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Protecting the Public Interest: Law Society Decision-Making After Trinity Western University

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Cases Commented On: *Law Society of British Columbia v Trinity Western University*, [2018 SCC 32 \(CanLII\)](#); *Trinity Western University v Law Society of Upper Canada*, [2018 SCC 33 \(CanLII\)](#).

Introduction

Canadian law societies strive to regulate lawyers and legal services in the public interest. Courts emphasize the law societies' broad discretion to determine what the public interest requires in governing the profession and, accordingly, defer to the law societies' exercise of that discretion (See Malcolm Mercer's [analysis of this on slaw.ca](#)).

Courts defer to law societies because they accept the underlying rationale for law societies' power and responsibility. Courts recognize the importance of the independence of the bar, and view self-regulation (of lawyers by lawyers) as an appropriate mechanism for ensuring that independence (This view is [problematic](#) but widely accepted – see, e.g., *Law Society of British Columbia v Trinity Western University* 2018 SCC 32 (“*LSBC v TWU*”) at para. 37). Courts view serving the public interest as something law societies must pursue in exchange for the privilege of self-regulation (*LSBC v TWU* at para 32) but simultaneously identify self-regulation as likely to ensure protection of the public interest given law societies' “particular expertise and sensitivity to the conditions of practice” (*LSBC v TWU* at para. 37). Briefly (albeit circularly), courts assert that they defer to law societies because independence of the bar requires self-regulation; self-regulation requires law societies to act in the public interest; and self-regulation effectively protects the public interest because of law societies' institutional expertise.

This blog post raises questions about whether current law society policy-making structures can effectively consider and advance the public interest. In particular, and in light of the saga of Canadian law societies' consideration of TWU's attempt to open a law school, it considers whether law societies can fulfill their mandate to regulate in the public interest when benchers make policy decisions in hard cases.

In our view, several significant structural obstacles impede the proper discharge of this mandate. First, the law societies' governing legislation generally fails to define the public interest mandate governing law societies sufficiently and, in some cases, does not address that mandate at all.

Second, the benchers who govern law societies have practical accountability to the profession who elects the majority of them, but no direct accountability to the public.

Third, law societies generally make policy decisions through quasi-legislative processes rather than quasi-judicial/adjudicative ones, which can make it difficult to assess whether those decisions were based on the public interest. There is nothing inherently wrong with using quasi-legislative processes to pursue the public interest, but doing so can make the public-interest assessment harder to track, and can be problematic when the decision-makers are not in fact democratically accountable. In addition, some law societies rely on referenda of their members when deciding what to do (like British Columbia's did with respect to TWU), which has the potential to push law society decision-making towards the interests of lawyers rather than the public.

Finally, public interest issues (like TWU) can have national implications, but national coordination can be elusive given that Canadian law societies may have different perspectives on how to proceed, have varying capacity to engage with novel and controversial issues, have distinct statutory mandates, and can have very different sorts of professional communities serving very different sorts of legal markets (e.g., Ontario/Toronto vs. PEI/Charlottetown). The Federation of Law Societies of Canada ("FLS"), the national working group of the provincial and territorial law societies, has done significant work in coordinating lawyer regulation in Canada (through, for example, the creation of the national mobility agreements and a model code of professional conduct). The FLS did not, however, show itself to be particularly well-suited to resolving the contentious problem of TWU.

These challenges are significant. We have no magic bullet for solving them. In our view, though, the following regulatory changes could enhance the public-interest decision-making of the law societies.

- Statutory changes could foster transparency and accountability in law society policy decision-making. We recommend in particular that the provinces and territories more explicitly define the public interest mandate of the law societies and that they remove referenda of lawyers as an aspect of law society decision-making. We would also urge the provinces and territories to, if possible, adopt common language, particularly with respect to the law societies' public interest mandate.
- Lawyers in general and benchers in particular need to be institutionally encouraged to be self-conscious and explicit about the fact that benchers are elected by lawyers, but do not serve lawyers or the legal profession. Benchers should be like other elected officials exercising quasi-legislative powers pursuant to a statute, such as municipal councilors, and subject to a code of conduct in relation to the exercise of that statutory authority.
- The Supreme Court has broadly defined the public interest and granted deference to the law societies. It is thus incumbent on the law societies to be careful and precise in explaining how they pursue the public interest. Bencher decisions should aim to be transparent about what is being decided and why a decision was made. Benchers may not be able to speak with a single voice, or to issue reasons for their decisions, but they should be able to demonstrate more than that they are "alive to the issues" (*LSBC v TWU* at para. 56). They should be able to explicitly articulate (e.g., in the language of the motion) how a decision advances the public interest.
- National coordinating bodies such as the FLS can best serve the public interest by continuing to provide information and a forum for law societies to coordinate on policy matters of national importance, but should not be asked to decide matters like TWU,

which required a substantive assessment of how the law societies should fulfill their public interest mandate.

- Courts should robustly scrutinize law society decision-making on matters that involve constitutional rights and freedoms given the inherent limits in the ability of law societies to consider those issues.

To frame this discussion we begin with an overview of how the provincial and territorial law societies and the FLS addressed the TWU question, including the relevant provincial appellate court decisions. We also summarize the Supreme Court judgments. Because of the varying law society processes and decisions, and the length of the Supreme Court judgments, this overview is unfortunately rather lengthy.

Background to the SCC Decisions

[The pre-2015 discussion here draws in part from J. Koshan and A. Woolley “Equality Rights, Freedom of Religion and the Training of Canadian Lawyers”, [Law Matters](#), Summer 2015]

In December 2013, TWU, whose [mission](#) is “As an arm of the Church, to develop godly Christian leaders”, received [approval from British Columbia’s Advanced Education Minister](#) to open a law school. TWU’s [Community Covenant Agreement](#) requires students (and other members of the TWU community) to refrain from “sexual intimacy that violates the sacredness of marriage between a man and a woman.”

The approval of the Advanced Education Minister came a day after the FLS issued its decision approving TWU’s proposed law degree (*LSBC v TWU* at para. 12). The FLS approval had two aspects. First, the FLS had an Approval Committee to assess whether TWU’s program satisfied the FLS’s [National Requirement](#) for an Approved Canadian Law Degree. While such a Committee would normally be composed of 4 members of the profession and 3 law deans, the 3 law deans stepped down after the Canadian Council of Law Deans took a formal position opposing TWU’s application. Another Committee member stepped down during the process, with the result that the final decision was made by just 4 of 7 Committee members, and only 3 members of the original Committee ([Approval Committee Report \(ACR\)](#), at paras 36-40). The Committee considered TWU’s proposal and also opposing submissions that emphasized that TWU’s Covenant “effectively bans LGBT students” and may prevent it from properly teaching legal ethics and professionalism as well as constitutional law (ACR, para. 25-31). The Approval Committee acknowledged tension between the Covenant and TWU’s ability to satisfactorily instruct students in Constitutional Law and Legal Ethics and Professionalism (ACR, para. 50). It concluded, however, that this tension created only a “concern,” not a “deficiency,” given TWU’s statement that its courses would “fully and appropriately” address “ethics and professionalism,” and that “the courses that will be offered at the TWU School of Law will ensure that students understand the full scope of [human rights and constitutional] protections in the public and private spheres of Canadian life” (ACR, para. 51-52). As a consequence, the Committee granted preliminary approval to TWU.

Second, the FLS struck a “Special Advisory Committee” of former benchers and presidents of the law societies of British Columbia, Alberta, Ontario, Quebec and Newfoundland “to provide advice on whether the application [by TWU] raises any additional public interest considerations.” ([Special](#)

[Advisory Committee Report \(SACR\)](#), at paras 7 and 16). The Advisory Committee concluded that it was appropriate to consider public interest issues raised by the TWU application (SACR, at para 12) but that there “will be no public interest reason to exclude future graduates of the program from law society bar admission programs” (SACR, at para 66). It based its conclusion on the 2001 Supreme Court decision on Trinity Western’s teaching college (*Trinity Western University v BC College of Teachers* [2001 SCC 31 \(CanLII\)](#)), [which it was advised by counsel “would be dispositive of a challenge to a decision refusing to approve the TWU school of law program” \(SACR, Appendix\)](#). The Committee further relied on: its conclusion that it had “not received evidence that would, in its opinion, lead to a different outcome than occurred in the *BCCT* case.” (SACR, at para 28); its view that TWU gives “differential treatment” to LGBTQ people but doesn’t “ban” them (SACR, at para 36); the lack of evidence that TWU graduates would engage in discriminatory conduct (SACR, at para 37); and TWU’s compliance with the law to which it is subject (SACR, at para 39). It rejected the argument that TWU results in fewer places for LGBT students—an “overall increase in law school places in Canada seems certain to expand the choices for all students.” (SACR, at para 53). It said that it saw “merit” in adding a non-discrimination clause to the FLS National Requirement similar to that of the American Bar Association, but did not view such a requirement as a “bar to approval of the TWU proposal” given that such clauses “permit the prohibition of certain conduct deemed incompatible with the religious values of the institutions” (SACR, at para 62).

The FLS’s decision was adopted by the law societies in several Canadian provinces and territories, including Alberta, Saskatchewan, Manitoba, Yukon, and Prince Edward Island (*TWU v LSBC* [2016 BCCA 423 \(CanLII\)](#) (*TWU v LSBC* (BCCA)) at paras 33-40) although not necessarily with enthusiasm. For example, the Law Society of Alberta [explained](#) that while it had delegated its decision to the FLS, it had advised the FLS that “a review of the existing criteria [for law school approval] by the Federation is advisable... consistent with the recommendation... that the possibility of a non-discrimination provision should be discussed.”

The Law Society of Nunavut [took the position](#) that it “must be directed by what the SCC will say in response to litigation which is being carried by larger law societies “ but also established a committee “to investigate the issue and provide recommendations to the Executive on the proper path forward”. The Law Society of the Northwest Territories considered several motions about TWU, none of which were accepted by its Benchers; a message from the President stated that the issue would require “further discernment” but the outcomes of that process remain unclear (A copy of the President’s Message is available from authors).

Similarly, in June 2014, the Law Society of Newfoundland and Labrador resolved to place the issue “in abeyance” (*TWU v LSBC* (BCCA) at para 38). In [New Brunswick](#), members of the Law Society Council originally voted in June 2014 to accredit TWU by a vote of 14 to 5. The Council then held a Special General Meeting in September 2014, where members of the Law Society of New Brunswick voted 137 to 30 directing Council not to approve TWU as a recognized faculty of law. The resolution was not binding on Council, however, which—as a result of a tie vote in January 2015—upheld its original decision to accredit TWU.

In April 2014, the Benchers of the Law Society of British Columbia (LSBC) voted 20-6 [against a motion](#) barring TWU graduates from admission to the profession; however three months later its membership [passed a non-binding resolution](#) that the LSBC reverse its decision. In September

2014, the LSBC initiated a referendum, asking its members to vote on the resolution that "the proposed law school at Trinity Western University is not an approved faculty of law for the purpose of the Law Society's admission program." The resolution passed by a 74% majority, and the LSBC's Benchers [ratified](#) the results of the referendum in October 2014, effectively withdrawing the LSBC's prior support for TWU (For a review of the LSBC process see *TWU v LSBC* (BCCA) at paras 16-30). In December 2014, following the LSBC's referendum results and ratification, the BC Minister for Advanced Education [revoked approval](#) for TWU's law school based on the "legal uncertainty" arising from the LSBC's refusal to approve TWU.

The LSBC decision was successfully challenged by TWU in the BC Courts. In *TWU v LSBC* (BCCA) the Court held that the LSBC had improperly fettered its discretion because in making its decision dependent on a referendum it had not discharged its duty to assess the impact on TWU of its decision and to balance any *Charter* infringements against its statutory objectives (at paras 85 and 91). The Court rejected in particular the argument that the LSBC could accept a referendum because either outcome would be "reasonable"; a statutory decision-maker has to aim to be correct, not merely reasonable (at paras 86-90). The Court further held that denying approval to TWU violated section 2(a) of the *Charter* and was not justified under *Doré v Barreau du Québec*, [2012 SCC 12 \(CanLII\)](#) and *Loyola High School v Québec (Attorney General)*, [2015 SCC 12 \(CanLII\)](#) (at paras 190-193) (the *Doré /Loyola* Framework).

In January 2014, TWU applied for approval to the Law Society of Upper Canada (LSUC) (now the Law Society of Ontario, but referred to here by its then name). The LSUC Benchers met on April 10 and heard oral submissions from TWU; they also received written submissions from TWU and 210 submissions from interested parties, as well as legal opinions with respect to the LSUC's accreditation powers, human rights legislation, and the *Charter*. On April 24, 2014, after a one-day meeting that included further submissions from TWU, the LSUC Benchers voted 28-21, with one abstention, to reject TWU's application for accreditation (A summary of the LSUC process in *TWU v Law Society of Upper Canada* [2016 ONCA 518 \(CanLII\)](#) at paras 40-50; A transcript of LSUC proceedings is [here](#)).

The LSUC decision was appealed to the Courts and upheld (*TWU v Law Society of Upper Canada* [2016 ONCA 518 \(CanLII\)](#)). The Ontario Court of Appeal reviewed the decision on a reasonableness basis. The Court held that the LSUC had the power when considering accreditation to consider more than matters of competence. The LSUC had the authority to consider the composition and diversity of the profession, as well as discrimination (at paras 108-111). The Court found that TWU's community covenant "is deeply discriminatory" against LGBTQ+ people (at para 119). The Court emphasized that the LSUC process to consider this issue was "excellent" (at para 122). It held that the "democratic process" resulted in a proper consideration of the rights and interests at stake even if some of the speeches made at the LSUC did not explicitly reflect the legal requirements for an administrative decision-maker engaged in *Charter* analysis (at paras 120-128). While TWU is not governed by the human rights legislation, the LSUC is (at para 133); the LSUC must consider human rights issues in determining whether TWU ought to receive the public benefit of accreditation by the LSUC (at para 138). The Court concluded:

Taking account of the extent of the impact on TWU's freedom of religion and the LSUC's mandate to act in the public interest, the decision to not accredit TWU represents a reasonable balance between TWU's 2(a) right under the *Charter* and the

LSUC's statutory objectives. While TWU may find it more difficult to operate its law school absent accreditation by the LSUC, the LSUC's decision does not prevent it from doing so. Instead, the decision denies a public benefit, which the LSUC has been entrusted with bestowing, based on concerns that are entirely in line with the LSUC's pursuit of its statutory objectives. (at para 143)

In Nova Scotia, the Nova Scotia Barristers Society (NSBS) considered whether to approve TWU's law school but was challenged in doing so by the fact that at the time the issue came forward the NSBS regulations made anyone with a law degree approved by the FLS eligible for admission (*NSBS v TWU* [2016 NSCA 59 \(CanLII\)](#) at para 12). Nonetheless, on April 25, 2014, the NSBS passed a resolution allowing TWU graduates to practice in Nova Scotia only if TWU exempted law students from the Community Covenant or amended the Covenant to make it non-discriminatory (at para 15). On July 23, 2014, the NSBS further amended its regulations to make admission to the NSBS subject to a qualification that Council can decline to approve a law degree if it determines that a university "unlawfully discriminates ... on grounds prohibited by either or both the *Charter of Rights and Freedoms* and the *Nova Scotia Human Rights Act*" (at para 19).

The NSCA held that the amended regulation was *ultra vires* the *Nova Scotia Legal Profession Act, SNS 2004, c 28* (NS LPA). The regulatory amendment requires the NSBS to assess whether a granting University "unlawfully discriminates," which involves the NSBS in making "a free-standing determination whether the university 'unlawfully' contravened the *Human Rights Act* and *Charter*" (at para 60). The NS LPA does not authorize the NSBS to make an "independent ruling that someone has violated Nova Scotia's *Human Rights Act*" (at para 63) nor does it "contemplate that the Council may enact a regulation that establishes Council as a court of competent jurisdiction under the *Charter* with the authority to rule that someone's conduct in British Columbia unlawfully violated the *Charter*" (at para 65). The lack of authority to amend the regulations also made the April 2014 resolution improper (at para 71); however, the resolution additionally fails because TWU does not in fact violate the amended regulation given that TWU does not unlawfully discriminate under the *Charter* since TWU is not subject to the *Charter*, or under the *Nova Scotia Human Rights Act* since TWU's conduct is entirely in British Columbia. (at para 73).

The NSBS did not appeal the decision of the NSCA. The LSBC appealed the decision of the BCCA, and TWU appealed the decision of the ONCA, which led to the two decisions by the Supreme Court issued on June 15, 2018.

***Law Society of British Columbia v Trinity Western University* [2018 SCC 32 \(CanLII\)](#)**

The Supreme Court of Canada reversed the BCCA decision, with a majority judgment by Justices Abella, Moldaver, Karakatsanis, Wagner, and Gascon, separate concurring judgments by Chief Justice McLachlin and Justice Rowe, and a dissenting judgment by Justices Côté and Brown.

The majority justices began with consideration of whether the LSBC had the authority to deny approval to TWU. They held that the LSBC had the authority to consider matters beyond the academic sufficiency of a proposed law school. The legislation says that the Benchers may "establish requirements, *including* academic requirements" (at para 30, emphasis in original) which suggests that the LSBC may consider "the overarching objective of protecting the public interest in determining...whether to approve a particular law school" (at para 31). The majority

noted the breadth of the LSBC’s public interest mandate in section 3 of the *Legal Profession Act, SBC 1998, c 9* (BC *LPA*), as well as its self-governing function, the independence of the bar and the deference traditionally afforded to how law societies act to protect the public interest (at paras 33-38).

The LSBC had decided that its obligations in this respect precluded approval of TWU because of the Community Covenant, which “effectively imposes inequitable barriers on entry to the school” (at para 39). The LSBC’s decision was a reasonable pursuit of its “overarching statutory duty: upholding and maintaining the public interest in the administration of justice, which necessarily includes upholding a positive public *perception* of the legal profession” (at para 40, emphasis in original). The integrity of the profession requires ensuring that access to membership is not limited by personal characteristics (at para 41). Requiring equitable access “promotes the competence of the bar and improves the quality of legal services available to the public” (at para 42) and furthers the public interest by “promoting diversity in the legal profession” (at para 43). In making its decision, the LSBC did not purport to regulate the law school or usurp the powers of the human rights tribunal; it simply considered the effect of TWU’s admission policy in relation to the exercise of “its authority as the gatekeeper to the legal profession” (at paras 45-46).

The LSBC’s referendum process was also unobjectionable. Section 13 of the BC *LPA* enables members of the LSBC to bind benchers through a referendum, and the benchers have a further discretion to “elect to be bound to implement the results of a referendum of members” (at para 49). Doing so is consistent with the self-governing nature of the legal profession, and is consistent with the overall statutory scheme (at para 50). The fact that the decision was ultimately made without any reasons also does not preclude reviewing that decision on a reasonableness basis; municipal decisions are reviewed for reasonableness although they are generally made by vote rather than as adjudicative decisions with written reasons (at para 53). Moreover, the LSBC was “alive to the issues” throughout its process (at para 56).

The LSBC’s decision was reasonable when viewed through the *Doré/Loyola* Framework (at para 57). The decision by the LSBC violated the “religious freedom of members of the TWU community” (at para 61). The LSBC decision did so because it limited “the right of TWU’S community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct” (at para 75). That violation was, however, appropriately overridden in pursuit of the LSBC’s statutory objectives given the nature and extent of the violation, and the proportionality between the violation and the objectives pursued by the LSBC. The majority held that the limitation on freedom of religion here was “of minor significance” (at para 87), approving TWU would not have “advanced the relevant statutory objectives” (at para 84), and the LSBC made a decision that “reasonably balanced the severity of the interference...against the benefits to its statutory objectives” (at para 85).

The majority noted that the decision advanced the LSBC’s statutory objective to preserve and protect “the rights and freedoms of all persons and [ensure] the competence of the legal profession” (at para 92). It helped maintain “equal access to and diversity in the legal profession” (at para 93). It emphasized that if TWU was approved, its 60 seats would be “effectively closed to the vast majority of LGBTQ students. This barrier to admission may discourage qualified candidates from

gaining entry to the legal profession” (at para 93-95). Denying approval to TWU also prevents harm that would arise for a LGBTQ student who attended TWU (at para 96).

The majority acknowledged that “conflict between the pursuit of statutory objectives and individual freedoms may be inevitable” (at para 100) but that the LSBC’s decision prevented “harms to LGBTQ people and to the public in general” (at para 103).

The Chief Justice and Justice Rowe concurred for reasons that centered primarily on *Charter* issues. The Chief Justice saw the violation of section 2(a) as broader than that articulated by the majority (at paras 129-134; 145-147), whereas Justice Rowe held that section 2(a) was not violated at all (at para 157). Both judges also had significant reservations with the approach taken to reviewing *Charter* violations in administrative law cases under the *Doré/Loyola* Framework and with the majority’s reliance on *Charter* “values” (see, e.g.: para 111 and 119 (CJ McLachlin) and para 156 and 166-175 (Justice Rowe)).

In upholding the LSBC decision, Chief Justice McLachlin emphasized that the “LSBC cannot abide by its duty to combat discrimination and accredit TWU at the same time” (at para 147). In his decision, Justice Rowe cast some doubt on the process used by the LSBC:

I note in passing, however, that had I found a *Charter* infringement, I do not see how it would be possible for the LSBC to proceed by way of a majority vote while upholding its responsibilities under the *Charter*. Is not one of the purposes of the *Charter* to protect against the tyranny of the majority? I fail to see how the LSBC could achieve a “proportionate balancing of the *Charter* protections at play” (M.R., at para. 58) simply by saying that a majority of its members were in favour of denying accreditation. (at para 256)

The dissenting justices disagreed with the rest of the Court with respect to the nature of the powers held by the LSBC, the legitimacy of how the LSBC exercised those powers and the constitutional rights at stake. They also expressed their concerns with the *Doré/Loyola* Framework (at paras 302-314).

The dissent began by noting that TWU is not subject to the *Charter* and does not violate human rights legislation by acting as it does, yet the LSBC was “conditioning access to the public square” on TWU’s religious practices (at para 260). In doing so the LSBC “profoundly interfered with the constitutionally guaranteed freedom of a community of co-religionists” (at para 261). The dissent noted that the LSBC’s statutory power to approve a law school is limited in scope; its “only proper purpose...is to ensure that individual graduates are fit to become members of the legal profession because they meet minimum standards of competence and ethical conduct” (at para 267). The LSBC did not claim that it had concerns with the fitness or competence of TWU graduates (at para 267). Further, even if it had jurisdiction to “take considerations other than fitness into account” the decision here “unjustifiably limited the TWU community’s freedom of religion” (at para 268).

The dissent argued that the majority erred in using principles of constitutional interpretation to interpret the LSBC’s statutory mandate (at para 270). The LSBC’s public interest mandate is limited by statute (at para 271) and those limits must be recognized and respected (at para 272):

A careful reading of the *LPA* leads us to conclude that the only proper purpose of an approval decision by the LSBC is to ensure that individual licensing applicants are fit for licensing. Given the absence of any concerns relating to the fitness of prospective TWU graduates, the only defensible exercise of the LSBC's statutory discretion for a proper purpose in this case would have been for it to approve TWU's proposed law school. (at para 273).

When reviewing the LSBC Rules, the dissent found that the “approval of law faculties is tied to the purpose of assessing the fitness of an individual applicant for licensing” (at para 280) and that law school approval is a proxy for the approval of individual applicants. The dissent noted in particular the problem with allowing the LSBC to approve how law schools select law students; “[b]y the majority’s logic, then, the LSBC would be entitled (or indeed, required) to consider such barriers [as fees] in accrediting law schools in order to promote the competence of the bar as a whole” (at para 289). The dissent held that the LSBC does not have the statutory power to “govern law schools by regulating their admissions policies” (at para 290); if law school admissions harm “marginalized communities”, that is a matter for human rights tribunals, legislatures or the bodies empowered to govern universities, not for the law societies (at para 291). Further, recognizing TWU does not endorse its “religious beliefs or practices” (at para 292).

In terms of the referendum, the dissent emphasized that making a decision that implicates the *Charter* “requires more engagement and consideration from an administrative decision-maker than simply being ‘alive to the issues’, whatever that may mean” (at para 294). The LSBC had an obligation “to properly balance the objectives of the *LPA* with the *Charter* rights implicated by their approval decision” (at para 294). Treating the referendum as binding violated the LSBC’s statutory duties (at para 296). It was also improper for the majority to assess the reasonableness of the LSBC’s decision based only on the outcome the LSBC reached (at para 300).

In terms of the *Charter*, the dissent viewed the scope of section 2(a) in terms similar to those adopted by Chief Justice McLachlin (at para 316) and held that the infringement of the rights here was not proportionate (at paras 321-323) and substantially interfered with religious freedom (at paras 324-325). Approving TWU would not have undermined the LSBC’s statutory objectives (at para 326); “the unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society” (at para 327). It is improper to impose “a forced choice between conformity with a single majoritarian norm and withdrawal from the public square” (at para 332). Approving TWU does not condone “the content of the Covenant or discrimination against LGBTQ persons” (at para 338), and refusing to do so ignores the fact that “both Parliament and British Columbia’s Legislature have recognized the...practices represented by the TWU Covenant as consistent with the public interest, legal and worthy of accommodation” (at para 340).

***Trinity Western University v Law Society of Upper Canada*, [2018 SCC 33 \(CanLII\)](#)**

The breakdown of judgments in the Ontario decision mirrored the breakdown in the BC decision, and the judges added little of substance to their analysis.

The majority judgment does not explicitly cross-reference its decision in the BC case; however, most of its analysis can be tracked paragraph by paragraph to the BC decision, and the key analytical determinations are reproduced verbatim.

The distinct aspect of the majority judgment was with respect to the statutory mandate of the LSUC. The majority analyzed the provisions of the Ontario legislation, in particular ss. 4.1 and 4.2 of the *Law Society Act*, [RSO 1990, c L.8](#) (*LSA*), which set out the functions of the Law Society and its governing principles. The majority concluded that that language of those provisions entitled the LSUC “to conclude that equal access to the legal profession, diversity within the bar, and preventing harm to LGBTQ law students were all within the scope of its duty to uphold the public interest in the accreditation context” (at para 20; for equivalent language see *LSBC v TWU* at para 40). The majority relied in particular on the fact that section 4.1 uses the language of “a” function not “the”, because otherwise the language of section 4.1 would seem to restrict the LSUC to only considering issues of professional competence and conduct (at para 17). The majority did not consider the impact of other provisions of the *LSA*, and in particular section 13 (which connects public interest to matters related to the practice of law or provision of legal services) or section 62 (regarding the creation of bylaws) both of which were viewed as significant by the dissent in constraining the LSUC’s statutory jurisdiction.

Chief Justice McLachlin accepted the majority’s position on the LSUC’s jurisdiction and adopted her reasons from the *LSBC* decision with respect to the merits of the LSUC’s decision. Justice Rowe adopted the majority’s position on the LSUC’s jurisdiction and adopted his reasons in the *LSBC* decision to hold that there was no section 2(a) infringement arising from the LSUC’s decision. He noted that the “record of the Benchers’ deliberations” shows how and why the decision was made (at para 53). Further, given the two choices available to the LSUC and its interpretation of its statutory mandate, its decision was substantively reasonable (at para 54).

The dissent focused on the jurisdiction of the LSUC. The dissent relied on the *LSA*’s emphasis on ensuring professional competence and conduct (at para 60). While the LSUC has a public interest mandate, that mandate relates to its primary function to regulate competence and conduct; it is not free standing (at para 61). The “LSUC’s functions, duties and powers are, in short, limited to regulating the provision of legal services” (at para 62). The dissent noted that the by-law provisions of the legislation only allow the LSUC to make bylaws for matters “relating to the affairs of the Society, and the governing of licensees, the provision of legal services, law firms, and applicants” (at para 63). Similarly, the *LSA* defines the public interest function as related “in any way with the practice of law in Ontario or the provision of legal services” (at para 64). As a consequence, the accreditation provisions of the LSUC bylaws must be understood as “meant *only* to ensure that individual applicants are fit for licensing” (at para 66, emphasis in original). Specific provisions of the legislation allowing the LSUC to enact bylaws related to legal education must be read consistently with the overall focus of the LSUC’s jurisdiction over the provision of legal services (at para 69). In the view of the dissent, the approval of TWU by the BC Minister of Advanced Education and the FLS should have been treated as determinative by the LSUC (at para 72). Based on its jurisdictional limits, and the *Charter* rights at stake, the only reasonable decision for the LSUC would have been to approve the TWU law school (at paras 77 and 81).

Analysis

In our view a few non-controversial observations can be made in relation to the SCC decisions and the events that preceded them.

First, the FLS, and in particular the Special Advisory Committee and its legal advisors, failed to anticipate how the SCC would approach this case. Their analysis of the effect of the TWU Community Covenant on LGBTQ+ people, their assertion that an overall increase in law school places was good for everyone, and their reliance on the significance of the SCC's 2001 decision about TWU look weak in hindsight, particularly as those conclusions are stated so unequivocally and without dissent. From this vantage point, the FLS Special Advisory Committee does not appear especially "alive to the issues" raised by the TWU application.

Second, the FLS decision failed to anticipate how Canadian law societies, and a majority of the members of those law societies, would view the TWU application. A clear majority of the voting members of the law societies of BC and New Brunswick rejected approval of TWU, and the law societies of Nova Scotia, BC, and Ontario all rejected the application in the end. In reading the FLS reports, one is left with the impression that the FLS did not fully appreciate the societal, legal, and judicial progress with respect to equal rights and LGBTQ+ people (although in fairness they were certainly not alone in this respect).

Third, the statutes that govern the law societies state the law societies' public interest mandates in the vaguest terms. In defining those mandates both the majority and dissenting judgments at the SCC employed considerable interpretive dexterity—either to permit the law societies to take into account issues broader than professional competence or to deny that they could do so. There was very little in the explicit language of the BC or Ontario statutes to support either the majority or dissenting interpretations.

Fourth, no law society that considered the issue gave reasons for its decision, or explained why refusing to accredit TWU's law school was in the public interest. The LSUC did, as the ONCA noted, have an extensive discussion of the issues, but ultimately the basis for the votes of its Benchers is unknown, which means the basis for the decision is unclear, and subject to speculation. The obscurity of the LSBC's motivations is particularly acute since the decision followed from the referendum; the motion that led to denying approval to TWU was a motion to implement the results of the referendum not a decision on the merits (*TWU v LSBC* (BCCA) at paras 29-30).

Fifth, law societies struggled to come up with consistent and coherent processes for deciding whether to approve TWU. Multiple law societies simply adopted the FLS decision, while others held their decisions in abeyance pending guidance from the Supreme Court. The LSBC reversed itself following a referendum. The Law Society of New Brunswick upheld its original decision to approve TWU following a referendum that clearly rejected TWU, because a tie vote of the Law Society Council resulted in its original decision surviving the referendum. The NSBS passed a resolution conditioning the approval of TWU on its removal of the Community Covenant, and subsequently amended its regulations to ostensibly provide grounds for its resolution although, as the NSCA noted, it did not then have a further process to assess whether TWU ought to be precluded by the amended Regulations. It is interesting, although not necessarily meaningful, to

note that the law society (LSUC) whose process was viewed by its reviewing court as “excellent” was the one law society to have its decision validated at every level of court.

Finally, while the SCC purported to defer to the law societies, it engaged in *de novo* review of all of the legal issues raised by TWU’s application. It independently analyzed and identified the jurisdiction of the law societies to regulate in the public interest, the *Charter* claims of TWU, and the appropriate balance between those claims and the statutory objectives of the law societies. It may be that this is the only sort of “deference” that was available in the circumstances given the nature of the law society processes, and the two incompatible options available to the law societies (to approve TWU or not). The law societies did not give the SCC any reasoning on which it could rely, and it would be difficult to describe decisions as fundamentally inconsistent as approving TWU and denying approval as both within the bounds of reasonableness. Regardless of the explanation, however, it is clear that the SCC’s deference here, if it can even be described that way, did not involve the SCC considering the analysis and reasoning of the law societies themselves.

Taken together, and in light of what we know about how law societies operate, these observations suggest that law societies face serious structural constraints when faced with public-interest policy decisions, particularly on matters that are contested or unanticipated.

The law societies do not have clearly defined public interest mandates. The procedures they use, which on policy matters are quasi-legislative with voting by benchers largely elected by members of the profession, are inherently designed to focus on the interests of the profession—electorally, law society decision-makers represent and are accountable to the profession. When, as happened here, decisions are made by referenda of the members, there is no accountability to the public at all, except insofar as we view lawyers as collectively and also individually committed to the public interest. Further, when faced with a really hard decision, with competing and irreconcilable values at stake, the law societies seemed to struggle to even know how to proceed, to know whether to delegate to the FLS, to decide the question as a matter of policy in the ordinary way, to use regulations or resolutions, or to employ a referendum.

The FLS’s collective decision-making mechanisms for the different provincial law societies have had notable successes (for example, in creating a national Model Code), but in this instance did not result in a decision that, at least from the SCC’s perspective, sufficiently accounted for where the public interest lay.

In the end, the public interest in relation to TWU was defined and applied by the courts that reviewed the law society decisions; the law society decisions in BC, Ontario, and Nova Scotia advanced the public interest in substance, but they did not do so in a way that was transparent or that could be explained or articulated. They were a metaphorical blank page with a decision at the end, a page on which a supporter could write their own supporting explanation, or a critic could craft an indictment.

These structural qualities of the law societies (other than their struggle with collective action) reflect the self-governing model of lawyer regulation. We count on self-regulation to advance the public interest through lawyers’ institutional expertise (emphasized by the court here) or because of the virtues associated with lawyer independence, with lawyers’ ability to guard “against the

power of both the government and substantial private interests” (Rebecca Roiphe, “[Redefining Professionalism](#)” (2015) 26 U Fl. J L & Public Policy 193 at 201). And, importantly, we trust self-regulation to advance the public interest through institutions actually designed to focus directly on the interests and concerns of lawyers, and only indirectly on those of the public.

Benchers are elected by lawyers. If they do not satisfy their constituents they risk not being re-elected by those lawyers. We have benchers make decisions on policy through “democratic” style processes. In short, we treat benchers like parliamentarians representing constituents on matters of policy, but where the constituents are lawyers and the parliamentarians are supposed to serve the public. It is structurally akin to the City of Calgary having municipal councilors elected only by residents of the northwest quadrant of the City.

It is worth noting in this respect that the public interest mandate of the law societies has not historically been, and in some places is not even currently, a central part of their statutory authority. Some, like the Nova Scotia Barristers’ Society, have for a considerable time had a clear mandate to “uphold and protect the public interest in the practice of law” (NS *LPA*). In Ontario, by contrast, the public interest sections relied upon by the majority of the SCC (ss. 4.1 and 4.2) were only added to the *LSA* in 2007; prior to that time the only reference to the public interest in the *LSA* was section 13, which said, “The Attorney General for Ontario shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do with the legal profession in any way, and for this purpose he or she may at any time require the production of any document or thing pertaining to the affairs of the Society.” (historical version [here](#)). In BC until 2012, the public interest mandate included the power within that mandate to “uphold and protect the interest of its members” (historical version [here](#)). In Alberta, the *Legal Profession Act*, [RSA 2000 c L-8](#) (Alberta *LPA*) still does not reference the public interest in setting out the powers of its Benchers, instead stating the general residual authority of the Benchers as the power to “take any action and incur any expenses the Benchers consider necessary for the promotion, protection, interest or welfare of the Society” (s. 6(n)). Indeed, the Alberta *LPA* references the “best interests of the public” only with respect to what should be treated as conduct worthy of sanction and, even there, it states the test as “best interests of the public *or of the members of the Society*” (emphasis added, Alberta *LPA*, s. 49(1)(a)).

One response to these observations is to challenge our reliance on self-regulation to serve the public interest. Doing so is fair, especially given the move away from self-regulation in other common law jurisdictions. It may be that until we fundamentally change the model for how we regulate lawyers the structural impediments to protecting the public interest will remain. Given, however, the legitimate importance of independence of the bar, the good work that is often done by Canadian law societies, and the practical barriers to fundamental change, we also think it is important to consider less radical ways of improving the ability of law societies to serve the public interest. Specifically, are there ways that we could adjust how law societies’ operate to enhance their ability to regulate in the public interest?

Before answering this question, it is worth noting that the law societies *have* materially improved the procedures used for adjudicating complaints of professional misconduct. While more work still needs to be done, many law societies have created independent, transparent, and professional adjudicative tribunals to assess whether a lawyer has acted improperly. These improvements

suggest, in our view, that it is possible to improve law society regulation materially without radical change.

One of the most basic and important changes would be to clarify and strengthen the public interest provisions of the legislation that governs Canadian law societies. For example, the provisions of the UK *Legal Services Act 2007* c. 29 provide more comprehensive guidance for what should inform lawyer regulation than any of their Canadian equivalents:

1 (1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services within subsection (2);
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen's legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

...

(3) The “professional principles” are—

- (a) that authorised persons [i.e., those licensed to provide legal services] should act with independence and integrity,
- (b) that authorised persons should maintain proper standards of work,
- (c) that authorised persons should act in the best interests of their clients,
- (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
- (e) that the affairs of clients should be kept confidential.

A provision like this would have allowed the provincial and territorial law societies to more clearly explain the basis for the TWU decision (“encouraging an independent, strong, diverse and effective legal profession”). It would also provide a clear target for law society policy-making to aim at, certainly more than the vague or incomplete language contained in the Canadian statutes. It would not eliminate disagreement or ambiguity, but it would focus the law societies’ decision making more precisely on the public interest questions they need to address.

It would also be desirable for provincial and territorial legislatures to use the same or consistent language to state the public interest mandates of the law societies. The public interest in the provision of legal services includes the same things—the sorts of things referenced by the UK legislation—wherever in Canada a lawyer works or a client retains that lawyer’s services.

Law societies should continually reinforce with benchers their ethical and legal obligation to regulate for the public, not the profession. Doing so does not change the incentive structure of the fact that benchers are elected by members, but it can contribute to a governance culture that emphasizes the public interest, and also help ensure that lawyers understand the actual mandate of the benchers they elect. It reinforces the principles of professionalism and independence on which

self-regulation is premised. We support, for example, the use of an oath of office for benchers, such as that incorporated in the [Rules](#) of the LSBC:

1-3 (1) At the next regular meeting of the Benchers attended by a Bencher after being elected or appointed as a Bencher or taking office as President or a Vice-President, the Bencher must take an oath of office in the following form:

I, [name] do swear or solemnly affirm that:

I will abide by the *Legal Profession Act*, the Law Society Rules and the Code of Professional Conduct, and I will faithfully discharge the duties of [a Bencher/President/First or Second Vice-President], according to the best of my ability; and

I will uphold the objects of the Law Society and ensure that I am guided by the public interest in the performance of my duties.

It would be useful for law societies to consider using codes of conduct, similar to those used by municipal councilors. Some law societies have codes of conduct for benchers acting as adjudicators (e.g., Ontario, [here](#)); it is equally appropriate, however, to have codes of conduct for the legislative aspects of the benchers' responsibilities. Municipal codes of conduct provide useful precedents. In Calgary, for example, Members of Council are elected by a particular ward but they have legal and ethical duties to govern in the interests of the municipality as a whole, and their Code of Conduct for Elected Officials Bylaw ([Bylaw 26M2018](#)) makes those responsibilities clear:

11. A *Member* must in the discharge of their office:
 - (a) Act in the best interests of the *City* taking into account the interests of the *City* as a whole, and without regard to the Member's personal interests;
 - (b) Consider all issues consistently and fairly, and in light of all relevant facts, opinions and analyses of which the *Member* should be reasonably aware;
 - (c) Bring to the attention of *Council* any matter that would promote the welfare or interests of the *City*;
 - (d) Act competently and diligently; and
 - (e) Vote on any matter brought to a *Council* meeting attended by the Member unless the *Member* must abstain under the *Municipal Government Act* RSA 2000, c M-26, another enactment or at law.

Like the oath, a code of conduct contributes to culture and expectations around the governance mandate of the law societies, and it clarifies the nature of benchers' obligations. It could also, conceivably, be used to impose sanctions on benchers, particularly where they vote in circumstances of a conflicting pecuniary interest. That aspect is, however, less significant than the cultural significance of explicitly reinforcing benchers' legal and ethical duties.

The procedures of law societies should be directed as much as possible to making the law society's consideration of the public interest, and the basis for a policy decision, explicit. Legislative processes do not lend themselves to providing reasons, and they necessarily leave the basis for any particular bencher's vote unknown. At the same time, however, even legislative processes can be designed to foster transparency about the reasons for the decision. Law societies could frame motions in terms of the public interest sought to be pursued by a policy proposal. The culture of

debate in a law society could be shifted to an expectation that benchers would frame their comments on a motion in terms of the public interest, particularly if a statute identified the public interest more clearly and specifically than is currently the case. Lawyers are well schooled in the concept of relevance, and when what is relevant is clearly defined they are certain to make their remarks in those terms, if for no other reason than being persuasive to a group of lawyers will require it. Law societies need to have robust policy-making procedures as a matter of ordinary course, so that when an issue like TWU arises the law societies have existing processes sufficient to address it; novel and contentious questions are hard enough as it is, without the law society struggling to identify the process to be used to make a decision.

For similar reasons, provincial and territorial legislatures should either remove or reduce the ability of law societies to employ referenda, and we would encourage law societies not to employ referenda unless absolutely necessary. Whatever the merits of referenda in democracies generally, they are in our view very hard to justify when a law society has a legal and ethical duty to one group (the public) but the referenda is only voted on by another group (lawyers), whose interests may conflict with the group to whom the duty is owed. Yes, in the case of TWU members of law societies in BC and New Brunswick had a better grip on the public interest than did the law societies themselves in the first instance, but it is not hard to imagine circumstances where that is not the case, and leaving something to a referenda at best makes it hard to see how a policy serves the public interest, and at worst makes it much less likely that it in fact will do so.

In terms of the FLS, the TWU process revealed the limits in using that body to provide advice on contentious matters that engage the public interest mandates of Canada's law societies and which, in turn, require a law society to make a determination as to what is required to satisfy its specific statutory mandate given the specific matter before it. Further, while benchers of law societies may be accountable to lawyers rather than the public, the FLS is arguably not accountable to anyone, except in the most indirect way (through the law societies that constitute it). It was perhaps unsurprising that the FLS process and in particular the Special Advisory Committee led by senior members of the bar who had formerly been involved in law society governance, and without, in the end, any involvement by law school Deans, took a conservative and ultimately inaccurate view of the public policy issues raised by TWU's application for a law school.

The FLS plays a very important role in law society governance but that role is best focused on continuing to provide information and options to the law societies, and facilitating them in coordinating their decision-making processes. It cannot realistically be a substitute decision-maker for the law societies, at least on contested matters of public policy. In terms of coordinated decision-making, an interesting example here is the Law Society of Nunavut, which, it appears from publicly available documents, deferred consideration of the TWU issue until the decisions of the other law societies had been through the courts. While it may be problematic for a law society to simply offload its public policy decisions elsewhere, in this case it made sense for Nunavut to wait until the courts had provided guidance to a larger law society better resourced for considering and litigating a contested public policy issue like this one. Conversely, as has been the case with recent interest in pro-active regulation, larger law societies may be able to rely on smaller and nimble law societies like the NSBS to test new regulatory approaches to see how they work. To be fair to the FLS, this issue was thrust upon them, not something they sought out. Our point is not to criticize the FLS or to suggest any kind of institutional overreach. Our point is only with respect to how the TWU precedent should inform the FLS's role going forward.

Finally, courts considering matters similar to TWU should not purport to defer to law societies. The discussion in the majority judgments in the TWU decisions of law society decision-making could most charitably be described as romanticized in its expression of the virtues of self-regulation, the relationship between self-regulation and the independence of the bar, and the capacity of self-regulation to generate decisions in the public interest. And even if that romanticism can occasionally be justified, courts also need to be sensitive to circumstances where the interests of lawyers and the interests of the public diverge. Undue confidence in the probity of law society decision-making is simply not warranted in those circumstances (for more on the power of the courts to usefully guide lawyer regulation see Amy Salyzyn, “The Judicial Regulation of Lawyers in Canada” (2014) 37 Dal LJ 481). This is especially the case when it comes to an issue like TWU. Whatever the institutional expertise of the law societies, there is little reason to see that expertise as including the balancing of conflicting rights and freedoms. And there is even less reason to defer to expertise when the law society gives no reason for decisions and, in the case of BC, has not even purported to assess the issue in substantive terms before reaching the decision in question. Both of us strongly agree with the outcome in this case, and respect the reasoning of the various judgments of the SCC on the issues it raised. But there is no use pretending that those reasons defer in any real way to the decisions of the law societies; they uphold those decisions, but they do so for the reasons and analysis provided by the SCC itself, not the law societies. That is as it should be; the only error here was pretending otherwise.

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