

PROTECTING THE PUBLIC INTEREST: LAW SOCIETY DECISION-MAKING AFTER TRINITY WESTERN UNIVERSITY

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Can current law society policy-making structures effectively assess and advance the public interest? This article considers whether law societies can fulfill their mandate to regulate in the public interest when benchers make policy decisions in hard cases, using the Canadian law societies' response to Trinity Western University's ("TWU") attempt to open a law school as a case study. In our view, the TWU case highlights the structural obstacles that can impede the law societies' accomplishment of their public interest mandate. We conclude that current law society decision-making structures create significant challenges and suggest several changes that could enhance the public interest decision-making of the law societies.

Les structures actuelles d'élaboration des politiques des barreaux peuvent-elles évaluer et promouvoir efficacement l'intérêt public? Cet article cherche à savoir si les barreaux peuvent s'acquitter de leur mandat de régler dans l'intérêt public lorsque leurs conseillers prennent des décisions de politique dans des dossiers épineux en se fondant, comme étude de cas, sur la réponse des barreaux à la tentative de l'Université Trinity Western (TWU) d'ouvrir une faculté de droit. À notre avis, l'affaire TWU souligne les obstacles structurels qui peuvent empêcher les barreaux de s'acquitter de leur mandat d'intérêt public. Nous concluons que les structures actuelles de prise de décision des barreaux suscitent d'importantes difficultés et nous suggérons des changements qui pourraient améliorer la prise de décision dans l'intérêt public par les barreaux.

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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.¹

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.² Courts view serving the public interest as something law societies must pursue in exchange for the privilege of self-regulation,³ but simultaneously identify self-regulation as likely to ensure protection of the public interest given law societies' "particular expertise and sensitivity

¹ For a general discussion of judicial deference to the law societies' public interest mandate in Supreme Court decisions, see Malcolm Mercer, "[Preliminary Thoughts on Green, Groia and TWU](#)" (22 June 2018), online (blog): *Slaw* <www.slaw.ca/2018/06/22/preliminary-thoughts-on-green-groia-and-twu/>.

² "The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense": *Canada (AG) v Law Society of British Columbia*, [1982] 2 SCR 307 at 335–36, 137 DLR (3d) 1. See also *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 37, 423 DLR (4th) 197 [*LSBC v TWU*]. For a more detailed consideration of the scope and meaning of independence of the bar, and critical perspectives on its relationship to self-regulation, see Alice Woolley, "Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation" (2012) 45:1 UBC L Rev 145; Alice Woolley, "Lawyers and the Rule of Law: Independence of the Bar, the Canadian Constitution and the Law Governing Lawyers" (2015) 34:1 NJCL 49.

³ *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 36, [2003] 1 SCR 247 [*Ryan*]: "Clearly, a major objective of the Act is to create a self-regulating professional body with the authority to set and maintain professional standards of practice. This, in turn, requires that the Law Society perform its paramount role of protecting the interests of the public." See also *LSBC v TWU*, *supra* note 2 at para 32; William H Hurlburt, *The Self-Regulation of the Legal Profession in Canada and in England and Wales* (Edmonton: Alberta Law Reform Institute & the Law Society of Alberta, 2000) at 141–42.

to the conditions of practice.”⁴ 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 case comment considers whether current law society policy-making structures can effectively assess and advance the public interest. In particular, and in light of the complex history of Canadian law societies’ response to Trinity Western University’s (“TWU”) 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, the TWU case highlights the structural obstacles that can impede the law societies’ accomplishment of their public interest mandate.

In particular, 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.⁵ Further, 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.⁶

In addition, law societies generally make policy decisions through quasi-legislative processes rather than quasi-judicial or adjudicative ones, which can make it difficult to assess whether those decisions were based on the public interest.⁷ There is nothing inherently wrong with using quasi-legislative processes to pursue the public interest, but doing so can make the decision-maker’s public interest assessment harder to track, and can be problematic when the decision-maker is not in fact democratically accountable. In addition, some law societies rely on referenda of their

⁴ *LSBC v TWU*, *supra* note 2 at para 37; *Ryan*, *supra* note 3 at para 31. See also Ontario, Ministry of the Attorney General, *The Report of the Professional Organizations Committee* (1980) at 25, cited in *Pearlman v Law Society of Manitoba*, [1991] 2 SCR 869 at 886–87, 84 DLR (4th) 105.

⁵ See e.g. the Nova Scotia *Legal Profession Act*, SNS 2004, c 28 [Nova Scotia *Legal Profession Act*], which refers to the public interest in several places (most notably section 4(1), regarding the purposes of the Barristers’ Society), but does not specify what “public interest” means. See also the Alberta *Legal Profession Act*, RSA 2000, c L-8 [Alberta *Legal Profession Act*], which does not connect the Law Society’s exercises of its powers to the public interest except in the specific context of professional misconduct (section 49(1)).

⁶ For the rules on election of benchers, see e.g. Alberta *Legal Profession Act*, *supra* note 5, ss 9–19.

⁷ For rules on bencher meetings see e.g. *ibid*, ss 20–29, 52.

members when deciding what to do,⁸ 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. Other key differences include varying capacities to engage with novel and controversial issues, distinct statutory mandates, and different varieties of professional communities serving different sorts of legal markets. The regulatory scope and issues faced by Ontario and lawyers working in Toronto differ vastly from those of Prince Edward Island and 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 (e.g., through the creation of the national mobility agreements and a model code of professional conduct).⁹ The FLS did not, however, show itself to be particularly well suited to resolving the contentious problem of TWU.

Why should we care if law societies face serious structural obstacles to fulfilling their public interest mandates? Two interrelated risks make the resolution of this issue imperative: substantively “bad” decisions and loss of public confidence. In our view, if law societies do not have a clear sense of what the public interest requires of them and do not adopt procedures that focus decision-making on these public interest requirements, law societies will inevitably make decisions that do not align with their regulatory mandates—that is, bad decisions. Making substantively bad decisions exposes law societies to public criticism and potentially a loss of the public’s confidence in their ability to properly regulate. Additionally, even if law societies make good decisions—ones within their regulatory mandate—public confidence will be lost if the processes for those decisions do not effectively address the public interest and create the perception that the law society has focused unduly on members’ interests. This risk is compounded in cases of national scope and in which different law societies take different or conflicting approaches.

⁸ See e.g. British Columbia *Legal Profession Act*, SBC 1998, c-9, s 13 [BC *Legal Profession Act*]. The Law Society of British Columbia relied on referenda to decide how to respond to TWU’s proposed law school.

⁹ “[National Mobility Agreement](#)” (16 August 2002), online (pdf): *Federation of Law Societies of Canada* <flsc.ca/wp-content/uploads/2014/10/mobility1.pdf>; “Model Code of Professional Conduct” (14 March 2017), online (pdf): *Federation of Law Societies of Canada* <flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf>.

In the specific case of TWU, the structural obstacles identified here resulted in a much lengthier, confusing, and resource-intensive approach. Moreover, although in its specific facts TWU was a unique case, there is good reason to believe that Canadian law societies will continue to face issues that open new and challenging questions about their public interest mandates. For example, there is currently significant controversy about new or proposed initiatives in the areas of equity, diversity and inclusion, mandatory pro bono, and non-lawyer legal service providers.¹⁰

Current law society decision-making structures create significant challenges. We have no magic bullet for solving them. In our view, however, several changes could enhance the public interest decision-making of the law societies: these include statutory refinement of the law societies' public interest mandate and removal of referenda of lawyers as an aspect of law society decision-making; adoption of a code of conduct for benchers in relation to their policy-making role; greater transparency and precision in bencher decision-making procedures regarding the role played by the relevant law society's public interest mandate; clarification and confinement of FLS' role in public interest decision-making matters; and robust judicial scrutiny of law society decisions on matters that involve constitutional rights and freedoms. Each of these proposals is discussed in greater detail below.

¹⁰ For example, the Law Society of Ontario has launched an Equity, Diversity and Inclusion Initiative and, as part of this initiative, has introduced new regulatory requirements: "[Equity, Diversity and Inclusion](http://lso.ca/about-lso/initiatives/edi)" (last modified March 2018), online: *Law Society of Ontario* <lso.ca/about-lso/initiatives/edi>. One of the first requirements introduced—a requirement that all Ontario lawyers and paralegals “create and abide by an individual Statement of Principles that acknowledges [the licensee’s] obligation to promote equality, diversity and inclusion generally, and in [the licensee’s] behaviour towards colleagues, employees, clients and the public”—has been the source of considerable discussion in the media and also is currently the subject of a constitutional challenge: "[Statement of Principles](http://lso.ca/about-lso/initiatives/edi/statement-of-principles)" (last visited 18 January 2018), online: *Law Society of Ontario* <lso.ca/about-lso/initiatives/edi/statement-of-principles>. Information about the constitutional challenge can be found in Alex Robinson, "[Professor Challenges Statement of Principles in Court](http://www.canadianlawyermag.com/legalfeeds/author/alex-robinson/professor-challenges-statement-of-principles-in-court-14901/)" (7 November 2017), online: *Canadian Lawyer Magazine* <www.canadianlawyermag.com/legalfeeds/author/alex-robinson/professor-challenges-statement-of-principles-in-court-14901/>. Additionally, the question of whether lawyers should be required to do a certain amount of pro bono work is currently a live issue in British Columbia, as is the question of licensing new, non-lawyer legal services providers: see Liam Britten, "[Make Lawyers Work For Free to Solve Access-to-Justice Issues, Victoria lawyer Says](http://www.cbc.ca/news/canada/british-columbia/bc-legal-aid-1.4861630)" (14 October 2018), online: *Canadian Lawyer Magazine* <www.cbc.ca/news/canada/british-columbia/bc-legal-aid-1.4861630>; Jean Sorensen, "[B.C. Attorney General Urges Members to Support Alternative Legal Service Providers](http://www.canadianlawyermag.com/legalfeeds/bc-attorney-general-urges-members-to-support-alternative-legal-service-providers-16418/)" (31 October 2018), online: *Canadian Lawyer Magazine* <www.canadianlawyermag.com/legalfeeds/bc-attorney-general-urges-members-to-support-alternative-legal-service-providers-16418/>.

To frame our analysis and 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.

I. Background to the SCC Decisions¹¹

In December 2013, TWU, whose mission is “[a]s an arm of the Church, to develop godly Christian leaders,”¹² received approval from British Columbia’s Advanced Education Minister to open a law school.¹³ TWU’s *Community Covenant Agreement* (“the Covenant”) 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.”¹⁴

The approval of the Advanced Education Minister came a day after the FLS issued its decision approving TWU’s proposed law degree.¹⁵ 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 [“National Requirement”].¹⁶ While such a committee would normally be composed of four members of the profession and three law deans, the three law deans stepped down after the Canadian Council of Law Deans took a formal position opposing

¹¹ The discussion of events pre-2015 draws from Jennifer Koshan & Alice Woolley, “Trinity Western University Law School: Equality Rights, Freedom of Religion and the Training of Canadian Lawyers” (2015) 40:2 *Law Matters* 9.

¹² Trinity Western University, “[About TWU](#)” (last visited 22 November 2018), online: *Trinity Western University* <www.twu.ca/about/>.

¹³ Government of British Columbia, “[Statement on Trinity Western University’s Proposed Law Degree](#)” (18 December 2013), online: *BC Gov News* <news.gov.bc.ca/stories/statement-on-trinity-western-universitys-proposed-law-degree> [BC Statement].

¹⁴ “[Community Covenant Agreement](#)” (last visited 18 January 2019) at 3, online (pdf): *Trinity Western University* <www8.twu.ca/governance/presidents-office/twu-community-covenant-agreement.pdf>.

¹⁵ *LSBC v TWU*, *supra* note 2 at para 12. See BC Statement, *supra* note 13. The Federation of Law Societies has two means for accrediting the academic credentials of prospective lawyers: through its National Committee on Accreditation process, which considers applicants for admission who do not have a degree from an “approved” law program, and through approving common law degree programs (and, in effect, automatically accrediting the graduates of those programs). TWU sought approval of its degree; it is perhaps possible that it could have ignored such approval and simply had its graduates apply for accreditation through the National Committee on Accreditation process; there is, however, no precedent for such an approach and it is not obvious to us that it would have been workable or possible.

¹⁶ “[National Requirement](#)” (1 January 2018), online (pdf): *Federation of Law Societies of Canada* <flsc.ca/wp-content/uploads/2018/01/National-Requirement-Jan-2018-FIN.pdf>.

TWU's application.¹⁷ Another Committee member stepped down during the process, with the result that the final decision was made by just four of seven Committee members, and only three members of the original Committee.¹⁸ The Committee considered TWU's proposal as well as 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.¹⁹ The Approval Committee acknowledged tension between the Covenant and TWU's ability to satisfactorily instruct students in the topics of constitutional law and legal ethics and professionalism.²⁰ 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."²¹ 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."²² The Advisory Committee concluded that it was appropriate to consider public interest issues raised by the TWU application²³ but that there "will be no public interest reason to exclude future graduates of the program from law society bar admission programs."²⁴ It based its conclusion on the 2001 Supreme Court decision on Trinity Western's teaching college,²⁵ which it was advised by counsel "would be dispositive of a challenge to a decision refusing to approve the TWU school of law program."²⁶ The Committee

¹⁷ Canadian Common Law Program Approval Committee, "[Report on Trinity Western University's Proposed School of Law Program](#)" (December 2013) at para 39, online (pdf): *Federation of Law Societies of Canada* <docs.flsc.ca/ApprovalCommitteeFINAL.pdf>.

¹⁸ *Ibid* at para 40.

¹⁹ *Ibid* at paras 25–31.

²⁰ *Ibid* at para 50.

²¹ *Ibid* at para 51.

²² [Special Advisory Committee on Trinity Western's Proposed School of Law, "Final Report"](#) (December 2013) at paras 7, 16, online (pdf): *Federation of Law Societies of Canada* <docs.flsc.ca/SpecialAdvisoryReportFinal.pdf> [SACR].

²³ *Ibid* at para 12.

²⁴ *Ibid* at para 66.

²⁵ *Trinity Western University v BC College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772.

²⁶ SACR, *supra* note 22, Appendix C (Memorandum from John B Laskin to Gérald R Tremblay, (21 March 2013) at 6).

further relied on several factors, including its conclusion that it had “not received evidence that would, in its opinion, lead to a different outcome than occurred in the *BCCT* case”;²⁷ its view that TWU gives “differential treatment” to LGBTQ people but does not “ban” them;²⁸ the lack of evidence that TWU graduates would engage in discriminatory conduct;²⁹ and TWU’s compliance with the law to which it is subject.³⁰ 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.”³¹ 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.”³²

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,³³ 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.”³⁴

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.”³⁵ The Law Society of the Northwest Territories considered several motions about TWU, none of which were accepted by its Benchers;

²⁷ *Ibid* at para 28.

²⁸ *Ibid* at para 36.

²⁹ *Ibid* at para 37.

³⁰ *Ibid* at para 39.

³¹ *Ibid* at para 53.

³² *Ibid* at para 62.

³³ See *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 at paras 33–40, 405 DLR (4th) 16 [*TWU v LSBC BCCA*].

³⁴ [Letter from Kevin Feth, President of the Law Society of Alberta, to professors at the University of Calgary and University of Alberta](#), (21 February 2014), online (pdf): *Law Society of Alberta* <ablawg.ca/wp-content/uploads/2014/03/LSA_TWU_Feb_21_2014_Letter.pdf>.

³⁵ “[Mark Mossey’s Report as President of the Law Society of Nunavut](#)” (30 May 2015), online (pdf): *Law Society of Nunavut* <lawsociety.nu.ca/wp-content/uploads/2015/09/Appendix-A-LSN-President-Message-May-2015.pdf>.

a message from the President stated that the issue would require “further discernment” but the outcomes of that process remain unclear.³⁶

Similarly, in June 2014, the Law Society of Newfoundland and Labrador resolved to place the issue “in abeyance”.³⁷ In New Brunswick, members of the Law Society Council originally voted in June 2014 to accredit TWU by a vote of 14 to five. 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 upheld its original decision to accredit TWU as a result of a tie vote in January 2015.³⁸

In April 2014, the Benchers of the Law Society of British Columbia (“LSBC”) voted 20 to six against a motion barring TWU graduates from admission to the profession;³⁹ however, three months later its membership passed a non-binding resolution that the LSBC reverse its decision.⁴⁰ 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.”⁴¹ The resolution passed 5951 to 2088,⁴² and the LSBC’s Benchers ratified the results of the referendum in October 2014, effectively withdrawing the LSBC’s prior support for TWU.⁴³ 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.⁴⁴

The LSBC decision was successfully challenged by TWU at the Court of Appeal for British Columbia. In *TWU v LSBC*, the Court held that the LSBC had improperly fettered its discretion because in making its decision

³⁶ A copy of the President’s Message is available from the authors.

³⁷ *TWU v LSBC BCCA*, *supra* note 33 at para 38.

³⁸ See News Release, January 9, 2015 “[Trinity Western University](#)”, [Law Society of New Brunswick](#). Online: <lawsociety-barreau.nb.ca/en/public/media/trinity-western-university>.

³⁹ *TWU v LSBC BCCA*, *supra* note 33 at paras 16–20.

⁴⁰ *Ibid* at paras 21–24.

⁴¹ *Ibid* at para 25–27.

⁴² *Ibid* at para 28.

⁴³ *Ibid* at paras 29–30.

⁴⁴ “[Trinity Western Law School: BC advanced education minister revokes approval](#)” (11 December 2014), online: *CBC News* <www.cbc.ca/news/canada/british-columbia/trinity-western-law-school-b-c-advanced-education-minister-revokes-approval-1.2870640>.

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.⁴⁵ 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.⁴⁶ 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*⁴⁷ and *Loyola High School v Québec (AG)*⁴⁸ (the “*Doré /Loyola Framework*”).⁴⁹

In January 2014, TWU applied for approval to the Law Society of Upper Canada (“LSUC”).⁵⁰ 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 to 21, with one abstention, to reject TWU’s application for accreditation.⁵¹

The LSUC decision was appealed to the Courts and upheld.⁵² The Court of Appeal for Ontario 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.⁵³ The Court found that TWU’s community covenant “is deeply discriminatory” against LGBTQ+ people.⁵⁴ The Court emphasized that the LSUC process to consider this issue was “excellent”.⁵⁵ 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

⁴⁵ *TWU v LSBC BCCA*, *supra* note 33 at paras 85, 91.

⁴⁶ *Ibid* at paras 86–90.

⁴⁷ 2012 SCC 12, [2012] 1 SCR 395.

⁴⁸ 2015 SCC 12, [2015] 1 SCR 613.

⁴⁹ *Ibid* at paras 190–93.

⁵⁰ Now the Law Society of Ontario but referred to here (and in the judgments) by its then name.

⁵¹ A summary of the LSUC process in *TWU v Law Society of Upper Canada*, 2016 ONCA 518 at paras 40–50, 131 OR (3d) 113 [*TWU v LSUC ONCA*]. For a transcript of the LSUC proceeding, see the [transcript](http://www.lsuc.on.ca/uploadedFiles/ConvocationTranscriptApr102014TWU.pdf) (10 April, 2014), online (pdf): <www.lsuc.on.ca/uploadedFiles/ConvocationTranscriptApr102014TWU.pdf>.

⁵² *TWU v LSUC ONCA*, *supra* note 51.

⁵³ *Ibid* at paras 108–11.

⁵⁴ *Ibid* at para 119.

⁵⁵ *Ibid* at para 122.

decision-maker engaged in *Charter* analysis.⁵⁶ The Court noted that while TWU is not governed by the human rights legislation, the LSUC is;⁵⁷ the LSUC must consider human rights issues in determining whether TWU ought to receive the public benefit of accreditation by the LSUC.⁵⁸ 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.⁵⁹

In Nova Scotia, the Nova Scotia Barristers Society ("NSBS") considered whether to approve TWU's law school but was challenged in doing so because when the issue came forward the NSBS regulations made anyone with a law degree approved by the FLS eligible for admission.⁶⁰ 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.⁶¹ 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*."⁶²

The Court of Appeal for Nova Scotia held that the amended regulation was *ultra vires* the *Nova Scotia Legal Profession Act*.⁶³ The Court found that 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*."⁶⁴ It further

⁵⁶ *Ibid* at paras 120–28.

⁵⁷ *Ibid* at para 133.

⁵⁸ *Ibid* at para 138.

⁵⁹ *Ibid* at para 143.

⁶⁰ *Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59 at para 12, 401 DLR (4th) 56 [*NSBS v TWU*].

⁶¹ *Ibid* at para 15.

⁶² *Ibid* at para 19.

⁶³ *Nova Scotia Legal Profession Act*, *supra* note 5.

⁶⁴ *NSBS v TWU*, *supra* note 60 at paras 59–60.

held that the Nova Scotia *Legal Profession Act* does not authorize the NSBS to make an “independent ruling that someone has violated Nova Scotia’s *Human Rights Act*,”⁶⁵ 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*.”⁶⁶ Additionally, the Court found that the lack of authority to amend the regulations also made the April 2014 resolution improper.⁶⁷ However, the resolution additionally failed 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.⁶⁸

The NSBS did not appeal the decision of the Court of Appeal for Nova Scotia. The LSBC appealed the decision of the British Columbia Court of Appeal, and TWU appealed the decision of the Court of Appeal for Ontario, which led to the two decisions by the Supreme Court issued on June 15, 2018.

II. The Supreme Court Decisions

The decisions at the Supreme Court turned on five central issues: (1) What power do law societies have in relation to law schools in pursuit of the public interest?; (2) Did the law societies exercise those powers reasonably in relation to TWU?; (3) What is the significance of the absence of reasons from the law societies, and of the LSBC’s reliance on the results of a referendum?; (4) Did the refusal to approve TWU violate section 2(a) of the *Charter*?; and (5) Could that violation be justified?

A) Law Societies’ Jurisdiction Over Law Schools

A clear majority of the Supreme Court, including the five writing for the majority and Justices Rowe and McLachlin concurring, accepted that the public interest jurisdiction of both the LSBC and the LSUC permits the law societies to consider matters beyond the academic sufficiency of a proposed law school. With respect to British Columbia, the majority noted that the governing legislation says that the Benchers may “establish requirements, *including* academic requirements,”⁶⁹ which suggests that the LSBC may consider “the overarching objective of protecting the public

⁶⁵ RS 1989, c 214; *NSBS v TWU*, *supra* note 60 at para 63.

⁶⁶ *NSBS v TWU*, *supra* note 60 at para 65.

⁶⁷ *Ibid* at para 71.

⁶⁸ *Ibid* at para 73.

⁶⁹ *LSBC v TWU*, *supra* note 2 at para 30 [emphasis added].

interest in determining ... whether to approve a particular law school.”⁷⁰ The majority noted the breadth of the LSBC’s public interest mandate in section 3 of the British Columbia *Legal Profession Act*,⁷¹ 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.⁷²

With respect to the LSUC, the majority found that the terms of sections 4.1 and 4.2 of the Ontario *Law Society Act (LSA)*⁷³ 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.”⁷⁴ The majority relied on the fact that section 4.1 of the *LSA* says that it is a function—not *the* function—of the LSUC to ensure that all lawyers can equally “meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide.”⁷⁵ That meant that section 4.1 ought not to be understood as constraining the terms of section 4.2, “which task the LSUC with advancing the cause of justice, the rule of law, access to justice, and protection of the public interest.”⁷⁶

The dissenting judges rejected the broad characterization of the jurisdiction of the LSBC and the LSUC. With respect to British Columbia, the dissent found that the LSBC’s statutory power to approve a law school is limited in scope; section 11 of the BC *Legal Profession Act* gives the LSBC authority over “the society, lawyers, law firms, articulated students and applicants” and its public interest mandate must be understood as limited to the exercise of that specific authority.⁷⁷ That means that in regulating law schools 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.”⁷⁸ They rejected the majority’s reliance on constitutional principles to interpret the LSBC’s statutory mandate.⁷⁹

⁷⁰ *Ibid* at para 31.

⁷¹ BC *Legal Profession Act*, *supra* note 8.

⁷² *LSBC v TWU*, *supra* note 2 at paras 33–38.

⁷³ RSO 1990, c L.8

⁷⁴ *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 at para 20, 423 DLR (4th) 321 [*TWU v LSUC*].

⁷⁵ *Ibid* at para 17 [emphasis in original].

⁷⁶ *Ibid*.

⁷⁷ *LSBC v TWU*, *supra* note 2 at para 273.

⁷⁸ *Ibid* at para 267.

⁷⁹ *Ibid* at para 270.

With respect to 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” with law school approval acting as a proxy for the approval of individual applicants.⁸⁰ The dissent identified the interference with law schools that could arise from granting law societies authority over law school admission, and found that discrimination or like harms arising from admission policies were matters for legislatures and human rights tribunals, not law societies.⁸¹

In the case of the LSUC, the dissent similarly found that section 4.1 of the *LSA* focuses the LSUC’s jurisdiction on matters of professional competence and conduct.⁸² While section 4.2 grants the LSUC a public interest mandate, that mandate relates to its primary function to regulate competence and conduct; it is not a freestanding power to pursue the public interest.⁸³ The “LSUC’s functions, duties and powers are, in short, limited to regulating the provision of legal services.”⁸⁴ The dissent noted that section 62 of the *LSA*, which empowers the LSUC to enact bylaws, limits that authority to matters “relating to the affairs of the Society, and the governing of licensees, the provision of legal services, law firms, and applicants.”⁸⁵ Similarly, section 13 of the *LSA*, which states that the Attorney General for Ontario “shall serve as the guardian of the public interest” links the public interest to matters related “in any way with the practice of law in Ontario or the provision of legal services.”⁸⁶ 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.”⁸⁷ 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.⁸⁸

B) Exercise of Law Society Power in This Case

The legitimacy of the law societies’ decisions in this case turned primarily on the constitutional questions. The courts did, however, also consider the reasonableness of those decisions from the perspective of the law societies’ regulatory authority and jurisdiction.

⁸⁰ *Ibid* at para 280.

⁸¹ *Ibid* at paras 290–91.

⁸² *TWU v LSUC*, *supra* note 74 at para 60.

⁸³ *Ibid* at para 61.

⁸⁴ *Ibid* at para 62.

⁸⁵ *Ibid* at para 63.

⁸⁶ *Ibid* at para 64.

⁸⁷ *Ibid* at para 66 [emphasis in original].

⁸⁸ *Ibid* at para 69.

For the majority (again on this point with the concurring judges) the decisions of both the LSBC and the LSUC were reasonable. The LSBC had decided that its regulatory mandate precluded approval of TWU because of the Community Covenant, which “effectively imposes inequitable barriers on entry to the school.”⁸⁹ Given those inequitable barriers, the LSBC’s decision reasonably pursued its statutory obligation to protect the administration of justice, including “upholding a positive public *perception* of the legal profession.”⁹⁰ The integrity of the profession requires that access to membership not be limited by personal characteristics; ensuring equitable access will promote lawyer competence, improve the quality of legal services available to the public, and further the public interest by “promoting diversity in the legal profession.”⁹¹ 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.”⁹² The majority assessed the LSUC’s exercise of its jurisdiction in almost identical terms,⁹³ while also noting that the “LSUC’s determination that it was entitled to promote equal access to and diversity within the bar is supported by the fact that it has consistently done so throughout its history. Since its formation in 1797, the LSUC has had exclusive control over who could join the legal profession in Ontario.”⁹⁴

In the view of the dissent, the LSBC had no basis within its jurisdiction to deny approval to TWU. Its statutory authority was limited to ensuring “that individual applicants are fit for licensing.”⁹⁵ Since it conceded that it had no such concerns with respect to TWU graduates “the only defensible exercise” of its statutory authority was to approve TWU.⁹⁶ The same was true of the LSUC given its concession that there “are no concerns regarding the competence or conduct of prospective TWU graduates.”⁹⁷

C) Procedural Issues

The two procedural issues raised in the decisions related to the ability of the Court to review the decisions for reasonableness in the absence of formal reasons from the regulator, and the reliance by the LSBC on the results of a referendum to reach its decision.

⁸⁹ *LSBC v TWU*, *supra* note 2 at para 39.

⁹⁰ *Ibid* at para 40 [emphasis in original].

⁹¹ *Ibid* at paras 41–43 (quotation from para 43).

⁹² *Ibid* at paras 45–46.

⁹³ *TWU v LSUC*, *supra* note 74 at para 26.

⁹⁴ *Ibid* at para 24.

⁹⁵ *Ibid* at para 74.

⁹⁶ *Ibid*.

⁹⁷ *Ibid* at para 77.

On reasonableness, the majority and concurring judges asserted the legitimacy of reviewing regulatory decisions for reasonableness despite the absence of formal reasons. As the majority noted in relation to the LSBC, municipal decisions are reviewed for reasonableness although they are generally made by vote rather than as adjudicative decisions with written reasons.⁹⁸ Moreover, the LSBC was “alive to the issues” throughout its process.⁹⁹ The majority adopted these reasons in its decision with respect to the LSUC, noting that the speeches made by the LSUC Benchers demonstrated “that the Benchers were alive to the question of the balance to be struck between freedom of religion and their statutory duties.”¹⁰⁰

The dissenting judges did not directly challenge the ability of the Court to review the decision deferentially despite the absence of reasons; however, they held that in the absence of reasons, a court has an obligation to ensure that the statutory objectives relied upon by an administrative decision-maker “find their source in the actual grant of authority.”¹⁰¹ Otherwise, there is a significant risk, one that materialized here, that the administrative decision-maker will simply make up the statutory objectives that it says justify a constitutional infringement.¹⁰²

On the referendum issue, the majority held that the approach used by the LSBC was unobjectionable. Section 13 of the BC *Legal Profession Act* enables LSBC members to bind their 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.”¹⁰³ Doing so is consistent with both the self-governing nature of the legal profession and the overall statutory scheme.¹⁰⁴

The dissent disagreed, holding that the decision of the Benchers to rely on the results of a referendum violated their statutory duties.¹⁰⁵ Making a decision that implicates the *Charter* may not require reasons, but it “requires more engagement and consideration from an administrative decision-maker than simply being ‘alive to the issues,’ whatever that may mean.”¹⁰⁶ The LSBC had an obligation “to properly balance the objectives of the LPA with the *Charter* rights implicated by their approval decision.”¹⁰⁷

⁹⁸ *LSBC v TWU*, *supra* note 2 at para 53; see also *TWU v LSUC*, *ibid* at paras 28–29.

⁹⁹ *LSBC v TWU*, *supra* note 2 at para 56.

¹⁰⁰ *TWU v LSUC*, *supra* note 74 at para 28.

¹⁰¹ *LSBC v TWU*, *supra* note 2 at para 322.

¹⁰² *Ibid*.

¹⁰³ *Ibid* at para 49.

¹⁰⁴ *Ibid* at para 59.

¹⁰⁵ *Ibid* at para 294.

¹⁰⁶ *Ibid* [footnotes omitted].

¹⁰⁷ *Ibid*.

In his concurring judgment, Justice Rowe also cast doubt on the LSBC's use of a referendum:

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” simply by saying that a majority of its members were in favour of denying accreditation.¹⁰⁸

D) Freedom of Religion

With the exception of Justice Rowe, all of the judges at the Court found that the decisions of the LSBC and LSUC violated section 2(a) of the *Charter*. The majority identified the violation in the limitation on “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.”¹⁰⁹ It also, however, characterized the restriction as one of “minor significance” because the mandatory covenant is “not absolutely required for the religious practice” and because prospective TWU students view studying at TWU as “preferred” rather than “necessary” for their spiritual growth.¹¹⁰

Chief Justice McLachlin rejected the view that the restriction was of minor significance, noting that the law societies were interfering with a religious practice, restricting the right of the TWU community to express their religious beliefs and restricting their ability to “associate as required by their beliefs.”¹¹¹ The dissent agreed with this characterization.¹¹²

Justice Rowe held that section 2(a) was not violated in this case. In his view, we protect freedom of religion to protect “the exercise of free will” through the “absence of constraint.”¹¹³ That includes a “communal aspect” to the protection, but fundamentally “religious freedom is premised on the personal volition of individual believers.”¹¹⁴ Justice Rowe held that section 2(a) does not extend to TWU’s Community Covenant in light of the fact that TWU is not a closed religious community but is, rather, open to

¹⁰⁸ *Ibid* at para 256 [footnotes omitted].

¹⁰⁹ *Ibid* at para 75.

¹¹⁰ *Ibid* at paras 87–88. For the LSUC see *TWU v LSUC*, *supra* note 74 at paras 32–34.

¹¹¹ *LSBC v TWU*, *supra* note 2 at para 129.

¹¹² *Ibid* at paras 316, 325. See also *TWU v LSUC*, *supra* note 74 at paras 46, 80–81.

¹¹³ *LSBC v TWU*, *supra* note 2 at paras 212–13.

¹¹⁴ *Ibid* at para 219.

anyone willing to sign the Covenant. TWU is, in effect, requiring “others outside their religious community to conform to their religious practices,” which is not something that section 2(a) protects.¹¹⁵

E) Justification for The Section 2(a) Infringement

All of the judgments (except that of Justice Rowe) used the *Doré/Loyola* Framework to assess whether the infringement of section 2(a) could be justified in this case. Chief Justice McLachlin provided an independent explanation for how that framework ought to operate¹¹⁶ and the dissent expressed (in *obiter*) its “view that the orthodox test—the *Oakes* test—must apply to justify state infringements of *Charter* rights, regardless of the context in which they occur.”¹¹⁷

The majority held that the section 2(a) rights were 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. Approving TWU would not have “advanced the relevant statutory objectives,”¹¹⁸ and the LSBC made a decision that “reasonably balanced the severity of the interference ... against the benefits to its statutory objectives.”¹¹⁹

Specifically, 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.”¹²⁰ It helped maintain “equal access to and diversity in the legal profession.”¹²¹ The majority emphasized that if TWU was approved, its 60 seats would be “effectively closed to the vast majority of LGBTQ students [and] this barrier to admission may discourage qualified candidates from gaining entry to the legal profession.”¹²² Denying approval to TWU also prevents harm that would arise for a LGBTQ student who attended TWU.¹²³

The majority acknowledged that “conflict between the pursuit of statutory objectives and individual freedoms may be inevitable,”¹²⁴ but

¹¹⁵ *Ibid* at paras 242, 251. For the LSUC see *TWU v LSUC*, *supra* note 74 at para 50.

¹¹⁶ *LSBC v TWU*, *supra* note 2 at paras 111–19.

¹¹⁷ *Ibid* at para 304. They state, however, that their “reasons apply the *Doré/Loyola* framework as we are able to understand it from the jurisprudence”: *ibid* at para 302.

¹¹⁸ *Ibid* at para 84.

¹¹⁹ *Ibid* at para 85.

¹²⁰ *Ibid* at para 92.

¹²¹ *Ibid* at para 93.

¹²² *Ibid* at para 93.

¹²³ *Ibid* at para 96. For the LSUC see *TWU v LSUC*, *supra* note 74 at paras 35–42.

¹²⁴ *LSBC v TWU*, *supra* note 2 at para 100.

that the LSBC's decision prevented "harms to LGBTQ people and to the public in general."¹²⁵ For her part, Chief Justice McLachlin emphasized that the "LSBC cannot abide by its duty to combat discrimination and accredit TWU at the same time."¹²⁶

The dissent disagreed, holding that the infringement of section 2(a) was not proportionate and substantially interfered with religious freedom.¹²⁷ Approving TWU would not have undermined the LSBC's statutory objectives;¹²⁸ "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."¹²⁹ It is improper to impose "a forced choice between conformity with a single majoritarian norm and withdrawal from the public square."¹³⁰ Approving TWU does not condone "the content of the Covenant or discrimination against LGBTQ persons,"¹³¹ 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."¹³²

III. Comment

In light of the Supreme Court's decisions, and the events that preceded them, a few key observations can be made about how the law societies and the FLS dealt with TWU's proposed law school.

First, the FLS, and in particular the Special Advisory Committee and its legal advisors, did not engage with the issues in a robust manner. 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. 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

¹²⁵ *Ibid* at para 103.

¹²⁶ *Ibid* at para 147. For the LSUC see *TWU v LSUC*, *supra* note 74 at para 46.

¹²⁷ *LSBC v TWU*, *supra* note 2 at paras 321–25.

¹²⁸ *Ibid* at para 326.

¹²⁹ *Ibid* at para 327.

¹³⁰ *Ibid* at para 332.

¹³¹ *Ibid* at para 338.

¹³² *Ibid* at para 340. For the LSUC see *TWU v LSUC*, *supra* note 74 at paras 80–81.

rights and LGBTQ+ people, although in fairness they were certainly not alone in not doing so.

Second, the statutes that govern the law societies state the societies' public interest mandates in vague 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.

Third, 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 Court of Appeal for Ontario 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, rather than a decision on the merits.¹³³

Fourth, law societies struggled to develop 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 provide grounds for its resolution although, as the Court of Appeal for Nova Scotia noted, it did not then have a further process to assess whether TWU ought to be precluded by the amended regulations. Although not necessarily meaningful, it is interesting 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.¹³⁴

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

¹³³ *TWU v LSBC BCCA*, *supra* note 33 at paras 29–30.

¹³⁴ *TWU v LSUC ONCA*, *supra* note 51 at para 122.

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—in particular, the lack of reasons—and the two incompatible options available to the law societies (whether or not to approve TWU). Regardless of this 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 have 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 except insofar as we view lawyers as collectively and also individually committed to the public interest.

Further, as detailed above, when faced with a hard decision having competing and irreconcilable values at stake, the law societies struggled to develop an appropriate process for that decision. They stumbled to a result by delegating to the FLS, deciding the question as a matter of policy in the ordinary way, using regulations or resolutions, employing a referendum, or through mixing some or all of those mechanisms together.

The FLS’s collective decision-making mechanisms for the different provincial law societies have had notable successes (e.g., 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. The decisions were a metaphorical

blank page with a result at the end, a page upon which a supporter could write their own 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, as emphasized by the court here, or because of the virtues associated with lawyer independence,¹³⁵ with lawyers' ability to guard "against the power of both the government and substantial private interests."¹³⁶ And, importantly, we trust self-regulation to advance the public interest through institutions structured to focus directly on the interests and concerns of lawyers, and only indirectly on those of the public.¹³⁷

Benchers are, as a general matter, 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 councillors 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."¹³⁸ In Ontario, by contrast, the public interest sections relied upon by the majority of the SCC—sections 4.1 and 4.2—were only added to the *Law Society Act* in 2007; prior to that time the only reference to the public interest in the *LSA* was section 13, which states:

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

¹³⁵ *LSBC v TWU*, *supra* note 2.

¹³⁶ Rebecca Roiphe, "Redefining Professionalism" (2015) 26:2 U Fla JL & Public Pol'y 193 at 201.

¹³⁷ For critical discussion of self-regulation in Canada, see HW Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33:4 Alta L Rev 800; Richard Devlin & Porter Heffernan, "The End(s) of Self-Regulation" (2008) 45:5 Alta L Rev 169.

¹³⁸ Nova Scotia *Legal Profession Act*, *supra* note 5, s 4(1).

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.¹³⁹

Until 2012, the public interest mandate in BC included the power within that mandate to “uphold and protect the interest of its members.”¹⁴⁰ In Alberta, the *Legal Profession Act* 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 being the power to “take any action and incur any expenses the Benchers consider necessary for the promotion, protection, interest or welfare of the Society.”¹⁴¹ Indeed, the Alberta legislation 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 being for the “best interests of the public *or of the members of the Society*.”¹⁴²

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.¹⁴³ 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 the independence of the bar, as well as 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.¹⁴⁴

¹³⁹ *Law Society Act*, RSO 1990, c L.8, s 13(1) as it appeared on 18 October 2006.

¹⁴⁰ BC *Legal Profession Act*, *supra* note 8, s 3(b)(ii).

¹⁴¹ Alberta *Legal Professions Act*, *supra* note 5, s 6(n).

¹⁴² *Ibid*, s 49(1)(a) [emphasis added].

¹⁴³ See Deborah L Rhode & Alice Woolley, “Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada” (2012) 80:6 *Fordham L Rev* 2761.

¹⁴⁴ Ontario created the Law Society Tribunal through the *Modernizing Regulation of the Legal Profession Act*, SO 2013, c 17. For information about the Law Society Tribunal, see “[About the Tribunal](#)” (last visited 22 January 2019), online: *Law Society Tribunal* <lawsocietytribunal.ca>.

These improvements suggest, in our view, that it is possible to improve law society regulation materially without radical change.¹⁴⁵

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 England and Wales' *Legal Services Act*¹⁴⁶ provide more comprehensive guidance for what should inform lawyer regulation than any of their Canadian legislative 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,

¹⁴⁵ For general information on modernization of lawyer regulation in Canada see Richard Devlin & Alberta Cheng, “Re-Calibrating, re-Visioning and re-Thinking Self-Regulation in Canada” (2010) 17:3 Intl J Leg Profession 233–81.

¹⁴⁶ (UK), 2007, c 29.

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.¹⁴⁷

A provision like this would have allowed the provincial and territorial law societies to “point to the regulatory objectives”¹⁴⁸ to explain their response to TWU— perhaps as “encouraging an independent, strong, diverse and effective legal profession.” As noted by Laurel Terry, Steve Mark, and Tahlia Gordon, regulatory objectives “set the parameters for acceptable debate on any particular issue.”¹⁴⁹ Adopting a more specific articulation of the public interest mandate here would provide a clear target for law society policy-making to aim at, certainly more than the vague or incomplete language currently contained in 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.¹⁵⁰

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 English and Welsh legislation—wherever in Canada a lawyer works or a client retains that lawyer’s services.

¹⁴⁷ *Ibid*, ss 1, 3.

¹⁴⁸ Laurel S Terry, Steve Mark & Tahlia Gordon, “Adopting Regulatory Objectives for the Legal Profession” (2012) 80:6 *Fordham L Rev* 2686 at 2731.

¹⁴⁹ *Ibid* at 2728.

¹⁵⁰ It is noted in this respect that in 2014, the Canadian Bar Association passed a resolution urging the FLS, provincial and territorial law societies to require that all legal education programs be non-discriminatory: see “[Resolution 14-04-M: Non-Discrimination in Legal Education](#)” (22 February 2014), online (pdf): *Canadian Bar Association* <www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2014/Non-Discrimination-in-Legal-Education/14-04-M-ct.pdf>. The FLS in 2016 released a report for consultation on whether the National Requirement for law schools should include a non-discrimination report, but withdrew the report pending the resolution of the TWU litigation: *Federation News*, “[Draft report on non-discrimination provision and the National Requirement](#)” (25 October 2016), online: *Federation of Law Societies of Canada* <flsc.ca/archive/federation-news/2016/>. For a general discussion of the non-discrimination requirement, see Amy Salyzyn, “[Let’s Be Clear: The Case for Explicitly Banning Discriminatory Law Schools](#)” (9 August 2018), online (blog): *Slaw* <www.slaw.ca/2018/08/09/lets-be-clear-the-case-for-explicitly-banning-discriminatory-law-schools/?highlight=salyzyn%20explicitly%20banning>.

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.¹⁵¹

It would be useful for law societies to consider using codes of conduct, similar to those used by municipal councillors. Some law societies have codes of conduct for benchers acting as adjudicators.¹⁵² It is equally appropriate, however, to have codes of conduct for the legislative and policy 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 makes those responsibilities clear:

10. A *Member* must in the discharge of their office:

a) [A]ct 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;

¹⁵¹ "[Law Society Rules 2015](#)" (1 July 2015), online (pdf): *Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/publications/mm/LawSocietyRules_2015-06.pdf>.

¹⁵² See e.g. [Law Society Tribunal, "Adjudicator Code of Conduct"](#) (last visited 22 January 2019), online: *Law Society Tribunal* <lawsocietytribunal.ca/Pages/Mainpage.aspx#114>.

- b) [C]onsider all issues consistently and fairly, and in light of all relevant facts, opinions and analyses of which the *Member* should be reasonably aware;
- c) [B]ring to the attention of *Council* any matter that would promote the welfare or interests of the *City*;
- d) [A]ct competently and diligently; and
- e) [V]ote 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.¹⁵³

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. However, that aspect is less significant than the cultural importance of explicitly reinforcing benchers' legal and ethical duties.

The procedures of law societies should be directed as much as possible to making explicit a law society's consideration of the public interest and the basis for its policy decisions. Legislative processes do not lend themselves to providing reasons, and they necessarily leave the basis for any particular bencher's vote unknown. We are not suggesting that law societies should give "reasons" for legislative and policy decisions. At the same time, however, 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 likely to make their remarks in those terms, if for no other reason than being persuasive to a group of lawyers. Law societies need to have robust policy-making procedures as a matter of ordinary course so they have existing processes sufficient to address issues, such as TWU, when they arise; novel and contentious questions are hard enough without the law society struggling to identify the process to be used to make a decision.

¹⁵³ City of Calgary, by-law No 26M2018, *Code of Conduct for Elected Officials Bylaw* (28 May 2018), s 10 [emphasis in original].

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. 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 will in fact 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 which, in the end, did not have 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, as well as 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 is that of the Law Society of Nunavut, which, as 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, more nimble law societies like the

NSBS to test new regulatory approaches. To be fair to the FLS, this issue was thrust upon them rather than 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. Generally speaking, courts should defer to law societies.¹⁵⁴ Courts should not do so, however, where the interests of lawyers and the public conflict, or where the matters at stake do not engage law societies' expertise regarding the provision of legal services. The discussions in the majority judgments in the TWU decisions of law society decision-making could most charitably be described as romanticized in their 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. 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.¹⁵⁵

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. 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. However, 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.

IV. Conclusion

In one sense, TWU can be told as a story of regulatory triumph for the law societies of British Columbia and Ontario: they made a challenging and controversial decision that the Supreme Court of Canada affirmed

¹⁵⁴ See Alice Woolley, "[Stranger Things: A Defense of Dunsmuir](#)" (16 February 2018), online (blog): *Double Aspect* <doubleaspect.blog/2018/02/16/stranger-things-a-defense-of-dunsmuir/>.

¹⁵⁵ For more on the power of the courts to usefully guide lawyer regulation, see Amy Salyzyn, "The Judicial Regulation of Lawyers in Canada" (2014) 37:2 Dal LJ 481.

as being both constitutional and in the public interest. This comment suggests, however, that TWU is more accurately viewed as a cautionary tale, revealing structural weaknesses in the law societies' ability to discharge their public interest mandate. Fixing those structural weaknesses requires the attention of all branches of government: the legislature should amend the law societies' governing legislation to clearly articulate the law societies' public interest mandate and to remove the use of referenda in law society decision-making; the law societies (the executive) should reform and refine their decision-making processes to direct legislative and policy decisions towards accomplishment of the public interest; and courts should be less deferential to law society decisions where the interests of lawyers and the public conflict, or where the interests extend beyond the law societies' mandate or expertise.