*, pp 273-278. See especially pp 276-277.
[38] *Ibid*. See also pp 279-296.
[39] *Ibid*. See especially p 292.
[40] *Ibid*. See especially p 293.
[41] *Ibid*, pp 249-258, 259-261, 262-272. See especially pp 262-263.

c. More defining moments in history: this module covers the *Indian Act*,[42] the legacy of residential schools, and the fostering out and adoption of Indigenous children during the Sixties Scoop;

d. It's the law: this module covers historical treaties, modern treaties, and Metis rights; and

e. Relationship-building with Indigenous peoples: This module discusses some of the cultural values and traditions of Canada's Indigenous peoples and presents some suggestions on how to work and communicate with Indigenous colleagues and partners.[43]

56. After each module, there is a short quiz with approximately 10 questions (which are a blend of true or false and multiple-choice).[44]

57. As mentioned above, Rule 67.2 requires every active member to submit an annual CPD plan and Rule 67.3 provides that if an active member fails to submit their annual CPD plan to the LSA by the required deadline, then they will be automatically suspended. However, neither Rule 67.2 nor Rule 67.3 specifically address the ability of the LSA to impose other CPD requirements on members. As such, on December 3, 2020, the Benchers passed Rule 67.4 to give the Benchers the ability to prescribe additional specific CPD requirements in a form, manner, and time frame acceptable to the Benchers.[45] Section 67.4 also includes an automatic suspension enforcement mechanism (similar to that which is found in Rule 67.3).

58. The Benchers also, on December 3, 2020, passed resolutions to:

a. create an 18-month timeline for completing the Indigenous cultural competency education;

b. deem lawyers to have completed the requirement if they already took The Path through the Canadian Bar Association or another organization;

c. deem lawyers to have completed the requirement if they completed "Indigenous Canada" at the University of Alberta; and

d. allow lawyers to be exempted from the requirement by certifying that they have previous education or knowledge equivalent to The Path.[46]

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[42] *Indian Act,* RSC 1985, c I-5.
[43] CRP, Vol A & B, pp 311-314.
[44] *Ibid*, pp 311-314.
[45] *Ibid*, pp 249-258, 259-261. See especially p 256.
[46] *Ibid*, pp 249-258, 262-272.

59. On February 26, 2023, in response to a written petition led by the Applicant, the LSA held a special meeting in relation to Rule 67.4 and The Path (the "Special Meeting").[47]

60. The Special Meeting was attended by 3,748 LSA members. At the end of the meeting, those in attendance were invited to vote on a resolution that Rule 67.4 be repealed. The motion was markedly defeated with the results of the vote as follows:

a. the number of votes cast was 3,473;

b. the number of votes necessary for adoption of the resolution was 1,737 (this representing a majority);

c. the number of votes in favour of the resolution was 864 (this representing approximately 25% of the vote); and

d. the number of votes against the resolution was 2,609 (this representing approximately 75% of the vote).[48]

D. The application for judicial review

61. On October 27, 2023, the Applicant filed this Originating Application for judicial review (the "Application"). As set out in the Application as well as the Applicant's written submissions, the Applicant is seeking judicial review of the following on the basis that they are *ultra vires*:

a. Rules 67.2, 67.3, and 67.4;

b. the Profile;

c. the CPD Tool; and

d. Part 6.3 of the Code.

62. The Applicant is also alleging that what he calls the "Political Objective" in the Application and what he calls the "Political Objectives" in his written submissions are *ultra vires*. In the Application, the Applicant defines the "Political Objective" as "the adoption of and promotion of various related post-modern ideologies" which post-modern ideologies include "critical race theory; critical legal theory; postcolonialism; gender theory; and intersectionality".[49] However, in his written submissions, the Applicant defines the "Political Objectives" as the LSA's adoption

[47] CRP, Vol C, pp 355-360.
[48] *Ibid*, pp 355-360. See especially p 359.
[49] Applicant's written submissions, pp 8-11. According to the Applicant, the LSA adopted the "Political Objectives" through its 2020-2023 Strategic Plan and through its Statement of Regulatory Objectives.

(as set out in the LSA's 2020-2023 Strategic Plan and the LSA's Statement of Regulatory Objectives) of what he describes as:

> "proactive" regulation in the "public interest" through expanded powers;
>
> "diversity, equity, and inclusion" in the profession, in the LSA, and the profession's and LSA's interactions with the public;
>
> collaborating with "stakeholders" and responding to the truth and Reconciliation Commission's (the "TRC") calls to action;
>
> competence in the "non-traditional" area of "cultural competence"; and
>
> the provision of "appropriate" legal services,
>
> so as to affect "society as a whole".[50]

63. In the Application and the written submissions, the Applicant is also alleging that the following violate his *Charter*[51] rights to freedom of expression and freedom of religion:

    a. Rules 67.2, 67.3, and 67.4;

    b. the Profile;

    c. the CPD Tool;

    d. Part 6.3 of the Code; and

    e. the "Political Objectives".

64. Based on the Application as well as the Applicant's written submissions, the Applicant is seeking a number of remedies, some of which are procedural, some of which are judicial review remedies, and some of which are *Charter* remedies:

    a. procedural remedies:

        i. an order for the LSA to produce a copy of a legal opinion it obtained related to the vires of Rule 67.4 (the "Legal Opinion");

        ii. an order for the LSA to produce its Statement of Regulatory Objectives;

    b. judicial review remedies:

[50] Applicant's written submissions, para 30.
[51] *Charter*, *supra* note 1, s 1.

i. an order declaring that Rules 67.2, 67.3, and 67.4, the Profile, the CPD Tool, and Part 6.3 of the Code are *ultra vires*;

ii. an order setting aside Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code; and

iii. an order prohibiting the LSA from the continuation of its Political Objectives; and

c. *Charter* remedies:

i. a declaration that Rules 67.2, 67.3, and 67.4, the Profile, the CPD Tool, Part 6.3 of the Code, and the Political Objectives infringe the Applicant's *Charter* rights; and

ii. an injunction prohibiting the LSA from the continuation of its Political Objectives; and

iii. an order striking Rules 67.2, 67.3, and 67.4, the Profile, the CPD Tool, Part 6.3 of the Code.

65. In support of his Application, the Applicant has filed three affidavits:

a. Affidavit of Joanna Williams, sworn October 23, 2023 (the "Williams Affidavit");

b. Affidavit of Yue (Roger) Song, sworn December 6, 2023 (the "First Affidavit"); and

c. Affidavit of Yue Song, sworn March 11, 2025 (the "Second Affidavit").

(together, the "Affidavits").

III. ISSUES

66. Before considering the primary issues in this matter, there are three preliminary issues for this Honourable Court to consider:

a. Should the LSA be required to produce the Legal Opinion or the Statement of Regulatory Objectives?

b. What use, if any, should the Court make of the Affidavits?

c. Can the Court consider whether the Profile, the CPD Tool, and the "Political Objective" or the "Political Objectives" are *ultra vires*?

67. The primary issues before the Court are:

a. What is the applicable standard of review?

b. Are Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code *ultra vires*?

c. Has the LSA unreasonably interfered with the Applicant's *Charter* rights to freedom of expression and freedom of religion?

68. With respect to the preliminary issues:

a. The LSA should not be required to produce the Legal Opinion or the Statement of Regulatory Objectives.

b. The Affidavits should be put to no or limited use.

c. The Court should not directly consider whether the Profile, the CPD Tool, or the "Political Objective" or the "Political Objectives" are *ultra vires*.

69. With respect to the primary issues:

a. The applicable standard of review is reasonableness.

b. Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code are *intra vires* as they are a means of upholding and protecting the public interest.

c. The LSA has not unreasonably interfered with the Applicant's *Charter* rights.

IV. ANALYSIS

A. The LSA should not be required to produce the Legal Opinion or the Statement of Regulatory Objectives

70. The procedural rules governing judicial reviews are set out in the *Alberta Rules of Court* (the "Rules of Court").[52]

71. Pursuant to Rules 3.18 and 3.19, when a body is named in a judicial review, the body must prepare a record of proceedings, which is to include:

a. the written record, if any, of the decision or act that is the subject of the judicial review;

b. the reasons given for the decision or act, if any;

c. the document which started the proceeding;

d. the evidence and exhibits filed with the body; and

e. anything else relevant to the decision or act in the possession of the body.

[52] Alta Reg 124/2010.

72. Rule 3.22 of the Rules of Court goes on to set out what evidence the Court may consider when deciding a judicial review:

> When making a decision about an originating application for judicial review, the Court may consider the following evidence only:
>
> (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
>
> (b) if questioning was permitted under rule 3.21, a transcript of that questioning;
>
> (b.1) if the originating application is for relief other than an order in the nature of certiorari or an order to set aside a decision or act, and affidavit from any party to the application;
>
> (c) anything permitted by any other rule or by an enactment;
>
> (d) any other evidence permitted by the Court.

73. As it relates to Rule 3.22(d), the Court has articulated various reasons why it might consider supplementary evidence, which include:

a. to address issues of standing;

b. where there is an allegation of bias but the facts in support of the allegation do not appear in the record of proceedings;

c. to demonstrate a breach of the rules of natural justice not apparent on the record of proceedings; or

d. to reveal the evidence before the decision maker where an adequate record of the proceedings does not exist.[53]

74. In the present case, neither the Legal Opinion nor the Statement of Regulatory Objectives form part of the record of proceedings under Rules 3.18 and 3.19. Neither of them is:

a. the decision or act that is the subject of the judicial review;

b. the reasons given for the decision or act, if any;

c. the document which started the proceeding; or

[53] *Bergman v Innisfree (Village)*, 2020 ABQB 661, para 45.

d. the evidence and exhibits filed with the body.

75. Additionally, neither of them are evidence that the Court may consider on judicial review under Rule 3.22. As it relates to Rule 3.22(d), the Statement of Regulatory Objectives also does not qualify as something "relevant to the decision or act in the possession of the body".

76. The Applicant alleges that the LSA's "Political Objectives" are based on the Statement of Regulatory Objectives. However, as will be further discussed below, the "Political Objectives" are not properly the subject of judicial review. Consequently, the Statement of Regulatory Objectives has no relevance in this proceeding.

77. As for the Legal Opinion, the Legal Opinion is clearly subject to solicitor-client privilege and it is uncontroversial that documents that are subject to solicitor-client privilege need not be included in the record of proceedings or otherwise disclosed.[54]

78. The Applicant suggests that the LSA waived solicitor-client privilege over the Legal Opinion because then LSA President Ken Warren (as he then was) mentioned the existence of the Legal Opinion at an LSA meeting on December 1, 2022. However, this does not constitute a waiver of the privilege.

79. Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege.[55] As it relates to the second requirement, "mere reference to a legal opinion, or even a statement of its bare conclusion" does not automatically result in waiver.[56] The LSA's reference to its membership that it obtained a legal opinion does not demonstrate an intention to waive privilege over the Legal Opinion.

80. Rules 3.18, 3.19, and 3.22 are not necessarily applicable to the Applicant's *Charter* allegations. However, neither the Statement of Regulatory Objectives nor the Legal Opinion are relevant to the Applicant's *Charter* claims either, and, as stated, the Legal Opinion is subject to solicitor-client privilege.

B. <u>The Affidavits should be put to no or limited use</u>

81. The assumption in a judicial review is that the Court will decide the judicial review on the basis of the record of proceedings. More specifically, Rule 3.22(b.1) provides that affidavits are not to be considered if the originating application for judicial review is for relief in the nature of *certiorari* or to set aside a decision or act.

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[54] See for example *Dhillon v General Faculty Council of the University of Alberta*, 1999 ABQB 635.
[55] *S. & K. Processors Ltd v Campbell Avenue Herring Producers Ltd*, [1983] BCJ No 1499, para 6.
[56] *Manson Insulation Products Ltd v Crossroads C&I Distributors*, 2014 ABQB 634, para 62.

82. In *Lethbridge and District Pro-Life Association v Lethbridge (City)*, the Court stated that, consistent with Rule 3.22, the use of affidavits on judicial review is generally not allowed, especially if the affidavits relate to the merits of the decision under review.[57]

83. In some cases, the Court has declined to rule that an affidavit is inadmissible and has instead opted to put the affidavit to limited use.[58] This was the approach taken by the Alberta Court of Queen's Bench (as it then was) in *Schulte v Alberta (Appeals Commission)*, where Graesser J. only considered the affidavit insofar as it helped him to better understand the applicant's position on certain issues.[59]

84. Since the present case is a judicial review, the presumption is that the Court will decide the matter on the basis of the record of proceedings. Further, since the Applicant is seeking relief in the nature of *certiorari* and to set aside a decision or act, there is a general rule that the Court will not consider affidavits.

85. While the Court maintains residual discretion to consider supplementary evidence, none of the reasons articulated by the Court in *Bergman v Innisfree (Village)* for why the Court might do so apply in the present case. Specifically:

    a. standing is not at issue;

    b. there is no allegation of bias;

    c. there is no allegation of a breach of the rules of natural justice; and

    d. the record of proceedings provides the evidence that was before the LSA.

86. If, however, the Court is disinclined to rule that the Affidavits are inadmissible, then the Affidavits should be put to limited use.

87. Following the approach used by this Court in *Schulte v Alberta (Appeals Commission)*, the Court might allow the First and Second Affidavits into evidence but only use them to help better understand the Applicant's position on certain issues. However, this allowance ought not to apply to the Williams Affidavit since the Williams Affidavit, not being from the Applicant, would be of limited use in helping the Court to understand the Applicant's position.

88. The Applicant also alleges that his *Charter* rights have been violated. However, the Court is capable of determining the *Charter* issues in this matter without the Affidavits.

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[57] *Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654, para 11.
[58] *Schulte v Alberta (Appeals Commission)*, 2015 ABQB 17, para 33.
[59] *Ibid*.

C. The Court should not directly consider whether the Profile, the CPD Tool, or the "Political Objective" or the "Political Objectives" are *ultra vires*

89. The Court should not directly consider whether the Profile, the CPD Tool, or the "Political Objective" or the "Political Objectives" are *ultra vires* for a number of reasons.

90. The first reason relates to the Rules of Court. The procedural rules governing judicial reviews are set out in the Rules of Court. The threshold rule, Rule 3.15(1), permits a person to bring an originating application for judicial review "against a person or body whose decision, act or omission is subject to review".

91. In the present case, the Applicant is asking the Court to review the following:

a. Rules 67.2, 67.3, and 67.4;

b. the Profile;

c. the CPD Tool;

d. Part 6.3 of the Code; and

e. the "Political Objective" or the "Political Objectives".

92. Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code constitute "decisions" or "acts" that are subject to judicial review under Rule 3.15(1).[60]

93. However, none of the Profile, the CPD Tool, or the "Political Objective" or the "Political Objectives" are a "decision, act, or omission". Rather, as explained above:

a. the Profile is a document that sets out nine domains or areas of competency that the LSA believes are important to maintain safe, effective, and sustainable legal practice in Alberta today, or, to use the description put forth by the Applicant, it is a description of what the LSA considers to be professional competence;[61]

b. the CPD Tool is a platform that members of the LSA are to use to submit their CPD plan to the LSA; and

c. the "Political Objective" or the "Political Objectives" are the Applicant's interpretation of the LSA's thoughts, beliefs, and motivations.

[60] See for example *Okotoks (Town) v. Foothills (Municipal District No. 31)*, 2013 ABCA 222, para 9, where the Court held that subordinate legislation can be "a decision or act".
[61] Originating Application, para 27.

94. Further, none of the Profile, the CPD Tool, or the "Political Objective" or the "Political Objectives" are justiciable.

95. As put in *De Smith's Judicial Review*, "[i]n respect of the institutional capacity of the courts, there are some decisions which [the courts] are ill-equipped to review – those which are not ideally justiciable or, in other words, 'not amenable to the judicial process', or indeed those which are better able to be determined by other bodies".[62]

96. In Canada, there is no articulable test for justiciability and, as put by the Supreme Court of Canada, "[t]here is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible".[63]

97. In the United Kingdom, where the law on justiciability is more developed than it is in Canada, decisions which are not justiciable include:

    a. "decisions which cannot be impugned on the basis of any objective standard because their resolution is essentially a matter of individual (including political) preference"; and

    b. "when a legal challenge is made on substantive grounds to a matter which is 'polycentric' – where the decision-taker has broad discretion involving policy and public interest considerations".[64]

98. Relatedly, a matter may not be justiciable if it raises a political question. The premise here is that some disputes are political in nature and "must be resolved, if at all, through [a] political process".[65] Political questions that are unsuitable for adjudication "will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process".[66]

99. None of the Profile, the CPD Tool, or the "Political Objective" or the "Political Objectives" are justiciable. They raise questions that are unsuitable for the Court to adjudicate. To use the language set out above:

    a. the Profile and the CPD Tool are essentially matters of preference – they represent the Benchers' preferred methods of ensuring CPD;

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[62] Lord Woolf, et al, *De Smith's Judicial Review*, 7th ed (London: Sweet and Maxwell, 2013), p 22 (citations removed) **[Tab 1].**

[63] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, para 34.

[64] *Ibid*.

[65] Lorne M Sossin, *Boundaries of Judicial review: The Law of Justiciability in Canada,* 2d ed (Carswell, 2012), p 161 **[Tab 2]**.

[66] *Ibid*.

b. the Benchers implemented the Profile and the CPD Tool as an exercise of their broad discretion involving policy and public interest considerations; and

c. the Profile and the CPD Tool involve moral, strategic, ideological, historical, and policy considerations.

100. As it relates to the "Political Objective" or the "Political Objectives", the LSA disagrees with the Applicant's characterizations. However, even if the LSA was motivated by the "Political Objective" or the "Political Objectives", they still would not be justiciable. Rather, they are the epitome of a political question.

101. In *Canada (Attorney General) v Democracy Watch*, the Federal Court of Appeal said the following:

> As in all judicial review applications, the Court must first decide whether the decision sought to be set aside is subject to judicial review. Not all administrative action gives rise to a right of review. There are many circumstances where an administrative body's conduct will not trigger a right to judicial review. Some decisions are simply not justiciable, crossing the boundary from the legal to the political.[67]

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.

D. The applicable standard of review is reasonableness

103. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, the Supreme Court of Canada set out a new framework for determining the standard of review.[68] Under the *Vavilov* framework:

a. the presumption is that the standard of review is reasonableness;

b. the presumption may be rebutted, and a standard of correctness will apply, if:

i. the legislature so indicates; or

ii. the rule of law so requires.

104. With respect to the second exception, the Court in *Vavilov* went on to say that the rule of law may require the standard of correctness to apply to the following types of questions: "constitutional questions, general questions of law of central importance to the legal system as

[67] 2020 FCA 69, para 19.
[68] 2019 SCC 65 [*Vavilov*].

a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies".[69]

105. The Court in *Vavilov* expressly held that "true questions of jurisdiction or *vires*" would no longer attract review on a standard of correctness.[70] Rather, the new framework, and the presumption of a standard of review of reasonableness, would apply to questions of *vires*.

106. Recently, in *Auer v Auer*, a case concerning a question of *vires*, the Supreme Court of Canada confirmed that "*Vavilov's* robust reasonableness standard is the default standard when reviewing the *vires* of subordinate legislation".[71]

107. The Supreme Court also expressly held that "the rule of law does not require that questions of *vires*, in themselves, be reviewed for correctness" and "[a] robust reasonableness review is sufficient to ensure that statutory delegates act within the scope of their lawful authority".[72]

108. The Court did, however, say that in "exceptional cases", a *vires* review may engage a question that ought to be reviewed for correctness.[73] As an example, the Court pointed to "a challenge to the validity of subordinate legislation on the basis that it fails to respect the division of powers between Parliament and provincial legislatures".[74]

109. While decided before *Vavilov* and *Auer*, the Supreme Court of Canada's decision in *Green v Law Society of Manitoba* is also important. In *Green*, which is discussed in further detail below, the Supreme Court asked itself the following question: "What standard of review applies to a question regarding the validity of rules made by a law society?"[75] In answer to this question, the Court said:

> In my view, the standard applicable to the review of a law society rule is reasonableness. A law society rule will be set aside only if the rule "is one no reasonable body informed by [the relevant] factors could have [enacted]". This means "that the substance of [law society rules] must conform to the rationale of the statutory regime set up by the legislature".[76]

110. Similarly, in *Morris v Law Society of Alberta (Trust Safety Committee)*, the Alberta Court of Queen's Bench (as it then was) considered the validity of rules made by the LSA.[77] Within the *Vavilov* framework, the Applicant argued that the rules at issue had the potential to impact

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[69] *Ibid*, para 53.
[70] *Ibid*, para 65.
[71] 2024 SCC 36 [*Auer*].
[72] *Ibid*, para 26.
[73] *Ibid*, para 27.
[74] 2017 SCC 20 [*Green*].
[75] *Ibid*, para 17.
[76] *Ibid*, para 20 (citations removed).
[77] 2020 ABQB 137 [*Morris*].

solicitor-client privilege – a general question of law of central importance to the legal system as a whole – and thus the appropriate standard of review was correctness. This Court, however, determined that the appropriate standard of review was reasonableness. In reaching this conclusion, the Court identified that the central issue did not concern a claim of solicitor-client privilege but instead concerned an issue of *vires*.[78]

111. In addition, in *Shaulov v Law Society of Ontario*, in response to a challenge to the Law Society of Ontario's licensing examination scheme and policies, the Ontario Superior Court of Justice definitively stated that "[t]he standard of review applicable to the review of law society rules is reasonableness".[79]

112. Based on the foregoing, the standard of review in the present case is reasonableness:

a. the issues concern the *vires* of the Rules and the Code, which are subordinate legislation, and *Vavilov's* robust reasonableness standard is the "default standard" for such questions;

b. the legislature has not, in the *LPA*, indicated that a standard of correctness ought to apply; and

c. the rule of law does not require a correctness standard. More specifically, the present case does not raise constitutional questions, general questions of law of central importance to the legal system as a whole, or questions regarding the jurisdictional boundaries between two or more administrative bodies.

113. Despite the foregoing, the Applicant has suggested that the standard of review is correctness. In support of this argument, the Applicant asserts that the LSA's actions violate the rule of law. Therefore, he says, the rule of law "demands" that the standard of review is correctness.[80]

114. Simply asserting that the rule of law has been violated is not enough to justify the application of the correctness standard. In fact, if mention of the rule of law is reason enough to displace the presumption of reasonableness, then the presumption of reasonableness is not a presumption at all.

115. Rather and as mentioned above, the Supreme Court of Canada has specifically said that only "exceptional cases", such as those involving the federal and provincial division of powers, will result in exceptions to the presumption of reasonableness.[81] The Applicant has failed to demonstrate that this is such a case.

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[78] *Ibid*, paras 42-46.
[79] 2023 ONSC 5242, para 26.
[80] Applicant's written submissions, para 188.
[81] *Auer*, *supra* note 71, para 27.

116. Further, even if it is accepted that the rule of law is implicated here, that does not take away from the fact that, like in *Morris*, the central issue is one of *vires*, not the rule of law or the independence of the bar.

117. In summary and consistent with the Supreme Court of Canada's repeated rulings, the standard of review in this case is reasonableness.

E. Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code are *intra vires*

i. How to conduct a reasonableness review of the vires *of subordinate legislation*

118. In *Auer*, the Supreme Court of Canada explained what reasonableness means in the context of determining the *vires* of subordinate legislation. The Court, pulling from its decisions in *Vavilov* and *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*[82] (a case concerning the validity of Ontario regulations adopted by the Lieutenant Governor in Council that aimed to control the price of prescription drugs) said the following about reasonableness:

a. reasonableness review ensures that courts intervene in administrative matters only where it is truly necessary to do so to safeguard the legality, rationality, and fairness of the administrative process;[83]

b. reasonableness review "finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers";[84]

c. in conducting a reasonableness review, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision;[85] and

d. when conducting a *vires* review, a court does not undertake a *de novo* analysis to determine the correct interpretation of the enabling statute and then ask whether, on that interpretation, the delegate had the authority to enact the subordinate legislation. Instead, "the court ensures that the delegate's exercise of authority falls within a reasonable interpretation of the enabling statute, having regard to the relevant constraints".[86]

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[82] 2013 SCC 64 [*Katz*].
[83] *Auer*, *supra* note 71, para 46, citing *Vavilov*, *supra* note 68, para 13.
[84] *Auer*, *ibid*.
[85] *Ibid*, para 50.
[86] *Ibid*, para 65.

119. The Supreme Court of Canada in *Auer* very helpfully went on to provide a roadmap for conducting a reasonableness review of subordinate legislation. Again pulling from *Katz* and *Vavilov*, the Court highlighted the following principles:

a. subordinate legislation must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object.[87] Statutory delegates are empowered to interpret the scope of their authority when enacting subordinate legislation. Their interpretation must, however, be consistent with the text, context and purpose of the enabling statute.[88] The governing statutory scheme, other applicable statutory or common law, and the principles of statutory interpretation are particularly relevant constraints when reviewing the vires of subordinate legislation.[89]

b. the challenged subordinate legislation and the enabling statute should be interpreted using a broad and purposive approach to statutory interpretation.[90]

c. a review of the *vires* of subordinate legislation does not involve assessing the policy merits of the subordinate legislation. The Court should not: ask whether the regulations are "necessary, wise, or effective"; inquire into the underlying "political, economic, social or partisan considerations"; or assess whether the regulations "will actually succeed at achieving the statutory objectives".[91]

   The "reasonableness standard does not assess the reasonableness of the rules promulgated by the regulation-making authority; rather, it addresses the reasonableness of the regulation-making authority's interpretation of its statutory regulation-making power";[92]

d. subordinate legislation benefits from a presumption of validity.[93] This means that the burden is on the challenger to demonstrate invalidity.[94] It also means that, wherever possible, the subordinate legislation and the enabling should be interpreted in a manner that renders the subordinate legislation *intra vires*;[95]

e. a reasonableness review is possible even in the absence of formal reasons. Formal reasons are not usually provided for the enactment of subordinate legislation. However, the reasoning process can often be deduced from various sources, such as debate,

[87] *Ibid*, para 3.
[88] *Ibid*, para 64.
[89] *Ibid*, para 60.
[90] *Ibid*, para 3.
[91] *Ibid*, paras 29, 55-58.
[92] *Ibid*, para 56, citing Paul Salembier, *Regulatory Law and Practice*, 3d ed (Toronto: LexisNexis, 2021).
[93] *Ibid*, para 50.
[94] *Ibid*, para 29.
[95] *Ibid*, para 37.

deliberations, and statements of policy. Even where such sources are not available, the record and the context may reveal the motive or reason;[96] and

f. reviewing the *vires* of subordinate legislation is fundamentally an exercise of statutory interpretation to ensure that the delegate acted within the scope of their lawful authority.[97] This exercise must be carried out in accordance with the modern principle of statutory interpretation. The governing statutory scheme, other applicable statutory or common law, and the principles of statutory interpretation are particularly relevant constraints when determining whether the subordinate legislation at issue falls reasonably within the scope of the delegate's authority.[98]

120. Applying this framework, Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code are *intra vires* and reasonably within the LSA's scope of authority.

i. The policy merits of the subordinate legislation

121. Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code constitute subordinate legislation. The primary issue before the Court in this proceeding is whether they are *ultra vires*.

122. Thus, to use the words from the roadmap provided by *Auer*, *Vavilov*, and *Katz*, a review of the *vires* of Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code does not involve assessing their policy merits and the Court should not:

a. ask whether any of Rules 67.2, 67.3, and 67.4 or Part 6.3 of the Code are necessary, wise, or effective;

b. inquire into the underlying political, economic, social, or partisan considerations; or

c. assess whether Rules 67.2, 67.3, and 67.4 or Part 6.3 of the Code will actually succeed at achieving the statutory objectives.

123. It again bears emphasizing that there is a distinction between the Rules on the one hand and the documents, tools, and programs promulgated under them on the other hand. Rules 67.2 and 67.3 ought to be distinguished from the Profile and the CPD Tool and Rule 67.4 ought to be distinguished from The Path. For Rules 67.2, 67.3, and 67.4, the Court may certainly consider their *vires*. However, the Profile, the CPD Tool, and The Path are different. They are a step removed and the Court ought not to consider their content or merits.

[96] *Ibid*, paras 52-54.
[97] *Ibid*, paras 59-60.
[98] *TransAlta Generation Partnership v. Alberta*, 2024 SCC 37, para 17 [*TransAlta*]. See also *Auer*, *ibid*, para 63.

ii. *The presumption of validity*

124. This Court must also consider that Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code benefit from a presumption of validity. As such, the burden is on the Applicant to demonstrate that they are invalid. Additionally, if necessary and wherever possible, Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code are to be construed in a manner which renders them *intra vires*.

iii. *The reasons*

125. As mentioned above, a reasonableness assessment can be performed even in the absence of formal reasons.

126. In the present case, various sources indicate that, as it relates to the amendments made to Rules 67.2 and 67.3, the LSA's motives and reasons were as follows:

a. to prioritize competence initiatives in order to have the most impact on the profession and public interest;

b. to drive competence and thereby increase the effectiveness, wellness, and ethics of the profession;

c. to account for the reality that members of the LSA have different levels of experience, levels of practice, and access to firm-based competence programming;

d. to support practitioners at all points of practice and take into account wellness as part of the competence framework; and

e. to raise competence across the profession by not only encouraging competence but providing lawyer competence educational programming where appropriate.[99]

127. As it relates to Rule 67.4, the LSA's motives and reasons were to increase the competence of the profession, including by increasing the cultural competence of its members relative to the following topics: the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law and Aboriginal-Crown relations.[100]

128. Concerning Part 6.3 of the Code, one of the LSA's motivations for updating the provisions was to keep the Code consistent with the Federation's Model Code. As mentioned above, consistency across the codes is important so that the rules of conduct are harmonized across Canada. The LSA and the Federation were also driven by the following:

[99] CRP, Vol A & B, pp 338-341. See especially pp 338-339.
[100] *Ibid*, pp 279-296.

a. a concern that the previous provisions might not adequately reflect the importance of preventing discrimination and harassment;

b. empirical and anecdotal evidence that discrimination, harassment, and bullying are prevalent in the legal profession. The sources of the evidence included: a consultation paper from the Law Society of Ontario, results of articling student surveys by the LSA, the Law Society of Ontario, the Law Society of Saskatchewan, and the Law Society of Manitoba, and a report from the International Bar Association; and

c. a desire to "provide significantly greater guidance on the duties of non-discrimination and non-harassment" and also to "include specific guidance regarding bullying".[101]

129. 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.

iv. *Statutory interpretation*

130. The fundamental question to be considered in assessing if Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code are *intra vires* is whether they are consistent with the specific provisions of the LPA and its overriding purpose or object.

131. In reviewing the challenged Rules and the Code, they and the LPA should be interpreted using a broad and purposive approach to statutory interpretation.

132. The modern principle of statutory interpretation is that the words of the statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[102] In applying the modern principle of statutory interpretation, the constraints of other applicable statutory or common law must be taken into account.

133. When these constraints are examined, it is evident that the LSA's role goes far beyond that suggested by the Applicant. The LSA is necessarily involved in the ongoing monitoring, supervision, and education of members of the profession and is given the authority to proactively manage the competency and conduct of lawyers.

[101] *Ibid*, pp 21-142. See especially pp 58-59.
[102] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para 21, citing E. A. Driedger, *Construction of Statutes* (2d ed. 1983), at p 87.

a. The constraints

134. In the present case, the common law significantly informs the statutory interpretation exercise. The following principles are well-established and relevant:

a. the purpose of an independently regulating profession is to uphold and protect the public interest;

b. the meaning of "public interest" is for the independently regulating profession to decide; and

c. in the LPA, the LSA has been given "broad regulatory powers to accomplish its mandate" of protecting the public interest.

135. As it relates to the first principle, it is important to note that many professions in Alberta, and also in other Canadian jurisdictions, are self-regulating. What's more, in every single Canadian province and territory, the legal profession is self-regulating. Thus, independently regulating professions are relatively common and, as it relates to independently regulating professions, it is universally understood and accepted that "[t]he primary purpose of the establishment of self-governing professions is the protection of the public".[103]

136. Concerning law societies in particular, the Supreme Court of Canada has explained that a necessary corollary of independent regulation is the protection of the public interest:

a. "[f]or many years, this Court has recognized that law societies self-regulate in the public interest";[104]

b. "the regulation of professional practice through a system of licensing is directed toward the protection of vulnerable interests — those of clients and third parties;"[105]

c. "[t]he legal profession in British Columbia, as in other Canadian jurisdictions, has been granted the privilege of self-regulation. In exchange, the profession must exercise this privilege in the public interest";[106] and

d. "a major objective of the Act is to create a self-regulating professional body with the authority to set and maintain professional standards of practice. This, in turn, requires that the Law Society perform its paramount role of protecting the interests of the public".[107]

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[103] James T. Casey, *Regulation of Professions in Canada* (Thomson Canada, loose-leaf, 1994), §1:1 **[Tab 3]**.
[104] *Law Society of British Columbia v. Trinity Western*, 2018 SCC 32, para 36 [*Trinity Western*].
[105] *Ibid*, para 36.
[106] *Ibid*, para 32.
[107] *Law Society of New Brunswick v Ryan*, 2003 SCC 20, para 36.

137. The Alberta Court of Queen's Bench (as it then was) has also confirmed that the LSA has "a broad public interest authority".[108]

138. As it relates to the second principle, the Supreme Court of Canada has explicitly said that what is in the "public interest" is "for the Law Society to determine"[109] and also that "the law society's interpretation of the public interest is owed deference".[110] As recognized by the Supreme Court, where the legislature has delegated aspects of professional regulation to the professional body itself, that body has primary responsibility for the development of structures, processes, and policies for regulation. This delegation recognizes the body's particular expertise and sensitivity to the conditions of practice. This delegation also maintains the independence of the bar; a hallmark of a free and democratic society.[111]

139. Furthermore, a law society must be afforded "considerable latitude in making rules based on [their] interpretation of the 'public interest' in the context of [their] enabling statute".[112]

140. The last principle, that the LPA gives the LSA "broad regulatory powers to accomplish its mandate" of protecting the public interest, was the finding of the Honourable Madam Justice A. Loparco in *Morris*.[113] As mentioned above, in *Morris*, the Court considered the validity of certain rules made by the LSA. The Court ultimately determined that the rules at issue were *intra vires*, stating:

    a. "the Legislature has given the LSA a broad public interest authority and broad regulatory powers to accomplish its mandate";[114] and

    b. "[t]he law society cases … support a broad interpretation of the delegation of legislative authority to law societies".[115]

141. The Supreme Court of Canada's decisions in *Green* and *Trinity Western* also operate as significant constraints.

142. Starting with *Green*, the circumstances considered by the Court in *Green* included the following:

    a. the Law Society of Manitoba (the "LSM") implemented a CPD program which required its members to complete 12 hours of CPD activities each year;

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[108] *Morris*, *supra* note 77, para 63.
[109] *Green*, *supra* note 74, para 29.
[110] *Trinity Western*, *supra* note 104, para 38.
[111] *Ibid*, para 37.
[112] *Green*, *supra* note 74, para 24.
[113] *Morris*, *supra* note 77, para 63.
[114] *Ibid*, para 63.
[115] *Ibid*, para 77.

b. if a member failed to complete the requirement, then they would be automatically suspended from the LSM;

c. Mr. Green refused to complete 12 hours of CPD activities and was suspended from the LSM; and

d. Mr. Green alleged that the LSM did not have the authority to suspend him for failing to comply with the CPD program.[116]

143. The question before the Court was whether the impugned rule which provided for a mandatory suspension was *ultra vires* and unreasonable. In response, the Court ruled that:

a. "[t]he establishment of mandatory standards such as those provided for in the impugned rules is compatible with the Law Society's purpose and duties";[117]

b. "[t]o set such a [mandatory] standard in order to maintain a practicing certificate which, in the benchers' view, serves to protect the public, is in keeping with the duties given to the Law Society under the Act";[118]

c. "[t]o ensure that those standards have an effect, the Law Society must establish consequences for those who fail to adhere to them";[119] and

d. "[a] suspension is a reasonable way to ensure that lawyers comply with the CPD program's educational requirements".[120]

144. The Court also emphasized that Mr. Green's opinion on the usefulness of the CPD program was irrelevant, saying, "it is not up to Mr. Green to decide whether CPD activities are valuable or adequate. The legislature has decided that … it is for the Law Society to determine the nature of those standards".[121]

145. The Court ultimately held that "the rules establishing a mandatory CPD program that permit the suspension of a lawyer as a consequence for contravening those rules are not unreasonable".[122]

146. Turning to *Trinity Western*, the facts before the Supreme Court of Canada were as follows:

a. Trinity Western University ("TWU") sought to open a law school;

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[116] *Green*, *supra* note 74.
[117] *Ibid*, para 45.
[118] *Ibid*.
[119] *Ibid*, para 46.
[120] *Ibid*, para 47.
[121] *Ibid*, para 48.
[122] *Ibid*, para 50.

b. students of the proposed law school would be required to adhere to a covenant prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman";

c. the Law Society of British Columbia (the "LSBC") passed a resolution declaring that TWU's proposed law school was not an approved faculty of law because of its mandatory covenant; and

d. TWU challenged the LSBC's decision on the basis that it violated section 2(a) of the *Charter*.[123]

147. The Supreme Court of Canada ultimately decided that the LSBC's decision not to approve TWU's proposed law school was reasonable. In reaching this conclusion, the Supreme Court noted that the LSBC's decision was based on the following objectives:

a. promoting equality;

b. ensuring equal access to the legal profession;

c. supporting diversity within the bar; and

d. preventing harm to LGBTQ law students.[124]

148. The Supreme Court held that it was reasonable for the LSBC to conclude that these things were valid means to pursue the public interest since the LSBC "has an overarching interest in protecting the values of equality and human rights in carrying out its functions".[125]

149. It also bears noting that as it relates to Part 6.3 of the Code, the provisions very closely mirror other statutory and common law. For example, the *Alberta Human Rights Act*[126] contains various prohibitions on discrimination and the *Occupational Health and Safety Act*[127] prohibits workplace harassment, including bullying. Both statutes also prohibit reprisal.[128]

150. All of these constraints must be considered when applying the modern principle of statutory interpretation in the present case.

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[123] *Trinity Western*, *supra* note 104.
[124] *Ibid*, para 40.
[125] *Ibid*, para 41.
[126] *Alberta Human Rights Act*, RSA 2000, c A-25.5.
[127] *Occupational Health and Safety Act*, SA 2020, c O-2.2. See for example s 3(1)(c).
[128] See for example *ibid*, s 18. See also *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 10.

b. The modern principle of statutory interpretation

151. The words, scheme, and object of the LPA support an expansive construction of the LSA's rule-making authority.

152. At a high level, the LPA covers a wide range of topics, including: membership in the profession; qualifications to practice; conduct of members; and protection of persons dealing with members.

153. Contrary to the Applicant's arguments, the LSA is not just involved at the time of admission and does not just provide an ethical code and then leave lawyers alone to practice independently, barring future misconduct. The LSA is necessarily involved in the monitoring, supervision, and education of lawyers between enrollment and discipline.

154. As it relates to the object of the LPA, the LSA acknowledges that the LPA does not include a "purpose" clause or a clause that specifically mentions the public interest as some other statutes do.

155. However, this does not mean that the LPA is without a purpose and that its role is not to uphold and protect the public interest.

156. Rather, the legal principles and precedents referred to above, as well as the words and the scheme of the LPA, clearly and definitively demonstrate that the LSA's purpose is to regulate the legal profession in the public interest and "the Legislature has given the LSA a broad public interest authority and broad regulatory powers to accomplish its mandate".[129]

157. In examining the words and scheme of the LPA, it demonstrates a requirement to protect the public interest with broad rule making authority.

158. Section 6 of the LPA sets out the powers of the Benchers. Section 6(l) specifically provides that the Benchers may "establish a code of ethical standards for members". Section 6 and subsection (l) in particular are broad and open-ended. There are no prescriptions or restrictions concerning the code of ethical standards. Rather, the content and substance of the code of ethical standards are left for the Benchers to decide.

159. Part 6.3 of the Code establishes ethical standards for members related to discrimination and harassment. It does exactly what section 6(l) of the LPA permits the Benchers to do. It also protects the public interest by ensuring members of the profession are not engaging in discrimination or harassment.

[129] *Morris*, *supra* note 77, para 63.

160. Accordingly, Part 6.3 of the Code falls reasonably within the LSA's scope of authority under section 6(l) of the LPA.

161. Section 7(1) of the LPA gives the Benchers the power to make rules "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". This provision vests the LSA with a relatively open-ended rule-making authority provided that such rule making authority upholds and protects the public interest.

162. Section 7(2) goes on to list specific items that the Benchers may make rules in relation to. But it explicitly provides that the list of items does not restrict the generality of subsection (1) which confirms that the plenary power is not limited by any of the specific items.[130]

163. Rule 67.2 requires every active member to prepare and submit to the LSA an annual CPD plan and Rule 67.4 allows the Benchers to prescribe additional specific CPD requirements. Such rules are for the exercise or carrying out of the LSA's powers and duties to regulate the profession. As recognized by the Supreme Court of Canada, the establishment of mandatory CPD requirements is compatible with the LSA's purpose and duties.[131]

164. Similar reasoning applies to the automatic suspensions set out in Rules 67.3 and 67.4. Such rules are for the exercise or carrying out of the LSA's powers and duties to regulate the profession and, as recognized by the Supreme Court of Canada, a suspension is a reasonable way to ensure that lawyers comply with mandatory CPD requirements.[132]

165. In addition, section 7(2)(g) explicitly provides that the LSA has the power to make rules respecting "the suspension of the membership of a member or the registration of a student at law, without notice or hearing, if the member or student-at-law does not … do any other act by the time specified by or determined in accordance with the rules". This is precisely what Rules 67.3 and 67.4 do.

166. Section 6(n) of the LPA also bears mentioning as it gives the Benchers the power to, by resolution, "take any action and incur any expenses the Benchers consider necessary for the promotion, protection, interest or welfare of the Society". Consistent with all of the above, this provision equips the LSA with a broad power to act as it sees fit, subject only to the constraint that the Benchers themselves must consider their actions necessary for the promotion, protection, interest, or welfare of the LSA.

167. The Applicant states that this clause is "clearly related to the interests of the law societies themselves, not the profession or public writ large" (emphasis in original) and that it "cannot reasonably be interpreted to mean that the LSA has the power to regulate the profession".[133]

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[130] *Green*, *supra* note 74, para 77.
[131] *Ibid*, para 45.
[132] *Ibid*, para 47.
[133] Applicant's written submissions, para 210.

This argument mistakes the nature of the LSA and professional regulation more generally. The LSA does not have its own independent interests. The LSA's only interest, its *raison d'être*, is the public interest.

168. The Applicant's additional arguments concerning the public interest are somewhat difficult to follow. At one point, he seems to argue that, because the LPA does not include a public interest clause, the LSA does not have the power to regulate the legal profession in the public interest.[134] However, elsewhere in his written submissions, he argues that the LSA is required to regulate the legal profession in the public interest which he defines as "the rule of law be[ing] preserved".[135]

169. The Applicant is wrong about at least two things here; the public interest is not simply the rule of law being preserved and, more importantly, it is the LSA and not the Applicant that is responsible for defining the public interest.

170. Furthermore, the doctrine of jurisdiction by necessary implication also applies to the LSA.

171. As stated by the Supreme Court of Canada in *Green*, the LPA must be construed such that the powers it confers includes not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.[136] This is consistent with section 25(2) of the *Interpretation Act*.[137]

172. As it relates to the scheme of the Act, part of the Applicant's argument is that the LPA "nowhere mentions or implies LSA involvement in CPD".[138] However, the Applicant himself contradicts this argument by later acknowledging that the LSA has the ability to impose CPD requirements on its members.

173. For example, the Applicant specifically states that "Song does not challenge the LSA's right to impose CPD obligations of all sorts"[139] and the Applicant also states that he is not contesting the parts of Rule 67.2 that require members to prepare a plan for their continuing professional development.[140] This inconsistency reveals the truth of the Applicant's position: it's not that the LSA lacks the statutory authority; it's that the Applicant does not like or agree with the CPD program that the LSA has chosen.

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[134] Applicant's written submissions, paras 205-206.
[135] Applicant's written submissions, para 169.
[136] *Green*, *supra* note 74, para 42.
[137] *Interpretation Act*, RSA 2000, c I-8.
[138] Applicant's written submissions, para 243.
[139] Applicant's written submissions, para 201.
[140] Applicant's written submissions, para 196.

174. Regardless, the case law clearly establishes that CPD programs are an important part of the public interest:

> [a law society] is required by statute to protect members of the public who seek to obtain legal services by establishing and enforcing educational standards for practising lawyers. CPD programs serve this public interest and enhance confidence in the legal profession by requiring lawyers to participate, on an ongoing basis, in activities that enhance their skills, integrity and professionalism. CPD programs have in fact become an essential aspect of professional education in Canada. Most law societies across the country have implemented compulsory CPD programs.[141]

v. *Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code are reasonable*

175. As the above analysis demonstrates, Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code fall reasonably within the LSA's scope of authority as they are consistent with the specific provisions of the LPA and its overriding purpose or object.

176. By way of summary:

a. the evidence indicates that the LSA was motivated to increase the competence and ethics of the profession;

b. the purpose and object of the LSA, as set out in the LPA, is to protect the public interest;

c. the meaning of public interest is for the LSA to decide and is owed deference;

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;

ii. mandatory standards which, in the benchers' view, serve to protect the public are in keeping with the duties given to a law society;

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;

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

[141] *Green*, supra note 74, para 3.

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; and

vi. the public interest may include protecting the values of equality and human rights;

e. the LSA has broad regulatory powers to accomplish its mandate of protecting the public interest;

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;

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;

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; 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.

177. While the Applicant repeatedly argues that the public interest is limited to "legal competence, legal ethics, and independence of the bar", that is not the case. As outlined above, the public interest includes ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students. It also includes upholding a positive public perception of the legal profession.[142]

178. Fundamentally, the public interest is a broad concept that is within the LSA's discretion to determine on the basis of a number of policy considerations related to the public interest.

179. With respect to the challenged Rules and the Code, the LSA determined that these Rules and the Code were needed to ensure competency within the profession, which included increasing the cultural competence of its members, and to demonstrate to members the importance of protecting against discrimination and harassment. The LSA is entitled to consider how to promote the competence of the bar as a whole.

180. The competency of the profession, including cultural competency, and the elimination of discrimination and harassment are inherent to protecting public confidence in the profession

[142] *Trinity Western*, *supra* note 104, para 40.

and in promoting the quality of legal services provided to the public. A bar with cultural competency is more responsive to the needs of the public it serves.

181. In promoting the public interest in the administration of justice and, relatedly, public confidence in the legal profession, the LSA was entitled to consider competence and cultural competence. A lack of cultural competence in the profession could undermine public confidence in the LSA's ability to independently regulate in the public interest.

182. In addition, according to the Supreme Court, all of the Rules and the Code must be viewed from the following perspectives:

a. the starting point is judicial restraint and respect for the LSA's role;

b. the court is not to undertake a *de novo* analysis;

c. the court is not to consider the policy merits of the subordinate legislation;

d. the court should not: ask whether the subordinate legislation is necessary, wise, or effective; inquire into the underlying political, economic, social, or partisan considerations; or assess whether the subordinate legislation will actually succeed at achieving the statutory objective;

e. the court is to presume that the subordinate legislation is valid;

f. the onus is on the Applicant to show that the subordinate legislation is unreasonable; and

g. wherever possible, the subordinate legislation and the enabling statute should be interpreted in a manner that renders the subordinate legislation *intra vires*.

183. Based on all of this, Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code are *intra vires* the LSA. They fall within a reasonable interpretation of the LSA's authority under the LPA, having regard to the relevant constraints. The LPA grants the LSA extremely broad authority to establish rules and ethical standards. This authority is constrained by the requirement that the LSA uphold and protect the public interest. Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code respect this constraint.

F. The LSA has not unreasonably interfered with the Applicant's *Charter* rights

i. The LSA has not interfered with the Applicant's Charter *rights at all*

184. Section 2(a) of the *Charter* provides that everyone has the right to "freedom of conscience and religion". The test for determining whether section 2(a) has been infringed is as follows:

a. does the claimant sincerely believe in a belief or practice that has a nexus with religion; and

b. does the impugned measure interfere with the claimant's ability to act in accordance with their religious beliefs in a manner that is more than trivial or insubstantial?[143]

185. Section 2(b) of the *Charter* provides that everyone has the right to "freedom of thought, belief, opinion and expression". The test for determining whether section 2(b) has been infringed is as follows:

a. does the activity in question have expressive content;

b. does the method or location of this expression remove that protection; and

c. does the government action in question infringe that protection, either in purpose or effect?[144]

186. Applying these tests, it is clear and obvious that the LSA has not infringed on the Applicant's section 2(a) or 2(b) rights.

187. The Applicant bears the onus of establishing that their *Charter* rights were infringed. In the present case, the Applicant identifies the tests just set out but fails to apply them. His arguments, however, appear to be as follows:

a. the "Political Objective" or the "Political Objectives" and the "Theories" are in conflict with his own beliefs;

b. the LSA requires him to complete The Path and to complete The Path, he must answer multiple choice questions, and the Applicant does not believe that the "correct" answers are actually correct;

c. the LSA requires him to demonstrate what the LSA calls "cultural competence" or else his legal practice will be deemed unsafe, ineffective, and unsustainable; and

d. the LSA requires the Applicant to avoid engaging in "harassment and discrimination" or else his conduct may be "deserving of sanction".

188. In response, it's important to clarify what actions or measures the LSA has *actually* taken. As already set out:

[143] *Trinity Western*, *supra* note 104, para 63.
[144] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, para 38.

a. the LSA amended Rules 67.2 and 67.3 so that a member is required to submit their CPD plan to the LSA and, on request by the LSA, produce a copy of the CPD plan and participate in a review of the CPD plan by the LSA;

b. the LSA introduced a new CPD program under which each member is to develop a personalized learning plan for the CPD program year. In developing a plan, the member is asked to reference the Profile – a document which sets out nine domains or areas of competency that the LSA believes are important to maintain safe, effective, and sustainable legal practice in Alberta today. One of the domains is "Cultural Competence, Equity, Diversity, and Inclusion". This competency is summarized as follows:

> Lawyers have an awareness of the unique experiences of the enumerated groups set out in the *Alberta Human Rights Act*. They implement strategies to meet the specific needs of individuals from these groups to achieve culturally or community-appropriate services and outcomes. Lawyers treat all people with dignity and respect and take active steps to support and advocate for members of enumerated groups.[145]

While the LSA requires its members to complete a CPD plan in relation to the Profile, "lawyers are not required to demonstrate competency in every area of the Profile each year".[146] Rather, a lawyer is required to select two or more competencies of their choosing (not domains) contained within the Profile to focus on in developing their learning plan. This approach acknowledges that CPD plans are personal to each lawyer, their practice, and their learning goals and that the LSA does not expect that all lawyers will be highly proficient in all domains included in the Profile. Once a member's CPD plan is complete, the member is to use the CPD Tool to submit their plan to the LSA. The CPD Tool was created based on the Profile;

c. the LSA introduced Rule 67.4 to allow it to prescribe additional specific CPD requirements in a form, manner, and time frame acceptable to the Benchers and to allow the LSA to automatically suspend a member for failing to comply with the additional specific CPD requirements;

d. the LSA required its members to complete The Path, an online course which covers topics such as:

    i. the cultural and historical differences between First nations, Inuit, and Metis;

    ii. the evolution of the relationship between Canada and Indigenous people from pre-contact to yesterday's headlines;

[145] CRP, Vol A & B, pp 179-202. See especially p 190.
[146] *Ibid*, pp 150-166. See especially p 159.

iii. stories of social and economic success, reconciliation and resilience; and

iv. understanding intercultural communication in the workplace;

e. the LSA modified Part 6.3 of the Code to state that the LSA expects lawyers not to:

i. directly or indirectly discriminate against a colleague, employee, client or any other person;

ii. harass a colleague, employee, client or any other person;

iii. sexually harass a colleague, employee, client or any other person;

iv. engage or participate in reprisals against a colleague, employee, client or any other person because that person has: (a) inquired about their rights or the rights of others; (b) made or contemplated making a complaint of discrimination, harassment or sexual harassment; (c) witnessed discrimination, harassment or sexual harassment; or (d) assisted or contemplated assisting in any investigation or proceeding related to a complaint of discrimination, harassment or sexual harassment.

189. It is difficult, if not impossible, to see how any of these things could interfere with or infringe upon the Applicant's rights to freedom of conscience, religion, or expression.

190. In more direct response to the Applicant's arguments:

a. the Applicant's rights to freedom of conscience, religion, and expression, do not guarantee to the Applicant that the LSA's motivations will mirror and align with the Applicant's beliefs. Even if the "Political Objectives" conflict with the Applicant's beliefs, such a conflict does not result in a violation of the Applicant's *Charter* rights. It also again bears highlighting that when the Applicant refers to the "Political Objective" or the "Political Objectives", he is referring to what he believes the LSA's political persuasions and motivating ideologies are. In other words, the Applicant is essentially asserting that his *Charter* rights have been violated because what he thinks the LSA believes is at odds with what he believes;

b. the multiple-choice questions included in The Path do not ask the Applicant what he believes. Instead, they ask what the module taught. Further, while the Applicant alleges that the questions concern "complex matters of social, epistemological and historical 'truth'", this severely mischaracterizes the vast majority (if not all) of the questions included in The Path. Further, if the Applicant is so offended by The Path and the multiple-choice questions, then he has the option to educate himself on the required topics and then certify the same to the LSA, upon which he may be exempted from completing the Path;

c. the Applicant is required to prepare and submit a CPD plan. If the Applicant wishes to do so, he can focus on competencies listed under the "Cultural Competence, Equity, Diversity, and Inclusion" domain. However, he is equally free to craft his plan using competencies listed in the other eight domains. He is explicitly "not required to demonstrate competency in every area of the Profile each year".[147] If a member of the LSA fails to satisfy the CPD program requirements, they are subject to an administrative suspension. The LSA does not declare the member's practice to be unsafe, ineffective, or unsustainable;[148] and

d. the Code defines and clarifies the expectations and standards of behaviour that are applied to lawyers. It is intended to serve a practical, as well as a motivational function. If the LSA received a complaint that the Applicant discriminated against someone, harassed someone, sexually harassed someone, or engaged in reprisal against someone, then the LSA would handle the complaint pursuant to its conduct process. More specifically, the LSA would review and analyze the complaint and then decide to dismiss the complaint or refer the matter to a practice review or conduct committee. At the end of the process, it's possible that a conduct committee might determine that the Applicant's conduct was deserving of sanction. Furthermore, as mentioned above, the standards set out in Part 6.3 of the Code essentially mirror those set out in other pieces of legislation. Thus, if Part 6.3 of the Code violates the *Charter*, then the *Alberta Human Rights Act* and the *Occupational Health and Safety Act* do as well.

191. In sum, the LSA has not ordered or required the Applicant to think, believe, say, or do anything and has not interfered with his rights to freedom of conscience, religion, or expression.

ii. *The balancing exercise*

192. *Charter* rights are not absolute. Instead, they are subject to reasonable limits.[149]

193. When the Court considers an allegation that a law infringes a *Charter* right, the Court first considers whether a *Charter* right has been violated and, if so, the Court next conducts an *Oakes* analysis to determine if the infringement is reasonable.[150]

194. In *Doré v Barreau du Québec*, the Supreme Court of Canada moved away from a strict application of the *Oakes* test in assessing an administrative decision for *Charter* compliance in favour of a "more flexible administrative approach" to balancing *Charter* protections in the exercise of administrative discretion.[151]

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[147] *Ibid*.
[148] *Ibid*.
[149] *Charter*, *supra* note 1, s 1.
[150] *R. v. Oakes*, [1986] 1 S.C.R. 103.
[151] 2012 SCC 12, para 37 [*Doré*].

195. *Doré* involved a challenge to the decision of a disciplinary body to reprimand a lawyer for the content of a letter he wrote to a judge. The lawyer did not challenge the constitutionality of the provision in the lawyer code of ethics that authorized the reprimand. Instead, he alleged that the reprimand decision itself was unconstitutional because it infringed his freedom of expression under s. 2(b) of the *Charter*.

196. As noted by the Court in *Doré*, a discretionary administrative decision made by a decision-maker within the scope of their mandate is normally judicially reviewed on the deferential standard of reasonableness.[152] The question was whether reasonableness should be replaced by the *Oakes* test where the administrative decision-maker was required to account for *Charter* protections.

197. In moving away from the *Oakes* test in favour of an administrative law framework, the Court found that such a change was justified, at least in part, by the "completely revised relationship between the *Charter*, the courts, and administrative law".[153] This changed relationship included the policy of deference on judicial review to recognize legislative intent and the specialized expertise of administrative decision-makers.

198. Under the administrative law framework set out in *Doré*, the decision-maker must "balance the severity of the interference of the *Charter* protection with the statutory objectives".[154] On judicial review, the question is whether the decision reflects a "proportionate balancing" of the relevant *Charter* protections.[155] If, in exercising their discretion, an administrative decision-maker has proportionately balanced the *Charter* protections with the statutory objectives, then the decision will be found to be reasonable. While this was a move away from a formulaic application of the *Oakes* test, the Court observed that the administrative framework used the same "justificatory muscles"; that is, balance and proportionality.[156]

199. In *Loyola High School v Quebec (Attorney General)*, the Supreme Court of Canada affirmed the *Doré* framework, with some modification.[157] In *Loyola*, the Court identified a preliminary issue in the analysis: "whether the decision engages the *Charter* by limiting its protections".[158] If such a limitation has occurred, then the question becomes whether the decision reflects a proportionate balancing of *Charter* protections in light of statutory objectives.[159]

200. It is not entirely clear what framework the Court should apply in a case like this where the subordinate legislation looks somewhat like a law, but also somewhat like an adjudicative

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[152] *Ibid*, para 3.
[153] *Ibid*, para 30.
[154] *Ibid*, para 56.
[155] *Ibid*, para 57.
[156] *Ibid*, para 5.
[157] 2015 SCC 12 [*Loyola*].
[158] *Ibid*, para 39.
[159] See for example *Trinity Western*, *supra* note 104, paras 57-59; *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, paras 59-74.

decision. However, given the conclusion set out above, that none of the Applicant's *Charter* rights have been infringed, it is unnecessary for the Court to conduct this secondary analysis.

201. If, however, the Court were to find that the Applicant's *Charter* rights have been infringed upon, then the Court ought to apply the *Dore / Loyola* framework in order to give credence to the fact that a discretionary administrative decision made by a decision-maker within the scope of their mandate is normally judicially reviewed on the deferential standard of reasonableness.

202. The *Doré / Loyola* framework was summarized by the Supreme Court of Canada as follows:

> Under the *Doré/Loyola* framework, an administrative decision which engages a *Charter* right will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate. The reviewing court must be satisfied that the decision "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. In other words, the *Charter* protection must be "affected as little as reasonably possible in light of the state's particular objectives". ...
>
> The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives, always asking whether the decision falls within a range of reasonable outcomes. If there was an option or avenue reasonably open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant objectives, the decision would not fall within a range of reasonable outcomes. The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not in issue, the question is whether the administrative decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.[160]

203. The LSA's actions, rules, standards, and programs have significantly advanced the public interest. In accordance with *Green*, it is in the public interest for the LSA to require lawyers to participate, on an ongoing basis, in activities that enhance their skills, integrity, ethics, and professionalism and in accordance with *Trinity Western*, it is in the public interest for the LSA to take actions to promote equality, ensure equal access to the legal profession, support diversity within the bar, and prevent harm to the vulnerable.

204. Even if there has been some interference with the Applicant's *Charter* rights, which is denied, the interference is at most minimal. Again, the LSA has not ordered or required the Applicant to think, believe, say, or do anything to interfere with his rights to freedom of conscience, religion,

[160] *Trinity Western*, *ibid*, paras 35-36.

or expression. Further, the LSA has provided the Applicant with options when it comes to completing the requirements. For example, the Applicant can decide what types of competencies to focus on in his CPD plan just as the Applicant has the option of pursuing education other than The Path.

205. The LSA has significantly advanced the public interest and has not interfered (or minimally interfered if at all) with the Applicant's *Charter* rights. Consequently, in the present case, the LSA's actions reflect a proportionate balancing of the *Charter* and the LSA's statutory mandate.

V. CONCLUSION AND RELIEF SOUGHT

206. As stated at the outset, this case is about the LSA's statutory authority to establish Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code.

207. For the reasons set out above, in establishing Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code, the LSA has acted reasonably and within the scope of its statutory authority. The LSA has broad and specific powers under the LPA and, when reviewed for reasonableness, Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code are *intra vires* as they are all in the public interest.

208. As it relates to the Applicant's secondary *Charter* argument, Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code do not infringe on any of the Applicant's rights and to suggest otherwise is to mischaracterize and misconstrue Rules 67.2, 67.3, and 67.4 and Part 6.3 of the Code and the LSA's actions.

209. Consequently, the Respondent LSA respectfully requests that:

a. the Application be dismissed;

b. costs in such amount this Honourable Court deems appropriate; and

c. such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of April 2025.

FIELD LLP

Jason J. Kully / Leanne Monsma
Counsel for the Law Society of Alberta

VI. LIST OF AUTHORITIES

Jurisprudence

1. *Auer v Auer*, 2024 SCC 36
2. *Bergman v Innisfree (Village)*, 2020 ABQB 661
3. *Canada (Attorney General) v Democracy Watch*, 2020 FCA 69
4. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
5. *Canadian Broadcasting Corp. v Canada (Attorney General)*, 2011 SCC 2
6. *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31
7. *Dhillon v General Faculty Council of the University of Alberta*, 1999 ABQB 635
8. *Doré v Barreau du Québec*, 2012 SCC 12
9. *Green v Law Society of Manitoba*, 2017 SCC 20
10. *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26
11. *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64
12. *Law Society of British Columbia v Trinity Western*, 2018 SCC 32
13. *Law Society of New Brunswick v Ryan*, 2003 SCC 20
14. *Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654
15. *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12
16. *Manson Insulation Products Ltd v Crossroads C&I Distributors*, 2014 ABQB 634
17. *Morris v Law Society of Alberta (Trust Safety Committee)*, 2020 ABQB 137
18. *Okotoks (Town) v Foothills (Municipal District No. 31)*, 2013 ABCA 222
19. *R. v Oakes*, [1986] 1 S.C.R. 103
20. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27
21. *S. & K. Processors Ltd v Campbell Avenue Herring Producers Ltd*, [1983] BCJ No 1499
22. *Schulte v Alberta (Appeals Commission)*, 2015 ABQB 17
23. *Shaulov v Law Society of Ontario*, 2023 ONSC 5242
24. *TransAlta Generation Partnership v Alberta*, 2024 SCC 37

Legislation

1. *Alberta Human Rights Act*, RSA 2000, c A-25.5
2. *Alberta Rules of Court*, Alta Reg 124/2010

3. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982* (UK), 1982, c 11

4. *Indian Act,* RSC 1985, c I-5

5. *Interpretation Act*, RSA 2000, c I-8

6. *Legal Profession Act,* RSA 2000, c. L-8

7. *Occupational Health and Safety Act,* SA 2020, c O-2.2

Secondary Sources

1. Lord Woolf, et al, *De Smith's Judicial Review*, 7th ed (London: Sweet and Maxwell, 2013) **[Tab 1]**

2. Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed (Carswell, 2012) **[Tab 2]**

3. James T. Casey, *Regulation of Professions in Canada* (Thomson Canada, loose-leaf, 1994), §1:1 **[Tab 3]**

De Smith's Judicial Review

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to Parliament on the ground that it is elected;[111] though deference to elected members may be legitimate on the ground that they, rather than the court, are better equipped at deciding particular questions requiring an assessment of the public interest.[112] The courts possess the legitimacy to guard the invasion of those rights that now form the basis of our constitutional democracy.

Limitations inherent in the courts' institutional capacity

1–038 In respect of the institutional capacity of the courts, there are some decisions which they are ill-equipped to review—those which are not ideally justiciable or, in other words, "not amenable to the judicial process",[113] or indeed those which are better able to be determined by other bodies, including Parliament.

Matters which are in essence matters of preference

1–039 These include decisions which cannot be impugned on the basis of any objective standard because their resolution is essentially a matter of individual (including political) preference. Where the Secretary of State had the power to decide whether the expenditure of local authorities had been "excessive" and to penalise

[111] *R. v Inland Revenue Commissioners Ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617 at 644 (Lord Diplock: "It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central governments is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge"). This view towards judicial deference on constitutional grounds is shared by Lord Steyn, "Deference: A Tangled Story" [2005] P.L. 346; J. Jowell, "Judicial Deference and Human Rights: A Question of Competence", in P. Craig and R. Rawlings (eds), *Law and Administration in Europe, Essays in Honour of Carol Harlow* (2005), p.67; Jowell, "Judicial Deference: Servility, Civility to Institutional Capacity" [2003] P.L. 592. In respect of "common law" rights the courts may presume that Parliament did not intend to abrogate the right unless clearly enunciated—"the principle of "legality" (on which see 5–036). cf. *Rehman v Secretary of State for the Home Department* [2001] UKHL 47; [2003] 1 A.C. 153 at [62] (Lord Hoffmann contended that matters of national security "must be made by persons whom the people have elected and whom they can remove").

[112] See, e.g. in relation to local authorities: *R. v Brighton Corp Ex p. Tilling (Thomas) Ltd* (1916) 85 L.J.K.B. 1552 at 1555 (public transport licensing); *Sagnata Investments Ltd v Norwich Corp* [1971] 2 Q.B. 614 (amusement arcade permit); *Cumings v Birkenhead Corp* [1972] Ch. 12 (local educational policy); *Cannock Chase DC v Kelly* [1978] 1 W.L.R. 1 (allocation of tenancies of council houses); *Pickwell v Camden LBC* [1983] Q.B. 962 (allocation of salaries and wages even though strike still in progress). But note the caution expressed in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167 at [17] (HL found unpersuasive the submission of the Secretary of State that the decision-maker and the court should assume that the immigration rules adopted by the responsible minister and laid before Parliament "had the imprimatur of democratic approval and should be taken to strike the right balance between the interests of the individual and those of the community"). In *R. (on the application of Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] Q.B. 394 (on the lawfulness under EU law and Convention rights of delegated legislation banning the sale of tobacco from automatic vending machines) the CA accepted, with different nuances, that "the involvement of the legislature is a factor favouring a broader margin of appreciation than would be appropriate to a purely executive decision" (Lord Neuberger of Abbotsbury M.R. at [211]–[214]), though this was not inevitably the case when all the relevant factors were taken into account (Arden L.J. at [151]–[155]).

[113] *Council for the Civil Service Unions v Minister for the Civil Service* [1985] 1 A.C. 374 at 418 (Lord Roskill).

BOUNDARIES OF JUDICIAL REVIEW

The Law of Justiciability in Canada
Second Edition

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> Issues are sometimes resolved by judicial process which might have been resolved by political processes, and justice is often contrasted with politics, not because it is even *prima facie* expected that political decisions will be unjust, but because there are characteristic (though disputed) differences between the ways in which decisions may be reached ... But what does this contrast amount to, and are there some types of disputes which are inherently suited to one sort of decision rather than another?
>
> Geoffrey Marshall[1]

> It is the prerogative of a sovereign Parliament to make its intention known as to the role the courts are to play in interpreting, applying and enforcing its statutes. While the courts must determine the meaning of statutory provisions, they do so in the name of seeking out the intention or sovereign will of Parliament, however purposively, contextually or policy-oriented may be the interpretative methods used to attribute such meaning. If, then, the courts interpret a particular provision as having the effect of ousting judicial remedies for entitlements contained in that statute, they are, in principle, giving effect to Parliament's view of the justiciability of those rights. The rights are non-justiciable not because of the independent evaluation by the court of the appropriateness of its intervention, but because Parliament is taken to have expressed its intention that they be non-justiciable
>
> Chief Justice Brian Dickson[2]

INTRODUCTION

In the previous chapters, I explored areas where the boundaries of judicial review turned on the capacity of courts to hear and decide disputes that were not "live" in one sense or another. In this chapter, I consider the boundaries, if any, where disputes raise political questions. The "political questions" doctrine has a chequered history and uncertain future in Canada. Its premise is simple. Certain disputes are either "purely" political or designated as such by statute, and must be resolved, if at all, through the political process. However, the common law suggests that a court should not allow actions to be immune from review lightly.[3] Moreover, an overly broad understanding of justiciability will lead to a

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1 G. Marshall, "Justiciability" in A. Guest (ed.) *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961), 265.

2 *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.) at 91-92 [hereinafter *Auditor General*].

3 See for a discussion of this common law principle, *Hamilton City Council v. Waikato Electricity Authority*, [1994] 1 N.Z.L.R. 741 (New Zealand H.C.).

Regulation of Professions in Canada § 1:1

Regulation of Professions in Canada
James T. Casey

Chapter 1. Introduction

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§ 1:1. Generally

The purpose of this book is to review the law with respect to the regulation of professions in Canada. The power of self-government granted to the professions has two essential aspects—the authority to license and the ability to discipline licensees. The licensing power is essentially the authority to decide who shall be permitted to earn their living by the pursuit of a particular calling. [1] This means that professional organizations act as the gatekeepers to the professions in their assessment of the qualifications of prospective members. Once an individual becomes a member of a profession, the professional organization has the power to regulate the conduct of the licensee by establishing rules of practice and standards of conduct enforceable through the discipline process.

Self-governing professions have a long history in Canada. In the pre-Confederation era, only the legal and medical professions were established to any significant extent. Other modern professions were in their infancy with individual practitioners forming small informal groups to provide professional support. As these groups became better organized, they began to lobby the Legislatures for the extension of self-governance to their particular professions. In the post-World War II era, there was a tremendous growth of all types of administrative tribunals, including professional tribunals, as the Federal Parliament and the Provincial Legislatures recognized the advantages of delegating powers to specialized tribunals staffed by experts in the area. Initially, the debate focused on the advantages of self-governance to the professions. However, in the late 1960's and the 1970's, the public's focus began to change and fundamental questions were asked. Is a self-governing model for the professions in the best interest of the public? Are the rights of the individual adequately protected in a self-governing model? A number of provinces conducted investigations into the self-governing status of various professional organizations. For example, the *McRuer Report* [2] in the Province of Ontario, provided recommendations which formed the basis for the future legislative framework of many self-governing professions. The various studies carried out during this period generally affirmed the desirability of the self-governing model, but recommended greater emphasis on public accountability and on the protection of the rights of the individual.

During the first part of the century, the principles of natural justice which provide protection to individuals had been steadily eroding in Canada, largely due to the artificial distinctions among judicial, *quasi-judicial* and administrative actions. [3] The supervisory function of the Court of administrative tribunals was extremely restricted because the requirements of natural justice were found to apply only to judicial and *quasi-judicial* acts. The landmark decision of the Supreme Court of Canada in 1979 in *Nicholson* [4] lead to the establishment of the doctrine of procedural fairness and largely reduced the need to make artificial distinctions based on the characterization of the type of power being exercised. The Court held that the requirements of procedural fairness could apply even where no *quasi-judicial* function was involved. As a result, there was a tremendous expansion of the type and number of decisions made by administrative tribunals to which administrative law remedies applied. Professional disciplinary tribunals had long been considered in Canada to be *quasi*-judicial, and thus subject to a greater degree of review by the Courts. Therefore, while the distinction between *quasi-judicial* and administrative actions was somewhat less important in this area of the law, the *post-Nicholson* era saw a greater general awareness of the rights of the individual in administrative law. There was a great explosion of case law with respect to professional tribunals, as individuals increasingly challenged the decisions of their professional bodies.

The enactment of the Canadian Charter of Rights and Freedoms in 1982 lead to a further increase in the case law of professional tribunals. The Charter's focus on individual rights provided a natural remedy for an individual in conflict with the collectivity represented by his or her professional organization. Charter challenges regarding the regulation of the professions presented Courts with the difficult task of attempting to balance the legitimate and often competing interests of the stakeholders in professions. There are three groups with an interest in the effectiveness and the fairness of the self-governance of professions: the public, the profession itself, and members of the profession who are subject to regulation and potentially, discipline. [5]

Firstly, the public's interest is clear. The Supreme Court of Canada has concluded that it is difficult to overstate the importance in our society of the proper regulation of our learned professions. [6] The primary purpose of the establishment of self-governing professions is the protection of the public. This is achieved by ensuring that only the qualified and the competent are permitted to practise and that members of the profession conform to appropriate standards of professional conduct. The Supreme Court has on many occasions noted the crucial role that regulatory organizations play in protecting the public interest. The Court notes: "The privilege of professional self-regulation therefore places the individuals responsible for enforcing professional discipline under an onerous obligation. The delegation of power by the state confirms the importance of properly discharging this obligation and the seriousness of the consequences of failing to do so." [7]

Secondly, the members of established professions have an interest in the proper functioning of their organization. The downfall of one individual is said to diminish all members of the profession. Clearly, there is an interest in ridding the profession of the incompetent and the unethical. Further, if the public perceives that a profession is not properly functioning in the public's interest, then there will be pressure on the government to either re-examine or revoke a profession's self-governing status. Members of a profession have an interest in ensuring that their profession is operating in the public interest and that the public perceives this to be the case.

Finally, members of the profession who may be subject to discipline have a crucial interest in the proper functioning of the self-governing process. Disciplinary sanctions can lead to the loss of one's profession, the loss of one's work. The Supreme Court of Canada describes the importance of work as follows: [8]

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in Society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

Disciplinary tribunals have been described as both an anachronism and an anomaly, since they allow professional tribunals to establish private courts like the feudal courts of old. [9] Members of a disciplinary tribunal are not elected by the general public and are often not appointed by the government, but have the authority to impose disciplinary sanctions of the most serious kind and until recently, most disciplinary tribunals carried out their work behind closed doors as required by statute.

The tremendous powers of a disciplinary tribunal have been described as having the capability of destroying a man's or woman's professional life, [10] affecting in a grave and sometimes irretrievable way, not only the member being disciplined, but also his colleagues, the members of his family and his patients or clients. [11] As stated by the British Columbia Court of Appeal: [12]

> Disciplinary proceedings expose a member of the Society to a range of punishments which include suspension of the right to practise and even disbarment. In addition, irrespective of their outcome, the very nature of the proceedings can have a devastating effect on a members reputation, the single most valuable asset which any professional can possess.

The far-reaching effect of professional sanctions lead the *McRuer Report* to conclude the following with respect to the importance of procedural safeguards in the disciplinary process: [13]

> The most obvious feature of the power of a self-governing body to discipline its members is that it is clearly a judicial power within the meaning we have given to that term, i.e., its consists of the independent and impartial application of predetermined rules and standards; no element of policy should be present in the exercise of this power. It is a power whose exercise may have the most far-reaching effects upon the individual who is disciplined. The sanction imposed upon one who has been found guilty of professional misconduct may be anything from a reprimand to expulsion from the profession. Where a conviction may result in what has aptly and justifiably been termed "economic death", it is vital that procedural safeguards to ensure fairness be clearly established and rigorously observed.

The tension generated from the balancing of the legitimate and at times competing interests of the public, the profession, and the individual, has resulted in the creation of an unique body of law concerning the regulation of professions in Canada.

Footnotes

1 Ontario, Royal Commission Inquiry into Civil Rights McRuer Report, (Report No. 1, Vol. 3) Commissioner: James Chalmer McRuer (Toronto: Queen's Printer, 1968-1971) 1163.

2 Ontario, Royal Commission Inquiry into Civil Rights McRuer Report, (Report No. 1, Vol. 3) Commissioner: James Chalmer McRuer (Toronto: Queen's Printer, 1968-1971) 1163.

3 See the history of the development of the principles of natural justice in D.P. Jones & A.S. de Villars, Principles of Administrative Law (Toronto: Carswell, 1985) at 147 and following.

4 Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police (1978), [1979] 1 S.C.R. 311.

5 Ontario, Royal Commission Inquiry into Civil Rights McRuer Report, (Report No. 1, Vol. 3) Commissioner: James Chalmer McRuer (Toronto: Queen's Printer, 1968-1971) 1163 at 1183; see also generally DeMaria v. Law Society of Saskatchewan, 2013 SKQB 178 (Sask. Q.B.) at para. 41 to 45, affirmed 2015 SKCA 106, 2015 CarswellSask 590 (Sask. C.A.); application for leave to appeal dismissed with costs (2016), 2016 CarswellSask 224, 2016 CarswellSask 225, [2015] S.C.C.A. No. 493 (S.C.C.).

6 Rocket v. Royal College of Dental Surgeons (Ontario) (1990), 71 D.L.R. (4th) 68 at 80 (S.C.C.).

7 Pharmascience inc. c. Binet, 2006 SCC 48, 2006 CarswellQue 8953, 2006 CarswellQue 8954 at paragraph 36 [SCC].

8 Reference Re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 at 368.

9 Branigan v. Yukon Medical Council (No. 1) (1986), 21 Admin L.R. 127 at 143 (Y.T.S.C.).

10 Bernstein v. College of Physicians & Surgeons (Ontario) (1977), 15 O.R. (2d) 447 at 470 (Div. Ct.).

11 Brand v. College of Physicians & Surgeons (Saskatchewan) (1989), 58 D.L.R. (4th) 178 at 184 (Sask. C.A.).

12 Cameron v. Law Society (British Columbia) (1991), 81 D.L.R. (4th) 484 at 492 (B.C.C.A.).

13 Ontario, Royal Commission Inquiry into Civil Rights McRuer Report, (Report No. 1, Vol. 3) Commissioner: James Chalmer McRuer (Toronto: Queen's Printer, 1968-1971) 1163 at 1181.

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