Action No.: 2301-14224
E-File Name: CVK25SONGY
Appeal No.: _____

IN THE COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

YUE SONG

Plaintiff

and

THE LAW SOCIETY OF ALBERTA

Defendant

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P R O C E E D I N G S

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Calgary, Alberta
May 6, 2025

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| J. Kully | For The Law Society of Alberta |
| L. Monsma | For The Law Society of Alberta |
| A. Bituin | Court Clerk |

THE COURT: This is on the Song and Alberta Law Society judicial review; correct?

MR. BLACKETT: Correct.

THE COURT: Just for everybody's attention this is my student Emma Sterling (phonetic) who will be taking -- observing the proceedings today. Will be taking notes on my behalf of anything I need and will be sitting there. So, no objections I am assuming from either counsel.

MR. BLACKETT: No objection.

MR. KULLY: No objections.

THE COURT: Excellent. Any preliminary applications before we get started today?

MR. BLACKETT: No.

THE COURT: No.

MR. KULLY: Nothing from the LSA's perspective.

THE COURT: Perfect. Then we can get started.

MR. BLACKETT: All right. Thank you.

**Submissions by Mr. Blackett**

MR. BLACKETT: All right. So, good morning, Justice Kachur. My name is Glenn Blackett. I am counsel for the applicant Roger Song. Roger Song is with me today. He is not participating in the hearing but he is going to sit at counsel table. I assume that is fine?

THE COURT: No objections?

MR. KULLY: No objections.

MR. BLACKETT: Thank you.

THE COURT: Thank you.

MR. BLACKETT: My friends here are Jason Kully and Leanne Monsma from Field LLP and they are counsel for the respondent Law Society of Alberta.

THE COURT: Good morning.

MR. KULLY: Good morning.

MR. BLACKETT: I want to lay out my argument in a bit of an odd orientation because of the time constraints that are on me and the volume of material that I would like to cover but I am going to be unable to cover. So, what I had planned to do was start with a fairly extended introduction followed by an outline of the areas that I would like to hit in detail and I will be happy to take the Court's direction as to certain areas that there may be weakness on or that the Court would appreciate input on and I can prioritize those area first because I frankly have far more to say than I would -- than I have time to say it.

THE COURT: I agree. That doesn’t take me by surprise at all. I will tell you I have read the materials if that is helpful at all.

MR. BLACKETT: Very helpful.

THE COURT: So, what I would suggest on your lengthy introduction, be advised that I have read the materials so that may be helpful to shorten your lengthy introduction. I don’t want to take away from what your argument is at all, Mr. Blackett.

MR. BLACKETT: Okay.

THE COURT: But again I have read the materials. So, --

MR. BLACKETT: Okay.

THE COURT: -- if that is helpful at all to you.

MR. BLACKETT: Thank you. All right. So, by way of introduction Mr. Song brings this application both as a lawyer, and a Christian, and as a Canadian citizen. As a lawyer he brings it in defence of the rule of law in accordance with his oath to uphold the rule of law. As a Christian and a Canadian he brings it in defence of the constitutional freedoms of conscious, and speech, and his constitutional guarantee of state religious neutrality.

The application is really about one question. Is the Law Society of Alberta operating inside or outside of its legal and constitutional jurisdiction? Specifically we might ask is the LSA pursuing its proper statutory objectives, is it exercising powers granted to it under the LPA or the *Legal Profession Act* and is it exercising its statutory discretion legally and constitutionally?

The applicant's claim in a nutshell is that in direct violation of its statutory and constitutional duties namely to protect the Alberta lawyers -- or rather to protect the Bar of Alberta lawyers from political interference, the LSA is instead using its vast statutory powers over the Bar to politically interfere with lawyers.

It seeks to convert the Bar from loyal advocates of the client's interests into advocates for a political objective. It seeks to substitute the lawyers' loyalty to the constitution including the rule of law with loyalty to political objectives and political objectives which don't merely conflict with the constitution, but are in direct opposition to it and hostile to the constitution. The objectives that the Law Society has assumed we would say melt the rule of law like acid.

Its objectives are the adoption and promotion of what we term the applied post-modern theories in the practice of law. Those are also colloquially known as wokeness, DEI, critical race theory, critical legal theory, post-colonialism, and gender theory. Collectively, I will refer to them just as the theories today.

So, just based on that already we see as I say in my sur-reply brief that this is really an extraordinary application whether true or not. If it is true it means that the regulator, including the benchers, are directly violating their prime statutory and constitutional duties and seeking to arrogate democratic power from parliament and putting power into the hands of whatever stakeholders are driving these political objectives. If it is false, it means

I stand before you erroneously advancing a wild and irresponsible conspiracy.

Given this extraordinary context, the LSA's response to all of these allegations in its reply brief is all the more extraordinary because the LSA -- sorry, rather I would say all of the more extraordinary and revealing, because the LSA does not deny that it has adopted a political objective. It doesn't deny that it has adopted a political objective which is hostile to the constitution. It doesn't deny that its new definitions of competence and ethics, especially the concept of cultural competence, means that a lawyer should advocate not solely on behalf of the client but on behalf of extraneous political interests and not in support of the constitution but against it. It does not squarely deny those things. All it denies is that as the term has been defined, political objectives, all cap, it is not pursuing those exactly but it won't say what it is pursuing and it doesn't deny that the characteristics of what it is pursuing are described properly.

THE COURT: I don't know if I agree with you there on what their brief says. They do deny what your brief indicates the political objectives are.

MR. BLACKETT: Right, right.

THE COURT: Their brief absolutely said that is the opinion of the applicant --

MR. BLACKETT: Yes.

THE COURT: -- and not what the Law Society is saying.

MR. BLACKETT: Right. But it -- but what it does is it denies it by reference only to the title political objectives. It says -- first of all it says we don't know what the political objectives are. They are confusing. So, what it is denying is not exactly clear. I think that the political objectives are defined with sufficient clarity but then every time it denies it, it denies pursuing the "political objectives" as defined.

THE COURT: By the applicant.

MR. BLACKETT: Right.

THE COURT: Correct.

MR. BLACKETT: Right. But it does not deny that the political objectives it is pursuing and which it admits to having are not defined --

THE COURT: Well, I don't think they -- let's -- let's -- let's break this down. I don't think the Law Society is saying they have political objectives. I think that is the first thing.

MR. BLACKETT: Well, I think it is absolutely clear they do because they say the Courts should not be considering its political objectives.

THE COURT: No. What it says is pursuant to the law one of the things the Court should not be looking at when looking at this thing, pursuant to the case law, is that they shouldn't be looking at political objectives and/or societal. That is what the case law says.

MR. BLACKETT: Well, why would it make those arguments if it didn't have political objectives?

THE COURT: Well, okay. Show me in their brief where they absolutely said we have political objectives.

MR. BLACKETT: Well, the most obvious place would be -- just a moment.

THE COURT: And I am not denying, Mr. Blackett, that they are saying there are objectives. I am not denying that at all because they had said that there were objectives put forth.

MR. BLACKETT: Well, they said that there were objectives and they characterized them as political and then they tell this Court that the Court has --

THE COURT: Well, that's where I am asking you and if I have missed it, I apologize.

MR. BLACKETT: Right, right, and I will find it. I'm sorry. I'm looking for a particular quote.

THE COURT: And, Mr. Kully, you may be able to help on here. Is anywhere in your brief talk about the Law Society's from your perspective --

MR. BLACKETT: Here we are. Here we are.

THE COURT: Where are we?

MR. BLACKETT: This is paragraph 102 of their reply brief. I mean for example, this -- the implication that these things contain political objectives is the -- is the premise of many of the Law Society's objections, but at 102 they say the profile of the CPD tool, the political objectives or political objectives are not subject to judicial review because they are political.

THE COURT: Fair enough. Okay. I see where you are saying.

MR. BLACKETT: All right. Okay. And the Law Society also doesn't deny that it mandated 10,000 Alberta lawyers to undergo re-education in a program called The Path which included misinformation -- misinformation which vilified Canada's first prime minister, Sir John A. MacDonald. They don't deny that The Path advocates for the racial segregation of Indigenous Canadians into a collectivist authoritarian --

THE COURT: Okay.

MR. BLACKETT: Yes.

THE COURT: This is one of my questions. The Path is not before me. Nobody has --

MR. BLACKETT: Right.

THE COURT: -- included The Path in --

MR. BLACKETT: We have.

THE COURT: -- in the -- the modules have been included --

MR. BLACKETT: Right.

THE COURT: -- but the actual course in and of itself I have not seen.

MR. BLACKETT: We -- we --

THE COURT: Where is it?

MR. BLACKETT: It is included in the Song affidavit.

THE COURT: The second affidavit?

MR. BLACKETT: The first Song affidavit. It is at Exhibit 'X'.

THE COURT: The actual full course?

MR. BLACKETT: Yes.

THE COURT: Okay. Thank you.

MR. BLACKETT: You're welcome. So, the Law Society doesn't deny that The Path advocates for the racial segregation of Indigenous Canadians into a collectivist, authoritarian, therapeutic, and post-modern society. Nor does the LSA anywhere deny that the political and legal system into which lawyers are to shepherd Indigenous Canadians are the policy recommendations of an ideology that rejects reason, and empiricism, and therefore, are the policy recommendations of an ideology that offers no reason or evidence to believe that any of what the Law Society suggests in The Path will actually benefit the socioeconomic status of Indigenous Canadians.

And I think this is very important but nor does the LSA identify in The Path where and how Indigenous Canadians have authorized these changes by informed and legal democratic processes. Where is the legitimacy to the laws that the LSA says research units are making visible and the lawyers should then apply to their Indigenous clients or to Indigenous issues? Not the normal modes of validation that lawyers are accustomed to. Specifically we look for the democratic will of the legislature as expressed in legal laws and then we interpret those laws in a court. We don't find those laws in a research unit at the University of Victoria and start to apply them to Indigenous Canadians. So, there is a black hole of democratic consent that sits there and it is the informed consent mostly of Indigenous Canadians that seems to be missing.

In fact, the LSA admits having a political objectives but refuses to say what it is. It fails to put most evidence of it in a certified record of proceedings. The Court has already observed they entirely failed to include The Path. It also claims the Court should ignore most of that evidence and it claims that the Court has neither the capacity, the institutional capacity nor the constitutional legitimacy to really consider what those objectives are and whether or not they are consistent with the Act or the constitution.

This is an incredible position to take in the circumstances. How is the public to maintain confidence in the judicial system if the Court refused to look at and refused to consider the whole of the problem?

From the moment this application was filed, the applicant has warned that justice really

requires that the Court take a careful and complete catalogue of the LSA's objectives lest it be fooled into believing that they are something else.

If I could take the Court please to the application at paragraph 16.

THE COURT: This is the amended application?

MR. BLACKETT: Yes.

THE COURT: Go ahead.

MR. BLACKETT: So, what I am trying to demonstrate here is that from the beginning of this application, it has been clear to the applicant that we have a serious risk that justice will not be done if we don't really understand what these theories are and we don't look behind words like competence, ethics, diversity, equity, inclusion, to make sure we understand how those terms are being used, what their content is. So, in the application at paragraph 16 referring to the theories, which are defined in the application as the anti-constitutional ideologies, it says: (as read)

> The anti-constitutional ideologies appear superficially to embody the values, principles, and guarantees of the Canadian constitution including most especially recognition of the inherent and equal dignity of each individual, respect for minorities, the rules of equity, the principles of fundamental justice and equality before and under the law without discrimination but are, in fact, subversive to the constitution including hostile to those same values, principles, and guarantees.

Further at -- sorry -- 16(f) the applicant states that: (as read)

> The anti-constitution ideologies have objectives including equity and de-colonization which are terms of art imbued with special and opaque ideological meanings and which objectives are inconsistent with and directly hostile to the constitution.

So, from the beginning of this file the applicant has been warning that we have to not fall into this trap which we talk about in the sur-reply brief as the motte-and-bailey trap where we take one word like equity and think it means one thing when, in fact, it means something very different.

The LSA itself acknowledges even in just the CRP and repeatedly -- sorry.

THE COURT: Go ahead.

MR. BLACKETT: The LSA acknowledges repeatedly in the CRP that its terminology that it uses, these terms and concepts are niche, difficult to understand, and constantly evolving and shifting. It directs lawyers in the profile to review the LSA's key resources so that lawyers can come to understand what all of these words mean and what all of these concepts mean including the glossary which we place heavy reliance on in the brief which itself states that the definitions contained in that glossary relate to the lawyer's work in anti-racism and: (as read)

> …these terms are crucial to the system of thought that works to combat individual, institutional, and systemic racism.

The terms are crucial and it also needs to be noted that the Law Society doesn't direct lawyers to a dictionary. It directs them to a glossary. The difference between a dictionary and a glossary being that the dictionary defines how terms are used, what people think they mean whereas a glossary defines terms in a new and unique specialized way. That is the purpose of a glossary.

And yet notwithstanding these directions to lawyers that they are going to need these resources in order to understand these concepts it now objects to the Court seeing those same resources including the glossary.

Effectively what we see here is that instead of the Law Society coming before you it says that it should be subject to a reasonableness review where we should look at their reasons and determine whether or not they are transparent, intelligible, rationale. They follow a correct chain of analysis, relying on the appropriate evidence, et cetera. Instead of doing that the Law Society comes before you on this judicial review and effectively black boxes the main question. The main question being what are its political objectives and are they consistent with the constitution. It takes that entire question and it puts it in a black box and it labels that black box competence, ethics, public interest, harassment, and discrimination, and reconciliation.

So, there is this black box that it insists the Court not look into. It applies these labels that seem to be something that the Law Society should be doing under the constitution and under the *Legal Profession Act* but it insists the Court not look in the box. It invites the Court in other words to conduct a judicial review by assumption. Namely an assumption that what the box contains is appropriate material.

So, it is the applicant's submission that the Court rather than avoiding these issues, in fact, according to the case law has a high duty to ensure that the LSA's use of its statutory powers

is legal and constitutional. That the Court cannot satisfy that duty by making assumptions and that if it were to conduct a judicial review by making those kinds of assumptions even though what we are doing here today may have the trappings of a judicial review it would not in substance be a judicial review.

And I'd also like to just acknowledge briefly that obviously the context of this application is highly contentious. The affidavit shows that when Mr. Song opposed Rule 67.4 which is a mandatory education training program he was pilloried publicly and privately as a racist. That he should go back to his own country. That he hates Indigenous people. That he is part of reconciliation -- that he is not a part of reconciliation. He's a settler, et cetera. And that includes lawyers of the Alberta Bar including one lawyer of the Alberta Bar who wrote an op-ed against Mr. Song and alleged that the -- that the reason the motion was brought was because of simple racism.

So, we all know the invective and public humiliation which is reserved for people who oppose these particular political objectives, but if loyalty to the law means anything it means loyalty, of course, when it becomes uncomfortable, painful, and socially isolating to be loyal to it. That is the price the lawyers agree to pay for the privilege of practicing law. The applicant, in other words and in my submission, is a model of professional ethics but as we will see the LSA characterizes him instead as an unsafe, ineffective, and unsustainable practitioner.

So, I'm quickly, still in my long introduction here, going to talk about the constitutional context. As we set out in the brief, and is well known to the Court, the constitution is animated, I think most essentially, by this concept of dignity of the individual. Namely that individuals have inherent and equal value and that individuals possess and can exercise free will. Given that foundation the constitution does things like preserve the individual's rights to enjoy those personal freedoms and to participate, of course, in democratic decision making, the search for truth, and morality, and personal self-fulfillment in the manner that they choose.

The constitution is therefore characterized by democracy, respect for minorities, personal freedoms of property, body, expression, mind and soul. Repugnance for identity based discrimination and stereotype, empiricism including objectivity, reason and science. It, of course, defines a multi-cultural pluralism rather than a racially segregated state. Those are very different things. And, of course, under section 1 of the *Charter*, places reasonable limits on those individual and collective rights, provided that those limits are prescribed by law, demonstrably justified and consistent with a free and democratic society.

The reason that the rule of law features so predominantly in this application is because, as we say in the brief, the rule of law is very much the sinew which binds all of that together.

Without the rule of law the constitution will collapse. For example, if parliament makes laws which are unclear, which is a violation of the rule of law, they can't be followed. If parliament makes laws which are perverted or ignored once they leave the legislature and when they are being implemented then the democratic will is subverted as are the rights of citizens which are protected by those laws. And if citizens do not enjoy the fundamental freedoms of expression and conscious, which are guaranteed expressly by laws, then democratic dialogue is rendered illusory. Instead of having a free democratic dialogue to make collectively decisions as to what should happen in the legislature, democratic power is arrogated, effectively, by the censor. So, the rule of law is not just an end into of itself, it is the necessary mechanism by which all of the constitutional features are manifest.

So, given this order and the complexity of modern law and procedure, citizens necessarily have to rely on lawyers. They become their conduit, the citizens' conduit to the legal system. They give them access to the law. The lawyer help protect the client's rights under the law and the lawyer helps the client understand what the laws are so that the client can follow the laws. Broadly speaking we say that the lawyer provides the client access to justice and in particular access to the justice defined by the parliament. This is reflected in the text and in the scheme of the LPA. The lawyer's fundamental duty is to uphold the rule of law. We see that in the requirement that lawyers take an oath of loyalty to the constitution which means undivided loyalty to the clients' interests within the law which is a dual loyalty to the client and to the law.

These loyalties, to the client and to the law, are the foundation of what we should call legal culture, appropriate legal culture. The lawyer's undivided loyalties matter because lawyers have the capacity to pervert and subvert the law just by the way they practice. Lawyers have the capacity to distort the law individually, collectively as a Bar, in private practice, working in government, working in the administrative state or even from the bench. Because a lawyer with a poor legal culture can distort the rule of law, when called to the Bar, lawyers swear an oath to the constitution including "I will as a barrister and solicitor not pervert the law".

That sounds somewhat intangible, this concept that we could somehow pervert the law, so, my brief goes into a lot of detail to try to demonstrate how it is that a lawyer can pervert the law if they get the wrong legal culture. So, for example, as a result of incompetence (I would call incompetence poor legal culture) a lawyer may fail to advise their client of their full legal rights because they don't know what those rights are, or they may fail to secure the client's full rights under law because they are unable to do that as a lack -- for a lack of skill. This subverts the law, obviously, by denying the client access to justice.

Similar failures may also be caused by the lawyer's divided loyalties. A lawyer may choose not to advise a client of their full rights because it is not in the lawyer's interest to do so or

it is in the interest of some third party or some third -- rather or some competing objective, for example a political objective. The lawyer may also subvert the law by bad faith interpretation; by working outside of legitimate legal systems. And again here I refer to the concept that The Path tells us to implement laws that I see no evidence that they have been passed by some democratic majority, soft-pedaling the client's case, knowingly assisting in the dishonesty, fraud, crime or illegality of a client, abusing legal process, influencing a tribunal improperly, withholding binding authority or, where a client wants a particular outcome, the lawyer might improperly pervert the law by stretching the law beyond its reasonable boundaries to provide the advice that will support the outcome the client seeks. In other words, the lawyer may provide an illegitimate CYA opinion to the client.

So, these loyalties and competences are therefore foundational to correct Canadian legal culture. Where such legal cultures is lacking, and the law is subverted, the lawyer undermines the rule of law and, therefore, democracy, making the lawyer, in a sense, the local legislator. This is an illegal and unconstitutional theft of democratic power. The lawyer's job is to secure the client's rights under the law, not to change the law.

And, just as -- just a single lawyer practicing with poor legal culture can seriously damage the rule of law. Corporate policies may be drafted that are illegal and affect hundreds or even thousands of employees. Environmental regulations may be skirted. Security laws may be subverted. An innocent person may be convicted of a crime they didn't commit. But where the entire Bar's legal culture is compromised, the rule of law will necessarily collapse, and this is the heart of Mr. Song's concerns. He submits that the LSA has redefined legal culture to affect an anti-democratic subversion of the law and the constitution.

So, I want to speak briefly on the role -- the proper role of the Law Society. To preserve this correct constitutional legal culture of loyalty to the law and to the client, the lawyer has to be independent. The independence of the Bar that concept reigns supreme in constitutional case law and the lawyer must be independent especially from political forces which seek to change the law the lawyer is to implement and I make heavy reliance on the statement of Justice Estey, in our brief when he spoke in *AG Canada v. Law Society of BC* 1982 2 SCR 307, where he says: (as read)

> The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as human ingenuity it can be so designed, be free from state interference, in the political sense. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members,

legal advice and services generally.

So, the LSA's proper statutory purpose is, therefore, to promote a legal culture of undivided loyalty. This means the LSA is especially to protect the Bar's independence from political interference. In 2019, however, the LSA decided to use its power granted to it by the legislature of Alberta, instead, to adopt and advance a political objective. To, in fact, politically interfere with the Bar which, I would say, is effectively their prime directive not to do. For example, again in its mandatory education The Path, lawyers were encouraged to radically transform the legal regime under which Indigenous Canadians live and they were encouraged that -- to effect that transformation through the way they practice law.

In other words The Path was intended to encourage lawyers to radically transform their -- the law by changing their legal culture, and this is what the LSA now calls culture competence. Culture competence means that a lawyer is to pursue a radical transformative agenda. Now, the CRP contains very little of this. It is not at all clear from the CRP, the certified record of proceedings, that the -- that this is what culture competence means. The closest we come to it is an article that is quoted by Jennifer Freund, the policy director or officer of the LSA who quotes from an article by Pooja Parmar but only quotes it in part but does quote one part where Ms. Parmar says that culture competence means pursuing a transformative agenda.

It doesn’t say what that agenda is exactly. Doesn't say it is radical although elsewhere she says it is radical. And again the LSA has not included The Path itself in the CRP. Instead it includes what I would submit is a fairly misleading summary. If you look at that summary that was provided, it does not say that The Path is a lesson in the theories and, yeah, the Court referred to that document earlier. So, it doesn’t say The Path is a lesson in the theories. It doesn't say that, according to the theories, Indigenous Canadian should be racially segregated and it doesn’t say that, according to the theories, the legal systems that are suited to Indigenous Canadians are characterized by post-modernism, therapeutics, irrationality, and collectivisms.

I think maybe the most important part of The Path that is missing from that summary is a statement -- or rather an instruction to the 10,000 captive lawyers that they should have: (as read)

> An understanding of the law that allows it to be intensely democratic in terms of being part of relations of power in Canada. It is everybody's business.

Now, that could be read a few ways I suppose but the fact that it is mandatory education to lawyers, that lawyers are clearly -- that this is supposed to affect the way they do law. It is

clear from the theme of The Path that it becomes a lawyer's social responsibility to see the recommendations come to fruition. I believe that where The Path mentions that the lawyers should be intensely democratic, what they are suggesting is a radical form of direct democracy where each lawyer takes that democratic decision making into their own hands.

In other words the summary is misleading because it doesn't say what The Path really is and the applicant submits that when you read The Path and when you read that The Path understanding the underlying ideological concepts which are evident in The Path including things like colonialism, legacies of colonialism, systemic discrimination, reconciliation, de-colonialism, all of these terms, we see that it is really an instruction to lawyers to breach their oath of loyalty to the law.

The LSA urges this Court not to question the wisdom of its political ambitions, but this is not about the wisdom of The Path. This is not about whether or not the recommendations The Path has for Indigenous Canadians are going to work out well. This is about the fact that, in Canada, radical transformative political decisions are made by democratic electives, not by lawyers, not by Judge, not by commissions, not by stakeholders and not by the LSA benchers.

As part of its effort to define and encourage this new culture competence, the LSA released a document called the Professional Development Profile by which lawyers are to assess their culture competence and seek remedial education where their competence is lacking. The LSA requires that lawyers assess their competencies and plan their education using the LSA online CPD tool which is inextricably linked to the profile. It is impossible to generate the kind of plan that they want without assessing your competency against this profile.

And furthermore, having used the CPD tool, what the lawyer does is submits to the Law Society for the Law Society's inspections big parts of their plan including what competencies they have decided to pursue.

According to the profile, lawyers should -- and, of course, this is all within their practice but would also clearly apply outside of their practice, should not advocate solely for their client but instead should: "advocate for those facing systemic barriers"; advocate for diversity, equity, and inclusion; and apply the TRC's calls to action and calls to justice just directly apply the TRC's calls to action.

And I need to just pause and really focus on that word advocate. Lawyers are advocates. What we do is advocate. This is clearly a request for us to advocate for something other than the client. So, in the applicant's view the profile squarely and expressly seeks to improperly divide the lawyer's loyalty and the profile is an unconstitutional form of political interference.

So, now, in my extended introduction, I want to spend a moment talking about the theories themselves. So, in the applicant's view, to do justice in the application, the Court must understand the nature and details of these theories, the nature and details of the LSA's political objectives, because, once the theories are understood, as the application says, it becomes fairly clear then that they are hostile to the constitution and, therefore, the plaintiff says obviously not appropriate legal competence or ethics.

So, the LSA's theories come down to the basic post-modern premise that there is no such thing as the real world; that the real world or objective reality is just an idea. Specially that objective reality is a construct. It is an intellectual construct, but it is not an objective thing that has any inherent reality or validity. Objective reality is only true to the extent that a human may believe it to be true. One of the LSA's key resources on the subject of culture competence puts it this way: "The most important theoretical concept for culture competency is that all experience is constructed". The most important theoretical concept and that's the article by Travis Adam that starts at page 880 of my client's affidavit.

So, effectively what the theories do is they reject what they call grand narratives. They reject the grand narrative of Christianity, of the enlightenment, and associated principles like universalism, empiricism, reason, liberal democracy and, of course, the dignity of the person. Things we once called "Christendom" or the "enlightenment" but we can also refer to as the "west". The theories say that these institutions, these constructs, concepts like objective reality are actually a sham, a cynical invention of the specifically white, Anglo-Saxon Christian, heterosexual man to oppress all other identity groups, trapping them in a sort of mental prison.

The basic idea seems to be that things like objective reality, reason, democracy, and liberalism are fundamentally unsuitable for racial minorities. Therefore, belief in these things keeps minorities in a state of marginalization and powerlessness. Treating -- if the minorities treats these institutions -- or sorry, rather, the theory is that by treating these institutions as normal - and that word norm, or normal, or normative is very important in the theories, - as normal -- if we treat those theories as normal we call that a discourse in oppression or a discourse in colonialism. So, by treating those things as normal we call that a discourse in colonialism or a discourse in oppression, and the minority hearing other people treat those things as normal starts to believe that they are normal. Starts to believe that there is inherent validity to the concept of objective reality, or reason, or something like that.

In other words, by treating it as normal we fool -- the white Anglo-Saxon Christian man, fools the minority into treating the system which oppresses them as normal. So, when the oppressed group believes in these things they become complicit in their own oppression.

They become, in a sense a race, a betrayer of their race or a betrayer of their identity group. This explains why the glossary defines internalized racism as follows: (as read)

> Internalized racism is a situation that occurs in a racist system when a racial group oppressed by racism supports the supremacy and dominance of the dominating group by maintaining or participating in the set of attitudes, behaviours, structures, and ideologies that undergird the dominating group's power.

And I will just pause here to say if you read that and didn't have a clear understanding of what the theories is that makes no sense. It is very difficult to discern even what that means and this is one of the key resources that the Law Society directs lawyers to understand the theories.

According to the Law Society the culturally competent lawyers know this. Knows that objective reality is a construct that oppresses minority through them believing in it. In other words objective reality and those other enlightenment institutions are systemic barriers. And we see that again in the glossary where it defines universalism. It defines universalism as: (as read)

> The assumption that there are irreducible features of human life and experience. Claims about the universality of existence, however, usually emanate from the mainstream dominant locations and use white western middle-class straight male experience and perspectives as holding true or ideal for all of humanity.

Again we see they are not true, not ideal for all of humanity. Right. Not fit for minorities: (as read)

> An insistence on universality or its possibility often emerges as a response by white people to discussions of racism.

I am here in response to a discussion on racism: (as read)

> The evidence that these individuals present, however, is often vague or generalized to the point of meaninglessness in an attempt to erase the materialities of privilege and oppression. The ideology of universalism is pervasive in Canada.

I point out that it is pervasive in our constitution.

So, we see just here that the LSA's theories reject universalism and we also see again that the materials become very difficult to understand without significant assistance and significant effort.

How is the uninformed to interpret "claims about the universality of existence erase the materialities of privilege and oppression"? Likewise the LSA's key resources to which it directs lawyers to become culturally competent redefine democracy as liberal democratic racism. It says: (as read)

> Democratic liberalism is distinguished by a set of beliefs that includes among other ideals the primacy of individual rights over collective or group rights. The primacy of individual rights. The power of one truth, i.e., objective reality, tradition and history, i.e., the constitution. An appeal to universalism, the sacredness of the principle of freedom of expression, and a commitment to human rights and equality.

But the glossary carries on: (as read)

> As many scholars observe liberalism is full of paradoxes and contradictions and assumes --

This is very important: (as read)

> -- assumes different meanings depending on one's social location and angle of vision. Liberalism can be, there for, both egalitarian and inegalitarian, simultaneously supports the unity of humankind and the hierarchy of cultures. It is both tolerant and intolerant.

So, once we know about the theories we can decode this. What it means is that freedom is only free for the white Anglo-Saxon Christian male and for everyone else freedom is oppression.

So, given all of this we come to understand what the LSA means when it talks about systemic discrimination which it has done so publicly and loudly and also whiteness and colonialism which it has done so less loudly. The terms systemic discrimination, whiteness, and colonialism refer, simply, to the principles of the enlightenment embedded in our constitution.

The glossary defines "whiteness" as: (as read)

> A social construction that has created a racial hierarchy that has shaped all

> the cultural, social, educational, political, and economic institutions of society. Whiteness is linked to domination and is a form of race privilege invisible to white people who are not conscious of its powers. The power of whiteness is manifested by the ways in which racialized whiteness becomes transformed into social, political, economic, and culture behaviours, and --

Again this concept: (as read)

> White culture, norms and values in all of these areas become normatively natural.

Likewise, the glossary defines anti-Indigenous racism in similar terms.

So, what I am trying to demonstrate here is that only when we really understand the theories which we can only do, I would submit, with both an actual review of the evidence, that the Law Society has excluded from the certified record of proceedings, and with the assistance of Dr. William's expert report, do the LSA's various materials come into focus, are we able to understand what they mean in the profile for example by anti-racism? For example in 2022, the benchers released a public acknowledgment of systemic discrimination. It says: (as read)

> Systemic discrimination functions due to some of the inequitable principles historically embedded in our institutions and systems.

Only with an understanding of theories does it become clear that, where the acknowledgment refers to the principles historically embedded, it is referring to the principles of the enlightenment, the principles of the constitution.

The LSA makes this same basic allegation that these inequitable oppressive principles are somehow deeply embedded in our legal system throughout its materials. In The Path it says, after listing off a number of events including - I just need to pause for a moment to note alleging that the Gerald Stanley not guilty verdict was a travesty of justice, which is a violation of the rule of innocent until proven guilt the Path says: (as read)

> These and other events have exposed the racism, the discrimination, the unfair treatment, and the inequality built into Canadian law policies and structures.

And again the glossy defines anti-Black racism as being: (as read)

> Deeply entrenched in Canadian institutions, policies and practices to the extent that it is either --

Again: (as read)

> -- functionally normalized or rendered invisible.

Another important feature of the theories to just focus on quickly is the fact that because the theories reject objectivity, empiricism, and reason, and those kinds of enlightenment concepts, they are, by definition, not empirical or reasonable. The theories operate by asserting theories, just theories. They theorize, for example, that any inequality in outcome that we see in socio-economic outcomes between Indigenous Canadians and other Canadians, for example, is caused by the theory of systemic discrimination. So, first it theorizes something that we can't see and then it theorizes that any socio-economic disparities it sees are caused by that thing we can't see.

And we see this I think most especially in The Path where the 10,000 lawyers were re-educated into this idea that: (as read)

> The Canadian colonialism legacy is still alive and nowhere is that clearer than in the treatment of Indigenous people within the Canadian justice system. It is clear when you look at the overall numbers. While Indigenous people make up about 5 percent of Canada's population they represent 27 percent of its prison population.

Now, I will just stop there, and note, first of all, that is a sad statement obviously. That fact of that socio-economic disparity is something that we should all, as Canadians, be concerned about, no doubt, but we have to take this allegation seriously. What the allegation is saying is that it is the colonialism legacy which causes Indigenous people to be imprisoned at five times their proportion in the population which means four out of five Indigenous people are imprisoned for no other reason than colonialism.

THE COURT: I don't know that is --

MR. BLACKETT: I will let you chew on that but --

THE COURT: Yes, you will, because I don't know that is a conclusion you can draw.

MR. BLACKETT: I think if you look at The Path nowhere does it suggest that there are other causes, and if we understand the nature of the theories we

understand also that there are no other causes nor might we look for them, nor can we look for evidence of them because those are processes of empiricism and the processes of empiricism the attempt to prove that -- you know, if I say to a person who claims that four out of five people are -- which The Path does -- that four out of five people are in prison because of the colonialism legacy, the act of asking for proof is oppression. So, I am not allowed to ask for it because to do so is to impose my -- it is called colonial logics on the situation. It is those colonial logics which are the mechanism of oppression.

THE COURT: Are you suggesting that The Path is saying that these Indigenous people are in gaol not because of the criminal action but because of colonialism?

MR. BLACKETT: That is a deep question.

THE COURT: Well, that is what I heard you say.

MR. BLACKETT: Well, no. I mean it is deep because it really begs the question what is a criminal action. Yes. I think that -- I mean I don't -- I can't stand here and explain to you what that -- what innocent explanation there is for that statement. What I can also say is that nowhere in the certified record of proceedings does the Law Society try to determine whether or not that statement is either accurate or whether what it appears to say is fair but what it says, and I can read it again, it says expressly: (as read)

> Canada's colonialism legacy is still alive and nowhere is that clearer than in the treatment of Indigenous people within the Canadian justice system. It is clear when you look at the overall numbers. While Indigenous people make up about five percent of Canada's population they represent 27 percent of its prison population.

They are linking that statistical difference only and entirely to the colonialism legacy. That is what it says.

THE COURT: Okay.

MR. BLACKETT: Well, I have got -- there are other quotes in the brief where this is brought out. I mean we also see it with respect to diabetes even.

THE COURT: But doesn't -- isn't it broader than that? You are taking one statement in a broad, broad area. Was it not saying that it -- there's higher issues of addiction, there's higher issues of -- of a whole bunch of things that would also lead to this but, yes, they are then bringing it back to because of the treatment this is what it leads

to but it is not saying colonialism in and of itself has led to the higher populations in gaol. It is like colonialism has created these things that may lead to the higher populations in gaol.

MR. BLACKETT: Right. That is kind of the more innocent interpretation of it but when you read The Path it is impossible to arrive at that interpretation.

THE COURT: Why?

MR. BLACKETT: For example when we look at alcoholism to take your example, The Path is teaching us cultural competence. Culture competence includes trauma informed practice.

THE COURT: Mm-mm.

MR. BLACKETT: According to The Path trauma informed practice means not treating alcoholism as a problem, treating it as a symptom. The problem is colonialism. So, even on something as clear as that -- and that is the -- I have to admit the one place in the brief where the applicant says this is not wise policy. It is not wise policy to treat alcoholism as a symptom. It is wise policy to treat it as a problem in and of itself but the fact that the Law Society would go so far as to say even alcoholism should not be treated as a problem but rather we should look at the cause behind it, we should look at alcoholism as a symptom clearly identifies that the causative relationship is between colonialism embedded in Canada's institutions and the socio-economic outcomes.

But I understand what you are saying that there is certainly a historical reality to the fact that the condition that Indigenous people find themselves in today is not what it looked like pre-colonialism. So, there is some kind of a causal relationship between the historical events of colonialism and today's outcomes - some kind of. I don't know that it would explain everything, as The Path would suggest it does, but the point is that if you see the theories in The Path and you really read carefully what The Path is telling you, in fact, what it is saying is -- it doesn't identify any cause except those outcomes.

It says that colonialism leads to diabetes, colonialism leads to incarceration, and I guess the corollary point there is that we have to often go back to theory to understand how the theories operate and to the theories, the outcomes are caused by the minority believing in, finding normal and participating in these systems of oppression. Right. By the minority participating in the colonial institutions including the colonial institution of criminal law.

The theories do not, therefore, attribute socio-economic outcomes to other causes including

a person's choices and actions, which are the kind of causes that the Court is referring to and including choices and actions both individually and collectively. And, while I think that there is a charitable temptation not to blame the victim as it were, the cost of that charity is the implication that the victim lacks agency, which is consistent with the theories' rejection of the basic constitutional and Christian assumption of the dignity of the individual, namely, that the individual possesses free will, that the individual is ultimately responsible for their situation.

In one of the Law Society's resources called Strategies of Liberal Racism the Law Society tells lawyers: (as read)

> In the west what has become known as --

And this may help: (as read)

> In the west what has become known as the cult of individualism has impacted us in such a way that it can be very difficult to understand anything outside of our own experience. Individualism fosters a belief that everyone is free to choose. That our destiny is within our own hands --

Sorry: (as read)

> -- within in our control and that choice, determination, pulling oneself up by one's bootstraps are all individually determined and ultimately achievable despite socio-economic, racial and cultural circumstances.

So, we see there that the theories -- and this is the Law Society's key resource that we are supposed to go to understand this stuff -- don't just say that colonialism has interfered so as to limit free choice, it says that colonialism has interfered so as to prohibit free choice entirely. Again the cult of individualism: (as read)

> fosters a belief that everyone is free to choose. That our destiny is within our own control and that choice, determination, pulling oneself up by our bootstraps are all individually determined and ultimately achievable.

So, I am almost wrapping up this theoretical summary, but the other thing I will just note very quickly is that, because the theories reject empiricism, they don't offer reason or evidence of things. That is a problem especially in our legal system and finally perhaps the most important part of the -- well, one of the most important parts of theory is that they redefine familiar terms from the constitutional structure where we -- where we define rights and freedoms by process and, instead, start to redefine those terms by outcome results. And

I think the easiest way to see what I mean there is if we look at the glossary's definition of equality. So, it defines equality as: (as read)

> Equal treatment is valued as one of the central concepts along with tolerance and freedom of expression in liberal democracies. Often the discourse of equality is used to perpetuate discriminatory practices because there is a focus on same or equal treatment which is perceived as fair by the dominant culture. Therefore, the focus remains on the treatment and not on the result. If the treatment does not result in equality or the balancing of power then equality has not been achieved.

So, rather than a concept of equality under the law, equality comes to mean equality of outcome whatever the law. And again if we look at the Law Society's own public acknowledgment of systemic discrimination, they define that term to mean policies, procedures, and practices within systems and institutions that result in disproportionate opportunities and disadvantages that result in disproportionate opportunities and advantages.

So, understanding all of this, where we see the profile instructing the lawyers to take action to dismantle systemic inequalities and barriers, what we see is that lawyers are supposed to change their culture, so that they don't apply the constitutional principles where those constitutional principles achieve an inequitable outcome.

Because of time I am not going to spend a lot of time on this topic but I am just going to take the Court quickly to the regulatory objectives of the Law Society. In 2019 as part of this strategic shift the Law Society promulgated new regulatory objectives and it says: (as read)

> These are the things that the benchers are going to look at and follow when we are making any kind of decision.

So, why those are not in the certified record of proceedings, I don't know, but I think the regulatory objectives are highly revealing. As we point out in the brief, the regulatory objectives set out five objectives. One of those objectives is rule of law. One of those objectives is its political objectives, namely diversity, equity, and inclusion. And it expressly says, in those regulatory objectives, that sometimes these things are going to conflict and we are just going to have to look at them both and decide which one to follow. In other words, they expressly contemplate in the regulatory objectives subordinating the rule of law to diversity, equity and inclusion, which sounds again sort of theoretical. Surely that wouldn’t happen. But then we look at the public acknowledgment -- which is kind of included in the record but not entirely. I don't think this part of it is. It is not clear from the

record that this part was part of what was published -- The benchers tell the public that, as part of our commitment to take further steps to address systemic discrimination, the Law Society will lead by example: (as read)

> We have already started this work by ensuring that our benchers participated in training focused on unconscious bias and centering equity in our governance.

Centering equity. And I'd also submit that when you understand the theories, especially with the help with -- well, I mean looking at the glossary helps, but definitely with Dr. Williams's report -- once you understand those theories, what we understand is that whatever the rules are, if those rules do not achieve an equal outcome the rule is a problem. That is just the -- that is the theory. That is the essence of the theory.

And so once you have that in your head when you as the bencher are faced with a conflict between equity and a rule -- as long as you take your commitment to diversity, equity and inclusion seriously the rule of law will never prevail and it is just not -- that is not a feature of that ideology. And this is the point that the applicant makes in his brief based on his, what we might call in this context, lived experience in China. Namely that, sure, China has got a constitution that guarantees rights, and there are bunch of rules, and regulations, and stuff but, because the predominant objective is an ideological one, it is all illusory. There is no rule of law. There is a rule of ideology.

All right. So, that concludes my very extended introduction. By my math, subject to some times for questions, I have only got about another half of hour to 45 minutes. So, what I intend to do is focus on a few areas spending a little bit more time on some than others and areas that I am going to look at are, first, a factual history briefly. Secondly, I want to look at the case of *Green v. Law Society of Manitoba*.

Next, I want to look at my friend's statutory interpretation. I can also look at the standard of review. The argument we make in the brief is that the standard of review -- it is not appropriate for the standard of review to be reasonableness. *Vavilov* is very clear that when we have an issue that affects the rule of law, the standard is correctness. I can't think of anything more threatening to the rule of law than a regulator that is violating it.

THE COURT: It also specifically says that any vires arguments is reasonableness and you are arguing in the first instance that this is -- they are exceeding their jurisdiction. They are *ultra vires* and *Vavilov* is very clear that it is reasonableness in that regard.

MR. BLACKETT: Well, I -- a couple of things. One, *Green* was

decided before *Vavilov*.

THE COURT: Mm-mm.

MR. BLACKETT: *Green* was still -- and post *Dunsmuir*.

THE COURT: But I said *Vavilov* says.

MR. BLACKETT: Right. But well, I don't -- no. I think what *Vavilov* -- let me contextualize *Vavilov*.

THE COURT: I mean if you are not there yet. You said you will get into it, --

MR. BLACKETT: Okay, okay. I will get there.

THE COURT: -- so you can get into it, but --

MR. BLACKETT: Okay. I'm going to highlight --

THE COURT: -- but I am giving you -- I am giving you a heads up right now --

MR. BLACKETT: Okay, okay.

THE COURT: -- that *Vavilov* was very clear. *Green* which was before *Vavilov* was also unreasonableness. *Vavilov* then took over and says on ultra vires -- on the vires determinations it is reasonableness. So, keep that in mind when --

MR. BLACKETT: All right.

THE COURT: -- you come to that argument.

MR. BLACKETT: Sure. Yes. Will do. I will also cover the affidavits, the political question, the LSA's argument that there is actually no interference with my right -- with my client's rights in any way and then finally even though these deserve far more time the Law Society's infringements on my constitutional -- on my client's constitutional rights.

So, on the history I am going to skip over a lot, but what I do want to mention is that prior to 2008, the Law Society had no CPD requirements really at all except for the code section

3.8. And so the code of professional or Code of Conduct says that as a matter of ethics lawyers should not be practicing where they incompetent which makes perfect sense. And it includes at sub (j) the obligation to pursue appropriate professional development to maintain and enhance legal knowledge and skills. So, that -- we've defined that as I believe voluntary CPD and my client takes no issue with the concept of voluntary CPD. We don't take any issue with the fact that lawyers should practice competently and if you are about to take on a file or you meet an issue on a file that requires you to enhance your competency you either go do that or you get off the file.

And what we see in the Code there and what we see in the first 100 years of a lawyer's -- or of the Law Society's regulation of the Bar, is that, on the one hand there is an obligation by the Law Society to make sure you maintain competence, but on the other hand, there is a preservation of the independence of the Bar by the Law Society not telling them what competence looks like and, certainly, not being involved in mandating competency training.

During this era, this first century of operation actually just as it so happens at the tail end of that era, the Law Society took a survey of Alberta consumers, legal consumers, and found out that 78 percent of Alberta consumers were either very satisfied or somewhat satisfied with their lawyer and 91 percent of consumers felt that they received good value for their legal fees. So, the Law Society operated for a long time granting that kind of independence and it seemed to be working.

If we look at the CRP it is not clear what changed in 2019 but something changed in 2019. Something big changed in 2019. It is in 2019 that the LSA adopted these political objectives and if we were to put their change of objectives into a single word the LSA decided that now they needed to be a pro-active regulator not a reactive regulator.

The change coincided in time with an articling survey that the Law Society did in 2019.

THE COURT: So, there was something at the time? It wasn't that there was nothing at the time. There was --

MR. BLACKETT: Well, --

THE COURT: -- there was -- there was the report from Ontario, I believe it was. There was the articling surveys from the Law Society of Alberta, Law Society of Manitoba, the Law Society of Saskatchewan. So, there was something at the time.

MR. BLACKETT: Well, --

THE COURT: It wasn't that there was nothing.

MR. BLACKETT: Well, no. I think that we are mixing things a bit. Those ones that you just mentioned relate to Code 6.3 which --

THE COURT: Right.

MR. BLACKETT: -- came much later in time. The articling survey came at around -- in around 2019, but it also comes -- if you really want to drill down into it, you see that Teskey makes reference to the articling survey in 2020 but he also references a speech that he gave earlier than that. So, I don't know if the articling survey came before or after the Law Society's determination to change its objectives, but we know that it formally changed its objectives after the date of the articling survey, and I've said that, according to the record, there was no evidence that I am aware of. The articling survey is not evidence. The articling survey was -- and we detail the problems with the articling survey but the articling survey was anecdotal, and very unclear, and I don't -- I am not nitpicking.

The articling survey just really was of no use and we know this from the fact -- I mean you can look at the articling survey itself. For example it says, "did you experience harassment or discrimination during your articles?" It doesn't say "by anyone in the legal profession". It doesn't say what is discrimination and harassment. If we look at the Code and we find what would be the, let's say, the most innocent kind of behaviour that might constitute harassment and discrimination, it comes down to making you feel uncomfortable. So, being the most, you know, innocent kind of behaviour, but it obviously also covers heinous behaviour but if you read the definition something that merely makes a person uncomfortable can constitute harassment.

So, the survey didn't identify whether or not the harassment took place in the profession although presumably that was implied. Doesn't define harassment and discrimination. And then finally once they get the results back they didn't do any quantitative assessment of it. They did a qualitative -- or sorry. I don't know if they even did a qualitative assessment. They only did a qualitative assessment of the my -- my experience of survey.

But as to the articling survey, what they didn't do was determined whether or not their results were statistically significant, which is the social scientist's way of saying "does this survey show us something material" because as we point out in the brief, about the my experiences project, if I go out to the Bar and I say send me -- as the Law Society did -- send me stories of discrimination, you are going to receive some. Receiving some isn't -- it doesn't matter. It doesn't tell you anything. Of course, we know there are -- there is both

discrimination in the profession and we know that people are going to perceive discrimination whether or not they are perceiving that correctly or not.

So, merely receiving some stories of discrimination really tells us nothing at all and that is, again, why I think it is so noteworthy that when it comes to the My Experience Project, the Law Society only did a qualitative and not a quantitative analysis. It looked at the quality of the anecdotes it received. It didn't try to quantify whether or not that's a serious problem.

So, yes, they had some sort of data, we might call it, but it is not useful social science data of any sort, and my suggestion would be that if the Law Society was really looking to find useful information it would have been far more rigorous in that survey. It would have asked questions that are far more particular. It would have defined terms and then it would have followed up to understand what those things are and then it would have compared those results to some kind of base line to determine whether or not this is a unusual level of harassment. I mean, for all I know, harassment and discrimination in the profession have been descending for decades and is already on a downward trajectory.

The Law Society didn't do anything to determine that. Rather it found that there are complaints of discrimination and harassment and then determined that it had to do something about it including completely changing the way it does regulation and including mandating The Path which *Vavilov* requires some rationale connection between things. What is the rationale connection between that and The Path?

There is a significant change in approach in 2019. Yes, there is some anecdotal material that comes before that change, but I think, overall, when we look at the CRP it is not clear why they thought this change was necessary.

When they made that change they added several core values to the organization most especially equity, DEI, and interestingly -- and this is at paragraph 26 of the brief, where formerly they had referred to the Bar's independence, they now referred also to autonomous regulation, which I think is really noteworthy because the Law Society stands before you today saying that they should be left to autonomously pursue objectives without oversight.

Of course, The Path was mandated in October of 2020. In our brief we go through the history of that decision and in particular we emphasize the fact that there appears to have been no due diligence on The Path whatsoever as far as we can tell, and especially no due diligence on some very important issues like, number 1, is it -- was it prepared by a trusted organization. And, as Mr. Song observes in his affidavit, the key researcher on The Path is associated with a group that characterizes Canada's constitution as a theft and tells lawyers that they should do something about the theft in the way they practice law.

And you can look at what that organization says about this constitutional theft and you can read The Path and it is perfectly obvious that that organization had a huge influence on the content of The Path.

Nor did the Law Society think about the ideological content in The Path. Namely that it contains post-colonialism and post-modernism. It didn't ask itself whether or not those are appropriate skills or knowledge for lawyers under a constitutional system like Canada's. And, so far as I can tell, the Law Society did nothing to determine whether or not the Law Society should be prescribing certain radical changes to Indigenous legal systems nor whether or not the radical changes it proposed would work.

Jordan Furlong is a name that features prominently in the CRP. He was involved in and prepared a report that the Law Society clearly relied on in deciding to implement this new CPD. His report is absent from the CRP.

THE COURT: But provided subsequently by you guys.

MR. BLACKETT: By us. When you look at that report, if you drill down on what these new cultural competencies look like, it is pretty clear that the culture competence has an exclusive theoretical concept or content. The other thing I will briefly just touch on is that Jennifer Freund's memo, that we looked at before or that we talked about before, she is policy counsel and in October 1st, 2020, she provided a memo on whether or not The Path should be mandatory and what she seems to indicate, and I'm distilling the whole memo down as best as I can, but she seems to say that the reasons that it should be mandatory is number 1, the results of that articling survey, which I don't know how those are connected; number 2, because the TRC said it should be mandatory, which again I don't know why that means the Law Society should make it mandatory; number 3, because other organizations were making it mandatory.

She also says in there, and this is I believe the first time I see this idea mentioned in the record, she says that the Law Society had determined the culture competency was, in fact, now a core competence. So, we have gone from the shift in policy in 2019 where the Law Society inserts what it calls non-traditional forms of competence as one of its objectives, to Jennifer Freund a year later saying that the Law Society has decided that this is a core competence. Now, I don't see the Law Society determined it was a core competence. I see her asserting that. Now maybe it did determine that somewhere off the record but I can't see that.

And finally she indicates that it should be mandatory because she says lawyers need "education to assist in reconciliation process". So, that seems to be about the most comprehensive reasons provided as to why The Path should be made mandatory. And I

would say that, if this Court were to perform a review of this based on reasonableness, there are some serious disconnects between those reasons and what would be appropriate reasons.

I also want to just pause quickly on the acknowledgment. This is dealt with at about paragraph 79 of our brief. What we see there is that -- so the Law Society is going to acknowledge to the public that our institutions are rife with all sort of systematic discrimination. This is the point of this document and, of course, they are going to announce it publicly which a lawyer's job is to maintain the integrity of the justice system. Presumably that is also the Law Society's job. So, I would think that if the Law Society is going to make that kind of an accusation it is going to be very careful about the evidence that it reviews.

But what we see with the memo provided by Susannah Alleyne, a DEI officer with the LSA, she sends a memo to the benchers and says, okay, here is the acknowledgment that is attached. Look, we are basing this on the My Experiences project, that survey. And that survey really only gave us data or anecdotes, whatever you want to call it, about race but I'd like the acknowledgment to be more inclusive, so let's -- let's acknowledge not just racial discrimination but discrimination on the basis of every other kind of identity characteristic.

So, what she is proposing there is that the Law Society acknowledge something which she is admitting they haven't collected any evidence of and this is the only evidence that she refers to, I believe. She may also refer -- or the acknowledgment when it is published refers also to the articling survey.

So, my point is when you look at the Law Society's decision-making process around deciding that it is time to publicly acknowledge that our legal system is corrupted with various forms of discrimination, there is a serious and concerning lack of evidence.

The brief also talks about the profiles genesis and what we find very interesting is that even through the profile, according to the Law Society, is intended to show skills that are necessary to have a safe, effective and sustainable practice, when you actually look at the Law Society's description of its process for coming up with these competencies, nowhere in that process do we have concepts of negligence, defalcation, or misconduct. So, as far as I can tell, either in the design of the task force, the selection of lawyers involved or the data that was collected, they didn’t look at data on negligence claims against lawyers. They didn't look at data on misconduct claims against lawyers, and didn’t look at data on defalcation, which I would think if you are going to come up with a profile to explain what you should do to avoid, you know, unsafe, ineffective and unsustainable practice we would definitely want to look at negligence, defalcation and misconduct.

Rather if you look at the both the organization that helped them come up with these competencies, and the task force that came up with the competencies, there is a heavy diversity, equity and inclusion element. In other words, these competencies are largely derived from a process which is driven by the theories and the political objectives.

The other thing that I think is interesting is that in the development of that profile, the -- what the -- and I can't say this definitely but I don't know that there is any other explanation for what I am seeing -- but the Law Society decided to first come up with all of the competencies and then send out a validation survey to, I don't know, various lawyers and the idea was that the lawyers would go through all of those different competencies and say, "yeah that is something that seems like an important competency" or, "no, that's not something that seems like a good competency" and, then, before they sent this out this survey they had determined what the validation threshold was, how many thumbs down means we should dump this as a competency. And, then what the record appears to show is that the TRC, the Truth and Reconciliation domain, which is an eighth of the thing, and the entire DEI domain failed validation. Did not validate. Did not clear that threshold. Then what we see is that, well, we consulted with the experts which I think is Furlong or his Act Inc. and they provided us advice on industry practices for interpretation and, based on industry practices for interpretation, the fact that these things didn’t validate didn't matter, and so they carried on with the profile including these domains which did not validate.

And the other thing that is important to note is that, throughout the CRP, we see the Law Society internally discussing, but they don't, except in one place -- communicate this to the Bar but internally discussing the fact that they are, over time, going to tighten the screws on lawyers. That they are going to start with kind of light touch regulation where it is kind of a suggestion and then it is going to become more and more mandatory as time goes on.

The other thing we note is that there is -- and we will get to this -- there is great confusion about whether or not this profile is somehow compulsory. I mean it is certainly compulsory that I assess my competency against the profile. That -- that much is -- is compulsory but what is -- I lost my train of thought. Just a second. Right. But it is not clear whether or not having those competencies is compulsory and the Law Society makes an argument to suggest that oh, no, lawyers don't have to have these competencies, or something like that, and we will get into that, but what we -- what we see in there is that the -- one of the people who developed this, in the appropriate committee, said that there would be a phased in approach and that the profile will set out the competencies -- competencies that all lawyers should be able to demonstrate in order to have a safe, effective, and sustainable practice after the benefit of a few years of experience.

So, to the extent the profile may be characterized as not compulsory the Law Society's idea

is that, well, it is compulsory to get compliant soon enough. All right. That is the end of my extended introduction. So, I am now in the Court's hands. I can look at *Green*. I can look at standard of review. Is there any preference as to where I start?

THE COURT: No. Wherever you are more comfortable.

MR. BLACKETT: Okay. I am just going to go to lunch.

Are you okay with that?

MR. KULLY: I'm subject to the Court. We are fine to go as long as the Court can take us.

THE COURT: It is up to you. Do you want a break? It is 11:30. We are breaking at 12:30 for sure. If you need a five-minute break right now I am fine to give you a five-minute break to regain your thoughts and get a -- but if you want to go. Do you need a break?

MR. KULLY: We are fine.

THE COURT: Madam clerk?

THE COURT CLERK: (NO AUDIBLE RESPONSE)

THE COURT: Are you sure?

THE COURT CLERK: Yes.

THE COURT: Okay. Go ahead.

MR. BLACKETT: Thank you. All right. So, I think probably *Green* is the best place to start so that is where I am going to go. Again, decided before *Vavilov*. Get into why that is important, the other thing -- I think the most important thing to note about *Green* is that it is based on completely different facts and it is based on completely different legislation and, of course, the facts and the legislation are what dictate the appropriate ratio decidendi to be extracted from the case.

So, most importantly even though *Green* is used by the Law Society expressly to support the idea that they have jurisdiction to impose CPD, the applicant in that case admitted they do.

THE COURT: But don't you also?

MR. BLACKETT: Well, I mean mandatory CPD. Again voluntary CPD versus mandatory CPD.

THE COURT: Okay.

MR. BLACKETT: And the issue of whether or not the Law Society was entitled to engage in the CPD program that it engaged in in *Green*, let's be more precise that way, was not an issue because that was admitted by the applicant there. The only thing that the applicant disputed is whether or not it was reasonable for the Law Society to impose an automatic suspension as a result of non-compliance with that program. So, the issue was -- the only issue other than the standard of review, was whether -- well, not -- well, basically the only issue, is whether or not the -- the automatic suspension was reasonable.

THE COURT: But they did go further in the decision than that.

MR. BLACKETT: Well, they talk about a lot of things in the decision. No doubt. Yeah. We will get into those, but my point is that the ratio -- the ratio to be extracted from the case is based on what is in dispute. So, if it is not in dispute, they have the jurisdiction to impose CPD then the ratio of the case isn't that they have the jurisdiction to impose CPD although there it may be an assumption of the court and it is. It was admitted. So, and, okay, and specifically the CPD that was in issue in *Green* was a requirement to do 12 hours of CPD seems to be based on CPD offerings of the Law Society of Manitoba and then to report to the Law Society that you had done it, and that if you failed to report that there was a discretionary long process by which a person could eventually get automatically suspended and that is what happened to Mr. Green.

So, those facts are quite different than the kind of CPD program we have here where we have a CPD program that requires us to be subjected to mandatory training in various sorts, subject ourselves to mandatory training that has all sorts of wild theoretical implications and CPD that requires lawyers to link their CPD development process to a definition of competency which includes a bunch of these theoretical concepts.

So, there is a reference in *Green* to the fact that while the applicant just didn't like what was offered, and didn't think it was useful, and the court says that doesn't really matter but what the applicant did not argue was that the context of the CPD contradicts the Law Society's proper objectives. That is quite a different argument.

So, *Green* on its facts is not nearly on all fours. But *Green,* on its legislation, is also very different, and I think it is best to look at that legislature before we talk about the standard

of review because it has a significant bearing on the standard of review, and we have linked to our brief, both the current *Legal Profession Act*, and the Manitoba legislation or the Manitoba *Legal Profession Act* as it stood at the time of that *Green* decision and sorry, I just need to pull something up, please.

All right. So, I think the most -- well, the most important difference between the Manitoba legislation and the BC legislation that is in issue in *Trinity* is the fact that both of those *Legal Profession Acts* contain what we've defined as the public interest clauses, and specifically the Manitoba Act contains section 3(1) that says the purpose of the society is to uphold and to protect the public interest in the delivering of legal services with competence, integrity and independence, and then provides a corollary power to that very board objective, which says, in addition to any specified power or requirements to make rules under this Act, the benchers may make rules to manage the Society's affairs, pursue its purpose, i.e., its public interest purpose and carry out its duties. So, I define those as the public interest clauses and they are present in the Manitoba legislation, present in BC legislation but absent from the Alberta legislation.

And if we look at the reasoning in *Green* and really the principles of why we use a reasonableness analysis in judicial review, if we use one, the Court basically says, look, the legislation has chosen to include these very broad terms in the governing legislation. So, we must respect that choice which is a choice to give to the Law Society of Alberta -- or sorry, the Law Society of Manitoba, the duty and discretion to -- to give those words meaning, to determine what the content of those words is or rather to interpret those words.

Which by the way does not mean that the Law Society can interpret them to mean whatever it wants. The Law Society has to still use appropriate principles of statutory interpretation including thinking about why it was given those powers in the first place.

And so *Vavilov* later kind of hearkens back to this kind of public interest clause and this is where we start to get into reasonableness but it says at paragraph 110: (as read)

> Where the legislature chooses to use broad open-ended or highly qualitative language, for example, "in the public interest" it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language.

Meaning the meaning of the statutory language. Another section of the Act, which is absent from the Alberta legislation is section 3.2 of Manitoba legislation and it says: (as read)

> In pursuing its purpose the Society must (a) establish standards for the education or professional responsibility in competence of persons

practicing or seeking the right to practice law in Manitoba.

And I really emphasize "practicing" there because it specifically mandates them -- mandates them to establish standards for practicing lawyers, including for education. And then finally -- sorry. Just one moment. Right. And we -- in the -- in the brief the applicant deconstructs the LPA to figure out what the scheme of the Act is and which is an honest assessment of what you see there. Right.

And so if we look at the scheme of the Act what we see is we see the Law Society heavily involved in education requirements and competency, that kind of stuff at admission. So, they determine what kind of degree you need to have, what kind of course you have got to take, what kind of course you have got to pass, et cetera, are you a person of good character. It determines all of that at admission and then there is really nothing about any of this until we get to conduct proceedings and where -- now that the Act next talks about the Law Society becoming involved in education when the Law Society finds that a lawyer has been practicing with insufficient competence in which case they can now prescribe education. And the kind of education they prescribe is a remedial education remedying the lawyer's particular form of incompetence. And, so should the Law Society be able to implement -- or maintain its profile here to the extent that a lawyer finds himself offside the competencies and the profile, the Law Society would have the clear right to require the lawyer to take remedial education as a matter of remedying misconduct.

So, in summary the applicant says that the LPA's scheme is one where the LSA is involved heavily in education and admission and then only in the event of misconduct arising from incompetence but otherwise grants lawyers professional independence which, of course, is consistent with the statement of the Supreme Court of Canada that we should by -- you know, by whatever human ingenuity we can engineer it, regulate lawyers where they are provided significant degree of independence.

And then finally -- and maybe most directly on point -- section 43 of the Manitoba legislation gives the benchers the power -- not the obligation this time but the power -- to establish, or maintain, or otherwise support a system of legal education, and a continuing legal education program and then splits out also remedial legal education programs. The Alberta Act does not contain that clause either.

So, it is obvious when you look at the legislation in Manitoba that the Manitoba Law Society had full power to both impose a CPD scheme and, which is not an issue in this case, ensure that it is enforced.

And so once we see those big legislature differences and we see those big factual differences I circle back to the Law Society's statement to the lawyers of the Bar in Alberta,

at their document A-157 which is contained in the continuing professional development guidelines where they say: (as read)

> The ability of Canadian Law Societies to establish such programs and administer them through the rules was confirmed by the Supreme Court of Canada in *Green*.

That is not right. That is not what *Green* confirmed at all. I think that is a very superficial reading of *Green*. First it did not relate to Canadian Law Societies. It is related to the Manitoba Law Society. It didn't establish the LSA's CPD jurisdiction. That was admitted. It was obvious from that legislation that they had that jurisdiction and even though Law Societies referring to CPD generally, what the Law Societies actually referring to are CPD's obligations which are not the ones that the Law Society -- or that the Court was talking about in *Green*. They are a different kind of CPD requirement.

My friend's reliance on *Green* has now changed from this statement. I am not saying my friend has changed his mind in particular or her mind in particular but what -- what *Green* is now used for in the brief is effectively the idea that what *Green* and *Trinity* both stand for is the proposition that it doesn't matter if the legislation contains a public interest clause or not. That a public interest clause is effectively found in the common law which we say is bad statutory interpretation.

All right. So, I will now just chat briefly about the standard of review. So, what I would suggest is, that if we look at *Green,* it actually stands for the proposition that, in this case, the appropriate standard of review is correctness and here's why. First of all, what the Court says in *Green* is that the reason that we should be applying reasonable is because the legislation has granted, with these broad words, these public interest powers, these express statutory public interest powers, And the Court relies on that broad statutory provision as supporting a more deferential review. That is number 1. So, the Alberta legislation does not contain the magical clause that the Supreme Court largely hung its hat on.

Secondly the Court in *Green* basically says, look, what we are dealing with here is a very particular rule. A rule that just applies to lawyers, i.e., has no impact on the public. It's -- it's -- and it's also a kind of little technical rule that would be something within the expertise of an administrator; meaning this is something within their bailiwick where they know better than we do the challenges of getting lawyers to comply. Therefore, let's give them some deference when they decide that a reasonable way to make a lawyer comply is using an automatic suspension as opposed to something else.

And then, of course, when a court comes to that conclusion, that we are going to use a reasonable analysis, they still do a reasonableness analysis. They still do a very

comprehensive look at what the Law Society did there and they determined that it was reasonable for the Court (sic) to use an automatic suspension as a means of enforcing compliance.

Here we are dealing with very different facts. Again, we don't have the same legislation and we are not dealing with some little itty bitty rule that has, you know, no effect on the public. Our argument is that we are dealing with a rule that, if it is followed by the lawyers of the profession, we have a serious undermining of the rule of law and a serious undermining of the constitution.

THE COURT: So, let me hold you there for a second --

MR. BLACKETT: Sure.

THE COURT: -- because are you saying that the statute has to specifically use those words public interest because I want to take your attention to section 6, I believe it's (n), which gives the society very, very broad powers to do whatever they think is necessary. So, it --

MR. BLACKETT: Sure. Let's go there.

THE COURT: -- does not say the actual words public interest. So, are you stating that because it doesn't say the actual words public interest that differentiate it? Because it sure gives it broad, very broad powers.

MR. BLACKETT: I'm sorry. I am just getting myself to that Rule.

THE COURT: Yes.

MR. BLACKETT: Yeah. Well, my argument on 6(n) is that it doesn't actually give them very broad powers at all.

THE COURT: To do anything and pay anything.

MR. BLACKETT: 6(n) says that: (as read)

> The benchers may by resolution take any action and occur any expenses the benchers consider necessary for the promotion, protection, interest or welfare of the Law Society.

THE COURT: Right.

MR. BLACKETT: The Law Society. So, it is a broad power to do what is in the Law Society's local interest, not to do --

THE COURT: But what is the Law Society? It is the lawyers.

MR. BLACKETT: Yes. Yeah.

THE COURT: Okay.

MR. BLACKETT: But it is a corporation. Right. It's a corporation with corporate interests. I mean it finds itself at 6(n) because what it is doing is it is giving the corporation the power to make private -- to make private decisions. What -- what are called private decisions in the case law as opposed to public decisions. So, it has private interests like renting a photocopier, renting an office, having employees.

THE COURT: That is what you think that applies to and not overall how they can mandate their members?

MR. BLACKETT: Yes. Because -- because it says the welfare of the society as opposed to the welfare of society or what it would say if it related to something other than the welfare of the society, namely to the public interest, is it would say take any action, incurring expenses, the benchers consider necessary for the promotion, protection, interest -- sorry -- for the promotion, protection or interest of the public. Just like it does in Manitoba or BC. So, I -- I give meaning to the words the society.

THE COURT: And you give meaning to the words that it doesn't have public interest or the word public in there as it does in Manitoba.

MR. BLACKETT: Absolutely. Right. I mean the -- the -- it is interesting, this same clause actually appears in the Manitoba legislation and the Supreme Court of Canada doesn't mention it. The Supreme Court of Canada focuses on the public interest clauses where right at the top of the document the Law Society is given the power to expressly pursue the public interest. Here is says they can take any action, incur any expenses in the interest of the society which is a very different focal point. One is the public generally. The other is the corporation of the Law Society. So, I see those as impossible to reconcile those by saying, well, we should read the Law Society of Alberta as being -- just strike that out effectively and say the public interest.

And now my friend makes the argument and -- and it's a little tricky to tease this out but it is clear from the case law that the object of the Law Society is a public interest objective,

which is to say when the Law Society is given all of its powers, it is not given all of those powers so that it can do things for its own interests. It is not given all of those powers so it can pursue some political objective. It is not given all of those powers so that it can take care of its members and line its members' pockets or something like that. The point of you having all of this autonomy is to make sure you are complying with your duties to the public and the duties to the public are defined in the case law and defined by the scheme and words of the Act themselves which are primarily a duty of loyalty to the law and loyalty to the client.

And what my friends do effectively if they kind of leap frog the words of the Act, they leap frog those statutory objectives, and then they just land over here on this concept of public interest, and they say, oh, we don't have to look at the Act because we are supposed to be doing things in the public interest we can do whatever we want in the public interest which is just -- that is not how statutory interpretation works and if you -- let's say that we accept that argument and we apply it (INDISCERNIBLE) to other cases. What statutory delegate in Canada does not have a public interest objective? Every statutory delegate pursues the public interest.

So, what happens to judicial review if every single statutory delegate can effectively ignore the words of its Act and pursue this vague concept of public interest with no judicial oversight. I mean the rule of law requires that its powers be prescribed by the statutory wording itself. We'd be ignoring that statutory wording and it requires that the Court pay attention to and ensure that there are reasonable decisions being made with respect to the proper statutory objectives. Not to some vague concept of the public interest.

So, every tribunal, every board, every Crown corporation, even if it is recognized that, well, those things do something in the public interest ipso facto we should read the legislation that is giving them power to pursue the public interest. I just -- the rule of law evaporates. There is -- there is no effective judicial review anymore because instead of constraining the powers of the legislation, we now just open the barn door wide and the statutory delegate can just gallivant off and do whatever it thinks is in the public interest.

So, I think it is very important that we look at those words where it relates to the welfare of the society and to takes those words very seriously.

The other thing I point out is that if I were to try to summarize what *Vavilov* says in, you know, a sentence it is that okay -- well, probably be a couple but *Dunsmuir* says -- like *Dunsmuir* was a regime of categorization. Right. So, it became this game of categorization and the game of categorization is if you can convince the Court that what you have before you is a true question of *vires* then correctness applies. Right. So, *Dunsmuir* led to all of this chaos about what is a true question of *vires* versus a false question of *vires*. I mean it

is all *vires* and ultimately judicial review is all about *vires*. So, it became very murky what all of that meant.

So, what *Vavilov* said is okay, knock it off. There is no more of this categorization stuff, instead we are going to apply principles. And the first principle is, by default, everything is reasonableness. And the second principle, is where the rule of law requires it, it's correctness. That is what *Vavilov* says. It does away with the categorical analysis and it just doesn't do away with that categorical analysis. It does away with that categorical analysis while referring expressly to the words that we see in the Manitoba legislation namely in the public interest. It is not referring -- it doesn't say it is referring to the Manitoba legislation but it is referring to those words. Right.

And so in *Green* we still see the application of basically a categorical analysis where it says, hey, when we are dealing with issues of a Law Society jurisdiction which is a category of case that will always be reasonableness. That seemed to be what is suggested.

THE COURT: Excuse me. Can you take that outside because we can hear you whispering and it is interrupting.

UNIDENTIFIED SPEAKER: All right.

MR. BLACKETT: So, that's -- so we have *Dunsmuir* which says it is all about categories still. We have *Green* where they are applying the categorical analysis and then we have *Vavilov* that says knock off the categorical analysis. Now, it is either reasonableness by default, or if you can convince us that we are some threat to the rule of law, then it is correctness. So, I believe this application clearly demonstrates a threat to the rule of law and, therefore, I believe the appropriate standard is correctness. And again the other thing is that in *Green* and *Vavilov* there is a reference to the idea that the degree of deference we grant to the delegate is going to be based on the -- how narrow the issue is we are dealing with. This is -- we are dealing with a very broad issue and how narrow the words of the Act are and in *Green* there was very broad wording. In Alberta here we have very narrow wording

I guess the other point I make on this is by default when we consider a reasonable analysis we are looking at reasons, formal reasons. Now, there's plenty of case law that says no, we don't always need formal reasons because judicial review is a multi-faceted beast. So, sometimes there aren't going to be formal reasons but we can construct some reasons from the record, or I suppose what seems to be happening here is that LSA can now it its brief offer reasons, new reasons, and to the extent therefore that the Court would determine that it is going to exercise a reasonableness review, the Court has to look at the -- either the reasons that are offered in the record which there are very few, and the CRP, as we point

out in our brief, does not contain most of want really are the reasons including for example the Parmar article.

And secondly, if we look at our friend's brief, what he has done, again, is he has completely black boxed the question. He has stuffed all of this politics into a box called competence and he says to the Court, look, I have jurisdiction -- the Law Society has jurisdiction to regulate competence. That is what is in this box. Therefore, isn't this reasonable.

I mean *Vavilov* calls for a transparent reasoning process. That's the opposite of transparency. And it requires rationale connection between objectives and outcomes in the reasoning process. How can we possibly establish on my friend's brief even a rationale connection between what is inside the black box and pursuit of appropriate regulatory objectives. We don't know what it is so how can we possibly know that it is appropriate or reasonable? So, on the one hand, yes, by default it should be reasonableness. *Green* might suggest that it should say reasonableness.

Maybe I am not convincing in my argument that the rule of law is at stake here, therefore, correctness is absolutely required. And in that case the Court may be tempted to do a reasonableness analysis but the question becomes what does that look like if we -- if my friends have not actually told you its reasons, the Law Society's reasons.

What it -- what it comes down to again would be a reasonable analysis by assumption. A reasonable analysis would look like: I don't know what is in the black box; It has got the label competence on it; I am going to assume that the competence that it has got inside that black box is reasonable because it seems reasonable and therefore I agree to -- or I dismiss the application. In other words, on these facts, where really no reasons are offered and the reasons are, on purpose, contained inside of a black box, to choose to apply a reasonable analysis is just about the same as just choosing to give the Law Society a pass, but that is not what a reasonableness review is. It is not about giving the person a pass. It is about really applying a rigorous analysis of the thought making process and ensuring that it is entirely reasonable and most especially in this case reasonable given the requirement of the Law Society not politically interfere with the Bar. So, those are my submissions on reasonableness.

I might just spend a minute if I could on statutory interpretation.

THE COURT: Mm-mm.

MR. BLACKETT: So, I have already referred to this concept but my friend in his brief -- or my friends in their brief, sorry -- they have a section called "constraints" and in the section called constraints they lay out a bunch of things which are

not constraints at all but, in fact, are the opposite of a constraint. They are -- they are -- they lay out a number of principles under the heading constraints which, in fact, tend to expand the Law Society's powers and tend to insulate the Law Society from judicial oversight or, to circle back to their 2020 plan, render the Law Society autonomous from judicial oversight.

So, constraints, beware of that section. That is not how constraints are supposed to work. Also as we point out constraints is not -- is kind of, but not expressly a part of the *Rizzo Shoes* rules of statutory interpretation. Instead constraints is a concept in *Vavilov*. So, constraints is really a concept about what constrains the decision-maker's discretion. The decision-maker has been given a choice to make but they can't do whatever they'd like. We see in *Roncarelli*, okay, you are given a choice to yank a person's liquor licence but you can't do that to prosecute a religious minority. Right. So, we have that kind of a constraint. Yes, you have the power to yank their licence but you don't have the power to yank that licence for the wrong reasons. That is a constraint. It narrows -- you look at the Act that seems to give plenary discretion to do certain things but it narrows significantly that discretion to do that thing.

So, that is what constraint means. Constraint constrains powers but if you read the Law Society sections on constraints it seems to do the opposite. And as I pointed out in that constraint section the Law Society locates for the first time of three times in their brief they locate public interest clauses effectively. They find public interest clauses in the constraints of the common law.

The other thing to note is that if you -- because my friend has decided -- elected not to make any arguments about its political objectives, the profile, or the CPD tool, it offers no arguments whatsoever about its jurisdiction to do those things, and so we have set out a number of reasons why a profile is not an appropriate use of the Law Society's statutory discretion including that it seems to be a competing code of ethics that the Act only calls for one. The Act calls for a standard of ethics but the profile purports not to be any kind of a standard. And then, of course, no statutory delegate is permitted to pass laws that are so unclear that you don't understand them. That is an abuse of discretion in and of itself and invalidates that bylaw. And so, we've got a number of arguments in our brief that have not been responded to in that respect.

As it relates to the code again we are -- we have this black box or what I call the Motte-and-Bailey argument. Really I think it is just two paragraphs that my friend spends on the code of ethics and says, look, the code of ethics, section 6(l) of the Act allows us to impose a code of ethics and that is exactly what we did. We imposed some stuff in a code of ethics. What things -- all it says is harassment, discrimination. Okay. So, that superficially sounds okay, I guess, but the question becomes, of course, what does it mean by discrimination --

sorry, what does it mean by harassment and what does it mean by discrimination.

In the applicant's brief they say, like, let's look at what it calls harassment and discrimination. Well, it calls -- calls discrimination things like, you know, effectively denying the concept of systemic discrimination. It says that it is -- it's a form of harassment not to know certain things about Canada. That sounds very different than the kind of thing I would expect to find in a code of ethics. So, it is not -- we can't just rely on these superficial terms on this black box. We need to look inside the black box and we look inside that black box, we see that -- that harassment and discrimination have been defined to include -- have been defined theoretically. They are theoretical concepts now.

And we make all of these observations in our brief that discrimination and harassment and the code incorporates the theoretical concepts. We say it is for improper political purpose and, therefore, it is an abuse of discretion, and we say that the meaning of all of that stuff that is actually inside of the black box is totally unclear. You know, you are supposed to recognize systemic discrimination. What is that? When the Law Society was going to publicly acknowledge it, it had to define it. So, what do all of these things mean? It is an abuse of discretion to pass laws that everyone is scratching their heads trying to understand.

And the case law, especially *Canadian Committee for the Commonwealth of Canada* says that where a statutory delegate passes a law which is unclear and that law abuts constitutional freedoms that is a particular problematic unclarity and where we have *Charter* rights that are involved that renders the law not even a law for the purpose of section 1. So, if we are going to limit constitutional rights, *Charter of Rights and Freedoms* says that we can only do so by limits which are prescribed by law and the Court has interpreted that to mean correctly that -- that the law is clear enough that people can understand it.

I know there are a bit of back and forth between *Canadian Commonwealth* and the *Nova Scotia* case where the Court is trying to delineate what the scope of that is, but in my view, I mean again we have to circle back to the fact that my friends say that this Court doesn't have the institutional capacity to understand its political objectives. It doesn't have the institutional capacity to even understand it. If that is the case how are lawyers supposed to get sufficient clarity out -- out of those rules to know what they are. And again we are dealing with a situation where we abut freedoms, and not just abutting the freedom of speech but when we look at what harassment and discrimination includes, it also abuts freedom of conscience.

Under the code of ethics now lawyers are supposed to have a certain view of the world. They are supposed to believe certain things. So, that is a profoundly important violation of those rights and therefore it is very important that the Law Society in those circumstances

be very clear and it has done the opposite.

THE COURT: You are saying the Law Society is telling lawyers they have to have a certain view of the world?

MR. BLACKETT: The Code says that expressly.

THE COURT: Okay. And where does the Code say that expressly?

MR. BLACKETT: I have to find that now. Sorry. Just a moment. I have got to pull it up.

THE COURT: Yes.

MR. BLACKETT: Sorry. So, it says for example, lawyers are expected to respect the dignity and worth of all persons; not -- don't say something which shows a lack of respect; but let's actually respect the dignity and worth of all persons. Which I don't deny that a lawyer should but to make it a requirement is a requirement that the lawyer has certain feelings and thoughts about people. It says that lawyers should strive to recognize their own internal bias. So, lawyers should as a part of the code of competence know that they have internal biases. So, that is a thought about yourself and the contents of your own mind. And again lawyers should be alert to unconscious biases that may inform these relationships. And so the lawyers is supposed to not only know that they have unconscious biases but be aware of them and make sure that they don't interfere with their work. So, that is a requirement for a lawyer to have certain beliefs.

THE COURT: You are losing me.

MR. BLACKETT: Well, a lawyer must be aware that --

THE COURT: You said a lawyer --

MR. BLACKETT: -- in their subconscious --

THE COURT: -- is to strive to recognize internal biases.

MR. BLACKETT: Yes.

THE COURT: That is what you said the wording was.

MR. BLACKETT: That -- yes, one of them. Yes.

THE COURT: So, you need to strive to recognize if you, in fact, have -- it doesn't say you do. It says strive to recognize internal biases and in striving you may find that you don't have any. Maybe you do. Maybe you don't. It doesn't say look at your internal biases. It doesn't say that. It says strive to recognize internal biases. Make an effort --

MR. BLACKETT: Well, I think the premise is there are internal biases and you go find them.

THE COURT: Why? Tell me that. Show me that. Help me understand that.

MR. BLACKETT: Because it doesn't say strive to recognize if you have internal biases. It says strive to recognize them.

THE COURT: Right.

MR. BLACKETT: Go recognize them. It is the same as the profile.

THE COURT: It says make an effort to.

MR. BLACKETT: Right. Because again when -- first of all, when we understand the theories, what we understand is that a person can make an effort to understand their biases but you can never actually quite recognize them. You can never quite get them over. As The Path says the way of colonialism is inescapable. So, the whole premise here is that we are never really going to get to the promise land where we both see that we have biases and get rid of them and the profile says this too. Instead what our job is, is to constantly search our conscious for these biases and constantly recognize them and to the extent possibly purge them our mind. I mean what I am saying right now sounds so dark to me but that is the requirement that the Law Society places on lawyers to search their subconscious for biases and to eject those biases and it elsewhere tells lawyers you have got these biases. There is no doubt especially if you are a white Anglo-Saxon Christian male you have got these biases. Now, go find them.

And here the Law Society is not saying think about whether or not you have biases and if you do try to get rid of them. It says go search them out. Go search out the biases that do, in fact, exist and in any case even if we say, well, no, it is not saying that. It is just saying search your mind for. I mean why is the Law Society in the business of telling me to search my mind for anything. That is not legal competence. That is not legal ethics. That has got

nothing to do with the Law Society. It is not the Law Society's business what is inside my brain would be my position.

I could probably do a better job of demonstrating in here that there are requirements to have certain conscious -- conscious but that brings me to another point which is first of all -- well, I just want to make this point about things being mandatory and I am sensitive to the fact that I am getting close to my time here but I don't know if the Court accepts this argument but my friend's argument is effectively that -- and you have to be very clear about the words that are used by the Law Society in their materials to lawyers and repeated in the brief very specific words are that the lawyer doesn't have to do all of the competency -- sorry. Doesn't have to demonstrate all of the competencies in a given year and there are other statements like it is not a shopping list or a check list, et cetera.

The idea being that it is not really compulsory that lawyers are competent as this thing defines it. Which we say, well, first of all, wait a minute. What gives here. If you look at the letter that accompanies the profile it says these competencies are important for safe, effective, and sustainable practice. Okay. Well, then if I don't have these competencies, by definition, I don't have a safe, effective or sustainable practice. My practice is unsafe, ineffective, and most importantly, unsustainable. It is not going to continue. That is what the Law Society says.

So, there is a bit of chaos here about whether or not this is compulsory or not and I think part of the chaos we can understand when we look at the certified record of proceedings where the Law Society says we are going to turn up the heat later but what we are going to start with sort of a little light touch and the light touch is we are going to call these things aspirations and we are going to say you don't  have demonstrate competence in all of these areas and, yeah, sure we are going to say that you need to be safe, effective and sustainable by having these competencies but we are going to say these do not set thresholds for sanction.

But here is the -- I mean first of all, I would say look at that. It can't be this confusing. This is not -- you can't impose on lawyers an obligation that is this confusing. Especially where it abuts constitutional freedoms. But secondly, let's be careful when we think about this. Okay. If the profile does not set threshold standards for sanction, the code does. The code says I cannot practice incompetently. That is where the threshold is set. Okay. Let's give them credit and say the profile doesn't set the threshold. The code does. The code says I cannot practice incompetently and so -- and what that means is that, look, I can -- I can be a civil litigator and I can be completely incompetent in matters of securities law as long as I don't get into that area, but as soon as I start practicing in that area now I have breached the code.

Right. So, this kind of hanging incompetence doesn't really matter until you practice with incompetence and nowhere does the Law Society say a lawyer is free to practice incompetently. Nowhere in there does it say that never mind the code of professional conduct that says we must comply with the code and we must comply with the spirit of the code not just the words of the code. With its spirit, right. We have a very earnest requirement to comply with the code in letter and spirit and it says I cannot -- I cannot practice incompetently.

So, I would submit that we have before us a scheme where the profile will say, look, if Glenn stands up in court and denies the existence of systemic discrimination that is a form of incompetence which we say is -- makes his practice unsafe, ineffective, and unsustainable. Okay. But most importantly it renders him incompetent and the code says if he is incompetent he cannot practice. He can't practice incompetently. So, I think we have to be really careful when we see that statement that oh, no, a lawyer doesn't have demonstrate competence in every area of the domain every year. It does not go on to say that a lawyer is free to practice incompetently.

And just while I am on the topic of the compulsory nature of the profile, the -- and by the way the same -- the same thing applies to harassment and discrimination. The code says we cannot harass and discriminate. It says we cannot harass and discriminate and it means all of these very theoretical difficult to understand things and we can look at the profile and get a better idea of what they mean by that.

Okay. So, when I am required to comply with the harassment, discrimination provisions of the code on pain of suspension or disbarment, in spirit, there is no way to interpret that code as just ignoring all of the competencies that are in the profile. Clearly the profile and the code have to be read together.

So, same point and then the other point we make is that even if the Court were to come to the conclusion that, no, there's really no requirement to comply with the profile, it is just something hanging in the wind that a lawyer can ignore effectively except for the fact that they have design their competencies with it. It has all sorts of indirect impacts on lawyers. And one of the indirect impacts is it informs the Law Society's mandatory education program. So, the Law Society passed Rule 67.4. When they passed that rule it starts with the words independent of and then it references the definition of professional competence. So, independent of that definition of professional competence, the section that contains it, the Law Society can impose mandatory education and the first thing that it imposed is stuff consistent with domain 8 of the profile, truth and reconciliation.

So, the profile might not be compulsory in some respect but is certainly compulsory in the sense that we are going to be compelled to continue this kind of education. So, that is one

way in which the -- the profile is compulsory and then the other point again is that that -- is that the Law Society basically says to the Bar that if you don't have these competencies you are ineffective, unsustainable, and unsafe. The Law Society is sending a clear signal to the Bar and what it is saying to the Bar is that this is our view of appropriate competence. All right.

And now as a lawyer if I see another lawyer practicing with incompetence, I have an obligation to do something about that and I'd say I have at least a moral obligation to say something about it to the lawyer if I don't have the formal obligation to make a complaint to the Law Society but -- so my point is not only does the profile have an effect on the lawyers directly because, I would say, they do have to comply with it, and not only does the profile have an indirect effect in the sense that we kind of get that it is going to affect us somehow and it is going to be -- made the subject of mandatory education but it also sends a signal to the rest of the Bar that the Bar will pick up on. The idea that a person who doesn’t share these competencies is an outcast and is incompetent and if we look at my client's experience when he opposed Rule 67.4, we see that in action.

We see a sort of public vilification including by members of the Bar of lawyers for not being culturally competent. And again from Roger's lived experience in China, he has a specific word for this kind of conduct and it is called social death. So, effectively it is a blacklisting of that individual and I mean it -- I think it is fairly obvious to a lawyer, myself included, that by standing against these principles we put ourselves on the wrong side of the Bar. Absolutely. So, there are many ways in which this profile is both obviously compulsory and also compulsory in a more insidious and indirect way in which we explore in the brief.

So, those I think should be all of my submissions. I have many more to make but I'd be happy to answer any questions that you might have about anything in particular.

THE COURT: We are going to take a break.

MR. BLACKETT: Okay.

THE COURT: We will take a lunch break right now. We will come back. What time do you guys want to come back at?

MR. KULLY: I'm in the Court's hands as to how long lunch is needed.

THE COURT: How long do you think your submissions are going to be because there needs --

MR. KULLY: No. I know there needs to be an end. Maybe two hours max, hour and half. I can shorten it as needed.

THE COURT: Well, no. I am just thinking because he -- how many questions I may have for both of you, Mr. Blackett is going to be allowed a very short rebuttal. So, I just want to -- I just want to do the timing properly. We typically go from two to four-thirty which would give us two and half hours subject to a small break possibly, particularly for madam clerk. So, I mean if you are two hours that gives 15 minutes worth of questions possibly and 15 minutes of rebuttal. We could probably do it if we come back at two.

MR. KULLY: Certainly. I can cap myself at two hours.

THE COURT: Okay. Thank you.

Does that work for you, Mr. Blackett?

MR. BLACKETT: Yes, it does, and I'm just going to -- I just need -- in respect for my client I need to point out that I stand before you here trying to make -- one of my two primary arguments is that all of this violates my client's *Charter* rights.

THE COURT: I understand that from your brief.

MR. BLACKETT: And -- and I haven't -- I just want to -- two things. Number 1, I need to reference the important of referring back to the briefs to see those arguments because I am not able to make those in oral submissions. But what I do want to emphasize before I sign off here and I will be two minutes is that we make a number of allegations that these things violate constitutional freedoms. My friends say that on the facts it is impossible if -- well, difficult if not impossible to imagine how there could be a constitutional violation. And at the very least we can see that that is pretty obviously not the case because the code on pain on sanction definitely censors speech, at least. Right. It says you cannot harass somebody. That is always a form of expression. Harassment is a form of expression.

THE COURT: There is a line though; correct?

MR. BLACKETT: Absolutely. I'm not -- I'm not -- I'm not saying we have a constitutional freedom therefore we should do it, and I'm not saying that we have constitutional freedom so it can't be restricted. That is not what I am saying. What I am saying is that 2(a) is very broad. It provides a very broad protection and where we get to

this line between acceptable and unacceptable expression we are talking about a section 1 analysis. Correct?

THE COURT: Correct.

MR. BLACKETT: Right.

THE COURT: Okay.

MR. BLACKETT: But 2 covers all forms of expression except violence, right. Violence is --

THE COURT: Okay. But whoa, whoa. There is a very broad definition of violence. So, be careful on that one is you are referring violence to just strictly physical violence there is a very broad definition of violence.

MR. BLACKETT: Well, that may be a major constitutional problem for another day because we see violence being used by the Law Society. Well, no. I take that back. We see violence being used by the theories of the Law Society as including the epistemological violence namely disagreeing with another person's perspective which -- which again I -- a constitutional issue for another day but the point is when we talk -- okay. When we talk about harassment it clearly covers things that are not violence in however, broad of a definition we might have for violence, right. I think so. I don't know.

THE COURT: I don't know either. So, why -- I don't know what you are referring to there.

MR. BLACKETT: Well, for example, well, okay. I'm going to posit that by -- on pain of sanction saying that a person cannot say certain things, right, which is what the code of conduct does. That is obvious. That prima facie appears to be a violation of section 2(b) which guarantees the right of expression subject only to very rare exceptions which I hear the Court saying are actually broader than I might imagine, but nonetheless there is a prima facie restriction on expression.

THE COURT: Okay.

MR. BLACKETT: I mean my friend has not made the argument that this is violent and therefore not covered by 2(b). My friend's argument is that it is unimaginable how telling a person they can't say something could be a restriction on their freedom of expression. That is my friend's argument which I don't -- I mean anyway it is pretty obvious that by restricting a lawyer's freedom of expression you are violating -- you

are impinging on their section 2(b) right. Now, whether or not that is reasonable or not would depend on a section 1 analysis but I can certainly, contrary to my friend's submission, imagine how that could constitute a constitutional violation. I mean it is almost a definition of a violation. It censors speech. That is what the 2(b) guarantee protects against is the censorship of speech.

So, to me -- my point is the constitutional violation or at least infringement subject to a section 1 justification seems obvious. I think it is more -- I think it is also obvious once we understand the theories and, once we really read what is inside that black box, that the constitutional violation are much more significant than that.

You know, for example, throughout the Law Society's materials they attack, as a system of oppression, the world view of the white Anglo-Saxon Christian male. Okay. They call that Christianity a sham. A sham that is intended to oppress minorities. A sham that has no validity. So, as we get into the details, as we reach into that black box and start pulling out all of these different goodies, we see that, in fact, beyond the code, you are saying don't say things are particularly rude.

THE COURT: But where does it say -- show me where. So, I am hearing you say that courses such as The Path are actual speaking against Christianity and saying that Christianity is a sham or Christianity and colonialism created something or did something that now has caused an entire portion of our population to suffer. Okay. I am hearing you say that. Where -- and I have seen in your client's affidavit particularly at paragraph 72, he has given a bunch of things of why he thinks that is offensive. From my perspective there is a difference between awareness and indoctrination. There is a difference between saying you must believe this and here is a perspective. Be aware of it.

MR. BLACKETT: Mm-mm.

THE COURT: There is a complete difference on that.

MR. BLACKETT: Yes.

THE COURT: So, what I am hearing you say is this -- what the Law Society is trying to do and in courses like The Path it is saying you must believe this and you must say that this is true. Is that what you are saying and if so show me where it says that, please. Help me.

MR. BLACKETT: Well, I mean that is only a sliver of the argument but yes in a sense or part of the argument is that Law Society is compelling us to have those thoughts and where is that. It doesn't say in the --

THE COURT: Compelling us to have what thoughts?

MR. BLACKETT: Have the thought that colonialism is an ongoing system of oppression that is incompatible with the race of Indigenous Canadians and, therefore, lawyers in their conduct should go about and resolve it. Should reconcile by shepherding them into this system of authoritarian racial segregation.

THE COURT: Show me because here is -- again you need to help me with this because there is a difference between an awareness of it and something that --

MR. BLACKETT: Mm-mm.

THE COURT: -- it is telling you to do. So, here is an awareness. There is a perspective out there that says colonialism has created this. Perspective. Be aware of it. Okay. Where does it -- show me, tell me, point it out where it says you must believe this and as --

MR. BLACKETT: Well.

THE COURT: -- such --

MR. BLACKETT: Sure. Okay. The CRP or we go to the profile, I should say. And before I take you here we need to emphasis it doesn't matter if the Law Society says you have to believe this. Okay. For the Law Society to --

THE COURT: I'm talking about infringing. Because you are saying this infringes on his beliefs and I am saying there is a difference between making an awareness.

MR. BLACKETT: Right.

THE COURT: I am not asking you to believe in it. I am just asking you to be aware of it.

MR. BLACKETT: Yes, yes.

THE COURT: You don't have to --

MR. BLACKETT: Yes. yes.

THE COURT: You can absolutely disagree with it.

MR. BLACKETT: Right.

THE COURT: You can think it is poppycock. You can think it is untrue.

MR. BLACKETT: Mm-mm.

THE COURT: How can having an awareness of something be an infringement of my beliefs if I am allowed to not believe it. If I am allowed not to go out and when I read your client's affidavit what I am understanding in China he was not only told that this is the way it was, he had to go out and promote it.

MR. BLACKETT: Mm-mm.

THE COURT: Okay.

MR. BLACKETT: Mm-mm.

THE COURT: That is what I understand.

MR. BLACKETT: Right.

THE COURT: So, what you need to point out to me and --

MR. BLACKETT: Sure.

THE COURT: -- to help me out here is here is an awareness of what this perspective believes. Shows me where it is saying not only do -- you must believe it, you must go and promote it.

MR. BLACKETT: Okay. So, this -- I mean first of all, it is implied in The Path but I don't want to go there. Instead what I would like to go to is the profile and so if we go to the profile obviously the two competencies, 3 and 8, and if we go to 3 it defines the competency as building intelligence. Okay. And so what does that mean? It means developing self-awareness of how one's own conscious and unconscious biases affect perspectives and actions. So, the competency is defined -- we have performed the competency appropriately once we have developed self-awareness of our unconscious biases which -- I don't need to get into again how dark that is because it really requires

something irrational which is to be aware of something that is outside of your awareness. But nonetheless, that shows what the Law Society is saying is that competency is defined by knowing it. You are competent once you know it. It is not the search for it that makes you competent. It is the knowing of it that makes you competent.

THE COURT: Knowing that you do have unconscious biases --

MR. BLACKETT: Right.

THE COURT: -- or knowing that you have strived to see if you have it.

MR. BLACKETT: No. It says develop self-awareness of how one's own conscious and unconscious biases affect perspectives and actions.

THE COURT: Okay.

MR. BLACKETT: It is -- I think it is fairly clear saying you have them. Now, develop self-awareness about them and not only that understand how they affect perspectives and actions which is weird ideological speak and when we understand that, what we know that it means is affects your perspectives based on your race. That is what they mean. So, it is not just develop self-awareness and the fact that you have some vague unconscious bias. It is a very particular form of unconscious bias that we are talking about. That's why I mean obviously we hear a lot of about this kind of re-education, training. It is a lot about unconscious biases. That is kind of at the heart of the theory.

It also says reduce one own biases. Okay. First it asserts you have the biases and then it tells you, you must recognize them and then the next thing it tells you to do, not eliminate them again because there is no such thing as eliminating them but reduce them. Okay. it also says recognize how systemic inequalities and barriers affect individuals and groups. It doesn't say listen to other people's perspectives about that. It doesn’t say consider whether or not that happens. It says recognize how systemic inequalities and barriers affect individual groups.

THE COURT: Be aware.

MR. BLACKETT: Yes. Be aware. Have it in your awareness. Yes.

THE COURT: Okay.

MR. BLACKETT: Know it.

THE COURT: Be aware.

MR. BLACKETT: Right.

THE COURT: Not necessarily have to believe.

MR. BLACKETT: Not necessarily have to?

THE COURT: Have to believe.

MR. BLACKETT: I don't know. I don't see any daylight between those two things.

THE COURT: Okay.

MR. BLACKETT: It also says -- okay. Now we have developed this culture competence in terms of what the content of our mind, what we are aware of, but now we must practice anti-discrimination and anti-racism. Practice it. Again the use of these terms which are so key to the lawyers' job. I practice law and now I practice anti-discrimination and anti-racism. So, not only do -- if I am practicing anti-discrimination maybe it doesn't matter what the contents of my mind are but to the outside world I seem to have embraced the theories. That is what anti-racism is. It is a theoretical concept. So, that is a requirement that I now take action and there are other requirements like that including advance inclusion through intentional positive and conscious efforts.

So, not only do I have to search my mind for this stuff and put the right knowledge in my mind, the Law Society is telling me that I then I have to go out as a soldier of these theories and advance those theories through intentionally positive and conscious efforts. And then similarly if we go to the profile part 8, again strengthen understanding of the truth. Competency is indicated when I acknowledge the impact of colonialism and systemic discrimination.

So, that is not only -- acknowledgment is two parts, right. One is believe it and the other part is I am saying it. I am acknowledging out loud, yes. What I am seeing in the Indigenous communities is because of colonialism is a manifestation of ongoing systemic discrimination. That is my requirement to believe that and it is my requirement to say that. That is compelled belief and compelled speech.

And then finally again it says apply calls for action and calls for justice applicable to Indigenous people's -- the calls to action there is about 94 of them, I think.

THE COURT: Seven I think.

MR. BLACKETT: Okay. Ninety-seven of them. Just call action number 27, which was the call to action in here is --

THE COURT: In the justice system.

MR. BLACKETT: -- awash with ideological content and it says -- the very last word that my friend has not included in their brief repeatedly, is that part of called to action number 27 is to mandate training in anti-racism. Anti-racism is an expressly theoretical concept. So, I think we see there at least many situations where the lawyer is supposed to, as a -- well, is not competent unless they have come to know these things and is not competent unless they say they know these things and is not competent unless they walk around advancing these theories in their professional practice. So, my friend talks about his experience in China. I -- again I see no daylight between these kinds of invasion of conscious and invasions of personal autonomy including your freedom to independently serve your clients than we see here in the profile.

One more thing and then I will sit down. There is another aspect of this which is, okay, -- well, there's two aspects to religious freedom. One is don't interfere with a person's conscious and, okay, I think we have demonstrated in the brief in here that that is exactly what the Law Society intends to do and is doing. The other part of it is don't vilify a religion publicly because that is a breach of state neutrality and so that is not just a personal right of Roger's, that is right of every Christian in this country not to live in a country where government organizations are going around bad-mouthing their religion and that is exactly what we see in the Law Society's materials and I -- if we look at The Path, I don't know that the word Christianity comes up a whole lot but I can tell you that, having taken The Path the first time I saw the image of a Christianity, there was dark and scary music playing which I didn't put in the affidavit but I assure you that is the case. But outside of The Path, when we look at the rest of the materials we see that the Law Society had adopted the theories as a political objective and when we go through the definitions that they provide in their materials as to what those political objectives are they repeatedly and specifically name Christianity as one of the oppressive constructs oppressing minorities which is about as insulting as a person could be about their religion. So, in our view there is a fairly clear breach, also, of the duty of state neutrality. And, with that, as having promised it several times I will now sit down.

THE COURT: Thank you.

With that we will adjourn until 2:00. Thank you.

PROCEEDINGS ADJOURNED UNTIL 2:00 PM

**Certificate of Record**

I, Arlen Bituin, certify that this recording is the record made of the evidence in the proceedings in Court of King's Bench, held in courtroom 1601, at Calgary, Alberta, on the 6th day of May, 2025, and that I was the court official in charge of the sound-recording machine during the proceedings.

**Certificate of Transcript**

I, Janet Miller, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Janet Miller, Transcriber
Order Number: TDS-1084227
Dated: May 30, 2025

Proceedings taken in the Court of King’s Bench of Alberta, Courthouse, Calgary, Alberta

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| May 6, 2025 | Afternoon Session |
| The Honourable Justice S.L. Kachur | Court of King's Bench of Alberta |
| G.C. Blackett | For Y. Song |
| J. Kully | For The Law Society of Alberta |
| L. Monsma | For The Law Society of Alberta |
| A. Bituin | Court Clerk |

THE COURT: Mr. Blackett, is there anything that you thought that you forgot that you had to -- I mean I know there's a lot more you want to say. I know there is a lot more in your brief but we're good?

MR. BLACKETT: Yes, yes. I am good. Thank you.

THE COURT: Thank you very much.

MR. KULLY: Good afternoon, Justice Kachur. Jason Kully from Field Law for the Law Society of Alberta. Joining me is Ms. Leanne Monsma. Prior to beginning my submissions I am going to add to the Court's stack of materials for this afternoon.

THE COURT: Does your friend know about this?

MR. KULLY: He does and he's (INDISCERNIBLE) by the copies.

THE COURT: Okay.

MR. KULLY: And just for the provision of the record there's copies of the *Legal Profession Act* just so you have it all in one place, sections 1 to 9.

THE COURT: Perfect. Thank you.

MR. KULLY: Copies of the Rule of the Law Society, particularly 67. I've limited it to just 67, the one at issue here.

THE COURT: Okay.

MR. KULLY: And code of conduct part 6.3 which is at issue here.

THE COURT: Yes.

MR. KULLY: And an additional case which I advised Mr. Blackett that I would be referring to on Friday that is not found in the Law Society brief.

THE COURT: Mr. Blackett, any objections?

MR. BLACKETT: No.

THE COURT: Thank you.

**Submissions by Mr. Kully**

MR. KULLY: Justice Kachur, as you are aware the applicant has filed an application for judicial review challenging numerous actions of the Law Society of Alberta and the underlying rationale for those actions. If I can try to summarize I would say that the applicant is essentially arguing that the LSA can only take an action if it is to uphold the rule of law by ensuring that the lawyers are resolute advocates, loyal to their clients, and loyal to the constitution. The applicant says that any use of the Law Society's authority for any other purpose is improper. I will be responding to that today.

The applicant and the Law Society have taken very different approaches to this application as you have seen in the submissions before you. The applicant's submissions make numerous references to -- and criticisms of policies related to wokeness, DEI, critical race theory and other aspects. They are critical of any criticism of the western legal tradition. They are critical of wokeness and political correctness. In the Law Society's submissions those are not relevant to the application before you here today and I do not intend to address those issues or those theories as have been determined.

In our brief and as I will attempt to do here today we have attempted to distill the issues in order to address the major points raised in the applicant -- by the applicant in the context of these proceedings and to put them within the framework that the Supreme Court of Canada had advised should guide a Court in reviewing these types of subordinate legislation and these types of actions from a statutory actor.

Fundamentally the issues before you in this application are whether rules 67.2, 67.3, and 67.4 as well as the political profile, the CPD tool and part 3 of the code are *ultra vires* of

the Law Society of Alberta's grant of statutory authority. There is also the allegation that the so-called political objectives, as defined, are *ultra vires.* Those are two issues I intend to address and as part of my submissions today I will also review, as is outlined in the written submissions, why the Law Society of Alberta takes the position that the issues of the political profile, the CPD tool and the political objectives are not subject to an independent judicial review. We will talk about the so called black box that the Law Society is seeking to put them into. As I will expand here today it is not that the Law Society says the Court cannot be aware of what those issues are, it is that they are not subject to independent judicial review because they are not an Act or a decision and I will expand on that today.

Once I deal with that preliminary issue, the Law Society submits that the legal issue in this case is whether the Law Society of Alberta has the authority to require lawyers in Alberta to complete mandatory CPD, continuing professional development which includes a mandatory professional development course which, in this case, was connected to Indigenous culture competency and whether the Law Society of Alberta has the authority to amend the code of conduct to address harassment and discrimination.

In order to examine those issues the Court should be focusing on two questions. First, what standard of review applies to a question regarding the validity of the rules and the code of conduct passed by the Law Society of Alberta. The Law Society of Alberta submits that the answer to that is reasonableness and I will talk about that here today.

That leads to the second question. Do the challenge rules and code of conduct fall within a reasonable interpretation by the Law Society of Alberta of its statutory rule making power having regard to the relevant (INDISCERNIBLE). The answer to that question, in the Law Society's submission, is yes and I will expand on that further today but in brief and this is what my submissions will focus on today, the primary objective of the Law Society of Alberta under the *Legal Profession Act* is to advance and protect the public interest and I will expand on why that is the case. Continuing professional development programs are consistent with the protection of the public interest and consistent with that objective of the *Legal Profession Act* as is the code of conduct and, as will be expanded, the code of conduct is also specifically mandated as part of the rule making authority of the Law Society of Alberta.

With respect to the rules the benchers have broad rule-making authority under section 7(1) of the *Legal Profession Act* to make rules connected to its duties and powers which the Law Society submits is connected to its purpose and section 6 -- and section 6(n) which speaks about the ability to pass -- to make resolutions necessary for the promotion, protection, interests, and welfare of the society. So, those are the two rules -- two legislated provisions that we will be focusing on and as I will expand later. Again this is not about a

fear of any administrative decision-maker saying it can take any action in the public interest. There has to be some legislation authority to take any action based on some public interest or some other purpose and when we look at section 7(1) and section 6(n) those are the statutory grounds of authority given from the legislation to the Law Society. Those would need to be present for any statutory actor to take some action.

THE COURT: You heard your friend's argument earlier this morning, however, that on 6(n) he believes that it is only for the purposes of the society in and of itself as a corporation and not as a public at whole.

MR. KULLY: Certainly. So, it speaks to the welfare and the interest of the society. So, we talk about what is the society. It is the body elected to represent the lawyers, to governor the lawyers in Alberta. It also has this public interest mandate which I will speak to later. So, with respect to any interest of the society it is also connected to that public interest. The society itself serves to govern in the public interest. So, those two are related. So, although even if it is just the interest of the society that means more than if it can buy photocopiers, if it can get more paper. It is any resolution related to what the benchers view as to being in the interest, welfare, or protection of the society with its broad goals in mind and I will expand on that later.

THE COURT: Okay.

MR. KULLY: Also there is a specific authority to establish the code of ethical standards which is now in 6(l) of the *Legal Profession Act*. So, with those rule-making authorities and resolution making authorities in mind, the rules and part 6.3 of the code are consistent with the scope of the Law Society of Alberta's mandate and authority given to it by the legislature. The fundamental position is that the LSA must exercise its powers in the public interest with the protection of the public in mind. It is this purpose, not ensuring that lawyers are resolute advocates for their client and loyal to the constitution, that informs the work of the LSA.

While the public interest may include some such loyalty to clients, that is certainly within the public interest and loyalty to the constitution, that is also within the public interest. The Law Society of Alberta is not saying that those are not important considerations. What it is saying is that those are not the only considerations. The definition of the public interest as I will talk about here today particularly from what the Supreme Court of Canada has said in the *Trinity Western* decisions it means more than dealing with core-competency and ethics and so while those can be included it has a more expanded definition.

If the actions of the LSA are connected to this purpose and again consistent with its statutory ground of authority, then they are *intra vires*. The LSA has, according to the case

law and, from the Supreme Court of Canada, should have the authority to determine what learning activities, what continuing profession development is necessary to maintain a high professional standard and to maintain the protection of the public interest. Again it is not saying that the Court should not be examining or should not be reviewing. It is that the Court should be giving deference to the legal -- to the Law Society's decisions and that comes from the Supreme Court of Canada decision.

In looking at this issue the Court is not to judge or inquire into the merits of the decisions as that would be you usurping the role given to the Law Society of Alberta by the legislature. Again that is consistent with the reasonableness review. It is not that the Court lacks the institutional authority. It lacks the knowledge to conduct that review. It is that the Supreme Court has said when the legislature has given this statutory grant of authority to an administrator decision-maker like the Law Society of Alberta the Court is to respect that role and give deference.

There is also the separate issue of whether the applicant's *Charter* rights were breached and the Law Society submits that under the *Dore* analysis, the answer to that is no, and I will talk about that today as well.

So, with that introduction in mind outline of submissions for here today. I will go through some of the background. I don't need to go through detail but there are some key issues I want to discuss with respect to rationale or reasons for some of the decisions made by the Law Society of Alberta as well as timing as well as some of the review of the text which I have already talked about.

I will briefly address the scope of judicial review from the Law Society of Alberta's submissions as to what should be the scope of the judicial review. I will discuss the standard of review. I will then discuss why the rules and part 6.3 of the code are intra vires. The Law Society of Alberta's granted statutory authority and will respond specifically to some of the arguments made by the applicant. I will then turn to the *Charter* issue and I will then conclude.

THE COURT: Thank you.

MR. KULLY: Of course, if the Court has questions or would like to direct me to anything first, I am happy to move there at this time.

THE COURT: No. Go ahead.

MR. KULLY: Thank you. So, by way of background, this is set out at pages 2 to 12 of the Law Society's written brief and again I only intend to summarize

with respect to some of the more important issues. While it hasn't been said, I think it is clear that the Law Society of Alberta is the regulator of the legal profession in Alberta and it is governed by the *Legal Profession Act*. It is given that authority under the *Legal Profession Act*.

So, first I want to start by talking about the Law Society's authority under that *Legal Profession Act*. I will start with the code of conduct. I have reviewed that already but the *Legal Profession Act* gives the Law Society the authority to "authorize or establish a code of ethical standards for members". And that is found at section 6(l). That is a power that has been given to the Law Society by the legislature and the LSA has established the code of conduct as t hat code of ethical standards and that code has a long history. It is also based on the model of -- model code from the Federations of Law Societies of Canada and we talked a little bit this morning about what was the rationale for updating the code.

In October of 2022, the federation amended the model code to provide greater guidance on the duties of non-discrimination and non-harassment and to provide specific guidance regarding bullying. And that was based on the -- there was the my articling survey from the Law Society of Ontario. There was the prairie provinces that engaged in some of the surveys as well as some information from the International Bar Association. There was a variety of materials which indicated that discrimination, bullying, and harassment were issues in the legal profession.

Then on October 5th, 2023, the benchers passed a resolution to amend the code to reflect those amendments and you have a copy of that before you. Specifically there is the prohibition on sexually harassing -- harassment or discrimination or reprisals against a colleague, employee, client, or any other person, and there is an expanded commentary. I will deal with more at the end but that is what was (INDISCERNIBLE) in that -- in that (INDISCERNIBLE).

With respect to the *Legal Profession Act* and its rule-making and resolution-making authority, I have already touched on this a bit but from the Law Society perspective two key sections. Section 6(n) again that the Law Society can make -- can make resolutions with respect to anything that is in the interests of the Law Society, the protection or those other issues. That interest includes the mandate of protecting the public and I will expand on that.

Then section 7(1) of the *Legal Profession Act*. The benchers -- 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 -- what the Law Society submits is the key point -- and for the exercise or carrying out of the powers and duties conferred or imposed on the Law Society or the benchers under the LPA or any other statute.

That last part, as I mentioned, is the key part. The power to make rules, for the exercise or carrying out the powers and duties confer under the *Legal Profession Act*. As I stated in my introduction, and as I will expand upon, the LSA submits that those powers and duties which have been conferred on it by the *Legal Profession Act* include the protection of the public interest.

I will talk about it further. The Law Society of Alberta recognizes there is not a public interest clause in the statute. That is not for debate. However, the absence of that public interest clause does not take away from that fundamental duty and power that has been conferred upon the Law Society as its role as a self-governing body and that is to protect the public interest and I will expand upon that, but again the lack of that public interest clause is not fatal to that purpose.

In light of both section 6(n) and section 7(1) of the LPA, the Law Society of Alberta has established the rules of LSA which I will again long-history and address a number of things. I have only provided you a short except here today with respect to rule 67 but there are rules that got into the 200s. There's significant rules that have been passed.

As you will see and has been addressed by the parties we are dealing with four specific rules. Actually Rule 67.1 does not appear to be at issue but it starts out by defining the term continuing professional development. Rule 67.2 goes onto to require every active member of the Law Society to prepare and submit to the LSA an annual CPD in a form acceptable to the executor director. 67.3 prescribes that if an active member fails to submit their CPD by the annual deadline then they will be automatically suspended and 67.4 gives the benchers the ability to prescribe additional specific CPD requirements in a form and timeframe acceptable to the benchers which includes a power to automatically suspend a member if they fail to complete the CPD.

With that background in mind I am going to turn to the CPD program and its history. Just given the nature of this application. Again I don't want to take a lengthy period of time but we talked this morning about how the Law Society has had a mandatory continuing professional conduct program since 2008. And that was based on a self-assessment process. That requirement to submit -- to prepare and submit an annual CPD plan and the requirement of there being an automatic suspension if it is not submitted by the deadline, those have been in place since November 29th, 2008. So, those rules have predated.

Up to 2016, members had to complete a CPD plan and declare they had completed it. So, that was also part of it. So, even though there was the issue of 2008 of having to do it, that issue of having to submit it to the Law Society for review has continued for a long period of time since 2008. 2020, the Law Society of Alberta set out to make updates and we talked

a little bit about what the purpose was, the lack of a purpose. The purpose was to prioritize competence (INDISCERNIBLE), and we can see that the messaging from then President Kent Teskey which he discussed that the goal of protecting the public interest was engaged by raising the competence across the profession by not only encouraging competence through the code of conduct but also by providing lawyer competence educational programming where needed. So, that was the goal. It was to raise this level of competence and to provide opportunities for lawyers to engage in specific learning as opposed to that self-assessment procedure.

Although not specifically necessary to this application, the requirement to submit the CPD plan was suspended from February of 2020 to May 2023, as the Law Society worked on developing the new plan and then we had, in May of 2023, the introduction of the new CPD program which requires that learning plan to be developed, with reference to the profile on areas of competency that a lawyer chooses to learn about in the governing -- in the given year and the submission to the Law Society through the CPD, the articling platform.

With that in mind I will turn to Rule 67.4 and specifically The Path. I do note that The Path itself is not subject to the judicial review application. The requirement to complete The Path as the Indigenous culture competency program was passed by a resolution of the benchers separate and apart from Rule 67.4. 67.4 speaks to the benchers' mandating specific competency. I am not going to stand here and say that The Path is not relevant to the considerations before you today but I do note that The Path itself is not being challenged as being outside of the *vires* or the authority of the Law Society or the specific choice but it has been discussed at length and the Law Society has discussed it, so I will talk about Rule 67.4 and what The Path actually requires and what it involves.

That Rule 67.4 was added to the Rules on December 3rd, 2020 by a motion of the benchers. That followed as we talked about this morning call to action, number 27 from the truth and reconciliation committee of Canada which called upon the federation of law societies to ensure that lawyers received appropriate culture competence training which included a history and legacy of residential schools, United Nations declaration on the rights of Indigenous people, treaties, Aboriginals rights and Indigenous law and Aboriginal Crown relations. So, we had truth and reconciliation and it says -- it does goes onto to say this will require skills based training which in intra-cultural competency, conflict resolution, human rights, and anti-racism. That is the full call to action '27.

As the Court is likely aware, individual Law Societies other than the federation are responsible for lawyer professional development. As a result, the federation of law societies urged each individual law society to consider mandatory Indigenous culture competency training. And we can see this at page 284 of the record. There is said the

federation said that all members of the legal profession need a baseline knowledge of the issue outlined in call to action 27.

LSA worked through a variety of committees to determine what would be appropriate and October 1st, 2020, it determined that there would be Indigenous culture competency training for lawyers. December 3rd, 2020, past the motion adopting Rule 67.4 and passed a separate motion adopting The Path as the required Indigenous culture competency course and providing 18 months to complete the course.

The Path is an online course. It has five modules. The specifics of which are outlined at paragraph 55 of the Law Society of Alberta brief and involves a multiple choice quiz or a quiz at the end. Majority multiple choice, some alternative answers. Ten questions to answer I think at the end of each modules as The Path in this.

With that background in mind, subject to any questions from the Court, I would turn to the scope of the judicial oversight. With respect to the profile, that continuing professional development profile, the CPD tool and the political objectives, the Law Society of Alberta submits that these are not acts or decisions subject to judicial oversight. The profile is found at page 179 of the record. It is a description of what the Law Society of Alberta considers to be important competencies. It is designed to provide guidance to Alberta lawyers regardless of their experience or practice area and as set out in the profile, it is not intended to be a check list and lawyers are not required to demonstrate competency in each area of the profile in each year.

The profile also states that it will not be used for discipline as a threshold and it will not be used as a legal standard in negligence claims. So, that is found in the profile itself. It is not used to take any action and does not result in consequences for the lawyer. What it is used for is meant to provide guidance when lawyers are selecting areas for professional development that are meaningful to them in their practice. Again not a code of ethical conduct, not a requirement, does not have substantive areas of law. In fact, one of the areas in the profile (INDISCERNIBLE) talks about ensuring resiliency, exercising, those kinds of issues.

It is broad areas of knowledge, skills, and abilities that lawyers might want to look into developing or expanding. Just because someone selects a different profile does not mean they are incompetent in others. It is a way for a lawyer to gain competence. To increase their level of competence in the areas that they sought and again there are nine domains with different competencies. It is up to each individual lawyer to select a domain and then a competency within that domain. They are not required to demonstrate all of the competency indicators identified and they are not required to go through every domain. So, they could choose well-being and then they could choose practice management. Those are

what could be chosen. There's no requirement to choose diversity, equity, inclusion or any of the other ones.

As I said lawyers may already possess these competencies. They way wish to develop them further in their continuing professional development of choice in any given year and the profile is intended to support that professional development of lawyers through self-assessment and learning. Not to hold them to a minimum standard. Not to impose discipline or to be used as a standard for negligence claims. It is a tool to be used by lawyers in their continuing professional development program in that given year.

THE COURT: No. Go ahead.

MR. KULLY: Okay.

THE COURT: Yes.

MR. KULLY: Turning to the CPD tool.

THE COURT: Okay. Just on this though. Are you telling me so that Mr. Blackett gave me some examples from the profile that he would suggest possibly infringed on his client's or on other people's rights. I would suspect that most of those came from the DEI component of your module. And are you telling me that any given lawyer does not ever have to choose to ever go into that module in the profile and ever write anything in that module?

MR. KULLY: That is correct. They can use them as identifiers of where a competency might be something they wish to work on for that given year. If a lawyer wants to work on DEI issues, truth and reconciliation issues, they can look to see what a competency indicator might be. That it might be one of those things that have been identified. They can also look and say I want to be better at my practice management. I want to make more time for my health. I want to be more resilient and they can choose those. You are correct that they do not have --

THE COURT: Through my 30-year practice I could always choose something else. Should I decide if I am competent in the area of DEI, I would never have to go into that module. Is that what I am hearing?

MR. KULLY: That is correct. That is correct.

THE COURT: Okay.

MR. KULLY: Subject to any other questions with respect to the profile --

THE COURT: No.

MR. KULLY: -- I will turn to the CPD tool.

THE COURT: Thank you.

MR. KULLY: The CPD tool is the platform that is used to submit the CPD plan. It is the method of submission. It provides a platform for opportunities for lawyers to use to identify their professional goals which I have indicated they can -- they use the profile to select. They can self-assess their current levels of proficiency and then prioritize their competencies and learning activities in a given year to address those competency indicators they've identified. It is a tool that allows them to track their progress. To put in their learning activities and what they have done in relation to that competency and to engage in any reflection on their competency after having a learning activity and on how each activities supported their professional development goals.

The self-reflection and that learning activity it is not required. It is a tool that is there but that can be used to enhance the overall learning process and help lawyers determine what type of activities are effective for them. So, again it is not a requirement. It is a tool used for submission. Really in the Law Society's submissions the question is whether CPD can be required. The manner in which it is submitted to the Law Society that is not something that is subject to the judicial oversight with respect to being an accurate decision. That's like saying it has to be submitted by EL (sic). It has to be -- include these things. It is that activity of having mandatory CPD, which the Court is reviewing in this application, not the tool by which it is submitted.

THE COURT: But isn't self-reflection part of the tool that must be dealt with?

MR. KULLY: So, self-reflection does not have to be done.

THE COURT: Does not have to be.

MR. KULLY: It does not. It is an option.

THE COURT: Okay, okay.

MR. KULLY: The CPD plan has to be declared on what you

will be pursuing but self-assessment is not part of that.

THE COURT: Okay.

MR. KULLY: As I said the lawyers can track their progress. They can use it. They can use it to reflect on whether and how each activity supported their goal but that is not required.

THE COURT: Okay.

MR. KULLY: That is part of enhancing the overall learning activity. And again the submission -- the identifier of which competencies you are going to work on, saying you have done the CPD in submitting it, that is what is required. Not that self-assessment.

THE COURT: Okay.

MR. KULLY: Okay.

THE COURT: So, I can go in. I can do my CPD. I can say I am going to work on practice management and I'm going to work on personal wellness issues -- I think there are three you have to pick.

MR. KULLY: Correct.

THE COURT: Okay. And I am going to work on better understanding of trusts. That is what I am going to work on this year and that is what would be submitted solely --

MR. KULLY: Correct.

THE COURT: -- to the Law Society.

MR. KULLY: Correct.

THE COURT: Not anything else. Not my looking at anything else. Nothing else.

MR. KULLY: Correct.

THE COURT: Just those three things.

MR. KULLY: Correct. And you can choose throughout the year. I want to be clear. A lawyer can choose to self-assess which learning activities they want.

THE COURT: But it is not required.

MR. KULLY: Correct.

THE COURT: Okay.

MR. KULLY: Finally with respect to the political objectives. So, the political --

THE COURT: Okay. So, can we stop there --

MR. KULLY: Of course.

THE COURT: -- for a second because there was a big discussion this morning because Mr. Blackett had called it the political objectives and said that you were not arguing that they were political objectives. I didn't get the impression you were -- that you were agreeing that they were political objectives.

MR. KULLY: Correct. I -- the Law Society used the frame political objectives in that (INDISCERNIBLE) law when it talks about there are some issues that are not subject to judicial oversight in terms of political -- again goal policy other aspects. Not political -- capital 'P', capital 'O' objectives.

THE COURT: Right. Okay. So, when you are talking about the political objectives right now are you talking about the political objectives as defined by Mr. Blackett's brief?

MR. KULLY: That is an excellent question because it is defined two different ways. One it is defined as the theories of what we about this morning of wokeness, DEI, those types of issues. At other times it is defined as support for diversity, equity and inclusion, culture competence, and other aspects and particularly that is at paragraph 30 I believe of his brief. There's -- it is more related to those key issues as opposed to the theories themselves. Let me just find that to be sure. Perhaps that is one that I can return to just to confirm. I just want to --

MR. BLACKETT: It is at paragraph 30 of the brief.

MR. KULLY: Okay. Perfect. So, I did recall that. And there at paragraph 30, it is defined with respect to support of diversity, equity, and inclusion.

THE COURT: Correct. And regulations and public interest to expand powers, diversity, equity and inclusion in the profession, the LSA and the professions and LSA interactions with the public. Those are the ones that you are referring to right now.

MR. KULLY: Correct.

THE COURT: Okay.

MR. KULLY: And even if we wanted to talk about the theories, again we can -- I will call them theories for now. Either way the political --

THE COURT: Which is what Mr. Blackett had called it this morning.

MR. KULLY: Correct. So, regardless of whether we are talking about the theories or the political objectives, those are not appropriate for judicial review in themselves. I will talk about how the Court can be aware of what the Law Society's goals, objectives -- which if we want to call them proactive regulation, DEI, collaborating with stakeholders -- the Court can be aware of those. But they themselves are not subject to judicial oversight. The Court can know what the motivations and thoughts are behind actions but the motivations themselves and thoughts are not to be adjudicated. We see this in the application where there is a request for an injunction to tell the Law Society of Alberta that it can't have these considerations in mind.

That in the Law Society of Alberta submission it would be outside of the Court's authority to direct a statutory decision-maker, a regulator of the profession what it can and not -- what it can have and what it can't have as goals or objectives. Certainly the Law Society of Alberta is not saying you can't know the reasons. We talk about this when we are talking about why the CPD was implemented, about culture competency, about increasing knowledge on Indigenous issues. The Court can be aware of those considerations but they themselves are not subject to judicial oversight.

That is the Law Society of Alberta submissions with respect to the theories or political objectives and we can see that when we talk about the reasonableness standard which I will turn to. It is not about motivations. It is about whether the statutory grant of authority provides that rule-making power and if there is a connection. So, I will talk about further

today about how the Law Society of Alberta decisions have been made within the public interest. The Court can review and say is diversity, equity and inclusion within the public interest. Are those considerations fair. Are they connected to the public interest having regard to the deference but it is not something the Court can say the Law Society of Alberta you can't consider diversity, equity and inclusion. That is what the Law Society of Alberta is saying. Is that the political objectives themselves are not subject to judicial oversight and constraint in that fashion.

And we can refer to that as whether the theories or the political objectives as defined at paragraph 30. They are all related in that sense. It is the elected benchers who are responsible for determining the LSA goals. The LSA has always had goals. Has always had objectives. Here we have an applicant who is not happy with those goals or objectives. If the applicant has concerns about those, he can vote for different benchers. That is part of the aspect. He can run for a bencher. That is part of how those goals and motivations are changed. It is not the -- it is the action that the Court can constrain, not the beliefs themselves.

The Law Society of Alberta agrees that it exercise of state power, delegated state power, even a discretionary decision is subject to judicial review. So, in the applicant's reply brief there was a discussion about how issues of *Roncarelli* and *Trinity Western* they involved discretionary decision making and the Law Society would say those are not subject to judicial review. That is not what the Law Society has said.

The Law Society has said there still has to be an act or a decision which is subject to judicial review, so in *Trinity Western University* we had the resolution denying *Trinity Western* as a law school. *Roncarelli* we had to dictate from the individual. There was an act. In my submission if *Roncarelli* just -- if Premier Duplessis had just not liked *Roncarelli*, not taken any action, that is not subject to judicial review. There is no ability for the Court to constrain that thought, that goal, that objective. There has to be the action. The action -- you can look at the objectives behind the action. That we acknowledge. That is what we are talking about when we say the public interest.

So, here, as I will talk about more, a Court should not ask whether rules or subordinate legislation are necessary, wise or effective. That is the quote or what the underlying political, economic, social or partisan considerations are. That ties to this as well. That when we are conducting this *vires* review, those underlying considerations are not subject to that overview.

If again what we are really talking about is the reason behind the rules and whether they are connected to the public interest the Law Society of Alberta agrees that the Court should be engaging in that. That is its role. The Court has to ensure that the Law Society of Alberta

is meeting its mandate. It is not acting outside of its statutory authority. If the Law Society of Alberta has passed rules the Court needs to confirm that those rules are within the statutory authority and if that statutory authority speaks to public interest the Court can examine whether those rules are connected to the public interest. That is acknowledged. The Court should not be constraining or restricting what the Law Society thinks or sees as goals or objectives.

THE COURT: So, break this down for me then.

MR. KULLY: Sure.

THE COURT: The Law Society can implement a component of DEI or culture competency. That is the action actually saying we can implement that on a CPD. You have to have this competency.

MR. KULLY: Correct.

THE COURT: What they believe DEI is or what -- why they came to that conclusion that is what you are saying is not within this judicial review.

MR. KULLY: Correct.

THE COURT: Only that can they implement that component.

MR. KULLY: Correct. Is that within their statutory grant of authority.

THE COURT: Right.

MR. KULLY: Because that is the *vires* of the Act and again if the statutory grant of authority was to say you can only pass a rule if it is within the public interest. Law Society of Alberta is not saying we can pass any rule whatsoever. We are saying the rule has to be connected to the public interest. So, the Court's question would be you pass a rule talking about diversity, equity and inclusion is there a connection to the public interest. That is permitted. The Law Society having diversity, equity and inclusion goals, other goals, not relevant.

THE COURT: Okay. So, Mr. Blackett said -- was arguing and submitted that there was some issues with some of the underlying documents that would purport that Christianity is bad. That purport that if you are a -- if I can get this right, a white --

MR. BLACKETT: Anglo-Saxon Christian male.

THE COURT: Thank you.

MR. KULLY: Standing before you.

THE COURT: Thank you. You should be -- you should automatically believe that there's some biases that you hold. And my understanding, --

And you can correct me if I am wrong, Mr. Blackett.

His argument is that's why they created this in the first place, and then they put this into the CPD that the parties -- you are saying if that is in fact where the benchers were looking at and saying this might be a problem, I can't go there. I can only go to the fact that they are now over here saying we have a component, which you are telling me nobody has to do anyways, but there is component over here of competency culturally.

MR. KULLY: Correct. And the question would be is that in the public interest.

THE COURT: Right.

MR. KULLY: Is that connected. So, certainly --

THE COURT: Well, but I mean that is a bigger -- like, how --

MR. KULLY: I agree.

THE COURT: -- they got there may be -- that turns into a bigger question.

MR. KULLY: Correct.

THE COURT: Is -- I don't think -- and I will leave for submissions on rebuttal but I don't think Mr. Blackett was arguing that culture competency in the big picture is not -- is something that he is against. What I am hearing him say is the way they got there and the -- what it is trying to be imposed should not be --

MR. KULLY: And again that -- sorry, my apologies.

THE COURT: We should not continue on.

MR. KULLY: And certainly that would be the Law Society's position when we look at the cautions of reasonableness and the rule of statutory decision-maker. The delegate of power. So, the Law Society of Alberta has been granted the authority by the legislature to govern the legal profession in Alberta. What it determines is within that public interest. What it prioritizes as goals that is for the Law Society of Alberta to determine.

THE COURT: Okay.

MR. KULLY: That would be part of that review when we look at reasonableness and I will talk about what reasonable means and why the Court should be applying it. That is when we hear those comments about should not be looking into the underlying political, economic, social, or partisan considerations, or they will actually succeed. That is for the Law Society of Alberta to determine because the legislature has said you get to decide that, Law Society. Here is your grant of authority. You just stay in your grant of authority. So, the Court can certainly tell the Law Society if it is acting outside of its grant of authority. It should stop doing things but in the Law Society's submissions it is acting within that grant of authority. The rationale behind what the grant of authority is that is a different question that the Court should not be examining.

THE COURT: Okay.

MR. KULLY: Given that I have talked around it for a period of time I think it would be time to turn to standard of review. The standard of review addressed at paragraphs -- pages 21 to 24 of our brief. Two questions for the Court to consider. What standard of review should be applied by this Court when reviewing the rules, and the code of conduct, and how does it conduct that reasonableness review. This morning we talked somewhat about how to do it when there's no decisions. That intelligibility, rationale train of thought. Some of those are different when we are talking about subordinate legislation versus a decision after a hearing, and I want to expand on how the Court has said that should be done when we are talking about subordinate legislation.

But first, which standard of review is applicable? The Law Society submits that it is reasonable. *Vavilov* sets out the framework for determining that -- for that standard of review. We heard this morning, presumption is reasonableness and that presumption can be rebutted if the legislation indicates it or if the rule of law requires. There is nothing in the *Legal Profession Act* speaking to correctness being the standard of review. So, in looking at whether the rule of law requires it, the rule of law exception does not apply for questions of jurisdiction or *vires*. And that is at *Vavilov* at paragraph 65.

In *Vavilov* at paragraph 53 the Supreme Court said that only constitutional questions, general questions of law, of central importance to the legal system, and questions regarding jurisdictional boundaries between two or more bodies are subject to the correctness standard. So, those are the specific limits.

When we look at *Auer v. Auer*, the most recent case from the Supreme Court on subordinate legislation and review, it confirms that reasonableness review applies to the *vires* of subordinate legislation like the code of conduct and the rules. The Supreme Court at paragraph 26 in *Auer* -- so we are talking about *Auer* now specifically rejected the argument that the rule of law would require *vires* review to be done on correctness standard.

Reasonableness review is appropriate to ensure that a statutory delegate is acting within its scope of lawful authority and just -- this is an important issue -- just because subordinate legislation might touch on an important issue like potentially the rule of law or the independence of lawyers, that would not attract correctness because what the fundamental question is, is the legislation, subordinate legislation, the rules is that within the grant of authority. That is the question the Court is asking. Not what the rule relates to, and we can see this in *Morris* when we are talking about solicitor-client privilege, about how that did not attract a correctness review. Solicitor-client privilege has been recognized as a question of law of essential importance to the legal system.

If we were talking about specifically just the question of solicitor-client privilege I acknowledge that it would be a question of importance -- of essential importance to the legal system but the Court has said in *Morris* and consistent with the Supreme Court in *Auer* and *Vavilov* that when we are talking about the *vires* of legislation that is a different question. The underlying purpose or what it touches on that is not what we are looking at. We are looking at was the authority -- did the statutory -- did the decision-maker have the ability to pass that subordinate legislation or that rule. That is what is being examined. So, regardless of what it may touch on, we are still talking about was the subordinate legislation within the grant of authority and that attracts a reasonableness review. So, here for those reasons, reasonableness applies.

The issues concern the *vires* of the rules and the code which are subordinate legislation and the reasonableness -- robust reasonableness review from *Vavilov* is the default standard. Has not been overturned by anything in the *Legal Profession Act* and the rule of law in this case it does not require a correctness standard. Again I've talked about it. This is not a case of a constitutional question. Not a case of central -- of questions central importance to the legal system or questions regarding jurisdictional matters. It is a question of whether the Law Society of Alberta had the statutory authority to pass the rules and to pass the code of conduct. So, that is subject to the reasonableness review.

And *Auer* confirms, at paragraph 26, that a reasonableness review is sufficient and that is consistent with *Green* which I recognize as pre-*Vavilov* but we have *Auer*, we have *Vavilov* and we have *Green*. They all confirm reasonableness is the standard of review.

Submissions from the applicant this morning with respect to public interest in my submission if there is a public interest clause that relates to how the reasonableness review is conducted. When the Court is talking about reasonable -- or public interest in *Green*, you can see that it is further down in the decision. It is at paragraph 24. It is about after the Court has already determined reasonableness applies and that it should be given deference in how it is interpreting that public interest. Whether a public interest clause is present in the legislation does not go to what standard of review applies. It is about how much deference is given to that definition. And that is also at paragraph 110 of *Green*. Paragraph 24 and paragraph 110.

With respect to conducting a reasonableness review of subordinate legislation. This is addressed at pages 24 to 26 of the respondent's brief, and here the Law Society of Alberta has attempted to put these questions of the *vires* of the rules and the code within the framework that has been established by the Supreme Court of Canada in *Auer* with respect to the reasonableness review.

So, in summary I will just provide a summary of some of the comments from *Auer* as I do think it is important. So, *Auer*, paragraph 46: (as read)

> Reasonableness review ensures that courts intervene in administrative matters only where it is truly necessary to safeguard the legality, rationality, and fairness of the administrative process.

Paragraph 46 of *Auer* continuing. Reasonableness review: (as read)

> Finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers.

And that is consistent with my comments from earlier today. *Auer* at paragraph 50: (as read)

> 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 factual and legal constraints that bear on the decision.

That is consistent with what *Vavilov* stated and then importantly *Auer*, paragraph 65: (as read)

> 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: (as read)

> 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.

So, the Court is not to determine the specific correct interpretation of the *Legal Profession Act*. The Court is to determine whether the rules and code of conduct passed by the Law Society of Alberta are within a reasonable interpretation of the *Legal Profession Act* and that is the comment from *Auer* at paragraph 65.

As part of that, that is also important and this is at *Auer* at paragraph 56. My apologies for jumping around a bit but the reasonableness standard when we are talking about subordinate legislation: (as read)

> 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 authority-making power.

So, the question for the Court is not to ask are the rules reasonable. It did the Law Society reasonably interpret the *Legal Profession Act* when it decided it had the authority to pass these rules and code of conduct. Not the rules or code themselves. It is that interpretation. Did they have the authority to pass them. Not would the Court have passed these rules or these code of conduct.

THE COURT: So, where Mr. Blackett was saying that that the record was deficient at best and so the -- the Court would be making basically an assumption. You are saying that doesn't -- we don't even come to play there because all I am to do is look at the Act in and of itself and determine whether pursuant to that Act they had the reasonable ability to make that particular rule. Not why they made it, not on what grounds they made it, not with what evidence or -- he used the word evidence or empirical

studies they looked at. None of that matters. All it is what did the Act said and is it reasonable from the Act's interpretation that they could pass this action.

MR. KULLY: Correct. And that is where *Auer* talks about how generally for the vast majority of subordinate legislation there will likely be an inadequate record because it will be a decision made. It can be governed from statements, it can be governed from policy, it can be delineated from other sources, but it will generally not have that same quality and again when the Court is looking at is, it is asking itself is that a reasonable interpretation and with that record, the Court can be asking itself as I will turn to does that connect to the public interest. That is the key issue. Is it connected to what the statute provides to the legal -- to the Law Society of Alberta.

So, that is where it become relevant and certainly the Court is not making (INDISCERNIBLE) --

THE COURT CLERK: Apologies.

MR. CLARK: The Law Society of Alberta is not asking the Court to make assumptions about what was taken into account. We are talking about it within the reasonable review of what it should be looking at which is what the *Legal Profession Act* says, what the reasonableness interpretation of that is, were the rules or code of conduct connected to that and are they within that grant of authority. It is not an assumption. There is information before you with respect to the inaccuracy of the record, we can talk about that a bit more. There was no application to extend the adequacy of the record. There's many issues raised in the record. So, if that had been an issue we could have addressed that prior to today's date.

THE COURT: Well, there was an application to provide more information on the record but --

MR. KULLY: Correct.

THE COURT: -- that has passed and that was granted.

MR. KULLY: Correct. With respect to -- I will return to it, I just don't want to lose it, with respect to some of the resources that you had mentioned that we had been talking about this morning, it is important to note that when the applicant had been referring to the LSA glossary --

THE COURT: Yes.

MR. KULLY: -- it is not the Law Society of Alberta glossary. The Law Society of Alberta has set out in the applicant's affidavit. Has a webpage set out that says diversity, equity and inclusion -- or inclusion of resources there's a link to the anti-racism centre of Calgary. The glossary is found on their website. So, it is an optional resource for a member to click to find through a third-party provider. It is not something the Law Society says somebody has to read. It is not something that is used by the Law Society in the competency profile or any of the other issues. It is a third party link on that glossary. So, that is where those definitions were coming from.

THE COURT: Got it.

MR. KULLY: So, it is not the Law Society of Alberta glossary.

THE COURT: But one of the things that Mr. Blackett was saying that I understand is that to understand what the Law Society was doing or as a lawyer to understand what the Law Society was doing, you needed to look at that glossary possibly to understand what they are meaning by DEI, what they are meaning by discrimination, what they are meaning by harassment.

MR. KULLY: So, the Law Society of Alberta would not agree with that. In the code of conduct discrimination is defined. Harassment is defined. Those issues are set out specifically.

THE COURT: Over and above the glossary and excluding --

MR. KULLY: No reference to the glossary whatsoever. The glossary is there for anyone who -- a lawyer who wishes to engage in further knowledge on that diversity, equity and inclusion to go to the Calgary Centre of Anti-racism Centre webpage and look at those definitions. From what I understood the issues to be is that the Law Society of Alberta has implemented or adopted those ideologies --

THE COURT: Yes.

MR. KULLY: -- and they permeate throughout the materials. Law Society does not agree with that and that again is not relevant to the issue of did the Law Society of Alberta have the statutory authority to impose these rules --

THE COURT: Got it.

MR. KULLY: -- and the code of conduct. A few more comments from *Auer* and Supreme Court of Canada (INDISCERNIBLE). So, it talks a

little bit about the broad principles. The Supreme Court of Canada also provided some additional ones. So, they say subordinate legislation must be consistent with both -- with the specific provisions of the enabling statute and with its overrising purpose or object and that goes to the modern statutory interpretation principles. Purpose, object, and language all considered.

Statutory delegates are empowered to interpret their scope of their authority when enacting subordinate legislation and the question is whether that is a reasonable interpretation and that is a little bit of a repetition but that is also found at *Auer*, paragraph 3, 60, and 64.

*Auer* at paragraph 3: (as read)

> The challenged subordinate legislation and the enabling statute should be interpreted using a broad and purposive approach to statutory interpretation.

So, both the enabling statute and the subordinate legislation. *Auer* at paragraphs 3, 29, and 55 to 58, Court says that a review of the *vires* of subordinate legislation does not assessing the policy merits of the subordinate legislation. I have talked around this. I am not going to repeat it but that is what the Supreme Court has said. That we are not to be looking at the policy merits. Not whether they are necessary, wise, or effective. And that is want the Supreme Court said. And that I would submit is important. The applicant wants to make this case about the political and social considerations. The Supreme Court of Canada has said that is something the Court should not be doing.

I have talked about it already. Reasonable standard does not assess the reasonableness of the rules. It is the reasonableness of the interpretation and then *Auer* at paragraph 50, "Subordinate legislation benefits from a presumption of validity". And that means that wherever possible the subordinate legislation and the enabling statute should be interpreted in a manner that renders the subordinate legislation *intra vires* and that is at paragraph 37 of *Auer*.

(INDISCERNIBLE) addressed that at paragraphs 52 and 54 where it said reasons are not usually provided for the enactment of subordinate legislation but a reasoning process can be adduced from debate, deliberations and statements of policy and even where sources are not available the context and the record may reveal that reasoning. So, we can look at the context and the language itself.

And finally *Auer* at paragraph 59 and 60. Reviewing the *vires* of subordinate legislation is fundamentally an exercise of statutory interpretation to ensure that the delegate acted within their scope of lawful authority. And that is what this application is about. That has

to be carried out with the modern principle of statutory interpretation in mind and that goes to whether the subordinate legislation falls reasonably within the scope of the delegate's authority.

Turning to the reasonableness of the rules and the code. The primary issues in this application, of course, subject to the *Charter* issues, but the primary issues. Submissions are set out at pages 26 to 38 in the brief and here looking at the presumption of validity the applicant has to demonstrate that the rules and part 6.3 of the code do not fall within a reasonable interpretation of the *Legal Profession Act*. The fundamental question to be considered is are the rules and part 6.3 of the code consistent with the specific provisions of the *Legal Profession Act* and its overriding purpose or object.

LPA has to be given a broad and purposive interpretation and the words of that statute have to be read in their entire context harmoniously with the scheme of the legislation, the object of the legislation, and the intention of parliament, and also looking at common law. So, with those background in mind turn to the key sections where we have section 6(n) and section 7(1) of the LPA.

The legislature of Alberta has given the Law Society of Alberta, through its ventures, the ability to make resolutions and rules on a variety of things. Importantly under section 7(1) they are given the power to make a rule for carrying out of the powers and duties conferred or imposed on the society or the benchers under the LPA or any act that is significantly broad authority. Section 7(2) identifies some specific sections but then says that such enumeration does not restrict the generality of subsection 1, and we can see in *Morris v. Law Society of Alberta (Trust Safety Committee)*. That's 2020 ABQB 137. That is in the Law Society's brief at paragraph 27 the Court recognized that legislation made a conscious choice to delegate broad rule making authority to the LSA through the wording of section 7.

It goes on at that paragraph 27 to say given that broad rule-making authority the legislation does not need to anticipate all of the specific Law Society of Alberta rules. It doesn't need to say the Law Society can pass a rule relating to continuing competency because it has broad rule-making authority set out in section 7. *Morris* does not specifically deal with continuing competency but it does say that it does not need to anticipate specific rules. I just want to make that clear that that is not what *Morris* said.

Also section 6(n) relating to resolutions where the Law Society can take any action necessary for the protection, interest, welfare, or -- well, benefit of the society. So, again you heard my submissions on that earlier. We are talking about the society as a whole. When we talk about what interest the society have, you will hear me talk about it, the public interest. So, it can make resolutions related to that interest. It can make resolutions related

to the protection of the public because that is what it is mandated to do. So, both of those provide it with that broad rule-making authority.

So, in accordance with the *Legal Profession Act* and the legal principles if a rule is connected to the carrying out of the powers or duties conferred on the LSA by the *Legal Profession Act* as reasonably interpreted or if they relate to the protection-welfare of the society as reasonably interpretated then it is *vires*, the statutory grant of authority. And again I said this earlier but it goes back to that question of, well, can then any administrative body do whatever it wants if it says public interest. No. There has to be some grant from the legislature to say you can make rules connected to certain things. If they are connected to the public interest and the legislature has said that then, yes, any decision-maker that has that authority can do that.

If there is no rule-making authority, if there is no protection, resolution making availability for protection of society, that decision-maker can't do that rule. They can't pass that. The public interest in this is related to the rules that the Law Society can make based on its purpose and duties under the *Legal Profession Act*. So, that is that connection. It is not that anyone can just throw up their hands and say it is in the public interest it is fine. It is because the legislature has said, Law Society, you have broad authority to pass rules connected to your duties under the LPA and now as I am going to turn to now, the duties and objects of the Law Society under the *Legal Profession Act* are the protection of the public interest. So, it has to be able to make rules connected to that protection of public interest.

THE COURT: Go ahead.

MR. KULLY: As I have mentioned it is recognized that the *Legal Profession Act* does not include an expressed statement of regulatory objectives. Does not include a public interest objective like other statutes. However, the scope and object of the LSA statutory authority and its mandate has to be found somewhere. There has to be something that says what the purpose and object of the legal -- of the Law Society is under the *Legal Profession Act* and then looking at that the LSA has interpretated that its fundamental duty and purpose is to uphold and protect the public interest and the interest and promotion of the society. That is what it is concerned about.

And that is the fundamental issue of the debate here. Is what are we talking about. What the duty of Law Society of Alberta is. The applicant has submitted it is to ensure that there is resolute duty to its clients and the independence. Nothing else. The Law Society submits that that is inconsistent with all of the judicial authority and it is inconsistent with all of the statements in the legislation itself and from the Supreme Court and from this Court.

So, I will turn to those issues right now. So, first speaking very broadly the purpose of an

independently regulated profession is to uphold and protect the public interest. The primary purpose of all self-governing professions is the protection of the public and that it is outlined at paragraph 135 of the Law Society of Alberta's brief which has the quote from James Casey, author of the regulations of the professions, and that is an implicit and necessary part of a self-regulating profession. It is not dependent on there being an explicit clause in the legislation. That is what self-governing bodies do. They protect in the public interest. We can see that in the Supreme Court of Canada's quote in *Pharmascience Inc. v. Binet* and this is found in the Casey text at tab 3, page 2, footnote 7.

And there the Supreme Court said the privilege of professional self-regulation therefore places the individuals responsible for enforcing professional discipline under an onus obligation. The delegation of powers by the state comes with the responsibility for providing adequate protection for the public. So, that is what happens when bodies are given -- when professions are given self-governing status. They have to govern in the public interest.

Beyond that broad purpose that applies to all professions we have multiple commentary from the Supreme Court of Canada, the state that Law Societies across Canada govern in the public interest. So, you can see multiple quotes from the Supreme Court of Canada at paragraph 136 of the Law Society of Alberta's brief, but I will highlight two. So, we have *Law Society of British Columbia and Trinity Western* at paragraph 36: (as read)

> For many years now this Court has recognized that law societies self-regulate in the public interest.

Paragraph 32, the legal profession -- and this is still the *Trinity Western*: (as read)

> The 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.

That is framed in the general sense. It's not just the specific law society before the Supreme Court. Not just dealing with the legislation at issue which might have a public interest clause. It is not tied to any clause in the legislation. It is an acknowledge -- it also acknowledges that the British Columbia legislation does have a public interest clause but the Supreme Court has said it is just for the law societies in general. It said recognize the law societies as in other Canadian jurisdictions. Not just British Columbia. So, the absence of a public interest clause does not mean that the Law Society of Alberta's purpose is different than other law societies.

Finally this Court has recognized that the Law Society of Alberta has a duty to regulate the

legal profession in the public interest. So, we have *Morris and Law Society of Alberta* which is in the LSA's brief at paragraph 5. They state: (as read)

> The *Legal Profession Act* mandates the LSA to regulate the legal profession in the public interest.

Also have the case that I provided you this morning -- this afternoon of *Muti and the Law Society of Alberta* 2016 ABQB 276, and I just direct you to paragraph 34. So, there it says: (as read)

> The purpose of the Law Society in this province and other Canadian jurisdictions is to protect and serve the public interest by promoting a high standard of legal services and professional conduct. The Law Society implements this goal through the Code of Conduct and the Rules.

The two very things we are talking about here today. While the applicant argues that the lack of public interest clause means that the Law Society of Alberta does not have such a purpose or interest, that argument is inconsistent with the modern approach to statutory interpretation which involves looking at the intention and purpose of the legislature as a whole through the legislation and by looking at everything in their entire context.

So, it is not about looking at it from some original perspective where it is only saying this because something isn't present in the text. It cannot be involved as a goal or a purpose in the statute. The lack of something in a statute is not the end of it. The Court has to look to say, well, we look at interpreting the statute consistent with the purpose and the scheme. And then in that regard, we have the scheme of the *Legal Profession Act* and its object and the intention of parliament is to ensure that the Law Society of Alberta governs in the public interest and the common law has confirmed that through all of those cases.

With respect to the applicant's argument that the Law Society has its primary duty to safeguard the rule of law, or to uphold the independence of the Bar, those are also not found in the *Legal Profession Act*. Those are not to be seen. I heard argument this morning with respect to a lawyer taking an oath that is for the lawyer to uphold the rule of law. It is not for the Law Society's interest in that respect.

So, if the applicant's argument is to be accepted that the Law Society's only role is to govern in the rule of law or the independence of the Bar, those are also not found within the text. We have to look elsewhere for them and in doing so we would be ignoring the consistent commentary from the Supreme Court, from our Court about the public interest mandate of the Law Society of Alberta. So, in the Law Society's submission that can't be the case.

With that in mind this means that section 7(1) of the *Legal Profession Act* and section 6(n) give the Law Society of Alberta the explicit authority to pass rules and resolutions related to that purpose of protecting the public interest and regulating the legal profession in the public interest. Again, not the case that any administrative decision-maker can pass these rules. Has to look to the legislation and it is not the case that the Law Society can enact any rule. Very silly example, I don't know why I came up with this, can't tell lawyers to fly helicopters. Can't say you have to take a course on how to fly a helicopters. Is that connected to the public interest? That is a very strenuous argument to make.

THE COURT: You could get to court on time.

MR. KULLY: Maybe. But that's what the law is about. Is it connected to that purpose and object. Is it connected to the public interest. So, here according to this court in other decisions the *Legal Profession Act* gives the Law Society of Alberta broad regulatory authority to accomplish that public interest mandate and that is what we are looking at is given that reasonable interpretation, that broad and proposed interpretation of the legislation, the Law Society of Alberta has the authority to make rules and resolutions when it is concerning the public interest protection and that mandate.

I said public interest a lot. What do we mean? What are we talking about when we are talking about public interest? So, the Supreme Court of Canada has said that is for the LSA to determine. Again not an assumption. Not such that the Court can't look at it but the Supreme Court said in *Green* at paragraph 29 that the Law Society of Alberta gets to determine the public interest and that that interpretation is owed deference and the deference comment comes from *Trinity Western and Law Society of British Columbia* at paragraph 38.

In *Green* the Supreme Court of Canada said that a Law Society must be afforded: (as read)

> Considerable latitude in making rules based on their interpretation of the public interest in the context of their enabling statute.

In *Trinity Western,* the Supreme Court acknowledged that that delegation maintains the independence of the Bar, a hallmark of a free, democratic society. It is for the self-governing body of the legal profession to determine what is best meant by the protection of the public and the services provided by its members. So, that maintains the independence of the Bar. The state isn't determining what the public interest is. It is the body elected by lawyers themselves which I determining what is in the public interest and that should be given deference.

That latitude, that deference recognizes the Law Society's expertise and sensitivities to the

practice when it comes to deciding on the policies and procedures that govern the practice. When we look at the Law Society of Alberta's motivations in passing the rules the record indicates that it was motivated to increase the competence and ethics of the profession through the CPD requirements.

We look at in record 338 and 339, the LSA's reasons were to one, prioritize competent initiatives; two, drive competence and increase the effective, wellness, and ethics of the profession; three, account for the reality that members have a different levels of experience, levels of practice and access to firm based competence; and four, raise competence by not only encouraging, but providing educational programming where appropriate. So, those were what the goals had in mind all related to competence, ethics.

With respect to rule 67.4 specifically the Law Society had in mind we look at record -- pages 279 to 296. The Law Society had a goal of increasing culture competence and increasing knowledge on the history and legacy of residential schools, treaties, aboriginal rights and Indigenous law. Call to action number 27 from the truth and reconciliation commission. In the Law Society's submissions those are within the public interest.

THE COURT: So, again if I am hearing you correctly when looking at these motives I am not to specifically look at the motives other than to see that it is within the public interest.

MR. KULLY: Correct.

THE COURT: Okay.

MR. KULLY: I'm not saying that they are in a black box. Not saying that they can't be looked at. Not saying that the Court should make assumptions but what you are looking at is do they -- are they part of protecting the public. Is there a public interest mandate. That is the goal to look at.

THE COURT: And not to independently judge whether I feel that it is a proper motive or not --

MR. KULLY: Correct.

THE COURT: -- or whether I would have done the same thing based on those motives.

MR. KULLY: Correct. If the Court is applying the reasonableness review.

THE COURT: Under the reasonableness --

MR. KULLY: Correct.

THE COURT: Under the correctness test that is a different story.

MR. KULLY: Correct. But given the jurisdiction on why the reasonableness review applies and given how the Supreme Court has indicated that is correct. That you should be looking at, is this a reasonableness interpretation of the statutory making authority. Is it -- not even is the rule reasonable. Is it within that reasonable interpretation, so yes. If the Court would have passed that, that is not the question to be asking. Is it a good policy? Not the question to be asking. Certainly they will say -- it is not saying here that they are not good policy reasons but that is irrelevant to the consideration on the reasonableness review of the *vires* of subordinate legislation.

So, here we have the case where we are talking about professional ethics, competence. The public interest is maintained by ensuring continuing competence in the legal profession. And *Green* makes a comment on that. Although *Green* dealt with some other issues we talked about this morning. In paragraph 3, the Supreme Court recognizes that continuing professional development programs are consistent by -- with the public interest mandate by ensuring competence and enhancing competent in the legal profession by requiring lawyers to participate on an ongoing basis in activities that enhance their skills, integrity and professional.

And you can see that quote at paragraph 174 of the respondent's brief. And there it says CPD programs --

THE COURT: Yes.

MR. KULLY: CPD programs serve this public interest and enhance confident in the legal profession by requiring lawyers to participate. CPD programs have, in fact, become an essential aspect of professional education in Canada. Most law societies across the country have implemented compulsory CPD program and that is what we are talking about here, is the mandatory CPD.

The applicant has made some comments about the public interest. It has said that public interest is limited to legal competence, legal ethics, and independence of the Bar. So, what the applicant has referred to as these core competence and ethics. So, in his submissions that if there is going to be mandate in the public interest still has to be connected to core

competence, and ethics, and only those things; nothing else. In the LSA's submissions that restricted view of what the public interest means has been rejected by the Supreme Court of Canada. Particularly in the *Trinity Western* decisions.

So, one again as I talked about, it is up the Law Society of Alberta to confirm what that public interest is and it is owed deference and when we look at the Supreme Court of Canada's comments in *Trinity Western*, the Court concluded that public interest includes ensuring equal access to the legal profession, supporting diversity within the Bar, and preventing harm to LGBTQ law students. That is much more than core competence is and ethics and values.

In *Trinity Western and LSABC*, the Law Society of BC, at paragraph 41, the Court went on to state that: (as read)

> Indeed the Law Society of British Columbia as a public actor has an overarching interest in protecting the values of equality and human rights in carrying out its options.

That is how broad the public interest was perceived to be for the Law Society of British Columbia. It is not just that the rule of law be preserved. It is not just that lawyers be competent. It is a broad concept that is within the LSA's discretion to determine on the basis of a number of policy considerations, a number of issues, and they all relate to public interest, and that can change over time. So, there has been an evolution of some of what the LSA's goals and decisions have been. There was no mandatory CPD before. Not disputed. It was put into place. There was a requirement to do certain congenial professional development programs. That is permitted. The public interest can evolve with what the Law Society sees needs to happen to mandate -- or to govern lawyers to ensure that that public interest is protected and maintained.

And that is not about being activists as alleged by the applicant and it is not about advancing the public interest. It is about ensuring that the public is protected by -- there may be new requirements but it is still about protecting the public. Not about advancing or being activists in any way.

With respect to -- I am just going to move forward a little bit. Competency of profession which includes culture competency. That understanding of different perspectives. Understanding different client needs. That as well as the elimination of discrimination and harassment which is found in the code are inherent to protecting public confidence in the profession and in promoting equality of legal services provided to the public. A Bar with culture competency is more responsive to the needs of the public it serves and protects the public.

Raising competence by not only encouraging competence but providing educational programming is appropriate and even if it is connected to de-colonization or connected to views of colonization, that does not make it contrary to the public interest as alleged by the applicant. Even when you talk about colonization, the *Gladue* factors recognize colonization having an impact with respect to Aboriginal offenders in Canada. The recognition of colonization is not a boogeyman. It is something that is in the public protection and we see that in *Gladue* factors and if it forms part of the rationale for having culture competence that is appropriate when there is a goal for protecting the public.

It also does not undermined access to justice or promote incompetence as alleged by the applicant. While an individual lawyer including the applicant might not believe in the purpose of culture competence, providing lawyers with education and culture competence may improve -- it may increase their willingness to serve diverse groups. It will provide lawyers with better understanding of multiple clients, and a better ability to engage with clients. It will provide a better ability to provide effective services to a variety of clientele. That promotes competence. That promotes access to justice. So, certainly just because a single lawyer does not believe in the goals does not mean it undermines access to justice or competency.

Requiring continuing competence also does not undermine the Bar's independence. There is no interference with the self-governing Bar by requiring continuing competence. Lawyers remain a free from political interference and interference of others, but are subject to the governance of their own members and a delegation to the professional body is itself what maintains that professional independence.

The applicant has referred to many cases speaking about the need to ensure that lawyers are free from state interference. All of those cases speak to the independence from the state. Not independence from their own regulator. In fact, those cases recognize that self-governance is part of ensuring the independence from the state.

When we look at paragraph 150 of the applicant's initial brief there is a quote from *Pearlman* which is presented to suggest that lawyers have to be free from any -- from any interference. The very next line in the *Pearlman* decision says: (as read)

> On this view, the self-governance status of the professions and of the legal profession in particular was created in the public interest.

To ensure there is no state interference, lawyers are given the ability to govern themselves in the public interest. Those two are connected. It is that self-governing status that ensures lawyers are free from state interference, free from political interference, and the public

interest is a fundamental aspect of that self-governance.

This is also seen in the quotes from the Attorney-General of Canada and the Law Society of British Columbia decision from 1982 from the Supreme Court of Canada when there is a quote that says: (as read)

> Consequently regulation of these members of the law profession by the state must so far as human ingenuity can be so designed be free from the state interference.

The quote is used repeatedly by the applicant. That quote is made by the Supreme Court when discussing the self-regulating nature of the profession. The Court is confirming that members of the legal profession are to be free from state interference which is why there is self-governing status. That is what they are talking about when they are saying be so far as human ingenuity can be designed, free from state interference, the answer to that? Self-regulation. That is what the Supreme Court is talking about. In the line that follows that quote it says: (as read)

> The uniqueness of the position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.

Doesn't say that that self-governing body can't impose continuing competency or codes of ethics, or restrictions on the Bar. That is not political interference. That is not state interference.

So, wrapping up with respect to the rules and the code and some of the restraints that have to be provided from the following perspectives, again a little bit of a review but I just want to highlight it. The starting point is judicial restraint and respect for the Law Society of Alberta's role.

The Court is not to undertake a de novo analysis. The Court is not to consider the policy merits of the subordinate legislation. The Court is to presume the subordinate legislation is valid. The onus is on the applicant to show that the subordinate legislature is unreasonable and wherever possible the subordinate legislation and the statute should be interpreted in a manner that renders the subordinate legislation *intra vires*. That all comes from *Auer*.

So, if the Court is applying the reasonableness standard which the Law Society of Alberta submits is the answer given the jurisprudence, those are considerations that the Court needs to have in mind. Rules 67.2 to 67.4 are within a reasonable interpretation of the Law

Society of Alberta's statutory rule-making power.

Purpose and goal. A purpose and an objective of the Law Society under the *Legal Profession Act* is to advance and protect the public interest. Protecting the public interest, protecting the public from the providers of legal services is the fundamental purpose and objective of the LSA. Continuing professional development programs are consistent with that goal and such -- and the benchers have broad rule-making authority under section 7(1) and 6(n) and the rules that have been passed are consistent with the scope of the public interest mandate. So, that is why the Law Society of Alberta submits that the rules and code are intra vires. It is statutory authority.

Subject to any questions from the Court, I will talk about why the code of conduct is *intra vires* as well.

THE COURT: Go ahead.

MR. KULLY: Thank you. This will be quicker I promise. Section 6 of the *Legal Profession Act* sets out powers of the benchers. 6(l) specifically provides that the benchers may "establish a code of ethical standards for member". It says that you can establish a code of ethical standards. Again section 6(l) are broad and open-ended. There's no prescriptions or restrictions on what type of ethical standards can be imposed and there's broad authority for the benchers to make that decision.

Part 6.3 of the code establishes ethical standards related to discrimination and harassment and sexual harassment and as my friend indicated this morning the Law Society of Alberta agrees. It does what section 6(l) of the Legal Profession Act says the Law Society of Alberta has the power to do. It is a code of ethical standards. It also protects the public interest. If we are looking at public interest ensuring the members do not engage in harassment and discrimination certainly a part of protecting the public.

The amendments that were passed with respect to discrimination and harassment they were based on concerns and these are found at the record of pages 58 to 59. Here again we have some information as I indicated in my review of the background. The Law Society of Ontario, the Prairie Provinces, the International Bar Association, they all raised concerns that harassment, bullying and discrimination were prevalent in the legal profession. Whether a qualitative assessment of those concerns was done is not relevant from the Law Society of Alberta's submissions.

The Law Society of Alberta determined that a prohibition on harassment, sexual harassment, discrimination and reprisal connected to those was necessary to ensure the proper ethical standard of conduct for its members. Whether there was a qualitative concern

that needed to be addressed to that, not relevant. That is clearly within the statutory authority under 6(l) and it is consistent with the *Human Rights Act* in Alberta and the Occupation Health and Safety Code. Members of the Law Society of Alberta should not be engaging in discrimination or harassment.

With respect to concerns about the vagueness of those terms the commentary of the code provides some discussion. It identifies very specific actions which are harassment, very specific actions which are discrimination. The definition of harassment is the legal definition of harassment that has been adopted by the Courts. It talks about whether the action was known or ought to have been known would make the individual feel that way. That it would be harassing them. That is the definition the Court apply. Certainly there is some subjectivity to that but that is required. It is not a new definition. It is not taking some perspective and imposing it. Code says you will not engage in harassment and then it outlines what harassment is. Code says you will not engage in discrimination. It outlines what discrimination is. And in discrimination very specific to issues of adverse effect discrimination, making decisions based on protective characteristics. All of those that we would come to find being included in that definition of discrimination. Not any concerns about any uncertainty or use of other terms and glossaries to interpret what is meant.

A lawyer can look at the code of conduct and they can know what harassment means and what discrimination means and what they should not engage in. It is not vague. It is not a menu of aspirations and they are not guilty until proven innocent. I heard that comment -- read that comment in the applicant's submissions. If an individual is alleged to have engaged in a breach of any part of section 6.3 they will have a disciplinary hearing under the Law Society of Alberta process as mandated by the *Legal Profession Act*. There would have to be a hearing prior to any finding of conduct deserving a sanction. They are not presumed guilty. There may be some commentary about believing some of the submissions from a complainant. That is not guilty until proven innocent. That goes to ensuring there is a proper investigation and that these issues are dealt with seriously. Again protecting the public.

Based on all of those, rules 67.2, 67.3 and 67.4 and parts 6.3 of the code are *intra vires* as they fall within that reasonable interpretation of the Law Society of Alberta's authority under the *Legal Profession Act*. Should the Court look at the profile in the CPD, should the Court find that those are subject to review, they are similarly within that statutory authority. They relate to the protection of the public interest. They relate to continuing competency. They are connected.

So, with those submissions in mind, subject to any questions from the court, I will turn to the *Charter* issues.

THE COURT: Go ahead.

MR. KULLY: I may act for once as a lawyer. I may actually have accounted my time -- estimated my time correctly.

THE COURT: Yes, I think so.

MR. KULLY: For once. So, as set out in the Law Society of Alberta's brief, it has not interfered with the applicant's *Charter* rights. And this is set out at pages 38 to 45. Law Society of Alberta would be more than happy to engage with the Court on the constitutional debate of whether we apply the Oaks or the *Dore* analysis as that is very -- certainly an interesting issue but in the Law Society of Alberta's submissions it is not even necessary to get to the justification stage and if it is necessary to get to the justification stage the actions of the Law Society are justified under both the Oaks test and the *Dore* analysis. But if the Court was to pick one of the two the Law Society of Alberta submits the *Dore* analysis is the proper analysis.

As that the Supreme Court has indicated that the *Doré* analysis will apply to the decisions of administrative decision-makers, specifically discretionary decisions but even in a case the Commission Scolari case. It is not in the brief but that is the one that is 2023 Supreme Court of Canada 31 at paragraph 49. The Court just talks about judicial review of administrative -- administrative decisions are to be analysed under the *Doré* analysis.

We see that analysis provided in the Law Society of British Columbia in *Trinity Western* at paragraph 57 where it says discretionary administrative decisions that engage the *Charter* are reviewed based on the administrative law framework set out by this Court in *Doré v. Loyola High School*. Delegated authority must be exercised in light of constitutional guarantees and the values they reflect.

Breaking from the quote. That is what we are talking about here today. We are talking about did the Law Society of Alberta exercise its delegated authority in accorded with the *Charter*.

That is the same question that was before the Court in *Trinity Western* in which they applied the *Loyola* and *Doré* analysis. So, going on with the quote and this is again at paragraph 57: (as read)

> In *Loyola*, this court explained that under the *Doré* framework *Charter* values are those values that underpin each right and give it meaning and which help determine the extent of any given infringement in the particularly administrative contexts and correlatedly when limitations on

that right proportionate in light of the applicable statutory objectives.

So, again breaking from the quote we are talking to the same things here, statutory objectives. Is the action of the Law Society that has been delegated in accordance with the applicable statutory objectives. Going on with the quote at paragraph 57: (as read)

> The *Doré/Loyola* framework is concerned with ensuring that that *Charter* protections are upheld to the fullest extent possible given the statutory objectives within a particular administrative context. In this way *Charter* rights are no less robustly protected under an administrative law framework.

So, that is what we are talking about here today. And again it is not about a lesser standard. The *Doré*/*Loyola* framework provides full protection for the *Charter* rights in that balancing exercise at the justification stage.

Looking at what the Law Society of Alberta has done this is addressed at paragraphs 188 and 190 of the respondent's submissions and I have talked about it at length today. So, I will just briefly summarize because it is important to talking about is there in an infringement on the freedom of expression and on the freedom of religion. So, what the Law Society of Alberta have required is that members are required to submit their CPD plan to the Law Society of Alberta and on request produce a copy of the CPD plan and they have to participate in a review of the CPD by the Law Society of Alberta. Part 1.

There is a CPD program which each member has to conduct a personalized learning plan. The lawyers are not required to demonstrate competency in every area. They are to select two or more competencies of their choosing and to focus on developing in their learning plan. So, that is what we talked about earlier today.

Once a member's CPD plan is complete they use the CPD tool to submit it and that is based on the profile. We talked about that at length. They introduced rule 67.4 to allow for additional specific competency CPD requirements and they introduced The Path as part of that. So, as there were discussions of The Path, The Path talks about things like the cultural and historical differences between First Nations, Inuit and Metis. Talks about the evolution of the relationship between Canada and Indigenous people. Talks about stories of social and economic success, reconciliation and resilience, and the understanding of intra-culture communication in the workplace.

That is what The Path talks about. It is framed in the terms of history and education. Not re-education. It is about educating on what facts have occurred and giving different perspectives on that. What Indigenous people might believe, what they might think, what they might feel, not about indoctrination. About learning about other cultures. That is what

The Path is about. Just like any other history course maybe.

It does not promote one culture over the other. It does not promote one religion over the other. The discussion of what Indigenous history in Canada (INDISCERNIBLE) like. Although some of that may be dark, some of that may not be on -- cast certain people in a positive light. That is not indoctrination. That is looking at history and looking at different perspectives. Not requiring to believe.

With respect to the quizzes that follow each of the modules, the questions generally look at what was taught in the course. What was the material about. Not what the applicant believes to be true. We are not talking about the Law Society of Ontario mandate where you have to swear something specifically. It is about answering questions related to the continuing competency and the education that was provided to the lawyer.

THE COURT: So, on that, my understanding from the applicant is that there are certain statements in that path that do actually dictate that you agree with something from their perspective or you feel something or you should be saying this actually happened when, in fact, they don't. So, first question you originally said I am not even going to look at The Path because The Path is not before me. Okay. So, that's --

MR. KULLY: If we are talking with respect to the judicial review *vires* application.

THE COURT: Okay.

MR. KULLY: If we are talking about the *Charter* violation it likely becomes necessary to look at it in that perspective.

THE COURT: Correct. Okay. So, then looking at -- does this mean that I am from your perspective to go into The Path and actually go through the entire The Path, look at all of those questions and make a determination if, in fact, it does impose or infringe by dictating that you are to think or accept a perspective as opposed to just be aware of an -- of a perspective.

MR. KULLY: So, I would disagree that that answer requires somebody to think with respect to criticisms of prime minister or with respect to the not guilty verdict in the decision we are talking about. It talks about those as being concerns, talks about those being issues. It does not say that the individual has to agree with those. It's not about the belief or that indoctrination. With respect to even if those are required beliefs are saying this is what I learned in this course, then that would be justified under the second part. In the Law Society's submissions the --

THE COURT: The *Doré* test.

MR. KULLY: -- the loss -- The Path does not require anyone to say they think, they believe, they express. It is about learning from that history. Learning from those objectives and the modules of The Path are before them -- are in the materials before you.

THE COURT: So, if I hear you correctly, you are saying by answering the question yes, he was found not guilty and it was perceived as being -- I can't remember the word he used, but abhorrent. You are saying that by answering that question, picking that multichoice answer that is not asking to accept that as the truth or accept that as something that they need to believe on a go forward basis.

MR. KULLY: Correct. And in that same vein the rule 67.4 and the resolution passed with respect to The Path, it allows an applicant other ways a lawyer -- other ways to demonstrate Indigenous culture competency.

THE COURT: Yes.

MR. KULLY: The Path is not the only answer to Indigenous culture competency. The -- a lawyer can educate themselves are required topics in other ways. They can certify that for the Law Society of Alberta. They can ask to be exempted from completing The Path on that basis. So, in that regard a lawyer is being asked to engage in Indigenous culture competency. The default is The Path which again from my reasons doesn't include the type of indoctrination, re-education that has been alleged, and if an applicant is refusing to engage in that, it is not an automatic suspension. It is not in that regard. There are other options to complete Indigenous culture competency. So, the question then becomes is Indigenous culture competency a requirement for a breach of freedom of expression and given the learning and engaging in that, that is not a breach of freedom of expression or freedom of religion and it would be justified as having that proper balancing in that consideration of the public interest.

With respect to 6.7 (sic) when we are talking about discrimination, harassment, even if those are things that are protected under the freedom of expression and I will recognize that the Supreme Court of Canada has said hate speech is protected speech but any limitation on that type of violent speech is justifiable in society regardless of if we apply the *Oakes* test or the *Doré* analysis. Telling a member of the legal profession that they cannot harass, discriminate, sexually harass or engage in reprisal against somebody related to those is justifiable when we are doing a balancing of a freedom of an expression with respect to the public interest and the needs of clients and other members of the Bar

including -- because when we look at the language it talks about not discriminate or harassing other staff, other lawyers, clients, members of the public. All very important. So, even if that is a limit on expression that is justifiable in a society regardless of which analysis we apply.

And when we think of that we can see Alberta -- we look at human rights codes. We look at occupational, health and safety. All of those have limitations on harassment and discrimination. Those are not contrary to the *Charter*. Again even if freedom of expression is engaged on that type of violent speech, limitations on it is justifiable. Really from the Law Society's perspective, what seems to be the case is that the theories that the applicant says the Law Society is using or the political objective when we talk about DEI, public interest, the applicant is saying that those conflict with his views. That conflict is not a violation of *Charter* rights.

The applicant remains free to uphold those same views. He can say that DEI, public interest, engaging with stakeholders, is not something that should be engaged in. He is not being told that he has to have those beliefs. He is being required to take a course and he is being required to submit continuing professional development of his choosing which again can include well-being and other aspects and he is being required to not engage in harassment or discrimination. That is not conflict between what the applicant is believing, what he is expressing, what his freedom of religion is. There is not that conflict in that regard.

People are entitled. The applicant is entitled to believe what he wants and to think different things than what the Law Society of Alberta thinks is important. That is permitted. The Law Society of Alberta is not telling him that he has to agree with DEI. It is not telling any lawyers that they have to adopt all of these things. If somebody chooses the Law Society has resources available for them. If somebody wants to engage in their competency on those issues the Law Society has a way of engaging in that.

The Law Society thinks these are important perspectives and has done -- taken action to promote them and has mandated the continuing competency as well as The Path but that is within the public interest. The applicant is still free to engage in his beliefs and his religion as he deems necessary.

THE COURT: And if I heard you correctly the only mandatory aspect of DEI or culture competency is a -- is The Path course or some other Indigenous culture study.

MR. KULLY: Correct.

THE COURT: That's it?

MR. KULLY: That's it.

THE COURT: That is the only mandatory --

MR. KULLY: Correct.

THE COURT: A party at any time can avoid all DEI in the CPD?

MR. KULLY: Correct.

THE COURT: Okay.

MR. KULLY: They have the choices of the domains and the competencies and I believe we do identify what those specific domains are.

THE COURT: Yes, you do.

MR. KULLY: Okay. So, there's certainly ones that go beyond DEI, and truth, and reconciliation.

THE COURT: Yes.

MR. KULLY: Those two are to part of them but well-being, practice management, --

THE COURT: Yes.

MR. KULLY: -- those aspects so certainly. The requirement is to submit the CPD, to select some of form of competency from those domains. It does not say you have to choose truth and reconciliation or DEI.

THE COURT: But you have to do The Path or some --

MR. KULLY: Indigenous culture competency.

THE COURT: -- other Indigenous -- yes.

MR. KULLY: Correct.

THE COURT: Okay.

MR. KULLY: Under 67.4 and --

THE COURT: Right.

MR. KULLY: -- then the mandate. The other motion that was passed through the mandate, The Path.

THE COURT: Right.

MR. KULLY: That is correct. With respect to the allegations about the attack on Christianity, the requirement to take a CPD -- CPD -- CPD course is not an attack on Christianity. It is not engaging in the promotion of one religion or the other. Having to submit CPD is not an attack on Christianity. The only thing that could be an attack on Christianity in any way would be The Path and The Path does not engage in that type of conduct. It is about learning of other cultures and we can see this in *Loyola*. If we are talking about state neutrality.

State neutrality does not require an actor to refrain from any talking about other religions. It is not what state neutrality is about. State neutrality prevents any administrative body from promoting, favoring one or the other. When we talk about the cases, they talk about having a prayer before any sort of meeting. That is what *Loyola* is about. It was saying the prayer before the city council meeting. Talk about prohibiting people from wearing any religious paraphernalia. Of course, it said you can respect the neutrality by promoting other cultures. State neutrality does not require the exclusive restriction on any religious paraphernalia and *Loyola* specifically says at paragraph 71 in a multi-culture society it is not a breach of anyone's freedom of religion to be required to learn or teach about the doctrines and ethics of other world religions in a neutral and respectful way.

That is what The Path does. Talks about other religions, other cultures in that neutral and respective way. And that is not a breach of state neutrality and not a breach of freedom of religion. If we look at -- if a breach has occurred, talking about harassment, discrimination, freedom of religion, any of those, it is justified under the *Doré* framework and the *Loyola* framework.

THE COURT: Because I would think that the applicant is disagreeing with you that it is done in a neutral way. His exact example, accept it or not, is that the first preview of a Christian body in The Path came with darkness and sad or horrific music. So, I don't think he is saying that it is in a neutral way presented.

MR. KULLY: Certainly.

THE COURT: That it would be -- that The Path is teaching in a neutral way. I think part of their whole argument is it is not neutral in and of itself.

MR. KULLY: And the Law Society would not agree with that. The Path is the neutral aspect. With respect to the music playing, I -- I can't recall. That is not in the record.

THE COURT: But I think which is what you are coming to the second part even if -- even if is to be found, that isn't neutral, then you go into the second step the proportionality test.

MR. KULLY: Exactly. And that is where we've set out in our brief starting at paragraph 202 about how it would be justified under the *Doré*/*Loyola* framework if there is a breach. So, when we look at what we are doing, it is that breach measured is a proportionate to the statutory objectives, the goals, the public interest, in this case what the Law Society is doing in the public interest. That protection. Is there a proportionate balancing between the two. So, here the Law Society of Alberta submits that its action have significantly advanced its objective, that important objective of public interest and any breach if one occurred in minimal. If there is that discussion of presenting Christianity with a single aspect of negative sound or if there is --

THE COURT: Or negativity at all.

MR. KULLY: Correct. Negative. If there is that, that is a minimal breach when compared to the balancing of promoting the public interest of that culture competence and the promotion of respect of other views and knowledge of other culture. So, if there is that breach we look to see what was the extent of the breach. It is not that the applicant is being required to promote the religion. It is not about that they are saying that their previous religion is, not that they can't practice it anymore. It is what level of breach occurred and then is that level of breach proportionate to the statutory objective, the goals that the Law Society was seeking to engage in and then in that regard the Law Society would submit that that public interest objective is more significant and outweighs that breach, that minimal breach in this case.

So, therefore, any breach, if it occurred, would be justified, in that framework. Specifically we look at *Green*. *Green* says it is in the public interest for the LSA to require lawyers to participate on an ongoing basis in activities that promote their ethics and professional. Look at Trinity Western. It is in the public interest to take actions to promote equality, ensure

equal access to the legal profession, support diversity within the Bar, and prevent harm to the vulnerable and that case was LGBTQ.

Here we are talking about actions from the Law Society which promote knowledge of Indigenous history, Indigenous culture, which is something that has been a concern from the truth and reconciliation commission, from the courts in *Gladue*, from all varieties of actors dealing with history. Dealing with the legacy of what has happened. That is all important. That is serving the public interest. So, with respect of any interference with the *Charter* rights, that interference is at most minimal. There is requirement to engage in the self-selected CPD and have that Indigenous culture awareness, of course. If we've talked about anything here today that has engaged in that freedom of religion it is The Path. We also have to recognize as we talked about before The Path is not the only way to demonstrate Indigenous culture competency. There is a way to not take The Path.

And then if the concern is with The Path itself any of those breaches and any concerns about state neutrality in that respect are minimal. We are not talking about excluding the members from meetings because there was the prayer. We are not talking about saying he has to believe a certain way. Not saying he has to do anything. It is reviewing the videos, reviewing the online modules, answering the education. That is what we are talking about in terms of that breach. So, if there is that negativity, it would be a minimal breach and it would be justifiable in accordance with the statutory objective of protecting the public interest because of that learning of engaging in culture competency.

Turning to my conclusion as I have five minutes left. So, as I have talked about here today, the role of this Court is to ensure that the Law Society of Alberta exercise of statutory authority falls within a reasonable interpretation of the *Legal Profession Act*. Having regard to the modern principles of statutory interpretation which include the objective, the purpose of the legislation and the other relevant constraints.

The role of the Court is not to judge the Law Society of Alberta's goals, objectives, or to inquire into the merits of the policies. The Court should not usurp that authority which the legislation appointed to make that decision which was the Law Society of Alberta. But the Court certainly can and should ensure that the Law Society of Alberta has not exceeded the powers given to it by the legislature. As set out today the Law Society of Alberta has not exceeded those powers.

The rules in part 6.3 of the code have all been established with the Law Society acting within a reasonable interpretation of its scope of authority under the *Legal Profession Act* as the Law Society has broad powers under the *Legal Profession Act* and to protect the public interest that is the purpose as you have heard me say here today and when reviewed for reasonableness which the Court should apply they are intra vires, the *Legal Profession*

*Act* and the authorities given as they are all within the public interest.

With respect to the *Charter* issue, the Law Society submits that there has been no breach of the applicant's *Charter* rights but if there has any breach is minimal and is justifiable given the public interest objectives. So, with those submissions I would submit that the application should be dismissed.

THE COURT: Thank you.

MR. KULLY: Subject to any questions you may have, Justice.

THE COURT: You have three minutes.

MR. KULLY: I have learned not to fill time just because I have it.

THE COURT: Thank you.

MR. KULLY: Subject to any questions you may have.

THE COURT: Not at this point. I might take a five-minute break. Wrap my head around to see if I have any more questions the reply.

MR. KULLY: Thank you.

MR. BLACKETT: Thank you.

THE COURT: So, with that we will briefly adjourn. Thank you.

(ADJOURNMENT)

THE COURT: I'm good. Mr. Blackett, your response.

MR. KULLY: Justice Kachur, --

THE COURT: Oh.

MR. KULLY: -- before Mr. Blackett, I --

THE COURT: Oh, sorry. Yes.

MR. KULLY: -- just wanted to clear up one things with respect to the profile --

THE COURT: Yes.

MR. KULLY: -- just so the Court doesn't have (INDISCERNIBLE) correct one thing with respect to the profile, --

THE COURT: Okay.

MR. KULLY: -- on the CPD plan. So, with respect to the CPD requirement it is selecting one of the competencies in the domain, the lawyer does have to do a self-assessment of their own level in that at the time. So, the CPD requirement would say if you picked wealth and you picked improving resilient, a lawyer would self-assess where they are at at that standard at the time.

THE COURT: So, there is --

MR. KULLY: Correct.

THE COURT: That has to be submitted --

MR. KULLY: Correct.

THE COURT: -- to -- got it.

MR. KULLY: And it is a self-assessment and the Law Society doesn't see what the self-assessment says, but there is -- they don't have --

THE COURT: But it has to be submitted.

MR. KULLY: If -- only if there is a review. It is something that the Law Society looks at for everyone.

THE COURT: Okay.

MR. KULLY: So, it does have to be submitted. There is a self-assessment. The learning activities are something that you would select say if you are talking about how building resilience -- someone might say the learning activity I want to do is attend yoga this year.

THE COURT: Right.

MR. KULLY: You can then reflect on that throughout the year as I have indicated but that is not required. And then on the next year you would say okay, I am picking my competencies again. I am self-assessing where I am at on them and then I am going through to work on that throughout the year.

THE COURT: Do you have to answer whether you did or didn't go to yoga?

MR. KULLY: No.

THE COURT: Okay.

MR. KULLY: So, that is not part of it.

THE COURT: Okay.

MR. KULLY: That is part of the reflection and then the next year you could say -- you could pick building resilience again and the self-assessment could be you've improved.

THE COURT: I am really going to go to yoga this year.

MR. KULLY: Correct. And I just wanted to clear that up but there is that --

THE COURT: Yes.

MR. KULLY: -- assessment perspective.

THE COURT: Yes. Okay. I thought -- that is why I asked because I thought there was -- yes, okay.

MR. KULLY: Correct. But that is not the -- you have to do the learning objective and then assess after that.

THE COURT: Got it.

MR. KULLY: For clarity. I misstated that. I wanted to make --

THE COURT: No.

MR. KULLY: -- sure that was clear.

THE COURT: Okay. Thank you. I appreciate that.

Mr. Blackett.

**Submissions by Mr. Blackett (Reply)**

MR. BLACKETT: Thank you. So, once again far too little time for how much I would like to say. I will just start with that last comment there. The self-assessment that the lawyer has to do in the tool although it is submitted to the Law Society according to the rules, the Law Society cannot look at that but the Law Society can require you to participate in a review and in that case you have to bring in your full plan and let the Law Society look at what you have decided to do and why.

My friend provides a -- I think that this might be the easiest way to sort of address a big part of what I think my friend is getting wrong here and what I think is generally getting wrong again we're getting into this concept of the black box and my friend has presented a few arguments that's just no, in fact, it is appropriate to do this judicial review with this kind of stuff in the black box.

And my friend provides this authority which I think just has a real excellent quote in it which is -- and I have got to find it now -- sorry. Discretion has been described as the hole in the legal donut but that hole is not automatically a lawless void. And that is at paragraph 125 of our sur-reply brief.

The general point I am trying to make is that, yes, there may be just some decision that is granted to the statutory delegate but the Court has to make sure that that -- that decision is made reasonably, legally and constitutionally and in order to do that the Court needs to have a very clear understanding of what the statutory delegates' objectives were and how it was pursuing those objectives. Whether or not those objectives might be political or whether or not the way it's pursuing those things might be political.

Yes. The Court should not make the decision for itself. It is not for the Court to make the legislature's decision. But it is for the Court to know what decision exactly was made and why it was made. So, I think that my friend has done a very good job of suggesting that, in fact, we do have this black box and we can put all of this stuff inside of it and the Court doesn't need to bother itself with figuring out what exactly the Law Society's objectives were beyond again the labels on the box. My friend used the term --

THE COURT: That is what I heard him say is that what the Court needs to determine is first to see if they even had the authority under the legislation to make that determination or make that action.

MR. BLACKETT: Right.

THE COURT: That's that. And the reasons that they made that action don't necessarily come into play because that is what the legislature gives them authority to do. If it is determined they had the authority to implement a competency component, that the reasons for -- like that is where it stops because they are given that -- if it is determined that that is within that legislation they can make the subsequent rules to make it and their reasons behind making it shouldn't be assessed by the Court. What the Court is assessing did they have the authority in the first place to do that. That is what I heard him say. I didn't say -- I didn't hear also say put it in a black box. He said go head look at it if you want to but it is not for you to say those are not the factors they should have looked at. Those are incorrect factors that they looked at and I wouldn't have made that same decision on those factors. That is what I heard him say and he can correct me if am wrong.

MR. BLACKETT: I think we have to go back to *Roncarelli v. Duplessis*. There is no doubt whatsoever that there was a statutory right to deny a liquor licence. The issue was not whether or not they had the right to do it. they had the perfect right to do that. But what they didn't have was the right to do that for the wrong reasons. So, the objective in exercising a power, even the power may have appeared to be well within your jurisdiction, matters entirely. You cannot exercise any statutory power for an improper purpose. So, *Roncarelli* is key.

The other thing that is key is to really look at *Vavilov*. My friend continually summarized the test -- not that he was exactly trying to summarize the test. He provided a number of factors but really never dove down into what does a reasonable analysis look like. And when we look at *Vavilov* and we see what that actually looks like, it means that the statutory delegate has to provide reasons that are internally coherent. There is a rationale chain of analysis that leads logically from evidence to conclusion. It can't just provide law. It can't just provide arguments. It can't just provide preemptory conclusions. There has to be rationale and clear chain of analysis from evidence to outcome. They can't use logically fallacies, dilemmas, unfounded generalizations, et cetera.

When we look at what *Vavilov* requires the Court to do in a reasonable analysis is not simply see if there is a connection between some statutory objective and what they did. Not at all. The Court needs to look very clearly at what objective are they pursuing number 1,

and number 2, okay, you say there is some connection between that, show me that connection and reason me through why this enhances competence and my friend has failed on both of those accounts.

My friend continues to refuse to tell this Court what culture competence means, although in my friend's reply argument he did, for the first time now, start to explain the culture competence and I don't know if I have the exact quote here but he said something like it doesn't have any political or transformative component. It is really about this kind of -- and we get into this in the brief. There's type -- two theories of culture competence. One is that it is learning how to deal with people from other culture.

It is a set of skills and the other, newer, 21st century, concept of it, referenced by Pooja Parmar in the article that the benchers rely on said no, it is more than that. It is a radical transformative agenda. That is what it says and so we need to be very careful. When my friend says culture competence and the Court would think, well, that seems reasonable. Of course, we should learn how to communicate with our clients. It does become a bit hard to argue against that. Not entirely but that is not what it means.

So, when we do -- even if we are going to do a *Vavilov* reasonableness analysis, it is the first thing we have to say. Okay. what is the objective and we can't stop at the words culture competence and then assume we know what that means and we can't rely on my friend's representations what it means to the Law Society is just social skills because that is not what it means. When we look into the record it means much more than that and again I will quote it again radical, transformative agenda. Pooja Parmar says that it involves the lawyer unlearning colonial logics. Unlearning colonial logics. I am not merely to become aware of a new perspective. I am to unlearn the perspective I have now. So, we've in our brief gone in great detail to -- which my friend should have done. The Law Society should have done this when they provide their reasons they should have gone into great detail about what they mean by culture competence but they didn't.

So, *Vavilov* if that is where we are going, if we are going to use a reasonable analysis, it still requires that we know exactly what they are up to and exactly what they mean by these terms. Also *Vavilov* tells us that we have to be reasonable in outcome. So, the Court doesn't second guess them but the Court will look at what the outcome was because they will -- because the Court says -- paragraph 86, I believe, some outcomes are so at odds with the objects of the statute that they are unreasonable and this is our point. We have an outcome here where the Law Society is advancing this concept of culture competence that we say and it seems very clear from the materials, represents an attack on the constitution.

*Vavilov* would say, well, this outcome is just so at odds with the purpose of the *Legal Profession Act* that I don't care what reasons you try to give me, I don't care how hard you

try to reason your way around this, there is no way that you are allowed to do that. You cannot encourage lawyers to violate their oath of loyalty to the constitution which by the way the Act specifically requires that to be provided and if the Act says that lawyers are supposed to be loyal to the constitution that is the scheme and text of the Act telling you what the Law Society's duty is, which is to maintain that loyalty.

This is hole in legal donut, don't question the wisdom thing, we have to be very careful with that because it can lead you into error and what -- you know, what it is -- and it is difficult to summarize. The Court has done it in a number of cases trying to summarize it, but it gives -- again it has got this legal hole in the donut. Okay. So, the Law Society can try to put something through that hole. It is the Court's job to see what exactly are you trying to put through that hole and does it fit through that hole. So, yes, the Court isn't supposed to do certain things like question the wisdom of whatever but they are supposed to question the wisdom in the sense of did you make a reasonable decision. Are you pursuing a correct objective. Did you use a rational chain of analysis to get from 'A' to 'B'. That is a lot of wisdom really.

Okay. So, let's not get misled by this idea that we are not allowed to look into the decision. That is entirely the purpose of judicial review. Look very closely at that decision and as long as the Law Society had some wiggle room and they are moving within that wiggle room the Court says I am not going to pick where you wiggle. That's fine because you are staying within the box the legislation put you. That is what don't question the wisdom means. Where exactly you put yourself in there.

THE COURT: So, tell me this. Are you saying that the Law Society does not have jurisdiction to say that there should be a culture competency component? Are you saying that that is -- that they do not have the ability to do that?

MR. BLACKETT: As defined by the Law Society, yes.

THE COURT: No. That is not what I asked you. I said do you think that pursuant to the *Legal Profession Act*, the Law Society does not have the ability to put into action a cultural competency component.

MR. BLACKETT: I, in fact, know no other definition than the one that I've been using today. So, no, I do not think they do because culture competency means the lawyer --

THE COURT: Okay.

MR. BLACKETT: -- becomes the legislator and that is definitely not

the lawyer's job.

THE COURT: Okay. So, why does it mean that because you told me a minute ago coming to understand a difficult culture, that is fine. You are saying that is not what the Law Society is doing in this -- that's your argument. That is not what the Law Society -- but you just said coming to understand a different culture that's fine, but that is not what the Law Society is doing. The Law Society is making you accept something that may be against your beliefs. So, if you are saying that it is okay to understand a different culture, that's okay, then you are not saying that it is not within this Law Society's jurisdiction to do cultural competency. What I am hearing you say is how they are doing it that you object to. Which then would bring me to it is The Path that your basic objection is to.

MR. BLACKETT: Well, if the facts were different before us and the issue was whether or not the Law Society had authority to get lawyers to come to understand other cultures, I would have prepared for that argument, but that is not the argument because that is not what they mean by culture competency but let's just for a moment pretend that that is what they meant.

THE COURT: Well, they will disagree with you on that but that is fine.

MR. BLACKETT: I'd love to hear my friend explain then what a radically transformative agenda which includes unlearning colonial logics has to do with social skills. They're just obviously not what is contemplated but even if it was, even if it was the Law Society says, okay, we've decided that we are going to start teaching you the world's cultures, I mean again I --

THE COURT: But I'm going to --

MR. BLACKETT: -- have prepared for that but that's --

THE COURT: Well, no, because I am then going to take you to the next step because what I also understand today is the only thing that is mandatory is the Indigenous cultural test or competency. Either The Path or something else. No one -- on lawyer that is a member of the Law Society has to go into the DEI component. You don't have to. If you are -- if you don't think that is right, if you don't agree with that, you don't have to go into it. So, the only thing that is mandated -- my understanding, you can correct me if I am wrong, is The Path course or equivalent.

MR. BLACKETT: I think -- and as a result of this confusion -- I

mean the record shows that there was confusion at the Law Society about whether they should label the thing competence because they didn't know whether or not the profile was really about competence. I mean there is a lot of confusion going on about what this thing is. And the idea being that it is not about competence. It is about pursuing a transformative agenda so why are we calling it competence but I digress. The -- is it mandatory? Again and I would encourage the Court to take a look at my brief under this section, the original brief under the section, the Indirect effects of the profile, but --

THE COURT: Yes.

MR. BLACKETT: -- yes, it is mandatory because again my friends have any committed to this, that (a) the profile does not impose standards for the purpose discipline and as I point out the code of conduct does. So, over here in the profile, the Law Society says this is what we consider competence. Over here in the Code it says we are going to sanction you if you practice incompetently. So, I don't --

THE COURT: But I also heard that they can't look at the CPD when they are determining discipline.

MR. BLACKETT: No, no. It doesn’t say that they can't look at it.

THE COURT: That is what was argued.

MR. BLACKETT: Well, no. That can't be argued because that is not what is in the evidence. In the evidence the Law Society says does not establish discipline standards but when you go over to the code it just says you cannot practice incompetently.

THE COURT: Fair enough.

MR. BLACKETT: Now, the Law Society has said, oh, hey, when we say incompetent, we mean these things that you need to do to be safe, effective, and sustainable. There is nothing keeping them from saying that especially when we consider that the code must not only be followed in letter but in spirit. So, you know, we have a much more broad requirement to comply with the spirit of this. Okay. The spirit of this is I must be fully competent. Okay. How on earth do we say that you have to be competent, you have to comply with the spirit of that, but the spirit of that -- but the spirit of that has nothing to do with the way we have decided after this giant three-year program to define competence. It defies imagination.

Of course, anyway the point is them saying you cannot practice incompetently is definitely mandatory. And the other -- my other observation is that you look at the profile and it says

that lawyers shall not practice -- well, yeah. It is unsafe, ineffective -- or ineffective or unsustainability for you to be practicing without these competencies for -- I mean we stand in this Court debating the niceties of all of this stuff but for the average lawyer they are going to look at that profile and it is going to say you are going to advance anti-racism, you going to advance DEI. You're going to agree that colonialism is the reason that Indigenous people are five times their numbers in prisons, et cetera, and most lawyers not entirely sure what the obligations are, are going to stay away from that cliff.

And this is the point that we -- that's made by the Supreme Court in the Committee for Commonwealth. The fact that we are sitting here trying to struggle as to whether or not there is a mandatory obligation or not doesn't make the *Charter* violations better. It makes them worse because now we --

UNIDENTIFIED SPEAKER: Yeah, exactly.

THE COURT: I need the people --

MR. BLACKETT: Sorry.

THE COURT: -- in the gallery to not be talking, please.

MR. BLACKETT: Because, you know, I imagine it like a cliff. Okay. If the lawyer sees this cliff and knows, look, I can walk out to the end of this cliff and I can look over. I'm okay. I am safe over here looking over. But if it is dark or foggy you could be very -- you are going to stay well away from the cliff. That is the chilling effect. So, the fact that we have all of this confusion -- personally I have no confusion. To me it is clear that it is mandatory but the fact that we have this confusion about, well, do we really have to comply with this stuff or not.

When the Law Society says that my practice is unsafe does that mean they will do something about it? When the Law Society says that my practice is unstainable does that mean that it will not continue? Of course, of course, that is what it means. So, I think most people that look at profile get the message, comply. It is mandatory. It is mandatory in its words. It is mandatory under the code. It is mandatory. And it doesn't -- you know, if you look at -- depends on what we are talking about here.

If we are talking about *Charter* rights, you look at *R. v. Big M. Drug Mart*. *R. v. Big M. Drug Mart* does a very nice job of defining what appropriate -- sorry -- inappropriate coercion is. And it says coercion for the purposes of the *Charter* isn't just specific commands. It is other ways that you can restrain a person's conduct. So, this is -- this is in my view, not only is it clearly as command given the code and given the statement from

the president that you are unsafe, ineffective and unsustainable and given the Law Society's internal dialogue where they say after a few years of practice lawyers will be able to do all of this. That is where we are going. We are getting lawyers to be able to do all of this.

It's -- it would be perfectly reasonable for a lawyer to come to the conclusion that that they should comply with the competencies in the profile. My -- I have got two minutes left, so I will be very quick but I am not saying that competency and ethics are the only business of the Law Society. If you -- I have said it, I have used a number of different general categorizations of it. Protect the public interest from defalcation, negligence, or fraud. That's defalcation. There are public interest elements to it for sure.

I am not -- I am not saying that the Law Society shouldn't be thinking about generally the public interest but what my friend's argument is, is that effectively -- oh, when we read *Rizzo Shoes* and it says you start at the text of the legislation to see what that power is, my friend ends up at a place through his statutory interpretation where he is ignoring the text. He takes one act that contains a public interest clause and a public interest power and he sees the Supreme Court of Canada interpret that legislation and he says by dint of statutory interpretation I can therefore find the same power in the *Legal Profession Act*. He has got it all backwards. We start with the Act.

THE COURT: Although a Judge of our Court also found it.

MR. BLACKETT: Found?

THE COURT: Justice Loparco found that it was to --

MR. BLACKETT: In *Morris*?

THE COURT: Yes.

MR. BLACKETT: Well, again we have to think about what are the -- what are the -- I mean I don't think that is what the Justice found. What the Justice found is that case was that we had a very specific rule that dealt with trust safety. That rule implied that the Law Society would have access to solicitor-client materials. And that is what the Justice found. That you can't read this rule -- sorry. You can't read this section of the Act in any way that makes any sense where the Law Society doesn't get access to the solicitor-client material. So, there is a legislation requirement to waive privilege. And so then the Justice said therefore given that we are allowed that the Law Society is allowed to audit the trust accounts and the Law Society is allowed to invade the solicitor-client privilege in doing so then they have the power to basically provide a list of basically the trust data that would be required.

THE COURT: But she is also saying it is very broad that way in which you must interpret this not just in that particular instance but it is very broad is what she stated.

MR. BLACKETT: Well, she may state that, but she is dealing with a case that doesn't require any broad interpretation at all. She said herself the Act specifically implies that it is waived. So, she can then go onto say it is broad and I also believe if you look at the quote she has, she doesn't say this. She doesn't say that the Law Society -- I mean she says basically the Law Society has a public interest mandate and is given broad powers to pursue it. I don't quite disagree with that. I mean I would be very careful about agreeing with it over beers with my friend here but that is not entirely not true. It does have a public interest mandate. It does have what she would describe as broad powers. But the fact that that Justice describes them as broad doesn't mean we then interpret the Act to be broader than the language permits.

We still look at it, okay, she calls this broad. What exactly does it allow. I know maybe I wouldn't call that broad. I would call it very narrow. I'd call the rule that says the Law Society can make any rule it would like in its own corporate interest, I would say that it quite narrow. And if we'd look at section -- paragraph 91 of -- or I think it is 91 of *Vavilov* it talks about the difference between statutes that used broad clauses like in the public interest as opposed to statutes that use much more constrained language. So, I would say -- I would disagree with the characterization of that broad but it doesn't matter how we characterize it.

What matters is we start with a text of the legislation and I agree that the Law Society's purpose is related to the public interest but that does not mean that they have a statutory mandate to "pursue the public interest". They have -- in order to understand what their public interest mandate is, they read the Act, and again the most important part of that Act as far as I am concerned today, is that it says lawyers must be loyal to the constitution. So, the Law Society could do all of the interpretation it wants but if it decides to attack that loyalty is wrong and it is unreasonable.

All right. I believe I should stop as much as I would like to continue.

THE COURT: You have one last comment.

MR. BLACKETT: All right. Let me think carefully about this one.

THE COURT: Note that I said comment.

MR. BLACKETT: All right. I will just -- gee, there are so many things I'd like to talk about. I think -- this will be my last comment. My friend made all of his *Charter* applications in respect of The Path. I'd have to look at my brief again but I don't really remember making any *Charter* arguments about The Path.

THE COURT: Only in the sense of the issue of the Christianity. Most of your *Charter* arguments had to do with the profile.

MR. BLACKETT: Right. But even there I don't know that I got into the Christianity in The Path because The Path wasn't -- other than the spooky music which was not -- is not anywhere in your evidence. That I will just put that out there.

THE COURT: The music is not on the record.

MR. BLACKETT: The spooky -- we didn't mention the spooky music. No. But other than the spooky music, you read The Path. It doesn't -- I don't believe it has anything nice to say about Christians. It mentions Christians a few times but no. The -- the Law Society's attacks on Christianity are in its theories that it has specifically adopted including the key resources it has provided to lawyers so that they understand them which very clearly attacks Christianity by name. I said that was my last comment so I am going to stick to my words.

THE COURT: Thank you.

MR. BLACKETT: Thank you.

**Ruling Reserved**

THE COURT: Thank you for that. I am reserving as I suspected you suspected.

MR. BLACKETT: Yes.

THE COURT: And we are adjourned for that day. Thank you.

MR. BLACKETT: Thank you.

PROCEEDINGS ADJOURNED

**Certificate of Record**

I, Arlen Bituin, certify that this recording is the record made of the evidence in the proceedings in Court of King's Bench, held in courtroom 1601, at Calgary, Alberta, on the 6th day of May, 2025, and that I was the court official in charge of the sound-recording machine during the proceedings.

**Certificate of Transcript**

I, Janet Miller, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

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