

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MURRAY KLIPPENSTEIN

Plaintiff (Moving Party)

and

LAW SOCIETY OF ONTARIO

Defendant (Responding Party)

**AFFIDAVIT OF MURRAY JOHN KLIPPENSTEIN
(sworn March 16, 2023)**

An excerpted and highlighted version of the original affidavit,
prepared by MJK for readability. Reading highlights
will provide key points in less than 15 minutes.
Full Affidavit with Exhibits available at Klippensteins.ca

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I, MURRAY JOHN KLIPPENSTEIN, of the City of Toronto, in the Province of Ontario,
MAKE OATH AND SAY:

1. I am the Plaintiff in this action and the Moving Party for this motion for summary judgment, and as such have knowledge of the matters to which I depose herein.

BACKGROUND

6. I regard this claim for Information to be unfortunate but necessary to fulfill the duties of my office. I have previously requested the Information from the LSO to allow me to be informed and to inform my fellow benchers about a number of issues underlying various policies developed by the benchers of the LSO for application to members of the Professions. The LSO's failure to furnish me with the requested Information has and continues to restrict and impede my ability to carry out my duties as a bencher and director of the LSO corporation. Without that Information I am unable to adequately analyze and consider the reliability and validity, or lack thereof, of the Stratcom Report and the related Working Together Report, or to appropriately address these and other issues arising from the foregoing with my fellow benchers, while the LSO continues to rely upon those Reports in the development, implementation, and enforcement of important LSO policies.

THE STRATCOM REPORT, THE CONSULTATION PAPER, AND THE WORKING TOGETHER REPORT

11. By way of background, in 2012, Convocation created the Challenges Faced by Racialized Licensees Working Group ("**Working Group**") with a mandate to "identify challenges faced by racialized candidates and licensees" and to "identify best practices for

preventative, remedial and/or support strategies" ("**Mandate**") (MK73).

Working Group Terms of Reference, attached as Exhibit "3" (MK69)

12. In March of 2013, the Working Group commissioned Stratcom Communications Inc. ("**Stratcom**"), a consulting firm, to carry out an extensive study of the overall population of Ontario lawyers and paralegals (collectively, the "**Professions**"), in pursuit of the Working Group's Mandate.
13. Contemporaneously, LSO staff provided to Stratcom an undated and unattributed internal LSO report, entitled *Challenges Facing Racialized Licensees: Best Practices*. This report appears to set out in detail the end result expected from Stratcom's study by the LSO, undermining Stratcom's ability to conduct an impartial study.

Challenges Facing Racialized Licensees: Best Practices, attached as Exhibit "4" (MK76)

14. In the fall of 2013, Stratcom prepared a survey questionnaire informed by the Mandate to assess the experiences and views of the members of the Professions at large, in particular those in the Professions it referred to as "racialized." According to Stratcom, a survey invitation was sent to each member of the Professions.
15. The results and conclusions from this survey were central components of the *Challenges Facing Racialized Licensees: Final Report ("**Stratcom Report**")*, which the Working Group and LSO staff received from Stratcom in March of 2014.

Stratcom Report, attached as Exhibit "5" (MK9B)

16. Thereafter, members of the Working Group and LSO staff prepared a public Consultation Paper, entitled *Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees ("**Consultation Paper**")*, based on the Stratcom Report for

distribution to the Professions as a whole. The Consultation Paper relied heavily on the Stratcom Report in general and on the Stratcom survey in particular, containing 37 specific footnoted references to the Stratcom Report survey. The Stratcom Report survey is put forward as a main justification for the positions taken in the Consultation Paper.

Consultation Paper, attached as Exhibit "6" (MK249)

17. The Stratcom survey is portrayed throughout as a valid and accurate representation of the experiences and views of the Professions as a whole. At no point does the Consultation Paper disclose or hint that there might be any, and possibly serious, limitations, reservations, or qualifications with respect to the Stratcom survey, such as the very low survey response rate or the non-randomized and self-selected survey sample, which I will discuss below.
18. Members of the Working Group and LSO staff also prepared a detailed Communication Plan proposing extensive distribution of the Consultation Paper throughout the Professions.
19. On October 30, 2014, the benchers in Convocation approved the Consultation Paper and the Communication Plan, and the Communication Plan was subsequently implemented.

November 12, 2014 Working Group Agenda & Materials, Including the Consultation Plan, Communication Plan, Treasurer's Letter Regarding the Consultation Plan (p 251, and Bencher Speaking Notes (p 66-681,

attached as Exhibit "7" (MK306)

20. The Communication Plan included an extensive programme of direct communication from the Treasurer of the LSO to a large number of significant individuals and organizations in the Professions (centred on the Consultation Paper). The initiation of the consultation process included a set of individualized emails and letters from the Treasurer to some 46 legal associations in Ontario and Canada, to the Chief Justices of Ontario, to the Deans of

the Law Faculties in Ontario, to the presidents of 10 local County Law Associations, to federal and provincial Attorney General and Justice representatives, and to an unknown number of "managing partners" at law firms, *inter alia*. This Treasurer correspondence specifically advised these stakeholders of the consultation process, included a link to the Consultation Paper in the email, and included a hard copy of the Consultation Paper in a follow up letter, with an invitation to respond.

21. This far-reaching dissemination is significant because of the limitations and defects in the Stratcom report and survey, discussed below. These defects were carried forward into the Consultation Paper and widely distributed in the Professions without so much as a cautionary word, in a way that was misrepresentative to the large body of recipients of the Consultation Paper and to the LSO's benchers. As a bencher and director, I believe that it is my duty to shed light on this widely distributed misinformation and to bring these issues to the attention of Convocation and of stakeholders, given the heavy past and present reliance placed on this material by the LSO. The Information I seek will further enable me to do so.

22. After having received extensive responses to the questions set out in the Consultation Paper from members of the Professions and organizations of legal professionals, the Working Group and LSO staff drafted the *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions, Working Group Final Report ("Working Together Report")*. This major LSO policy paper relied heavily upon the Stratcom Report, also adopting input from the consultations.

Working Together Report, attached as Exhibit "8" (MK3551)

23. The Working Together Report set out 13 far-reaching recommendations for Convocation to adopt (including various sub-recommendations), and on December 2, 2016 the

benchers in Convocation voted, in one omnibus motion, to adopt all 13 of those recommendations (and sub recommendations).

24. Contrary to past and current practice at the LSO in the case of major policy-making studies, the LSO did not at any point distribute or provide copies of the critically important Stratcom Report to all benchers or to Convocation for their consideration in the entire period of nearly three years from the time of receipt of the Stratcom Report by the LSO to the adoption of the Working Together Report recommendations, including at critical meetings where it was considered, other than casual mentions that the Report was available online.

THE INFORMATION HAS CURRENT RELEVANCE TO THE LSO'S ONGOING ADHERENCE TO AND IMPLEMENTATION OF VARIOUS MAJOR POLICIES

26. While the Stratcom Report was first received by the LSO in March of 2014 and the Working Together Report was adopted in December of 2016, those Reports continue to be foundational to the LSO's present and ongoing implementation of various major policies.

28. The 13 recommendations from the Working Together Report that Convocation adopted in 2016 speak for themselves in terms of their sweeping implications. They are summarized in the Statement of Claim, and reproduced in full in Exhibit "8" to this Affidavit. All of these recommendations are predicated upon the purported findings of the Stratcom Report. I am, however, unable to fully analyze and assess the Stratcom Report, and to raise these matters as appropriate with other benchers, and with stakeholders who have been led to accept these Reports as valid, without access to the Information, including in particular the full Stratcom survey dataset, which is in the LSO's possession (see Stratcom Report, Exhibit "5," p 33, note 8; MK147).

CONCERNS REGARDING THE VALIDITY OF THE STRATCOM REPORT AND SURVEY

30. My impetus as a bencher and director for seeking the Information is in part owing to the concerns that I have about the validity and accuracy of the Stratcom Report, including in particular the survey of the Professions, which is a central part of the Report. Based on my general background and common knowledge of opinion surveys, I early on noted what appeared to be Stratcom's failure to follow standard statistical methods in gathering data and information, and in the presentation of such information in the Stratcom Report. I have also become aware of apparent irregularities in the process by which the LSO dealt with the Stratcom Report and in how the policies that were derived from it were arrived at and brought to Convocation (as discussed later below).

31. The survey of the entire Professions in Ontario which had been conducted on behalf of the LSO by Stratcom was a key component of the Stratcom Report. According to the Report, the survey research was "intended to generate insights applicable to all licensees as a community" (p iv; MK107). However, on reading the parts of the Stratcom Report dealing with the survey, I noticed several concerning features regarding whether the survey was or could in fact be an accurate representation of the overall legal professional community, as was asserted. These concerns included the following:

- a. Stratcom stated that survey invitations had been sent to all licensees, that is, to all Ontario lawyers and paralegals. That meant that the group that actually responded to the survey, that is, the individuals who had completed the questionnaire, was not a "random sample" of the study population. This was not a group of individuals who had been selected by the survey researcher from the overall population at random, as a smaller subset of the overall group, to complete the survey. Instead, the sample group was entirely "self-selected," being the

relatively small number from the survey population who had individually decided to complete the survey, as compared to the large majority of the study population who, despite being individually invited to complete the survey, had decided not to do so. To me this seemed quite significant, because I knew in a general way that the basic idea of most surveys was that a smaller subgroup of the population would be selected at random from the overall population to serve as a sample. It is this random selection process which, based on the mathematical principles of probability, justifies the "extrapolation" of the results of the small sample group to the overall population by the researcher, with some claim to accuracy in representation of the whole population. If the sample is not random, then the central idea of population surveying is missing;

- b. I noticed that the Stratcom Report did not provide the "response rate" for the survey, that is, the percentage of survey invitees who had actually completed the survey. The failure to report that number struck me as an unusual omission, one that was contrary to what I had seen in other survey reports. The reporting of the survey response rate for a survey helps the reader to assess how representative or accurate the survey might, or might not, be;
- c. While the survey response rate was not provided in the report, the number of those who had actually responded to the survey invitation was provided, and that number seemed to me to be a minute proportion of the total number of those who had been invited to fill out the survey (that is, all licensees). I therefore endeavored to calculate the actual survey response rate myself. To do so, I took the number of respondents as stated in the report (3,296) and compared that to the total number of licensees as published in the LSO's annual report for the applicable year, all of whom had apparently been invited to complete the survey

(which number was 51,996). This simple math indicated a response rate of 6.3%. This response rate struck me as exceedingly low because in all the many various public opinion surveys I had reviewed over the years, out of general interest, I had never seen a survey with such a low response rate;

- d. Given that there was only a relatively small number of self-selected respondents to the survey, it seemed to me obvious that it would have been incumbent upon Stratcom to make an assessment of the significance of the high level of survey non-response, including the possibility that the large majority of licensees who chose not to respond to the survey had views and experiences that differed substantially from the comparatively small number of those who did respond. There was no such assessment at any point, and the issue was never even mentioned. This concerned me as a director because I knew that survey non-response was considered a serious issue by survey researchers, especially when the non-response rate reached high levels, as discussed below in paras 53-55;
- e. Notwithstanding the low response rate and the absence of a randomized sample, the Stratcom Report made strong, unqualified assertions about the accuracy and significance of the survey results, stating that the sample was in fact accurately representative of the views of the overall licensee population. Specifically, the Stratcom Report stated that the survey "yielded a sample that produces representative, unbiased estimates of the views and opinions of Law Society licensees (Exhibit "5," pp V and 23; MK108, MK137), and that "we ensured that the views of all licensees are accurately portrayed in the data and final report (representativeness)" (*ibid*, p IV; MK107). These were forceful statements about the meaning of the survey results, specifically that they were accurately representative of the Professions as a whole, when in fact the views that had been obtained were

those of only a small and self-selected minority of the Professions. I did not understand how Stratcom could make such statements given the above and my general knowledge about how surveys work; and

- f. The Stratcom Report failed in its analysis to separate out the survey responses of lawyers and paralegals, or even to indicate how many of the respondents were from each group. This created major issues about how to interpret the results, given that the composition and context of these two Professions were and remain quite different. Records of the LSO document that paralegals have a proportionately higher visible minority membership than lawyers, and if they were overrepresented in the sample, that would skew the results for the picture given of the overall Professions.

32. The above issues, about possibly invalid and inaccurate extrapolation of results from survey responses, gave me concerns about the many assertions made in the Stratcom Report about the views and experiences of the members of the Professions as a whole, especially given the wide dissemination of those assertions by the LSO. One important example (of many) was the statement in the Stratcom Report that "fully 40% of racialized licensees identified their ethnic/racial identity as a barrier or challenge to entry into the practice of law or provision of legal services": p 38; MK152. That statement is clearly an assertion about the situation in the Professions as a whole, and it is an important one.

33. In making that assertion, Stratcom is referring to survey answers given by racialized licensees. Specifically, Stratcom is referring to the answers given by 40% of the racialized licensees who answered the survey. However, Stratcom does not tell us the actual number of how many racialized licensees answered the survey, only that the total

of all licensees who responded was 3,296. That is, we are not told what number the 40% applies to, or is based on. Stratcom failed to report this important underlying data, but then nevertheless proceeded to extrapolate that result to the Professions as a whole.

34. Although Stratcom does not actually provide the simple and important number of how many survey respondents reported themselves as racialized, it is possible to make some reasonable inferences to arrive at that number, using several simple steps of logic and calculation, and the results reveal some significant perspectives.

35. Although Stratcom does not say how many respondents were racialized (that is, the actual number), Stratcom does state that 33% of lawyer respondents to the survey identified as racialized, and that 41% of paralegal respondents identified as racialized: Exhibit "5," p 23, column 2 and p 24, column 2; MK137. However, Stratcom does not state how many survey respondents were lawyers and how many were paralegals, so one cannot simply use those percentages to calculate how many respondents of each group were racialized.

36. Nevertheless, if one uses the reasonable assumption, for present purposes, that the lawyer/paralegal division of survey respondents was proportionate to the division in the Professions as a whole, then 2,919 of the respondents would have been lawyers and 377 of the respondents would have been paralegals. This in turn would mean, using the above inputs, that a total of 1,118 of the survey respondents identified as racialized (33% of lawyers x 2,919 = 963 lawyers, and 41% of paralegals at 377 = 154 paralegals, for a total of 1,118 racialized survey respondents).

37. Therefore, when Stratcom asserted that 40% of licensees stated that their ethnicity was a barrier, Stratcom was referring to the 40% of racialized survey respondents who gave that answer, and that number would be 40% of 1,118, or 447 (including both lawyers and paralegals). In other words, Stratcom's assertion regarding the views of licensees in the

Professions as a whole on this issue was based on the answers of 447 survey respondents.

38. Another important number, for perspective, is the estimated total number of racialized licensees in the Professions at the time. Again, Stratcom does not provide an actual number. However, Stratcom reports percentages, asserting that "25% of paralegals say they are racialized, while 22% of lawyers indicated this": Exhibit "5," p 25; MK139. If one assumes, as it appears, that that is Stratcom's breakdown applicable to the Professions as a whole (rather than a breakdown of actual survey responses), and if one applies those percentages to the number of lawyers and paralegals at the time as reported in the Law Society's Annual Report, one arrives at a total number of "racialized licensees" of 11,617 (22% of lawyers x 46,054 = 10,132 lawyers, and 25% of paralegals x 5,942 = 1,486 paralegals, for a total of 11,617 racialized licensees).

39. When those two numbers are compared, that is, the 447 racialized survey respondents who said that their race was a barrier out of a total of 11,617 racialized licensees who were invited to answer the survey, one arrives at an important perspective regarding Stratcom's assertion that "fully 40% of licensees" said that their ethnicity was a professional barrier (MK152). The 447 are a portion of the total number of 11,617 racialized licensees at the time (all of whom were invited to respond to the survey), which works out to a percentage of 4%.

40. The result is that, in fact, only 4% of racialized licensees said that they saw their ethnicity as a barrier, not "fully 40%," as Stratcom reported.

41. The difference arises because Stratcom simply extrapolated the small survey sample numbers to the population as a whole, and given the issues described above, it seems to me that such extrapolation is extremely problematic.

42. The issues are that Stratcom was not transparent about some basic numbers, and even more importantly, that the results stated by Stratcom seem to be invalid and seriously misleading.
43. The above assertion regarding the 40% number was very widely disseminated in the Professions by the LSO. For example, that specific assertion (about the 40%) was included in the later Consultation Paper, was included in 'Bencher Speaking Notes' that were prepared as part of the Communication Plan to assist benchers in speaking publicly on the matter (see Exhibit "7"), was included in an educational video prepared by the LSO that essentially all licensees were required to view as part of compulsory Continuing Legal Education, and was cited by a bencher on a popular television news and analysis programme.
44. Further, the same issues or concerns regarding the extrapolation of survey response numbers (as in the 40% example) apply to much of the content of the Stratcom Report, and to many other assertions in the Report, in addition to the one specific 40% example.
45. It is important to note that Stratcom could easily have provided the actual basic numbers discussed above, for clarity and transparency, but chose (or perhaps was directed) not to do so.
46. In that regard, Stratcom states in its Report that "we received clear direction from the LSUC and Working Group throughout the research process": Exhibit "5," p 21; MK135. I have concerns, and I have to question, whether some of the lack of transparency in the Stratcom Report regarding disclosure or non-disclosure of data, and some of their methodology regarding extrapolation of survey responses, may have been inappropriately influenced by some LSO benchers or staff.
47. It is also noteworthy that while the above concerns have been repeatedly expressed and disseminated by me for several years, no response has ever been forthcoming from

Stratcom regarding these critiques of its work.

48. My review of the above issues with the Stratcom Report caused me to seriously question the quality of research and policy work being carried out by the LSO, and further caused me to think that the Professions, and the public, were and are being misled by the LSO.
49. The issues with the Stratcom Report also caused me concerns about the major consultation process that the LSO carried out based on the Stratcom Report. The many responses that the LSO received from legal organizations and others in response to the LSO's Consultation Paper were largely based on the information in the Consultation Paper, which was based on the Stratcom Report. To the extent that those responses were based on erroneous or misleading information from the Stratcom Report, those responses themselves are called into question.
50. After I was elected a bencher of the LSO in 2019, I attempted to raise my concerns about the Stratcom Report at the first meeting of the Equity and Indigenous Affairs Committee ("EIA Committee"), of which I was a member, but my comments in the meeting were interrupted and cut short. I was told to put my concerns in writing, which I did in the form of a detailed *Critical Review of the Law Society's Challenges Report: Representations to the Law Society EIA Committee and Benchers* ("Critical Review"). Given what I viewed as the seriousness of my concerns, I distributed the Critical Review to all Benchers and to senior LSO staff by email on January 8, 2020.

Critical Review, January 8, 2020, attached as Exhibit "9" (MK416)

The LSO Peer Review Panel's Assessment of the Stratcom Report

51. After about two years of my concerns about issues with the survey and other parts of the Stratcom Report being repeatedly raised but seemingly ignored by the majority of benchers and by senior LSO staff, and almost two years after the distribution of my Critical Review,

the CEO of the LSO unexpectedly announced in an EIA Committee meeting on November 25, 2021 that the LSO had retained three consultants to review several of the LSO's data projects, including the Stratcom Report, which she labelled a "**Peer Review Panel**".

52. The three consultants on the Peer Review Panel presented oral reports to the EIA Committee at a meeting of the Committee on May 3, 2022, at which I was present. The three Panelists eventually each filed a written report, after much delay (which is discussed further below). In their reviews, the three Panelists echoed many of the concerns I had raised earlier.

Expert Panel Reports, attached as Exhibit "10" (MK432)

53. The Peer Review Panelists all raised concerns about the issue of the very low response rate to the Stratcom survey (references are to Exhibit "5"):

a. Professor Wortley states at p 9 (MK441) of his report: "the response rate for the Stratcom survey is only 7.49 per cent. It

should be noted that, by any standard, these are very low response rates";

b. Ms. Ratnasingham states in her report at p 75 (MK507) that "the response rate for this survey is very low";

c. Professor Ornstein states that the "low response rate is a ... serious threat to the survey goal of representing 'the whole population of licensees'": p 49; MK481.

54. The Peer Review Panel similarly agreed that a consequence of the low response rate was that the survey results could not be validly extrapolated and generalized to the overall Professions:

a. Professor Wortley states at p 23 (MK455) that "[s]ampling issues, and a low response rate, prevent the generalization of findings to the broader legal

community ..." He also notes that he does "not think that any [data] weighting strategy can overcome the fact that those who responded to the survey may be significantly different than the 90 per cent of licensees who apparently did not participate in the survey": p 11; MK443;

b. Ms. Ratnasingham states at p 79 (MK511) that the "very low response rate impacts the ability to generalize the findings to all licensees in Ontario ..." and "... [data] weighting ... does not compensate for any differences in views by those that chose not to participate (i.e. nonresponse bias)." She goes on to say at p 80 (MK512) that "[i]n general, [the low response rate] would also lead one to question the credibility of the survey method";

c. Professor Ornstein opines that "no statistical magic can measure and account for the bias resulting from a very low response rate": p 51; MK483. He states further that "we must assume the survey respondents were more concerned about racism, reported more experiences of unfair treatment, were more interested in the issues" than those who did not respond to the survey: p 50; MK482.

55. The Peer Review Panelists thus were of the view that the very low survey response rate had a major impact on a key issue, namely, the degree to which the small number of survey responses could actually be held up as representing the views of the overall Professions, including the more than 90% of the Professions who did not respond to the survey invitation.

56. The Peer Review Panelists also commented negatively on the fact that the low survey response rate was not disclosed by Stratcom in its report:

a. Professor Wortley states that he was "surprised, and somewhat disappointed, that the Stratcom report does not provide a transparent discussion of the survey

response rate. This gives the impression that the authors wanted to avoid this sensitive topic and perhaps prevent criticism of their report": p 9; MK441;

- b. Professor Ornstein writes: "Surprisingly, Stratcom does not report the overall survey response rate or the response rates for racialized and non-racialized licensees ... ": p 49; MK481.

57. After I had earlier raised my various concerns about the survey, including the non-disclosure in the Stratcom Report of the survey response rate, I became aware that such non-disclosure of the survey response rate in the LSO's 2014 Stratcom Report was a departure from Stratcom's own previous practice. In a previous survey report prepared by Stratcom for the LSO on a different topic and reviewed by the EIA Committee in May of 2012, Stratcom included a detailed description of the survey methodology, outlining that the members of the Professions that were interviewed were chosen at random, setting out specifically how many individuals were interviewed, breaking out the respondents into relevant categories by number, and setting out the "margin of error" for a survey of this structure. In another report prepared earlier for the LSO by Stratcom on a different topic, Stratcom gave the number of respondents, identified the survey response rate, and described the margin of error for that level of participation. Both of these previous cases are in stark contrast to the Stratcom Report at issue here, raising the question as to why Stratcom changed from the reporting of this type of information to non-reporting, for this one particular report.

58. It is clear that the issue of the low survey response rate would have become apparent to Stratcom at an early stage in their work for the LSO, well before the delivery of their first draft Report. The low survey response rate would have been obvious within a day or two of the deadline for the return of the survey responses. I do not understand how such a fundamental and obvious issue was simply, to my knowledge, never openly mentioned,

not then, and never thereafter.

Prior Stratcom survey, circa 2004, attached as Exhibit "11" (MK527)

Prior Stratcom survey, circa 2014, attached as Exhibit "12" (MK539)

Concerns about the Working Group process

59. A review of the LSO records shows that there was an anomalous lack of in-person involvement of Stratcom personnel from an early point in Stratcom's work, or what could be described as a disengagement by Stratcom personnel.

60. The records of the Working Group show that at an early stage in Stratcom's work there was some disagreement among members of the Working Group about the appropriateness of Stratcom's work and methodology. This disagreement was communicated to Stratcom during the Working Group meeting of May 8, 2013.

May 30, 2013 Working Group Agenda and Materials, p 12, attached as Exhibit "13" (MK548)

61. The records relating to Working Group meetings after that May 8, 2013 meeting then do not show any further appearance by any Stratcom representative at any actual meeting, including at no meeting of the Working Group, or of the EIA Committee, or of benchers.

62. That is, during a lengthy period after May 8, 2013, which period included the receipt of the survey results, the preparation of the draft Stratcom Report, the delivery of the draft report to LSO staff, the delivery of the final report to staff, the preparation of the subsequent major Consultation Paper, and the presentation of the Consultation Paper to Convocation, a period of one and a half years, at no point did any Stratcom representative ever appear at any meeting to explain the methodology or the results or to answer questions. I find this extraordinary, not only from a common-sense governance perspective, but in comparison to usual practice at the LSO, in which the authors of major studies or reports are usually

made available for such explanation and inquiries.

63. Of equal concern is the complete absence of records of Working Group meetings during an important lengthy period. The extensive records of the LSO regarding past meetings, to which I have access as a bencher, and which usually carefully record and document such proceedings, contain no materials for any Working Group meeting between June 27, 2013 and October 15, 2014, a period of well over a year. This documentary gap is of concern because during that period a great deal of important activity occurred. During that time the LSO received a draft of the Stratcom Report for review, and then the final Stratcom Report, and then the substantial and important Consultation Paper and Communication Plan were prepared and were presented to Convocation on October 30, 2014 for approval. It is puzzling to me that throughout that long period of important work, there are no records of Working Group meetings, or if it met, of what transpired. This raises serious issues of governance, transparency, and accountability.

THE INCLUSION INDEX

64. One of the 13 recommendations approved by Convocation in its adoption of the Working Together Report was for the LSO to create and publish every four years an Inclusion Index, conceived as a firm-by-firm public ranking of all law firms in Ontario with more than 25 licensees (or, more specifically, of all such "legal workplaces", a broader term than law firm). In my original review of the 13 recommendations, I had noticed that the inclusion Index raised some obvious common sense statistical issues.
65. The Inclusion Index was to be based on a set of questions that were included in the LSO's annual filing requirement for 2018, which essentially all licensees were required to answer. These questions asked the licensees about various aspects of their demographics, and also contained "inclusion" questions, which asked them about their experiences in their workplace.

66. For purposes of the Inclusion Index project, the LSO planned to take the answers from all the individual licensees in a particular law firm (or other legal workplace) with 25 or more licensees, analyze the results for that specific firm or workplace, and then compare the results from different law firms and workplaces against each other. These results from approximately 200 of Ontario's largest law firms and legal workplaces would then be compiled into a list which ranked all of them individually on a descending scale. That firm ranking list would then be published by the LSO.
67. I became concerned that the Inclusion Index idea was the product of deficient statistical analysis at the LSO, and that the LSO was about to publish a major report which, while founded on poor analysis, would have a damaging effect on the reputation of a large number of law firms and legal workplaces in Ontario, based on their public ranking in the Inclusion Index list.
68. My initial concern was heightened by the fact that the LSO's Working Together Report itself, at p 32, cited an expert report on the topic of "Measuring Diversity in Law Firms: A Critical Tool for Achieving Performance" and, ironically, this expert report (cited by the Working Group itself) specifically warned against doing precisely what the LSO had resolved to do. Specifically, that report warned that an index approach is "not appropriate for smaller workplaces where the number of respondents in different comparison groups is likely to be smaller than 25 employees. Generally, *firms of fewer than about 150 employees will not have sufficient numbers of respondents* from many diversity groups to facilitate a valid examination of group differences through general employee satisfaction or engagement surveys": p 38; MK602 [*emphasis added*].

Measuring Diversity in Law Firms report by Or. Lorraine Dyke, attached as Exhibit "14" (MK558)

69. The LSO eventually hired a consultant, Diversio, to implement the Inclusion Index project.

Diversio's project proposal caused me to consider the Inclusion Index project in more detail, including the following issues:

- a. What would be the effect of survey respondent self-selection in each law firm or workplace? That is, would the views of those who chose to answer the survey possibly be different from the views of those who chose not to answer? If so, the survey results of the law firm would be biased and not accurately represent the actual or real situation in that firm;
- b. For many firms or workplaces, the sample size would be very small, by surveying methodology standards. Small samples inherently create the possibility of substantial inaccuracy in the results due merely to the operation of simple random variation (with no relation to the underlying realities), a problem that was identified in the above-mentioned Measuring Diversity in Law Firms report itself (as cited in the Working Together Report);
- c. The survey dealt with personal issues, on which some individual licensees might not want to answer survey questions, due to fear of their answers becoming attributable to them in the firm. This incentive to not answer questions would distort the survey results, especially given the small size of many of the firms;
- d. If two particular firms had small statistical differences in results between them that were due merely to simple random variations (which might have no relation to the reality inside a firm), those small purely random-based results could nevertheless have large consequences, in that they would result in quite large differences in the numerical ranking of two particular firms. That is, a small difference between two firms' internal survey results, due purely to random variation, could make a big difference in the ranking of the two firms in the public list;
- e. The consequences to many firms of this public ranking could be enormous, in

terms of reputation, and in terms of lawyer and articling student recruitment. A firm's reputation could be severely harmed due purely to random statistical variation, with no linkage to the underlying reality in the firm; and

- f. Public ranking of firms would inevitably self-perpetuate the ascribed ranking of any given firm. A firm's low score would deter potentially desired candidates, who would improve the firm's profile, from joining the firm. On the other hand, a high-ranking firm would attract new recruits of the similar type. The Index therefore could "backfire," by perpetuating or accentuating each law firm's ascribed rank and pigeon-holing firms in a damaging manner.

70. Because of these concerns, I sent a detailed email dated September 9, 2020 to the chair and members of the EIA Committee outlining some of my concerns. However, at the EIA Committee meeting the next day, my concerns were disregarded. Given that the EIA Committee majority was brushing aside my concerns, I sent a similar email to all benchers on September 15, 2020. Again, I received no substantive response to my concerns.

September 9, 2020 Email to EIA Committee, attached as Exhibit "15" jMK610)

September 15, 2020 Email to EIA Committee, attached as Exhibit "16" jMK614)

The LSO Peer Review Panel's Assessment of the Inclusion Index

71. As mentioned above, in November of 2021 the CEO of the LSO unexpectedly, and without prior consultation with the Committee, announced in an EIA Committee meeting that the LSO had retained three consultants to review several of the LSO's data projects. In addition to reviewing the Stratcom Report, as described above, the Peer Review Panelists were to review a draft of the Inclusion Index and its methodology in detail, and eventually delivered a series of harsh criticisms of the draft Inclusion Index (echoing many of my earlier expressions of concern), and recommended that it not be published. The full

opinions of the Panelists regarding the Inclusion Index can be found in the written reports, attached as Exhibit "10" (MK433). However, I highlight a few of the major criticisms:

- a. Professor Ornstein opined that "[f]or the many workplaces with low response rates and/or small absolute numbers of respondents, the resulting Inclusion Score is unreliable and potentially biased": p 58; MK490;
- b. A core feature of Diversio's methodology was the creation of three separate concepts to measure each of Commitment, Diversity, and Inclusion, and then to combine them into one single "Index" number for each firm. This aggregated Index number for each firm would be used for public ranking of the firms. However, the Peer Reviewers stated that there was no basis or justification for combining those three concepts into one number, which was a key part of Diversio's Inclusion Index methodology. Professor Ornstein states that an "index based on the combination of essentially unrelated Commitment, Diversity and Inclusion scores does not provide a meaningful measure of the overall extent of the progress of equity in workplaces": pp 58-59; MK491-2 *[emphasis in original]* ;
- c. Diversio's methodology begins by dividing all licensees into two groups, "Dominant" and "Non-dominant." The Dominant group consisted of "white, heterosexual, Anglophone men without a disability": p 57; MK489. The Non-Dominant group included everyone else. By creating these two broad categories, Diversio "lumped together" into the Non-dominant group all licensees who were women, persons of colour, Francophones, LGBTQ2+ individuals, and persons with disability. Professor Ornstein explains why this is problematic when he states that in "averaging the survey responses of all non-dominant licensees, women, who account for about 45 per cent of all licensees, have much more effect on the Inclusion Score than

racialized licensees, who account for around 25 per cent of licensees.

Francophones, LGBT2Q+ licensees, licensees with a disability, each around 5 per cent of the population, have even less impact; and Indigenous licensees, around 2 per cent, almost none": *ibid*; MK489;

- d. The Peer Review Panelists expressed concerns that Diversio's methodology would allow some individual licensees in firms to be actually identified on some deeply personal characteristics, with potentially harmful effects to those individuals: see pp 33 / MK465, 55 / **MK487**; and
- e. All Peer Review Panelists expressed concern that Diversio's methodology lacked transparency: see pp 24 / MK456, 53 / MK485, 56 / MK488, 91 / MK523, and 92 / MK524.

The Inclusion Index has the Effect of Imposing Race and Gender Quotas on Law Firms

72. In reviewing the information regarding the draft 2019 Inclusion Index, I became aware that the detailed mathematical formulas in Diversio's methodology raised an important policy issue that was hidden beneath the surface. This issue was not addressed by the Peer Review Panelists, and has never been brought to the attention of the benchers by LSO staff.

73. This issue arises out of Diversio's formulas for arriving at an Inclusion Index number for each law firm or legal workplace, to be then used for a public ranking of those firms by the LSO. The problem is that Diversio's formulas were designed to basically consist of a demographic comparison of the race and gender makeup of each firm with the race and gender make-up of the general population in the region of its location. The closer the match to the demographic numbers, the higher the firm's ranking.

74. This part of the methodology effectively amounted to a ranking of law firms based on race

and gender quotas. Firms would be publicly ranked not by the competence of their members, but by how closely their race and gender composition matched the numerical composition of race and gender in the general population in their geographical area. In short, if a firm hired individuals based purely on their race and gender, to meet the *de facto* quotas determined by the LSO through the Inclusion Index formula, they would be ranked higher by the LSO in its published ratings.

75. To quote the explanation by Diversio of its methodology:

... Diversio compared the representation of each LWP [Legal Workplace] to the demographics of the region in which they were located. ... WPs were awarded points for each of the identified demographic traits ... Full points were given if an LWP's demographics were at or above the regional population benchmark. ... If LWPs had lower representation than their regional population, points were deducted .. (p 5; MK623).

Memo re: LSD Follow-up Questions on the Inclusion Index methodology, April 22, 2020, attached as Exhibit "17" (MK618)

76. I note that the memo that Diversio provided to LSO staff explaining its methodology was dated April 22, 2020 but was not disclosed to the EIA Committee by staff until just prior to the May 3, 2022 EIAC meeting - a lag period of two years.

77. This issue of a race and gender quota built into the Inclusion Index methodology, which amounts to a momentous policy decision with major implications throughout the Professions, has never been properly brought to the attention of benchers. I attempted to raise this concern in an email to the EIA Committee and benchers in September of 2020, but I did not at the time have the detailed methodological information set out in Diversio's above memo, due to late disclosure by LSO staff. In any case, my concerns were ignored

by the majority of benchers and by LSO staff.

78. The Information I have requested in this action includes the dataset for the 2019 Inclusion Index that is in the LSO's possession, which would allow me to work out how this hidden part of the mathematical formula of the Inclusion Index would have specific effects. I require that information to enable me to bring this issue properly to the attention of my fellow benchers, and to discharge my obligations as a bencher.

THE LSO'S CLANDESTINE ENGAGEMENT OF THE PEER REVIEW PANELISTS

79. Although most of the methodological critiques that I had been raising for several years about the Stratcom Report survey and the Inclusion Index, all the time being ignored by LSO staff and the majority of benchers, were eventually validated and echoed by the Peer Review Panelists, I remain concerned about the process by which the Peer Review Panel was and continues to be engaged, from a governance point of view. That ongoing concern is the basis for some of my Information requests.

80. In November of 2021, a few days before the EIA Committee meeting of November 25 mentioned above, members of the Committee received a memo advising them that the LSO had retained three purported expert consultants to form a "Peer Review Panel" which would spend some six months reviewing the Stratcom Report, the Inclusion Index project, and several other LSO data projects, to report to the EIA Committee in May or June of 2022. In this memo there was no mention of the concerns I had been repeatedly raising about those projects.

81. The EIA Committee had not had any prior notice that such a major review was planned. The Committee had not had any input into the selection of the panelists, had not had any role in the creation of the actual mandate or terms of reference of the Panel, and had not had any opportunity for input into any of the process.

82. On receiving the pre-meeting memo, I became concerned about the lack of transparency of the process. I therefore wrote a detailed email to the Chair and members of the EIA Committee, and copied the email to all benchers on November 22, 2021: Exhibit "19," *infra*; MK636. I received no substantive response to my email from staff, or from the majority of benchers. In my email, I requested some specific information about the process by which the Panelists had been retained and instructed. I received no substantive response to that request, which now forms part of the Information requested in this action.

83. At the November 25, 2021 EIA Committee meeting the LSO CEO was present, which was unusual. The CEO announced that she, along with other senior staff and with some involvement of the Treasurer, had chosen three experts and instructed them on the project. At the meeting, the CEO orally and for the first time provided the names of the three already retained and instructed Panelists, which I had specifically requested in my pre-meeting email. During that EIA Committee meeting I expressed my objections to the process, to no avail.

Late Disclosure of the Peer Review Panelists' Written Reports

84. After a lengthy period of silence about the work of the Panelists, in late March of 2022 EIA Committee members were advised that an EIA meeting would be scheduled for the end of April or the beginning of May, at which meeting the three Peer Review Panelists would present their reports. Given the importance and complexity of the topic, I emailed LSO staff asking about receiving written materials from the Panelists in advance of the meeting to enable proper review before the meeting. An LSO staff member replied immediately by email, advising: "I can confirm that the Committee will be provided with a copy of the peer reviewers' report in advance of the May 3rd EIAC meeting."

85. However, no such written reports were provided to EIA Committee members before the May 3, 2022 meeting. Instead, the three expert Peer Review Panelists attended that Committee meeting by Zoom, and made oral presentations to the Committee about their review. EIA Committee members had not received any background or written materials beforehand from the Panelists.
86. Before the Panelists spoke at the meeting, an LSO staff member stated that Committee members would receive the written reports of the Panelists "in a few weeks". In fact, Committee members received no written reports from the Panelists for about four months after the meeting. Those reports quietly appeared in September in materials posted for a September EIA Committee meeting, buried in a lengthy set of materials, without any notification that they were there.
87. When I was finally able to review the written reports in late September of 2022, I noticed that one Panelist's report was dated March 24, 2022, another was dated April, 2022, and a third was dated June 2022. That is, at least two of the reports were dated before the important May 3 Committee meeting, and before other meetings that dealt with the topic in important ways in May and June of 2022.
88. The failure to provide the written reports of the Panelists in a timely manner considerably affected my ability to perform my duties on those topics. The subject matter of those reports was complex, technical, and detailed, and the written reports included many important details which were not dealt with in the Panelists' oral presentations on May 3, 2022. The fact that I did not have those written reports hampered my ability to carry out my oversight functions not only at the May 3 meeting, but at Committee meetings on May 12 and June 17, and at Convocation on June 28, where this topic was dealt with in a major way.

Public Misuse of the Peer Review Panel Results in the Cancellation of the Inclusion Index

89. Some of the important aspects of the oral presentation of the three Peer Review Panelists at the May 3, 2022 EIA Committee meeting pertained to the Inclusion Index.

90. Many of the comments of the Peer Review Panelists focused on an actual draft Inclusion Index that the consultant for that project (Diversio) had delivered to the LSO in the fall of 2019. The fact that the LSO had long had a draft of the Inclusion Index was first revealed to Committee members just before the November 25, 2021 Committee meeting.

91. The disclosure in November of 2021 that the LSO had in fact been in possession of a draft of the important Inclusion Index since 2019 surprised me. The Inclusion Index had been a major undertaking by the LSO, yet in my two years as a member of the Committee there had been no mention or briefing to the Committee that that important work had actually been delivered. It seemed unusual that this important component project of the Working Together Report had actually been completed in draft form and delivered to the LSO but had not been mentioned to the EIA Committee at all over a period of two years.

92. In their oral presentations at the May 3, 2022 Committee meeting, all three Panelists delivered major critiques of the methodology of the 2019 draft Inclusion Index (some of which are set out above), and all Panelists recommended that the Inclusion Index as received not in fact be published by the LSO, as had been planned. The result would be that that major effort, with a draft report already completed at great expense, was going to be abandoned in its present form, at least for the first iteration of the project.

93. The cancellation of the 2019 version of the Inclusion Index required a decision of Convocation, since publication of such a report had been part of Convocation's earlier adoption of the Working Together Report. That issue was therefore placed on the agenda for the June 28, 2022 Convocation (by what process, I do not know).

94. In an unusual step, the LSO issued a press release a few days before the June 28, 2022 Convocation, advising the Professions at large that the EIA Committee was recommending that the long-expected Inclusion Index would not be published. I do not know who wrote and who authorized that press release. However, the press release made no mention of any of the critiques of the draft Inclusion Index which had been made by the Panelists and others, or of any of its fatal defects. Instead, the press release stated only that the report had been "delayed by the onset of the pandemic" and that "given the passage of time" since 2019 the Committee was recommending that the Inclusion Index report not be published (MK633).

LSO Press Release, dated June 23, 2022, attached as Exhibit "18" (MK632)

96. Similarly, the staff briefing memo provided to benchers prior to the June 28 Convocation meeting, which included a recommendation for the non publication of the existing draft Inclusion Index, gave no hint of the gravity of the methodological problems with the Inclusion Index.

97. As a director of the LSO corporation, I am concerned that the benchers and our stakeholders were misled by receiving no hint that there had been serious and expensive mistakes made by the LSO on this important project.

Continuing Secretive Work of the Peer Review Panelists to Paper Over Past Blunders

98. In their oral presentations to the Committee on May 3, 2022, all the Panelists, after heavily criticizing the Stratcom Report and the Inclusion Index, nevertheless concluded by recommending that the projects set out in the Working Together Report should continue.

99. In the case of the Stratcom Report, Panelist Professor Ornstein, after describing a litany of problems with the Report, stated at the meeting that the Stratcom Report was simply

"water under the bridge." In his written report (only made available to Committee members four months later), Professor Ornstein wrote that "[i]n any event, the findings of the 2014 Stratcom report are baked into the trajectory of LSO engagement and its considerable virtues and significant defects are moot" [*emphasis added*] (MK483).

100. Regarding the Stratcom Report, Professor Wortley and Ms. Ratnasingham, after setting out a number of fundamental methodological critiques of the Stratcom report survey, then stated in their written reports that whatever the defects of the survey as an attempt to accurately describe the Professions as a whole, the mere fact that 3,296 licensees had responded was a major achievement and should be built upon. It was not clear to me, from the point of view of survey methodology, that they had any basis for making such statements, nor did they explain any such rationale.

101. At the first post-summer meeting of the EIA Committee in 2022, the Committee was advised by LSO staff that the three Panelists had simply been rehired for new and extended contracts to continue data collection work with the LSO, a decision that, like the decision to hire them for the initial review, had been made without any prior consultation with, or approval by, the Committee.

102. The result is that the three Peer Review Panelists, who had found numerous defects in major and expensive previous LSO statistical projects, but then simply dismissed those issues as "moot", or tried to salvage something from the projects, however weak, were then secretly hired to proceed with new future data and statistical projects, without input or approval of the relevant Committee.

103. As a bencher and director of the LSO corporation, I am concerned that the entire process involving the three Peer Review Panelists has been characterized by secrecy, disregard of the governance role of the Committee, unilateral actions by LSO staff without informing or obtaining approval from the Committee, the withholding of important

information from the Committee (and Convocation), dubious and inexplicable pronouncements by the Panelists, and the dissemination of misleading information to benchers, to the Professions, and to the public. I am concerned that I, and other benchers, have been unable to properly fulfil my and our oversight role and responsibilities due to the withholding and misrepresentation of information. In that context, I require the requested Information to properly carry out my due diligence oversight role.

PLAINTIFF'S NEED FOR THE INFORMATION TO CARRY OUT HIS DIRECTOR'S DUTIES

105. After several years of having my concerns ignored by LSO staff and the majority of benchers, most of my concerns about the possible methodological invalidity of the critically important and foundational Stratcom Report survey have been echoed by the Peer Review Panel hired by the LSO. Further, my concerns about the possible invalidity of the far-reaching and potentially harmful Inclusion Index were also echoed by the Peer Review Panel, with the result that the publication of the existing draft of the Inclusion Index was cancelled.

106. Nevertheless, the now apparent defects in the substance and process of these reports have not properly been acknowledged or dealt with by either the LSO staff or the majority of benchers, and I believe that they continue to constitute transparency and governance issues at the LSO.

107. Similar concerns apply to the work of the Peer Review Panel itself.

Those Panelists, who had been selected, hired, and instructed in secret by LSO staff, without any involvement or oversight by the EIA Committee, ended by recommending that the policies founded on the Stratcom Report be continued, despite the numerous defects in the Stratcom Report, which they themselves had pointed out.

108. The benchers overall have been kept in the dark about the seriousness of the defects underlying the Working Together Report, in the form of the prior Stratcom Report and the subsequent Inclusion Index which it recommended. The written reports of the Peer Review Panelists were never provided to benchers generally, nor were any accurate briefing materials regarding the contents of the Peer Review Panelists reports provided to benchers generally by staff.

109. The members of the Professions at large have received no information from the LSO acknowledging any problems with the Stratcom Report, the Working Together Report, or the Inclusion Index. Instead, the Professions at large were advised by an LSO press release in June of 2022 that the planned publication of the already existing draft Inclusion Index was being cancelled due to the passage of time, not because it was completely defective.

The Stratcom Survey Dataset (SOC, Schedule A, para 1)

111. The Peer Review Panel was retained to conduct a review of the Stratcom Report and survey, but, remarkably, the Panelists were not given a copy of Stratcom's actual survey dataset (that is, the detailed data results) to examine. As a director of the LSO, I require the detailed dataset because I believe that there are further issues with the Stratcom survey which a review of the dataset would disclose and clarify, and of which benchers should be made aware.

112. To illustrate, there is an important conflict between, on the one hand, some basic Stratcom survey numbers as described by Stratcom and referenced by the Peer Review Panelists and, on the other hand, the numbers otherwise published by the LSO. According to the Stratcom Report, the survey invitation was emailed to "all licensees" (MK104). Professor Wortley states that that number was 44,021 at the time. However,

the LSO's official published Annual Report for the relevant period states that the total number of licensees at the time was 51,996. That is a difference of 7,975 licensees. It is unclear whether those approximately 8,000 licensees were included in the survey invitations or not. If Professor Wortley's description and the official LSO numbers are both to be given meaning, then about 8,000 licensees were not included in the survey invitations, contrary to what the Stratcom Report states. Aside from this potentially significant factual misstatement by Stratcom, that would raise the question of what effect those omitted 8,000 licensees would have had on the survey response profile.

113. The Stratcom Report states that 11% of survey respondents did not identify whether they were racialized or non-racialized. Since the racialized/non-racialized distinction was the central analytical point of the whole survey, and since 11% is a significant segment of the survey sample, which as a "potential swing vote" would have a substantial effect on many of the key survey findings, it is important to know how that 11% was handled. The dataset would shed light on this point, which Stratcom does not explain. If the 11% was included or counted in the total number of survey respondents as given by Stratcom (3,296), then the "real" survey response rate is significantly lower than what was reported, since those 11% of responses do not address the key issue, and therefore the total response number should be clarified and corrected (by being reduced). Questions would also arise as to how that 11% of responses were used; for which questions, and for which conclusions.

114. Stratcom says it "weighted" the sample, that is, it took the raw data numbers from the survey responses and somehow processed them mathematically to adjust the sample numbers to compensate for overrepresentation of some types of respondents. This is important because two of the Peer Review Panelists made it clear that no such "weighting" could overcome the inherent bias problem arising from such a low survey

response rate when the respondents are self-selected: *supra*. Since Stratcom says that its "weighting" procedures did in fact produce a truly representative sample, which contradicts the opinions of the Peer Review Panel, the details of that "weighting" process should be made transparent for examination, through provision of the dataset.

115. Professor Ornstein states in his report that the results of the Stratcom survey "are baked into the trajectory of LSO engagement and its considerable virtues and significant defects are moot." If the Stratcom survey results are in fact "baked into" the LSO's set of programmes and policies, and if the survey is subject not only to the errors already identified but potentially to even more errors, that is all the more grounds for a full review of the actual Stratcom dataset. The survey is far from "moot", since it is still being used as the basis for many policies, including the 13 recommendations from the Working Together Report. Such review is needed to see the full degree to which many far-reaching and current LSO policies may in fact be based on information and data errors.

The Inclusion Index Dataset (SOC, Schedule A, para 14(a))

116. Despite the numerous problems with the concept of the Inclusion Index, pointed out by the Peer Review Panelists (and earlier by myself), and despite the decision not to publish the 2019 Inclusion Index, the LSO remains formally committed (through its past adoption of the Working Together Report) to continuing with a quadrennial Inclusion Index. Therefore, the issues with the Inclusion Index idea remain very much alive.

117. The problems with the Inclusion Index began early on. As described above, the Working Group ignored a strong and blunt warning about firm-by-firm data collection in an expert report which was actually cited in the Working Together report itself, namely that data collected from firms smaller than 150 licensees would be unreliable for such a comparison: Exhibit "14," *supra*; MK559. That point remains valid to this day, and

conflicts with the existing and continuing formal mandate for future versions of the Inclusion Index.

118. In his report as a Peer Review Panelist, Professor Ornstein warned that the low sample numbers and the low response rates from many firms, and the high variability in response rates between firms, made the 2019 Inclusion Index unfit for publication by the LSO. Those problems are likely inherent in the basic idea of the Inclusion Index, and thus are likely to affect the future versions of the Inclusion Index to which the LSO is committed, but they have not been fully explained or considered. A more detailed review of the Inclusion Index dataset would allow those issues to be more clearly identified and considered.

119. There appear to be discrepancies with how the response rates for various firms were handled by Diversio, in a way that hides deficiencies with the data that the Peer Review Panel did not touch on. Diversio in its data counted as a survey response any returned survey which answered even *one* of the important Inclusion questions. That means that even if a respondent did not answer most of the questions, that respondent would still be counted for purposes of the survey response rate. This is a potentially significant distortion of the key response rate numbers, which a review of the dataset would clarify.

120. Since the LSO is formally committed to further iterations of the Inclusion Index process, which is now proceeding seemingly in secret and without oversight by the EIA Committee, and given the gravity of the identified deficiencies with the Inclusion Index methodology used so far, and the potential for more deficiencies, and the potentially harmful consequences of the publication of an Index, it is critical that the dataset already used be carefully examined.

LSO's Engagement of the Peer Review Panelists (SOC, Schedule A, paras 19-23)

121. I have expressed concern above about the fact that the Peer Review Panelists were selected, retained, and instructed in a clandestine process by LSO staff without any foreknowledge of, information to, or oversight by, the EIA Committee. The result has been a Panel that, on the one hand, leveled significant criticism against the Stratcom Report survey and Inclusion Index, and then on the other hand, proceeded to recommend further work based on the Stratcom Report (suggesting its deficiencies are "moot"), and which recommended extensive further data collection work for what appears to be another iteration of the Inclusion Index. In my present assessment, as a bencher and director, the whole process is tainted, and it remains important to receive the requested Information regarding the origins and instruction of the Panelists to assess what happened.

Lengthy gap in Working Group records (SOC, Schedule A, para 9)

122. I remain concerned from a governance perspective about the highly unusual absence of any records of Working Group meetings or proceedings during a gap of over a year from June 2013 to October of 2014, as described above (*supra*, paras 59-63). During this period a great deal of important work was being done, including the receipt of the draft and final Stratcom Reports and the preparation of the detailed Consultation Paper, which was widely disseminated in the Professions. Not only is that gap a concern in itself, but in my assessment these steps resulted in the wide distribution of important misinformation, and I am concerned in terms of governance as to how that happened.

Financial cost of the Stratcom Report and Inclusion Index (SOC, Schedule A, paras 7 and 13)

123. Both the abandoned 2019 Inclusion Index and the Stratcom Report with all of its defects that I have discussed, were expensive. They cost the Professions, who finance these projects through their LSO licensing dues, a great deal of money. In response to my specific and repeated requests, the Treasurer advised that the LSO had paid Stratcom \$120,000 for its work and Diversio \$300,000 for its defective and now abandoned 2019 Inclusion Index. However, I am uncertain as to how accurate that information is and I require the actual financial records to confirm those expenses.

124. I believe that this money was entirely wasted, given the defective quality of the work, and that there has been no acknowledgement of the seriousness of such wastage. Indeed, there has been a resumption of similar work from which I fear the same result.

125. When benchers raised these financial concerns at the June 28, 2022 Convocation, Bencher Julian Falconer, who had been heavily involved in these projects, stated on the public record that: "[w]e will continue to make mistakes and spend money and have to be honest with members about it. That's how people with dignity operate. I don't have an issue with that. But I agree with Bencher Shi, there should be transparency about all of that."

Internal LSO Responses to Klippenstein's Critical Review of January, 2020 (SOC, Schedule A, para 11)

126. Most of the concerns regarding the Stratcom Report survey as set out in my January 2020 Critical Review have now been echoed by the Peer Review Panel, after having seemingly been ignored by LSO staff for several years. These problems should have been dealt with earlier. It is important to find out why they were not, so that the LSO can

take corrective governance measures.

Cultural Competency bar admission course training materials (SOC, Schedule A, para 18)

127. I am concerned that bar admission course materials on the topic of Cultural Competency will likely contain misinformation based on the Stratcom Report and the Working Together Report, due to methodological errors and misleading and mistaken statistics. These training materials will be and have been taken at face value by thousands of new entrants to the Professions, and I am concerned that they are being misinformed. As a bencher and director of the LSO, I require a copy of these materials to review these concerns.

REPEATED REQUESTS FOR THE INFORMATION

128. I have repeatedly raised my concerns about the Stratcom Report, the Working Together Report, and the Inclusion Index since October of 2019, through detailed emails distributed to all benchers and senior LSO staff, and at various meetings. There has been no significant response from the LSO, and my concerns have been largely ignored.

129. I have also repeatedly requested the Information to enable me to further consider and analyse the issues, and to further communicate with fellow benchers, including on the questions of whether the Stratcom Report and the Working Together Report should continue to be used in the development, implementation, and enforcement of policy by the LSO.

130. I requested a large portion of the Information by correspondence to the LSO on November 22, 2021 and November 29, 2021. On December 17, 2021, I wrote a

subsequent email noting that I had received no response to my request for information.

M. Klippenstein's Correspondence, attached as Exhibits "19," "20," and "21" (MK635 / MK640 / MK643)

131. Not having received any reply to my requests whatsoever from the LSO, I was left with no alternative but to retain counsel, who formally demanded the Information on April 26, 2022 and May 20, 2022. The LSO made no reply to my counsel, and has failed to furnish me with the Information.

Correspondence from Plaintiff's Counsel to the LSO, attached as Exhibits "22" and "23" jMK647 / MK653)

132. Finally, after receiving a second formal demand from my counsel, the Treasurer sent to me directly an unsatisfactory reply on May 27, 2022, failing to provide the Information or to even recognize my individual right to information as a director and bencher of the LSO.

Correspondence from the Treasurer, attached as Exhibit "24" jMK657)

PROPORTIONALITY OF THE REQUEST FOR INFORMATION

133. I have carefully considered all of the items and categories identified as the Information to which I claim a right as a bencher and director of the LSO. I regard the Information as proportional to the gravity of the policies in question. There were numerous other records that I considered requesting. However, after thorough deliberation I have settled upon the Information, all of which I regard as necessary and useful to me in performing the duties of my office as bencher and in governing the LSO.

PROPER PURPOSE

134. I am seeking the Information for the purpose of discharging the obligations of my office as a bencher and director of the LSO. Gaining access to the Information will

enable me to be sufficiently informed so that I may participate in the governance of the LSO in accordance with the standards required of me as a director. I believe that all of the Information is necessary or would be useful to me for this purpose.

SWORN BEFORE ME at the City of)
Toronto, in the Province of Ontario, this)
16th day of March 2023.



Commissioner for taking Affidavits
Jorge Pineda
#65305B



MURRAY JOHN KLIPPENSTEIN

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