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Trinity Western University Decisions and Engineers' Equity, Diversity, and Inclusion Obligations Under the Statutory Public Interest Mandate

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Trinity Western University Decisions and Engineers' Equity, Diversity, and Inclusion Obligations Under the Statutory Public Interest Mandate

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Abstract

Engineers create technologies but do not sufficiently care for their biased and inequitable outcomes despite the engineering profession's statutory mandate to protect the public interest. The engineering and legal professions' similar admission processes and statutory provisions mandating the protection of public interest may justify applying the Supreme Court of Canada's interpretation of the legal profession's public interest mandate in the Trinity Western University decisions to the engineering profession. The Supreme Court's interpretation centres on equal access to the profession, diversity within its membership, and protection of 2SLGBTQ+ persons. The work begins by setting out the definitions and challenges of equity, diversity, and inclusion ("EDI") and an overview of the Trinity Western University decisions. A comparison follows of the two professions' attention to 2SLGBTQ+ issues to reveal the relative EDI progress of each profession and substantiate engineering's need to adopt the Supreme Court's EDI-centred interpretation of the public interest mandate. The work then compares the admission processes of the two professions and the provisions setting out each profession's duty to protect the public interest to demonstrate their similarity and, therefore, transferability of the EDI-centred interpretation. The work concludes that the Supreme Court's interpretation could apply to the engineering profession and impose on engineers an obligation to uphold EDI principles, including in attending to the potentially biased and inequitable outcomes of their technological creations.

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Résumé

Les ingénieurs et les ingénieures créent des technologies mais ne se soucient pas suffisamment de leurs résultats biaisés et inéquitables, malgré le mandat statutaire de la profession d'ingénieur de protéger l'intérêt public. La similarité des processus d'admission des professions d'ingénieur et de juriste et les dispositions statutaires imposant la protection de l'intérêt public peuvent justifier l'application de l'interprétation du mandat de l'intérêt public de juristes établi par la Cour suprême du Canada dans les décisions de Trinity Western University à la profession d'ingénieur. L'interprétation de la Cour suprême est axée sur l'égalité d'accès à la profession, la diversité de ses membres et la protection des personnes 2SLGBTQ+. Le travail commence par présenter les définitions et les défis de l'équité, de la diversité et de l'inclusion (« EDI ») et une vue d'ensemble des décisions de Trinity Western University. Une comparaison suit de l'attention portée par les deux professions aux questions 2SLGBTQ+ afin de révéler les progrès relatifs de chaque profession en matière d'EDI et de justifier la nécessité pour l'ingénierie d'adopter l'interprétation de la Cour suprême du mandat d'intérêt public centrée sur l'EDI. Le travail compare ensuite les processus d'admission des deux professions et les dispositions établissant l'obligation de chaque profession de protéger l'intérêt public afin de démontrer leur similarité et, par conséquent, la transférabilité de l'interprétation centrée sur l'EDI. Le travail conclut que l'interprétation de la Cour suprême pourrait s'appliquer à la profession d'ingénieur et imposer aux ingénieurs et aux ingénieures l'obligation de respecter les principes de l'EDI, incluant en s'occupant des résultats potentiellement biaisés et inéquitables de leurs créations technologiques.

1. INTRODUCTION

Global attention on the societal impact of recent forms of technology has identified issues such as the algorithmic bias in AI surveillance and its consequences that include false arrests, imprisonment, and deportations in many countries.[1] Relatively less attention has come to the potential inequities present in fundamental forms of technology,[2] including the design, operation,

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1 Joy Adowaa Buolamwini, *Gender shades: intersectional phenotypic and demographic evaluation of face datasets and gender classifiers* (Master of Science Thesis, Massachusetts Institute of Technology, 2017) [unpublished], online: <dspace.mit.edu/handle/1721.1/114068>; Tolga Bolukbasi et al, "Man is to Computer Programmer as Woman is to Homemaker? Debiasing Word Embeddings" in Daniel D Lee, Masashi Sugiyama, Ulrike von Luxburg, Isabelle Guyon & Roman Garnett, eds, *Advances in Neural Information Processing Systems 29* (New York: Curran Associates, Inc, 2016), online: <proceedings.neurips.cc/paper/2016/hash/a486cd07e4ac3d270571622f4f316ec5-Abstract.html>; Marcelo O R Prates, Pedro H Avelar & Luís C Lamb, "Assessing gender bias in machine translation: a case study with Google Translate" (2020) 32 Neural Computing and Applications 6363, online https://dblp.org/rec/journals/nca/PratesAL20 .

2 Merriam-Webster defines technology as "the practical application of knowledge

and maintenance of our physical infrastructure. That the work of computer and software engineers has marginalizing effects should motivate all disciplines of engineers[3] to attend to the potentially biased and inequitable outcomes of their technological creations as members of a profession with a public interest mandate.

Like lawyers, engineers have a duty to protect the public interest under provincial regulatory statutes.[4] Regulatory bodies like the Law Society of Ontario ("LSO") and Professional Engineers Ontario ("PEO") exist to enforce a statutory framework that upholds the public interest. The LSO, for example, requires its members to complete continuing professional development hours focused on EDI principles. Lawyers and paralegals must complete a total of 3 "Professionalism Hours" that focus on advancing equality, diversity and inclusion in the lawyer and paralegal professions.[5] This requirement is not merely for the regulator to uphold the public interest; it directly translates to an obligation for individual lawyers to incorporate EDI principles in their professional conduct. Similarly, PEO's *Code of Ethics* also "ensures that practitioners exercise a high standard of care in their work and are aware of their role in protecting or promoting the interests of the public."[6] This statement indicates that the protection of the public interest is not just the regulator's statutory objective but also the responsibility of individual engineers. Therefore, while the overarching duty to uphold the public interest starts with the regulatory bodies, this duty seems to inevitably cascade down to shape the professional and ethical obligations of individual members within those professions.

The Supreme Court of Canada interpreted the legal profession's public interest duty when several provincial regulators of lawyers refused to accredit the

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especially in a particular area" and provides "engineering" as a synonym. See Merriam-Webster, "Technology" (last visited 10 November 2022), online: <merriam-webster.-com/dictionary/technology>. However, at least colloquially, technology has become synonymous to "higher technology" or "electronic technology" such as phones and computers. For example, when people say they dislike or cannot use "tech," they typically do not mean that they dislike or cannot use roads, buildings, running water, or energy. This work reclaims the term "technology" by using it in the context of its dictionary definition.

3 Engineering disciplines include traditional disciplines like civil, mechanical, chemical, and electrical engineering and "modern" disciplines like software, computer, environmental, mechatronics, and biomedical engineering.

4 In Ontario, for example, the duty to protect the public interest is set out in *Law Society Act*, R.S.O. 1990, c. L.8, s. 4.2.3 for the legal profession and in the *Professional Engineers Act*, R.S.O. 1990, c. P.28, s. 2(3) for engineering.

5 Law Society of Ontario, "Continuing Professional Development Requirement" (last visited 2 October 2023), online: <lso.ca/lawyers/enhancing-competence/continuing-professional-development-requirement>.

6 Professional Engineers Ontario, "Guideline: Professional Engineering Practice" (November 2020) at 6, online (pdf): <peo.on.ca/sites/default/files/2020-12/PEPGuideline_Nov2020.pdf>. ["Guideline"].

law school at Trinity Western University ("TWU"), a Christian institution with policies that discriminated against 2SLGBTQ+ persons, among other groups. The Supreme Court in *Trinity Western University v. Law Society of Upper Canada*[7] ("*TWU v. LSUC*") held that "equal access to the legal profession, diversity within the bar, and preventing harm to LGBTQ law students were all within the scope of [the law society's] duty to uphold the public interest."[8] Similarly, the Supreme Court held in the accompanying *Law Society of British Columbia v. Trinity Western University*[9] ("*LSBC v. TWU*") decision that "promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty: upholding and maintaining the public interest."[10]

Engineering differs from other professions in its direct role in creating the technologies that increasingly shape all facets of society.[11] While professions like healthcare or accounting also have the mandate to serve the public interest,[12] they conceivably do not generate new technologies with broad societal impact at the same scale as engineering.[13] The *TWU* decisions present an opportunity to explore how engineers, like members of many other regulated professions, have a public interest mandate. Issues like algorithmic bias in AI have far-reaching implications, including wrongful arrests and social discrimination.[14] These are concerns that require engineers to consider the societal consequences of their work actively. Examining the implications of the *TWU* decisions for engineering would, therefore, seems crucial for understanding how to train professionals who are not only technically proficient but also aware of their potential EDI obligations.

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7 *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, 2018 CarswellOnt 9570, 2018 CarswellOnt 9571 (S.C.C.) [*TWU v. LSUC*].

8 *Ibid* at para. 20.

9 *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, 2018 CarswellBC 1510, 2018 CarswellBC 1511 (S.C.C.) [*LSBC v. TWU*].

10 *Ibid* at para. 40.

11 Erik W Aslaksen, "Engineers and the Evolution of Society" in Diane P Michelfelder, Byron Newberry & Qin Zhu, eds, *Philosophy and Engineering: Exploring Boundaries, Expanding Connections* (Switzerland: Springer, 2017) 113 at 118-21.

12 For these professions' governing statutes in Ontario, see e.g. *Regulated Health Professions Act*, *1991*, S.O. 1991, c. 18; *Chartered Professional Accountants of Ontario Act*, *2017*, S.O. 2017, c. 8; *Veterinarians Act*, R.S.O. 1990, c. V.3.

13 Aslaksen, *supra* note 11 at 118-21.

14 See e.g. Reva Schwartz et al, "Towards a Standard for Identifying and Managing Bias in Artificial Intelligence" (2022) NSIT Special Publication 1270, online (pdf): <nvlpubs.-nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf> (bias in AI systems was found in this American study by the National Institute of Standards and Technology, where facial recognition technology proved to be significantly less accurate for people with darker skin tones, leading to higher rates of false positives).

TWU does not house accredited engineering programs but is on Engineers and Geoscientists British Columbia's ("EGBC") list of institutions offering "programs that allow students to transfer into an accredited program at other institutions."[15] In the absence of any judicial interpretation of Canadian engineering profession's statutory duty to protect the public interest, should provincial regulators and the Canadian Engineering Accreditation Board ("CEAB") make institutions with discriminatory policies part of the pipeline to becoming professional engineers and technology creators?

This work contends that the Supreme Court's interpretation of the legal profession's public interest mandate should apply to the engineering profession given their similar admission processes and statutory provisions mandating the protection of the public interest. The work concludes that the Supreme Court's interpretation likely imposes on engineers an obligation to uphold equity, diversity, and inclusion ("EDI") principles, including attending to the potentially biased and inequitable outcomes of their technological creations.

2. POSITIONALITY

Both authors decided to study law at different moments in their civil engineering careers as a result of the micro and macro acts of exclusion they experienced and observed within engineering. The authors' legal education and experiences in engineering combined to shape their interest in highlighting the engineering profession's deficiencies in engaging with EDI relative to the legal profession despite sharing nearly identical public interest mandates. The legal profession is not without shortcomings in relation to EDI, but it seems to have made considerably more progress. This is the case despite the 1989 École polytechnique event[16] remaining the most significant discipline-specific mass killing of women in Canadian history. Medical students, law students, accounting students, and other students of various gender identities and expressions in traditionally men-dominated disciplines have not faced the same extent of mass violence for their field of study.

The authors also observed a stark contrast between the curricula of accredited engineering programs and accredited law schools. The authors' formal training in engineering never, for example, acknowledged the heterogeneity of users of public infrastructure, but just their first few weeks of law school taught them about cases like *Trinity Western University*[17] that seek to protect

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15 Engineers and Geoscientists British Columbia, "Post-Secondary School List" (last visited 5 January 2022), online: <egbc.ca/About/Programs-Initiatives/School-Outreach-Career-Awareness/High-School/Post-Secondary-School-List> ["Post-Secondary List"].

16 The perpetrator targeted women in engineering; 12 of the 14 victims were engineering students who were women. See Wendy Hui Kyong Chun, "Unbearable Witness: Toward a Politics of Listening" (1999) 11:1 differences: A Journal of Feminist Cultural Studies 112.

17 *TWU v. LSUC, supra* note 7; *LSBC v. TWU, supra* note 9.

prospective 2SLGBTQ+ members of the legal profession. Critical scholarship exists on the "reasonable person"[18] in law but not (yet) on "users" or "occupants" in engineering standards.[19] The authors feel that their legal training, at minimum, acknowledged differences while their engineering training indoctrinated the idea that all subjects, users, or occupants are identical (or insufficiently different to matter). That technology causes inequity and violence comes as no surprise given the training engineers (and other scientists) receive. This paper presents the possibility of mitigating some of the inequity and violence by having the engineering profession interpret its public interest mandate as including upholding equity, diversity, and inclusion principles.

3. DEFINITIONS AND LIMITATIONS OF EQUITY, DIVERSITY, AND INCLUSION

Equity, diversity, and inclusion are complex and overlapping concepts that frequently arise together but are not, in fact, interchangeable. This section sets out their definitions and discusses their limitations by relying partly on Tanya De Mello's work in the context of law firms as businesses. De Mello points out that businesses often misuse the terms "equity, diversity, and inclusion" by combining them or using them interchangeably.[20] A quick scan of the webpages of various engineering regulators confirms that they also mistakenly combine and/or interchange the three terms.[21]

The *Cambridge Dictionary*'s definition of diversity includes recognizing differences in race, sex, gender, sexual orientation, and more,[22] but there is an increasing recognition that diversity cannot be about static and finite categories.

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18 See e.g. John Gardner, "Review: The Mysterious Case of the Reasonable Person" (2001) 51:3 UTLJ 273. See also Western Law, "Mayo Moran lectures on Tort Law's 'Reasonable Person'" (14 February 2017), online: <law.uwo.ca/news/2017/mayo_moran_lectures_on_tort_laws_reasonable_person.html>.

19 Michelle Liu, Andrea Atkins & Allie Kennington, "Applying the Cultural Competence Discourse in ADR to Engineering Education and Practice" (20 June 2023) Conference Proceedings 2023 Canadian Engineering Education Association, Kelowna, BC, online: <https://oxford-abstracts.s3.amazonaws.com/28a42cda-f17d-409f-874c-a84de1939b54.pdf>

20 Tanya De Mello, *The Fit Interview and Cultural Matching: Examining Equity in Hiring Processes in Law Firms in Canada* (PhD Thesis, University of Toronto, 2020) [unpublished] at 29.

21 See e.g. Professional Engineers Ontario, "Equity and Diversity Committee" (last visited 11 January 2022), online: <peo.on.ca/about-peo/committees-and-task-forces/equity-and-diversity-committee>; Engineers and Geoscientists British Columbia, "Equity, Diversity, and Inclusion" (last visited 11 January 2022), online: <egbc.ca/About/Programs-Initiatives/Equity-Diversity-and-Inclusion>; Association of Professional Engineers and Geoscientists of Alberta (APEGA), "Equity, Diversity, and Inclusion" (last visited 11 January 2022), online: <apega.ca/members/equity-diversity-inclusion>.

De Mello explains that "a group of White men may seem homogenous and not diverse, but they may exhibit diversity of socioeconomic class, age, weight, accent, [. . .]. As such, there are infinite measures of diversity within every group and every subgroup."[23] Justice Lorne Sossin expands on the "almost infinite complexities" of diversity in his discussion about a representative Supreme Court. He alludes to the existence of an infinite number of identities due to the "unique experiences and perspectives" of every individual,[24] along with the numerous[25] points at which this infinite number of identities can intersect at any given time.[26]

While infinite categories of differences exist, diversity discussions tend to implicitly be about a finite set of categories such as the protected grounds in the Ontario *Human Rights Code*: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.[27] For example, diversity is technically present when two people with different shoe sizes enter a room, but shoe size is generally not a category of diversity that matters in practice because people have not needed protection from discrimination on the basis of shoe size. In other words, diversity is about differences that are markers of social and historical context within which discrimination occurs, as Sherene Razack highlights:

> Without history and social context, each encounter between unequal groups becomes a fresh one, where the participants start from zero, as one human being to another, each innocent of the subordination of others. [. . .] Without an understanding of how responses to subordinate groups are socially organized to sustain existing power arrangements, we cannot hope either to communicate across social hierarchies or to work to eliminate them.[28]

Acknowledging the various complications of diversity, what does diversity actually do for a business, or in the context of this paper, a profession? Organizations themselves may not even know. What they do seem to know is that they want to *look* diverse. De Mello points out that the desire to appear diverse often leads firms to feature "one woman, one Black person, [and] one

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22 Cambridge University Press, "Diversity" (last visited 23 August 2021), online: < dictionary.cambridge.org/dictionary/english/diversity > .

23 De Mello, *supra* note 20 at 30.

24 Lorne Sossin, "Should Canada Have a Representative Supreme Court?" (2009) Queen's University Institute of Intergovernmental Relations School of Policy Studies, Working Paper No 2009-07 at 3.

25 Numerous and not infinite because the intersection of two infinite sets is not necessarily infinite (the union of two infinite sets is).

26 *Ibid.*

27 *Human Rights Code*, R.S.O. 1990, c. H.19, s 1.

28 Sherene H Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 8.

person in a wheelchair" in promotional materials "even if the identities represented in the photo may be underrepresented or relatively powerless in the business."[29] In other words, the component of diversity that organizations seem to care about is passive representation. A passively representative group, as Justice Sossin describes, "would not seek to represent their communities."[30] This aligns closely with what De Mello suggests about firms that want candidates to "'look different' as long as they are seen as being able to 'act the same' so that they culturally match" with the dominant group or groups. On the contrary, active representation is when someone looks different and can also "actively 'represent' the interests, values or representativeness of their community."[31] In light of these divergent definitions, the use of the word diversity on its own without specifying "active" or "passive" representation, among other qualifiers, seems ambiguous at best.

That professional settings are more inclusive by virtue of having more educated individuals is a common assumption.[32] This is not the experience of a racialized and woman-identifying physics professor whose colleagues called her the "token hire" in their department: "Despite my significant credentials [. . .], according to my new colleagues, my justification for being in that position was solely based on my race. I remember thinking that [. . .] no amount of education will shield us from the impacts of the racist and sexist society in which we all live."[33] Therefore, organizations that *look* diverse should not believe themselves to be above the need to ensure active, or substantive, equity and inclusion.

In the context of higher education, Dafina-Lazarus Stewart underscores the failure of institutions, not just law and engineering schools, to acknowledge the ways meritocracy has reinforced the deep-seated discrimination and systemic inequities in many professions.[34] Meritocracy tells members of the dominant group they are "rightfully [. . .] allowed to believe in their own merits while at the same time denying the meritorious potential of anyone unlike them — particularly those who are members of [. . .] minoritized groups."[35] In this light, diversity on its own may only perpetuate the belief of the dominant group in its own merit and does little in the way of attaining the equity or inclusion.

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29 De Mello, *supra* note 20 at 31.

30 Sossin, *supra* note 24 at 4.

31 *Ibid.*

32 Tomasz Szkudlarek & Piotr Zamojski, "Education and Ignorance: Between the Noun of Knowledge and the Verb of Thinking" (2020) 39 Studies in Philosophy and Education 577.

33 Geraldine Cochran, "The Problem with Diversity, Inclusion, and Equity" (22 June 2018), online (blog): <scholarlykitchen.sspnet.org/2018/06/22/problem-diversity-inclusion-equity>.

34 See e.g. Cheryl I Harris, "Whiteness as Property" (1993) 106:8 Harv L Rev 1707.

35 Dafina-Lazarus Stewart, "Language of Appeasement" (29 March 2017), online: <insidehighered.com/views/2017/03/30/colleges-need-language-shift-not-one-you-think-essay>.

The *Cambridge Dictionary*'s definition of equity includes the words "fairness" or "justice,"[36] which contributes to the incorrect but frequent use of "equity" and "equality" as interchangeable.[37] Equality, or *formal* equality, means allocating the same resources to everyone regardless of other factors.[38] Equity, or *substantive* equality, is about equal outcomes. Equal outcomes "are only achieved when we recognize that as a result of social, historic, and economic disadvantage, certain groups do not have the same advantages as others."[39]

Achieving equity, therefore, requires the "acknowledgment of and response to differences that members of a particular group might experience."[40] Organizations that strive only for passive representation do not do this, according to De Mello.[41] They hire diverse people but go on to assume that everyone is "starting from the same place,"[42] which often leads certain groups to be tokenized and further marginalized in the workplace. Given that equity, or substantive equality, is what "the *Charter of Rights and Freedoms* and human rights legislation aim to achieve,"[43] equity should be the focus of processes "such as setting clear targets, measuring progress, and emphasizing [. . .] inclusion at every level of the organization."[44]

"The 'Problem' Woman of Color in the Workplace"[45] image captures the issues flowing from the promotion of diversity in professional spaces without an inclusive environment. Organizations that have a revolving door for "token" hires owing to hostile conditions are prevalent.[46] "Well, we have hired two women. Now we'll see if they'll sink or swim," a department chair once said in front of the aforementioned physics professor.[47] Although equitable policies are conceivably a step above diversity, the "sink or swim" mentality makes clear the

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36 Cambridge University Press, "Equity" (last visited 23 August 2021), online: <dictionary.cambridge.org/dictionary/english/equity>.

37 De Mello, *supra* note 20 at 33.

38 *Ontario (Director of Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, 2010 CarswellOnt 6821 (Ont. C.A.) at para. 78, cited in Law Society of Ontario, "Definitions" (last visited 20 August 2021), online: <lso.ca/about-lso/initiatives/edi/definitions> ["Definitions"].

39 De Mello, *supra* note 20 at 33-34.

40 Patricia Hughes, "Supreme Court of Canada Equality Jurisprudence and 'Everyday Life'" (2012) 58 SCLR 245 at 247, cited in Law Society of Ontario, "Definitions", *supra* note 38.

41 De Mello, *supra* note 20 at 35.

42 *Ibid.*

43 Law Society of Ontario, "Definitions", *supra* note 38.

44 De Mello, *supra* note 20 at 35.

45 Kira Page, "The 'Problem' Woman of Colour in NonProfit Organizations" (last visited 14 August 2021), online (blog): <coco-net.org/problem-woman-colour-nonprofit-organizations>.

46 *Ibid.*

47 Cochran, *supra* note 33.

issues flowing from the implementation of more equitable hiring processes without following up on whether the employees succeed in the environment — that is, whether they experience inclusion.[48]

An inclusive space is one in which individuals are accepted and empowered for their differences — not just tolerated.[49] In other words, inclusion is about "sense of belonging" and ensuring that a space is welcoming and accessible to all. Being accepted involves having one's diverse needs met, which is consistent with substantive equality, or equity. Indeed, inclusion "goes one step beyond diversity and is often a by-product of equity."[50] Inclusion is also distinguished from diversity because having a highly diverse space does not necessarily imply inclusion: "being present is not enough. Inclusion means that diverse people feel heard, seen, connected, and valued."[51] Diversity is bringing in some number of differently identified or situated individuals while inclusion requires systemic change in the form of organizational cultural shift. Only then can those differently identified and situated individuals meaningfully participate and contribute to the organization.

This definition of inclusion, in some ways, sounds like Justice Sossin's definition of active representation.[52] An individual experiences inclusion when they express their views and feel that these views are seen and heard. However, an important distinction is that the individual who has experienced inclusion through having their views accepted may not necessarily represent the views of those who identify with them. The individual may very well practice passive representation.[53] That is, they look different from the dominant norm in the space but hold or at least externally adopt the views of the dominant groups. Organizations may, therefore, not always "capitalize on the idea that if people feel that they belong and that they are accepted for their uniqueness in the broader group, they will contribute different perspectives that benefit the whole"[54] until they acknowledge these nuances of equity, diversity, and inclusion.

The work surrounding recruitment into professional programs and subsequent admission into the professions is largely about diversity and passive representation.[55] How equity-seeking individuals fare once recruited and admitted is often neglected. Programs must consider ways to attract more equity-seeking students but also identify and resolve the obstacles[56] that equity-

48 *Ibid.*

49 De Mello, *supra* note 20 at 38.

50 *Ibid* at 37.

51 *Ibid* at 38.

52 Sossin, *supra* note 24 at 3.

53 *Ibid* at 4.

54 De Mello, *supra* note 20 at 38.

55 Sossin, *supra* note 24 at 4.

56 For example, the costs to submit applications or to take admission tests can be a barrier

seeking students who *do* apply already face in the process,[57] such as the high costs of admission tests. Professional programs should be especially attentive to the development of equitable admission processes for undergraduate and transfer programs that lead to accredited professional programs. After all, professional programs are the gatekeepers to professions like law and engineering whose graduates go on to serve a diverse public.

Stewart[58] points out that the language of diversity asks essentially different questions from inclusion and equity. Diversity is concerned with fundamentally different problems than equity and inclusion's attempts to achieve fairness and justice in society. Those who seek more than performative improvements must understand that:

> Diversity asks, "How many more of [pick any minoritized identity] group do we have this year than last?" Equity responds, "What conditions have we created that maintain certain groups as the perpetual majority here?" Inclusion asks, "Is this environment safe for everyone to feel like they belong?" Justice challenges, "Whose safety is being sacrificed and minimized to allow others to be comfortable maintaining dehumanizing views?"[59]

Setting out the definitions of equity, diversity, and inclusion reveals, among other things, that the three terms are different and not without limitations. For example, inclusion is ensuring diverse individuals are given equitable treatment so that they feel a sense of belonging. Activating one term without the other is difficult. While they should not be used interchangeably, they are likely to be activated together. Moreover, this section does not intend to present fixed definitions of the three terms given that their meanings depend on the theories and perspectives with which one examines each concept, as this section illustrated. Instead, this section outlined an EDI framework using *some of* the meanings and interpretations of the terms along with their limitations. This work proceeds to use this framework of EDI.

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to qualified applicants without the socioeconomic means to afford them. See Ontario Law Schools Application Site, "OLSAS — Fees" (last visited 27 August 2021), online: < ouac.on.ca/guide/olsas-fees > .

57 Different schools are known for different characteristics, such as being committed to "social justice", that may attract different applicants. See Bernise Carolino, "Canadian law schools: Resources if you're considering whether — and where — to become a lawyer" (last visited 26 August 2021), online (blog): < canadianlawyermag.com/resources/legal-education/canadian-law-schools-resources-if-youre-considering-whether-and-where-to-become-a-lawyer/328934 > .

58 Stewart, *supra* note 35.

59 *Ibid.*

4. OVERVIEW OF THE TRINITY WESTERN UNIVERSITY DECISIONS

Trinity Western University, a post-secondary institution "centred on the person and work of Christ"[60] and producing "graduates for the good of the world and the glory of God,"[61] sought to open a law school.[62] TWU's students and staff are subject to a religious code of conduct, the *Community Covenant Agreement* ("the *Covenant*"), requiring abstention from "sexual intimacy that violates the sacredness of marriage between a man and a woman."[63] The Federation of Law Societies of Canada ("FLSC") approved TWU's proposal to open a law school in 2013,[64] a decision that several law societies ultimately refused to adopt[65] given that the *Covenant* "effectively bans LGBT students,"[66] among other reasons. While the FLSC operates as an umbrella organization that ensures new law degree programs meet national requirements, its approval does not mandate automatic acceptance by individual provincial law societies, which retain the autonomous authority to accredit law schools based on their respective guidelines and considerations. Accordingly, even with FLSC's approval, TWU's law school needed to gain the separate approvals of each provincial law society to ensure its graduates could practice in those jurisdictions. The Law Society of Ontario ("LSO")[67] and the Law Society of British Columbia ("LSBC") were among the law societies that declined to approve TWU as a law school,[68] essentially meaning that graduates of TWU's law school would not be eligible for admission to the legal profession in these provinces. TWU appealed both law societies' decisions in their respective provinces. The British Columbia Court of Appeal determined that the LSBC's refusal to accredit TWU graduates was unreasonable given that the decision's negative impact on religious freedom,

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60 Trinity Western University, "Trinity Western University: Equipped for Life" (last visited 5 January 2022), online: <twu.ca/>.

61 Trinity Western University, "Commitments" (last visited 5 January 2022), online: <twu.ca/about-us/commitments>.

62 Alice Woolley & Amy Salyzyn, "Protecting the Public Interest: Law Society Decision-Making after Trinity Western University" (2019) 97:1 Can Bar Rev 70.

63 Trinity Western University, "Community Covenant Agreement" (last visited 18 August 2021) at 3, online (pdf): < twu.ca/sites/default/files/community_covenant_june_25_2019.pdf > ["Covenant"].

64 *LSBC v. TWU*, *supra* note 9 at para. 12.

65 *Trinity Western University v. Law Society of British Columbia*, 2016 BCCA 423, 2016 CarswellBC 3008 (B.C. C.A.) at paras. 33-40 [*TWU v. LSBC* BCCA], reversed 2018 CarswellBC 1510, 2018 CarswellBC 1511 (S.C.C.).

66 Canadian Common Law Program Approval Committee, "Report on Trinity Western University's Proposed School of Law Program" (December 2013) at paras. 25-31.

67 The Law Society of Ontario was previously the Law Society of Upper Canada. This work refers to the organization as LSO except when referring to styles of cause that use Law Society of Upper Canada.

68 *TWU v. LSBC BCCA, supra* note 65.

protected under section 2(a) of the *Charter*, outweighed the decision's positive impact on LGBTQ students.[69] The Court of Appeal for Ontario, on the other hand, upheld the LSO's decision to not accredit TWU, finding that this decision represented a reasonable balance between religious freedom and the LSO's statutory objectives to prevent discrimination and ensure diversity of the profession.[70] Both decisions proceeded to the Supreme Court of Canada.

On this issue, the Supreme Court held that the decisions to refuse accreditation of TWU's proposed law school were reasonable.[71] The majority of the Supreme Court concluded that under the *Doré/Loyola* framework,[72] the decisions not to accredit TWU's proposed law school represented a proportionate balance between religious freedom under the *Charter* and the statutory objectives of law societies to uphold and protect the public interest.[73] Specifically, the Supreme Court in *TWU v. LSUC* held that "equal access to the legal profession, diversity within the bar, and preventing harm to LGBTQ law students were all within the scope of [the law society's] duty to uphold the public interest."[74] Similarly, the Supreme Court held in *LSBC v. TWU* that "promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty: upholding and maintaining the public interest."[75]

Recent legal scholarship has acknowledged that the *TWU* decisions have become emblematic of the perpetual tug-of-war between religious freedom and LGBTQ rights in Canada. For example, Heather Shipley provides a nuanced view into how the Supreme Court's decisions signify a potential shift in recognizing LGBTQ+ rights and the complex interplay with religious freedoms.[76] Shipley's research underscores that while the Covenant was revoked, concerns remain about the experiences and rights of LGBTQ+ students, faculty and staff on the TWU campus and the broader issues relating to campus culture and sexual violence.[77] Furthermore, these decisions do not directly address the ongoing challenges faced by LGBTQ+ individuals within the TWU community, indicating that the legal battles around these issues could be far from over.[78]

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69 *TWU v. LSBC* BCCA *ibid*, at paras. 190-191.

70 *TWU v. LSUC* ONCA, *supra* note 68 at paras. 108-111, 143.

71 *TWU v. LSUC*, *supra* note 7 at para. 3; *LSBC v. TWU*, *supra* note 9 at paras. 84-85.

72 *LSBC v. TWU*, *ibid*, at paras. 302-304.

73 *TWU v. LSUC*, *supra* note 7 at para. 42.

74 *Ibid* at para. 20.

75 *LSBC v. TWU*, *supra* note 9 at para. 40.

76 Heather Shipley, "Sites of Resistance: LGBTQI+ Experiences at Trinity Western University" (2020) 35:1 CJLS 111.

77 *Ibid* at 114.

78 *Ibid* at 114.

Moreover, Léa Brière-Godbout and Marie-Andrée Plante use TWU's proposed law school as a focal point to articulate the mobilization of the minority label in religious challenges.[79] They clarify how *TWU*, despite not presenting a direct contest between rights, brought forward the critical dialogue between religious freedom and equality rights in the context of administrative law and law societies' responsibilities and statutory mandates.[80] This underscores the significant aspect that *TWU* and related decisions have been and continue to be pivotal in the broader discourse regarding the balance between religious freedoms and equality rights in Canada's legal and educational contexts.

5. ATTENTION TO 2SLGBTQ+ AND GENDER ISSUES AS AN INDICATOR OF EDI PROGRESS

To launch into the core analysis of this work, this section compares the two professions' attention to 2SLGBTQ+ issues as a case study given that the *Trinity Western University* cases partly grapple with whether discrimination against 2SLGBTQ+ students was sufficient basis to deny the accreditation of a new law school.[81] This comparison intends to reveal the relative progress of each profession in improving their consideration of EDI principles. Engineering's trailing progress serves to substantiate the adoption of the Supreme Court's EDI-centred interpretation of the public interest mandate.

The field of law has embodied the rights and experience of 2SLGBTQ+ persons as substantive matters for almost two decades[82] while these topics receive little acceptance as substantive — or "technical" — engineering matters. For example, provisions requiring segregated washrooms in the *National Building Code*,[83] a model engineering standard, are silent on how various gender identities and expressions might map to sex-segregated washrooms.[84] The prevalent perception in engineering is that the experience of users is for the attention of planners, architects, interior designers, and such, not engineers.[85] Even engineers

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79 Léa Brière-Godbout and Marie-Andrée Plante, "Religious Challenges to Anti-Discrimination Law: The Mobilization of the "Minority Label" (2020) 66:2 McGill LJ 377.

80 *Ibid* at 400.

81 Trinity Western University, "Covenant", *supra* note 63.

82 See e.g. *TWU v. LSUC*, *supra* note 7. See also early SCC cases where constitutional rights based on sexual orientation were formally adjudicated, e.g. *Egan v. Canada*, 1995 CarswellNat 6, 1995 CarswellNat 703, 124 D.L.R. (4th) 609, [1995] 2 S.C.R. 513 (S.C.C.) or *Vriend v. Alberta*, 1998 CarswellAlta 210, 1998 CarswellAlta 211, 156 D.L.R. (4th) 385, [1998] 1 S.C.R. 493 (S.C.C.).

83 *National Building Code of Canada*, 2015, online (pdf): <publications.gc.ca/collections/collection_2019/cnrc-nrc/NR24-28-2018-eng.pdf> [*NBCC 2015*].

84 See e.g. *ibid*, s 3.7.2.2.

85 Royce Francis, Marie Paretti & Rachel Riedner, "Exploring the role of engineering judgment in engineer identity formation through student technical reports" (2020), online: <ieeexplore.ieee.org/document/9273970>.

who believe the culture of the engineering profession could use more equity, diversity, and inclusion considerations are not often receptive to the need to better account for differently identified and situated users in technical standards and practices. This view likely flows from engineering education's lack of consideration of different users, as the above positionality statement noted, while both core/foundational and advanced law courses directly point to a variety of identities, including sexual orientation, gender, race, and disability.[86] This means that recent and current law students who have never thought about, for example, 2SLGBTQ+ persons and their experiences before law school will have had the chance to do so by the time they enter the profession. Thinking once or twice about 2SLGBTQ+ issues during law school may not be perfectly telling of how lawyers actually treat 2SLGBTQ+ members of the profession or the public, but it at least offers a level of exposure that the engineering discipline does not.

Bryce Hughes demonstrates and explores the consequences of this lack of exposure in his work.[87] Many of the gay[88] engineering students that Hughes interviewed used the word "neutral" to describe the climate[89] in engineering for 2SLGBTQ+ students.[90] Responses like this indicate that "a norm was present within the [engineering] school that acknowledgment of LGBT identities and experiences was irrelevant to the field of engineering."[91] Such a norm does not seem to exist in Canadian law schools or at least not to the same extent.[92] Engineering students, on the other hand, report a silence around 2SLGBTQ+ identities in engineering because "there's this pretend objectivity where [. . .] if we don't talk about that we're doing the experiment, then all of a sudden, it's objective and there's no human influence."[93] Many of Hughes's interviewees reported that the invisibility of their identity made for awkwardness or discomfort around the topic of sexual identity, but most interestingly, they felt like the invisibility also masked any hostility, hence their perception that the climate is neutral.[94]

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86 Again, the reading of *TWU v. LSUC*, *supra* note 7 in public and/or constitutional law class is a good example.

87 Bryce E Hughes, "'Managing by Not Managing': How Gay Engineering Students Manage Sexual Orientation Identity" (2017) 58:3 J College Student Development 385 at 385.

88 Hughes only interviewed gay engineering students but extrapolated his findings by relying on related studies that included other 2SLGBTQ+ identities.

89 *Ibid* at 392.

90 *Ibid*.

91 *Ibid* at 393.

92 See e.g. Law School Admission Council, "LGBTQ+ Guide to Law Schools" (last visited 20 August 2021), online: <lsac.org/discover-law/diversity-law-school/lgbtq-law-school/lgbtq-guide-law-schools> (choose "Canada" under "Schools Who Responded to the 2018 Survey" to see the 6 Canadian schools that responded to the LSAC 2SLGBTQ+ survey. No such initiative exists for Canadian engineering programs).

93 Hughes, *supra* note 87 at 393.

What distinguishes the experiences and tendencies of engineering students from law students may flow from the combination of the overrepresentation of male persons[95] in engineering (this data is only segregated by sex and not gender) and the discipline's emphasis on being "technical."[96] This combination[97] perpetuates the "association of masculinity with instrumentality"[98] and the notion that "masculinity is demonstrated through technological mastery or prowess."[99] The hegemonic masculinity creates an environment in which "technical work and expertise in the field tends to be valued over the social aspects,"[100] vitiating the pertinence of the identities of those doing the work and those whom the work intends to serve. Hegemonic masculinity is, of course, also live in law even though law is more of an "art" and less of a "technical field" relative to engineering. In engineering lab courses, for example, students who are men tend to carry out lab testing tasks such as loading concrete columns into the test frame, likely because it appears to require the most technological and instrumental aptitude,[101] while students who are women tend to record and analyze data.[102] An analogous example in the legal profession is the overrepresentation of men in litigation[103] and the perception that alternative dispute resolution is more "feminine."[104] Despite these similarities, the legal profession has demonstrated awareness of and engagement with differences within members of the public, including the various law societies' refusal to recognize TWU's proposed law school due to its discrimination against 2SLGBTQ+ persons. The engineering profession has yet to recognize its role

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94 *Ibid* at 394.

95 Only 13.1% of engineers in Canada identified as female in 2018, compared to 41.6% for lawyers. See Engineers Canada, "2018 National Membership Information" (last visited 20 August 2021), online: <engineerscanada.ca/reports/national-membership-report/2018>. See also Federation of Law Societies of Canada, "2018 FLSC Statistics Report" <flsc.ca/wp-content/uploads/2020/02/2018FLSCStatsReport.pdf> (last visited 14 August 2021).

96 Hughes uses the term "technical" loosely in his work to refer to skills that are not soft or social skills. See Hughes, *supra* note 87 at 393.

97 This combination is, of course, present in other fields, especially within STEM.

98 Hughes, *supra* note 88 at 389.

99 *Ibid* at 388.

100 *Ibid.*

101 J Gregg Robinson & Judith S McIlwee, "Men, Women, and the Culture of Engineering" (1991) 32:3 Sociological Q 403.

102 Marina Micari, Pilar Pazos & Mitra J Z Hartmann, "A Matter of Confidence: Gender Differences in Attitudes Toward Engaging in Lab and Course Work in Undergraduate Engineering" (2007) 13:3 J Women & Minorities in Science &Engineering 279 (the study unfortunately does not account for gender identities and expressions other than men and women).

103 Carrie Menkel-Meadow, "The Comparative Sociology of Women Lawyers: The 'Feminization' of the Legal Profession" (1986) 24:4 Osgoode Hall LJ 897 at 902.

104 *Ibid* at 914.

in, for example, updating washroom-related standards to reflect gender identities and expressions instead of sex — that is, to make all washrooms universal.

The different amount of scholarly work in law and engineering about or relating to 2SLGBTQ+ persons reflects the two discipline's different treatment of the identities of members of the public. A sizeable body of literature on 2SLGBTQ+ issues exists in law and law-adjacent journals that are, by all accounts, substantive.[105] These journal articles engage with questions of the identities, rights, and experiences of 2SLGBTQ+ persons to shift the norms of the legal profession and to uncover its responsibilities to engage with diversely identified and situated members of society. The core or "technical" journals in engineering do not include articles of this nature. A search of "LGBT" and variations of the keyword in prominent technical engineering journals[106] like the *Canadian Journal of Civil Engineering*[107] or the *Canadian Journal of Chemical Engineering*[108] turned up no results even though the work of civil engineers and chemical engineers impact the lives of 2SLGBTQ+ persons. Conceivable examples include the role civil engineers could play in standardizing universal washrooms and the role chemical engineers can play in the advancement of gender-affirming hormone therapy. That expecting to see articles relating to these examples in "technical" engineering journals seems farfetched under the *status quo* signals the magnitude of change necessary in the culture and attitude of the engineering profession in order for it to catch up to law's progress on EDI.

6. ADMISSION TO THE PROFESSIONS OF LAW AND ENGINEERING

This section substantiates the transferability of the interpretation of the legal profession's public interest duty in *TWU* to engineering by demonstrating that many aspects of the requirements for admission to the law and engineering professions are similar. Law and engineering are both self-regulated[109] and exclusive-right-to-practice[110] professions in Canada with rigorous admission

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[105] See e.g. Jena McGill & Amy Salyzyn, "Queer Insights on Women in the Legal Profession" (2014) 17:2 Leg Ethics.

[106] The word "technical" is used because these issues do appear in what the field would consider "non-technical" journals, like the *Journal of Engineering Education*. See e.g. Michael C Loui, "Ethics and the development of professional identities of engineering students" (2005) 94:4 J Engineering Education 383.

[107] A monthly peer-reviewed scientific journal published by the National Research Council (NRC) Press.

[108] A monthly peer-reviewed journal published by Wiley on behalf of The Canadian Society for Chemical Engineering.

[109] See Gordon Andrews, Patricia Shaw & Gordon McPhee, *Canadian Professional Engineering and Geoscience Practice and Ethics*, 6th ed (Toronto: Top Hat Publishing, 2018) at 12 (for engineering). See Federation of Law Societies of Canada, "Our Members: Canada's Law Societies" (last visited 15 August 2021), online: <flsc.ca/about-us/our-members-canadas-law-societies> (for law).

[110] *Ibid.*

requirements, including graduating from an accredited/approved program,[111] passing licensing exams,[112] and acquiring work experience that satisfies specific criteria.[113] Both law and engineering schools have an air of "prestige" for their high admission standards and are only accessible to individuals who can afford the high tuition costs of these programs.

The Federation of Law Societies of Canada ("FLSC") approves common law programs that lead to entry to provincial bar admission programs[114] and Engineers Canada's Canadian Engineering Accreditation Board ("CEAB") approves engineering programs that meet the academic requirements under provincial regulators of the engineering profession.[115] In both law and engineering, the national bodies that oversee accreditation require the approval — in various forms — of provincial regulators. In law, graduates of a school accredited by FLSC that is not approved by a provincial regulator cannot obtain licensure to practice law in that province.[116] In engineering, the accreditation process begins "at the invitation of a particular institution and with the

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[111] See Engineers Canada, "Accredited Engineering Programs in Canada by Institution" (last visited 14 August 2021), online: <engineerscanada.ca/accreditation/accredited-programs/institution> ["Accredited Engineering Programs"]. See also Federation of Law Societies of Canada, "Approving Canadian Law School Programs" (last visited 15 August 2021), online: <flsc.ca/law-schools> ["Law School Programs"].

[112] The licensing exam for law varies by province; for example, law societies in Alberta, Manitoba, and Saskatchewan use the Practice Readiness Education Program (PREP) administered by the Canadian Centre for Professional Legal Education (CPLED). See Law Society of Manitoba, "Articling Program & PREP — Overview" (last visited 15 August 2021), online: <lawsociety.mb.ca/become-a-lawyer/articling-program-prep-overview>. In engineering, the professional practice exam has been nationalized to become the National Professional Practice Exam (NPPE), used by all provinces and territories except Saskatchewan and Québec. See Professional Engineers Ontario, "National Professional Practice Exam (NPPE)" (last visited 15 August 2021), online: <https://peo.on.ca/apply/become-professional-engineer/national-professional-practice-exam>.

[113] The experience requirements vary by province for both engineering and law. See e.g. Association of Professional Engineers and Geoscientists of Alberta (APEGA), "Work Experience Requirements for Engineering Applicants" (last visited 14 August 2021), online: < https://www.apega.ca/apply/membership/professional-member/work-experience> (for requirements in Alberta). See Law Society of Alberta, "Articling" (last visited 14 August 2021), online: <lawsociety.ab.ca/lawyers-and-students/become-a-lawyer/articling> (for law).

[114] Federation of Law Societies of Canada, "Law School Programs", *supra* note 111 (with the exception of Quebec, where the requisite education is in civil law).

[115] Canadian Engineering Accreditation Board, "Accreditation Criteria and Procedures" (last visited 20 August 2021), online (pdf): <engineerscanada.ca/sites/default/files/accreditation-criteria-procedures-2016-final.pdf> ["Accreditation Criteria and Procedures"].

[116] *TWU v. LSUC* ONCA, *supra* note 68 (shows that co-applicant Brayden Volkenant, a student who wished to attend TWU's law school, sought LSUC's accreditation of TWU because "[h]e is interested in practising law in Ontario after graduating from law school" at para. 29).

concurrence of the [regulator] having jurisdiction."[117] Provincial regulators in both professions, therefore, play vital roles in deciding which institutions can provide the education necessary to enter each profession. That TWU's engineering transfer programs make up part of the education necessary to enter the engineering underscores the need for engineering regulators to adopt the interpretation of the public interest mandate that explicitly considers EDI.

CEAB oversees 279 accredited engineering programs at 44 higher education institutions on a renewal basis using a set of *Accreditation Criteria and Procedures*.[118] Students who graduate from an approved engineering school automatically meet the academic requirement to apply for licensure with a provincial engineering regulator.[119] CEAB's stated reasons for accreditation include that "regular accreditation of programs fosters the continual improvement of education; accreditation ensures that programs are meeting the high standards necessary for licensure; degrees from accredited programs are accepted by engineering regulators nationwide and are also recognized by our international partners."[120]

Similarly, candidates must have obtained a law degree from an FLSC-approved Canadian law school or a Certificate of Qualification from FLSC's National Committee on Accreditation[121] before they are eligible for provincial bar admission programs.[122] As of 2015, Canadian common law programs must comply with FLSC's *National Requirement* for their graduates to be eligible for law society admission programs.[123] The *National Requirement* specifies the competencies and skills graduates must have acquired as well as the academic program and learning resources law schools must have in place.[124] Section 2.1.7 of the *National Requirement* requires candidates to be familiar with "the

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117 Canadian Engineering Accreditation Board, "Manual of Accreditation Procedures" (last visited 20 August 2021) at 3, online (pdf): <engineerscanada.ca/sites/default/files/accreditation/2021-2022-cycle/Manual_of_Accreditation_Procedures%20%28Accreditation%20Visit%20Cycle%202021-2022%29.pdf> ["Manual of Accreditation Procedures"].

118 See e.g. Canadian Engineering Accreditation Board, "Accreditation Criteria and Procedures", *supra* note 115.

119 This is so because Engineers Canada can only proceed to consider the accreditation of an engineering program after receiving permission to do so from the provincial regulator in question. See Canadian Engineering Accreditation Board, "Manual of Accreditation Procedures", *supra* note 117 at 3.

120 Canadian Engineering Accreditation Board, "Accreditation Criteria and Procedures", *supra* note 115.

121 Federation of Law Societies of Canada, "National Committee on Accreditation" (last visited 15 August 2021), online: <nca.legal>.

122 Federation of Law Societies of Canada, "Law School Programs", *supra* note 111.

123 Federation of Law Societies of Canada, "National Requirement" (last visited 15 August 2021), online (pdf): <flsc.ca/wp-content/uploads/2018/01/National-Requirement-Jan-2018-FIN.pdf> ["National Requirement"].

124 Federation of Law Societies of Canada, "Law School Programs", *supra* note 111.

importance and value of serving and promoting the public interest in the administration of justice."[125] Interestingly, despite the Supreme Court's interpretation of the legal profession's duty to protect the public interest as including EDI considerations, FLSC has not updated the *National Requirement* to make reference to these considerations.[126]

Beyond similar accreditation procedures, both law and engineering gatekeep their accredited programs with admission standards like high grade-point averages ("GPA") and well-rounded résumés. Among other things, common law programs require the Law School Admission Test (LSAT),[127] and engineering programs require a set of university-track science and math courses in high school.[128] Students also have to have the financial means to pay tuition and associated expenses. In the 2019-2020 application cycle, about 35% of Ontario law school applicants were admitted to one or more law schools[129] and 20% of students who applied to Ontario engineering programs were admitted to their first-choice program at an Ontario university.[130]

English common law programs generally require applicants to have obtained a 3.7 cumulative GPA in their prior post-secondary studies.[131] Many schools use GPA and LSAT scores to filter out at least some applications.[132] Engineering schools like the University of Waterloo, University of Toronto, and McGill University require candidates to have a minimum high school average of 90%,

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125 Federation of Law Societies of Canada, "National Requirement", *supra* note 123.

126 As of January 2023.

127 LSAT requirements and weighting vary by school and province. For example, McGill University in Québec does not require an LSAT score for admission to the joint civil and common law program but will review the score if available. See McGill University, "Law School Admission Test (LSAT)" (last visited 14 August 2021), online: <mcgill.ca/law/fr/bcl-jd/guide-admissions/lsat>. The University of Ottawa does not require an LSAT score for admission to the French common law program; it requires an LSAT score for the English common law program, but the score "may carry less weight in the Admission Committee's evaluation of the application" if English is not the applicant's first language. See University of Ottawa, "Admission Criteria" (last visited 14 August 2021), online: <uottawa.ca/faculty-law/common-law/admissions/evaluation-applications>.

128 Advanced functions, calculus and vectors, chemistry, physics, and English are common course requirements for admission to accredited engineering programs in Canada. See e.g. University of Waterloo, "Ontario secondary school applicants" (last visited 15 August 2021), online: <uwaterloo.ca/engineering/undergraduate-students/application-process/applicant-type/ontario-secondary-school-applicants>.

129 Ontario Universities' Application Centre, "Law School Application Statistics" (last visited 14 August 2021), online: <ouac.on.ca/statistics/olsas-application-statistics>.

130 Ontario Universities' Application Centre, "Secondary School Application Statistics" (last visited 14 August 2021), online (pdf): <ouac.on.ca/docs/stats/uapp/aug21/aug_05_2021_ouac1_pgmgrp_ssuas_app.pdf>.

131 See e.g. Osgoode Hall Law School, "The Review Process" (last visited 15 August 2021), online: *York University* < https://www.osgoode.yorku.ca/programs/juris-doctor/juris-doctor-admissions/application-components/ >.

132 *Ibid.*

extracurricular activities that demonstrate leadership, and employment experience to be competitive.[133] The average could be higher for programs like biomedical engineering and software engineering. For example, the probability of a candidate with a high school average of 95% or higher receiving an offer to software engineering at the University of Waterloo is only 33%.[134]

Accredited professional programs like law, engineering, medicine, dentistry, and pharmacy also have high tuition rates. For example, pharmacy and engineering programs at the University of Waterloo cost approximately $17,000 annually in 2019 in comparison to the annual cost of $7,000 for non-professional science programs at the same school in the same year for Canadian citizens and permanent residents.[135] The difference between the tuition of international and domestic students is also greater in professional programs than non-professional programs at almost every Canadian institution.

The two professions differ in the level of education necessary for admission. Completion of a high school diploma program allows students to apply to accredited engineering programs in all provinces[136] except for Québec, where a diplôme d'études collégiales is required.[137] Approved common law programs are among the Canadian undergraduate programs that require applicants to "have an undergraduate degree or [be] within one-year of receiving a degree"[138] to be considered for admission. Many law schools temper admission expectations with statements like "it is rare that an applicant is admitted without completing their full bachelor's degree."[139] Engineering has not formally joined the ranks of undergraduate programs that require an undergraduate degree for admission,

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133 See e.g. McGill University, "Admission requirements for September 2021 Ontario high school applicants" (last visited 14 August 2021), online: <mcgill.ca/undergraduate-admissions/apply/requirements/Ontario> (check "Last year's cut-offs (2020)").

134 See University of Waterloo, "Admission Averages" (last visited 15 August 2021), online: <uwaterloo.ca/engineering/undergraduate-students/application-process/admission-averages>.

135 See University of Waterloo, "Fee Schedule for Canadian and Permanent Resident Undergraduates Fall 2019" (last visited 14 August 2021), online: <uwaterloo.ca/finance/student-financial-services/tuition-fee-schedules/fee-schedule-canadian-and-permanent-resident-undergraduates-3>.

136 See e.g. University of British Columbia, "UBC Engineering Admission Requirements" (last visited 14 August 2021), online: <engineering.ubc.ca/admissions/undergraduate/high-school>.

137 See e.g. Polytechnique Montréal, "Conditions d'admission au baccalauréat en ingénierie" (last visited 14 August 2021), online: <polymtl.ca/admission/exigences-academiques>. Note that completion of CÉGEP is generally a requirement for admission to university programs in Québec and is not unique to engineering.

138 Schulich School of Law, "Admissions Categories & Program Options" (last visited 14 August 2021), online: <dal.ca/faculty/law/admissions/jd-admissions/admissions-categories-program-options.html>.

139 University of Calgary, "How do I apply to UCalgary Law?" (last visited 14 August 2021), online: <law.ucalgary.ca/future-students/how-to-apply>.

but successful engineering applicants increasingly have college diplomas (outside of Québec) and university transfer program certificates given the aforementioned competitive nature.[140] Canadian universities with engineering programs not accredited by CEAB often have transfer program agreements with universities that house CEAB-accredited programs;[141] these agreements allow students to bridge into the second or third year of the accredited program after completing the non-accredited transfer program.[142] Additionally, high school graduates who complete Advanced Placement (AP) or International Baccalaureate (IB) curricula are admitted to engineering programs at a significantly higher rate,[143] indicating that the level of education required to be considered for admission to engineering may be headed in the same direction as fellow professional programs like law and medicine.

Both law and engineering cite their high admission standards as a means to fulfill the professional obligations to safeguard the public with competent practitioners.[144] Law and engineering programs also justify their high costs the same way: they help ensure the highest quality of training for future practitioners.[145] However, that both fields need to critically examine their gatekeeping practices to better fulfill their shared duty to protect the public interest is perhaps only secondary to engineering's need to examine how it relied on a system so similar to that of the legal profession to arrive at the opposite opinion about TWU.

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140 It is worth clarifying that high school applicants still make up the majority of applicants. See e.g. University of Toronto, "Engineering Applicant Census" (last visited 14 August 2021), online: <discover.engineering.utoronto.ca/how-to-apply/faqs/#census>.

141 Engineers and Geoscientists British Columbia, "Post-Secondary List", *supra* note 15.

142 For example, Thompson Rivers University has an Engineering Transfer program that allows students who complete this program to enter directly into year two of accredited engineering programs at the University of British Columbia or the University of Victoria. See Thompson Rivers University, "Engineering Transfer" (last visited 14 August 2021), online: <tru.ca/programs/catalogue/engineering-transfer.html>.

143 See e.g. University of Waterloo, "Frequently Asked Questions" (last visited 15 August 2021), online: <uwaterloo.ca/engineering/undergraduate-students/application-process/frequently-asked-questions>.

144 See Daniel Gatto, "Strategies for Succeeding in Law School" (14 September 2020), online: <cba.org/Sections/Young-Lawyers/Articles/2020/Strategies-for-succeeding-in-law-school> (for law). See Professional Engineers Ontario, "Guideline", *supra* note 6.

145 See Julius Melnitzer, "Canada's legal tuition fees among highest in the world" (28 November 2022), online: <canadianlawyermag.com/resources/legal-education/canadas-legal-tuition-fees-among-highest-in-the-world/371887> (for law). See Chris Martin, "If we want more engineers, maybe we should make it cheaper to become one" (6 January 2013), online: <theglobeandmail.com/news/national/education/if-we-want-more-engineers-maybe-we-should-make-it-cheaper-to-become-one/article6957907/#:~:text=In%20Canada%2C%20graduate%20and%20professional,fees%20at%20a%20faster%20pace> (for engineering).

7. INTERPRETING THE DUTY TO PROTECT THE PUBLIC INTEREST IN LAW AND ENGINEERING

This section juxtaposes the statutory public interest mandates of the LSO and Professional Engineers Ontario ("PEO") as a case study to demonstrate that the Supreme Court's interpretation of the legal profession's public interest mandate is transferable to the engineering profession. EGBC includes TWU on its list of institutions offering engineering transfer programs[146] while the LSBC declined to approve TWU's law school given that doing so would result in unequal access to the profession, limit diversity within the profession, and harm 2SLGBTQ+ students.[147] EGBC and CEAB make no indication that they considered these implications prior to recognizing TWU as part of the pipeline to the engineering profession,[148] something they would likely have to do under an EDI-centred interpretation of their public interest mandate.

If the statutory regimes differ significantly, then the LSO's approach to their public interest mandate may be irrelevant to PEO just as the Ontario Superior Court of Justice [149] found that the TWU accreditation decision of the British Columbia College of Teachers ("BCCT") is not comparable to that of the LSBC due to their different statutory regimes.[150] The Ontario Superior Court, in its judicial review of LSO's decision, had to contend with the impact of *TWU v. BCCT*,[151] a prior case where the *Covenant* was the basis for another professional body denying accreditation of a TWU program. The Court's decision in *TWU v. LSUC*[152] found that BCCT had a different statutory regime than the LSUC and

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146 Programs that bridge into accredited engineering programs at the university level. See Engineers and Geoscientists British Columbia, "Post-Secondary List", *supra* note 16.

147 Set out in various regulatory and court decisions. See e.g. *TWU v. LSUC*, *supra* note 7 at para. 20.

148 Although TWU does not house accredited engineering programs, TWU is recognized as having a transfer agreement that allows students who complete the transfer program to enter directly into year two of engineering programs at the University of Victoria, which are accredited. See Engineers Canada, "Accredited Engineering Programs", *supra* note 111.

149 This is the only court in the *TWU v. LSUC* history that distinguished LSUC's statutory mandate from that of BCCT. Subsequent courts (2016 ONCA 518, 2016 CarswellOnt 10465 (Ont. C.A.), affirmed 2018 CarswellOnt 9570, 2018 CarswellOnt 9571 (S.C.C.) and 2018 SCC 33, 2018 CarswellOnt 9570, 2018 CarswellOnt 9571 (S.C.C.)) do not mention BCCT.

150 *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, 2015 CarswellOnt 10273 (Ont. Div. Ct.) at para. 60 [*TWU v. LSUC* ONSC], affirmed 2016 CarswellOnt 10465 (Ont. C.A.), affirmed 2018 CarswellOnt 9570, 2018 CarswellOnt 9571 (S.C.C.) (overriding the FLSC Special Advisory Committee's finding that it had "not received evidence that would, in its opinion, lead to a different outcome than occurred in the *BCCT* case"). See Woolley & Salyzyn, *supra* note 62 at 76.

151 *Trinity Western University v. College of Teachers (British Columbia)*, 2001 SCC 31, 2001 CarswellBC 1016, 2001 CarswellBC 1017 (S.C.C.).

152 *TWU v. LSUC* ONSC, *supra* note 150. 2015 ONSC 4250, 2015 CarswellOnt 10273 (Ont.

that the two regulators' accreditation decisions are, therefore, not comparable.[153] The Ontario Superior Court highlighted that "unlike [LSUC], the public interest mandate of the British Columbia College of Teachers was directly, and solely, linked to the setting of standards for the education, professional responsibility and competence of its members."[154]

The LSO declined to accredit the proposed law school at TWU on the grounds that the institution's mandatory *Covenant* contradicted the LSO's duty to protect the public interest, notably under sections 4.1 and 4.2 of the *Law Society Act*[155] ("LSA"):

> **Function of the Society**
>
> **4.1** It is a function of the Society to ensure that,
>
> (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
>
> (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.
>
> **Principles to be applied by the Society**
>
> **4.2** In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
>
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
> 3. The Society has a duty to protect the public interest.

Div. Ct.), affirmed 2016 CarswellOnt 10465 (Ont. C.A.), affirmed 2018 CarswellOnt 9570, 2018 CarswellOnt 9571 (S.C.C.).

153 *TWU v. LSUC* ONSC, *supra* note 150 at para. 60. Although not central to the argument in this work, it is worth noting that the *BCCT* case and the *TWU* cases had other differences. In *BCCT* at para. 35, the Court concluded that "[t]here is nothing in the TWU Community Standards, which are limited to prescribing conduct of members while at TWU, that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. The evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct."

154 *TWU v. LSUC* ONSC, *supra* note 150 at para. 60.

155 RSO 1990, c L.8 [*LSA*].

> 4. The Society has a duty to act in a timely, open and efficient manner.
>
> 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.[156]

Ontario's *Professional Engineers Act*[157] ("*PEA*") sets out the principal object of PEO and additional objects for the purpose of carrying out the principal object:

> **Association**
>
> **2** (1) [. . .]
>
> **Principal object**
>
> (3) The principal object of the Association is to regulate the practice of professional engineering and to govern its members, holders of certificates of authorization, holders of temporary licences, holders of provisional licences and holders of limited licences in accordance with this Act, the regulations and the by-laws in order that the public interest may be served and protected.
>
> **Additional objects**
>
> (4) For the purpose of carrying out its principal object, the Association has the following additional objects:
>
> 1. To establish, maintain and develop standards of knowledge and skill among its members.
>
> 2. To establish, maintain and develop standards of qualification and standards of practice for the practice of professional engineering.
>
> 3. To establish, maintain and develop standards of professional ethics among its members.
>
> 4. To promote public awareness of the role of the Association.
>
> 5. To perform such other duties and exercise such other powers as are imposed or conferred on the Association by or under any Act.[158]

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[156] *Ibid*, ss 4.1-4.2.

[157] RSO 1990, c P.28 [*PEA*].

[158] *Ibid*, ss 2(3)-2(4).

The two profession's public interest mandates seem to apply to comparable scopes of activities in Ontario. In the *LSA*, "public interest" arises in section 4.2, which appears to apply to the entirety of the function of the Law Society under section 4.1 given the wording of "the Society shall have regard to the following principles [in] carrying out its functions."[159] This is the provision upon which the Supreme Court relied in *TWU v. LSUC* to find that the LSO was reasonable in concluding "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."[160]

Courts have only pointed to the engineering profession's duty to protect the public interest[161] but have not interpreted or elaborated on this duty. In the *PEA*, "public interest" arises in s 2(3) and appears to apply to the entirety of the principal object of PEO given the wording that PEO should carry out its full object "in order that the public interest may be served and protected."[162] Section 5 of PEO's *Guideline: Professional Engineering Practice* indicates that "engineering is the only profession where the primary responsibility is to the third party, the public."[163] PEO's *Code of Ethics* also "ensures that practitioners exercise a high standard of care in their work and are aware of their role in protecting or promoting the interests of the public."[164]

TWU v. BCCT makes clear that scope is a key factor in determining whether two statutory regimes are sufficiently similar to share an interpretation. PEO's additional objects under section 2(4).2 of the *PEA* to "establish, maintain and develop standards of qualification and standards of practice for the practice of professional engineering" are nearly identical to the BCCT's mandates. However, "who" section 2(4).2 of the *PEA* applies to is different; section 2(4).2 states that the PEO must carry out these activities for "the practice of engineering" and not, as in the BCCT statute, for just "[. . .] its members."[165] Moreover, the *PEA* provisions immediately preceding and following, sections 2(4).1 and 2(4).3, both specifically name "its members" as the target. Had the legislature wanted section 2(4).2 to apply only to members of the PEO, it likely would have stated so explicitly as it did in neighbouring provisions. Section 2(4).2, therefore, conceivably requires PEO to "establish, maintain and develop standards of qualification" for everyone who practices engineering, including

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159 *LSA*, *supra* note 155, s 4.2.

160 *TWU v. LSUC*, *supra* note 7 at paras. 18-20.

161 See e.g. *Salehi v. Assn. of Professional Engineers of Ontario*, 2015 ONSC 7271, 2015 CarswellOnt 18039 (Ont. S.C.J.) at para. 48, additional reasons 2015 CarswellOnt 19448 (Ont. S.C.J.), affirmed 2016 CarswellOnt 8611 (Ont. C.A.), leave to appeal refused 2017 CarswellOnt 1203, 2017 CarswellOnt 1204 (S.C.C.).

162 *PEA*, *supra* note 157, s 2(3).

163 Professional Engineers Ontario, "Guideline", supra note 6.

164 *Ibid.*

165 *TWU v. LSUC* ONSC*, supra* note 150.

students learning to practice engineering and often practicing engineering under the supervision of a licensed engineer. Overall, the duty to protect the public interest appears to apply to the same scope of activities for the LSO and PEO. That is, both regulators' public interest mandates apply to *all* functions and objects, not just when they are "linked to the setting of standards for the education, professional responsibility and competence of its members,"[166] as was the case in *TWU v. BCCT*.

8. CONCLUSION

This work demonstrated that the Supreme Court's interpretation of the legal profession's public interest mandate should apply to the engineering profession, imposing on engineers an obligation to uphold equity, diversity, and inclusion principles, including in their creation of technologies from washrooms to artificial intelligence. This interpretation may also impact how engineering regulators treat TWU's engineering transfer program and how CEAB should respond if TWU sought accreditation of its engineering program(s) in the future. While TWU does not currently house CEAB-accredited engineering programs, TWU appears under EGBC's list of post-secondary schools that house engineering transfer programs.[167] Through this pipeline, the engineering profession is disadvantaging students unable to attend TWU without violating the institutional *Covenant*, one of the very reasons for which various law societies refused to approve TWU's law school.[168]

If EGBC were to present an explanation for recognizing TWU, it might sound similar to the dissenting opinion in the *TWU* cases.[169] The dissent found that, pursuant to the enabling statutes of the LSBC and LSO, the only proper purpose of an accreditation decision is to ensure that individual graduates are fit to become members of the legal profession after meeting minimum standards of competence and ethical conduct.[170] The dissent saw no concerns regarding the fitness of prospective TWU graduates other than that the law school had yet to receive accreditation.[171] The dissent was of the opinion that the state and its

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[166] *Ibid.*

[167] Engineers and Geoscientists British Columbia, "Post-Secondary List", *supra* note 15.

[168] Worth noting is that EGBC may have chosen to recognize TWU not necessarily because it interprets its statutory mandate in a certain way. Rather, EGBC likely. Indeed, EGBC has not released a public explanation about its decision to include TWU under its recognized institutions, nor are there indications that EGBC and UVic considered TWU's mandatory Covenant and its impact on EDI despite the engineering profession's duty to protect public interest.

[169] *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, 2018 CarswellOnt 9570, 2018 CarswellOnt 9571 (S.C.C.), affirming 2016 ONCA 518, 2016 CarswellOnt 10465 (Ont. C.A.), affirming 2015 ONSC 4250, 2015 CarswellOnt 10273 (Ont. Div. Ct.).

[170] Federation of Law Societies of Canada, "National Requirement", supra note 123.

[171] *TWU v. LSUC*, *supra* note 7 at para. 260.

delegated regulatory bodies must maintain their neutrality by accepting different views and values in line with the principles of secularism and pluralism, rather than favouring or hindering any specific belief (or non-belief).[172]

Under the majority decisions in *TWU v. LSUC* and *LSBC v. TWU*, however, the LSO's approach to TWU should be relevant to the PEO, whose statutory mandate to protect the public interest should be live in accreditation conversations. Moreover, given the ease of attaining national mobility[173] in engineering, PEO and other provincial regulators should more critically examine EGBC's choice to recognize TWU's engineering transfer program and ensure that CEAB does not accredit TWU's engineering programs. Fair access for 2SLGBTQ+ persons and persons of other equity-seeking identities to the engineering profession must be of concern to CEAB and provincial engineering regulators. Adopting an EDI-centred interpretation of the engineering profession's public interest mandate may be among the ways to address this concern.

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172 *Ibid* at para. 267.

173 Engineers Canada, "Mobility across Canada" (last visited 18 August 2021), online: <engineerscanada.ca/become-an-engineer/mobility-across-canada>.