SCC File No. 37209 & 37318

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
AND THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS
(Appellants)

-and-

LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

AND BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Appellant)

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(Respondents)

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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SCC File No. 37209 & 37318

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(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
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BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS
(Appellants)

-and-

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AND BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Appellant)

-and-

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Overview

1. The intervener, Faith, Fealty & Creed Society ("FFC") is a registered Canadian charity whose purposes include researching legal trends relating to theology and faith and disseminating that information to the charitable sector and general public. It intervenes to address the question of whether a corporation such as Trinity Western University ("TWU"), which is a legal person and not a human being, is entitled to freedom of religion under s. 2(a) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

2. This Court has applied a purposive approach to determining whether corporations possess *Charter* rights. Applying that approach FFC submits that a corporation does not enjoy freedom of religion. While freedom of religion protects individuals and groups, the collective aspect of the freedom is ensured through liberal standing laws permitting a religious organization to seek relief on behalf of its members and by the members themselves vindicating their personal right to practice as part of a group.

3. If this Court does extend s. 2(a) rights to a corporation, it will be necessary to state the basis upon which a corporation can be said to have a belief system. Recent scholarship has identified two distinct accounts of corporate conscience that courts in other jurisdictions have relied upon to extend religious freedom to corporations, the "mission-operation theory" and the "moral association" theory.[1] If this Court does extend s 2(a) rights to TWU in this case, FFC submits that it should make clear what account of corporate conscience supports the extension, and what evidence is required to support such a claim.

Facts

4. TWU is a university constituted a body corporate by a statute of the British Columbia legislature. Its sole statutory object is set out in section 3(2) of the *Trinity Western University Act*, S.B.C. 1969, c. 44 as follows:

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[1] Kathryn Chan, "Identifying the Institutional Religious Freedom Claimant", 95:3 Can. Bar Rev. [forthcoming in 2017] (available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994985) at 5.

> The objects of the University shall be to provide for young people of any race, colour, or creed, university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian.

5. TWU requires students to sign a "Covenant" which, among other things, prohibits expressions of sexual intimacy between same-sex married couples.

6. Law societies in Ontario, British Columbia and Nova Scotia refused to accredit TWU as a law school for the purpose of gaining admission to the practice of law in those provinces due to the discriminatory nature of the Covenant. These decisions were challenged by TWU in its own right and by a graduate of TWU, Brayden Volkenant, as being contrary to s. 2(a) of the *Charter*.

PART II – STATEMENT OF ISSUES

7. TWU submits that it meets the test "for protecting corporations such as 'religious educational bodies' under section 2(a)"[2] set out in the minority judgment of this Court in *Loyola High School v. Quebec (Attorney General)*.[3] However, the majority in *Loyola* left open the questions of whether a corporation enjoys freedom of religion under the *Charter* and, if so, how courts should determine whether a corporation is entitled to freedom of religion on the facts of the case. FFC will address these questions.

PART III - ARGUMENT

This Court has generally adopted a purposive approach to determining whether a corporation has a Charter right

8. The question of whether a corporation is the holder of a right enshrined in the *Charter* has been considered by this Court on a number of occasions. The answer has varied depending on the description of the right's holder in the *Charter* and the Court's assessment of the nature of the interests sought to be protected by the right in question.

9. The *Charter* describes the holders of rights differently in its various sections. For example, the freedoms in s. 2 are guaranteed to "everyone." The democratic and mobility rights in sections 3 through 6 are granted to "every citizen." The rights with respect to criminal and

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[2] Appellant's Factum in appeal from the judgment of the Ontario Court of Appeal, at para. 67.
[3] [2015] 1 S.C.R. 613 [*Loyola*].

penal matters found in s. 11 are available to "any person." And the right to equality under s. 15 is guaranteed to "every individual".

10. It seems clear that the framers intended by use of this language to make some rights available only to human beings. The jurisprudence of this Court confirms this view. In *Edmonton Journal v. Alberta (Attorney General)*[4] a corporation challenged certain restrictions on its ability to broadcast information concerning court proceedings under ss. 2(b) and 15 of the *Charter*. The Court found the s. 2(b) violation made out. However, three judges went on to dismiss the s. 15 claim, holding that "Since s. 15 is limited to individuals, it does not apply to corporations like the appellant."[5]

11. *Edmonton Journal* implies that corporations are entitled to freedom of expression under s. 2(b) of the *Charter*, though the matter was not addressed by the Court (perhaps because the Attorney General of Alberta conceded that s. 2(a) was violated).[6] Indeed, as Professor Kislowicz points out, in some cases "the decision that a corporation can assert such a right is either never asked or implicit in the decision."[7]

12. In those cases where the issue has been squarely confronted the most important consideration seems to be the nature of the right rather than the description of the right's holder as "person" or "individual" or "anyone". In *Irwin Toy Ltd. v. Quebec (Attorney General)*,[8] for example, a corporation brought a section 7 challenge to legislation which prohibited advertising directed to children. Notwithstanding that s. 7 is available to "everyone", this Court held that a corporation cannot invoke s. 7.

13. The Court considered that section 7, as framed, was intended to apply only to human beings. It pointed out, for example, that corporations cannot be put in jail and thus it was wrong to conceive of corporations as having a liberty interest. The Court acknowledged that a corporation might be said to have an economic liberty interest. However, given that the framers

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[4] [1989] 2 S.C.R. 1326.
[5] *Ibid*. at 1382.
[6] *Ibid*. at 1334.
[7] Kislowicz, Howard, "Business Corporations as Religious Freedom Claimants in Canada" RJTUM [forthcoming] (available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3001258)
[8] [1989] 1 S.C.R. 927.

omitted any reference to property in s. 7 and defined the right as "security of the person", the Court concluded that a corporation's economic rights are not constitutionally protected.[9] This is noteworthy because corporations are considered legal persons under Canadian corporate law statutes.[10] Nevertheless, this Court concluded that under s. 7, "person" means human being.

14. Similarly, in *R. v. Amway*,[11] the Court concluded that a corporation did not enjoy the protection against self-incrimination in s. 11(c) of the *Charter*. The Court applied a "purposive approach", noting that the provision "was intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth."[12] No such affront could be experienced by a corporation, for a legal person, "unlike an individual, cannot suffer the indignities prohibited by the amendment's protection of the accused's person and thoughts."[13]

15. These cases may be contrasted with *R. v. CIP Inc.*[14] where the Court concluded that a corporation is entitled to the right to be tried within a reasonable time under s. 11(b) of the *Charter*. The Court could find "no principled reason for not extending that protection to <u>all</u> accused."[15] To hold otherwise would be to suggest that society is less interested in bringing corporations to trial in a reasonable time or that status determines whether an accused is entitled to fair or just treatment in the criminal justice system.[16]

16. To summarize, in determining whether a corporation enjoys a *Charter* right the focus is less on the description of the right's holder – person, individual or everyone – and more on the nature and purpose of the interest engaged. Corporations cannot invoke s. 7 because only on a strained interpretation of the section could it be said they possess the characteristics sought to be protected: life and liberty and security of the person. On the other hand, a right such as trial within a reasonable time protects an interest that is shared by all accused regardless of status and

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[9] *Ibid*. at 1004.
[10] Kislowicz, *supra* note 7 at 11, quoting Bruce Welling, *Corporate Law in Canada: The Governing Principles* (London, ON: Scribblers Publishing, 2016).
[11] [1989] 1 S.C.R. 21.
[12] *Ibid*. at 40.
[13] *Ibid*., quoting from a text writer who was in turn quoting from *Wigmore on Evidence*.
[14] [1992] 1 S.C.R. 843.
[15] *Ibid*. at 856 (emphasis in original).
[16] *Ibid*. at 858.

it can thus be concluded the framers intended the protection to extend to human beings and corporations alike.

A purposive approach to section 2(a) militates against extending religious freedom to corporations in their own right

17. A corporation is an artificial entity that stands separate and apart from those that run or own the corporation.[17] It would seem to follow from this fundamental character of corporations that they cannot hold religious beliefs or "foster a connection with the divine".[18] Indeed, in *R. v. Edward Books* Chief Justice Dickson had "no hesitation remarking that a business corporation cannot possess religious beliefs."[19]

18. A purposive approach supports this conclusion. In *Edward Books* Chief Justice Dickson identified the purpose of s. 2(a) as follows (at p. 759):

> The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being.

19. It strains a common sense understanding of the ideas expressed in this passage to say that an artificial entity has any personal beliefs, let alone profound ones, or that it has a "perception" of itself or others. Just as a corporation does not have "life" for the purpose of s. 7 it does not have personal beliefs and thus does not enjoy s. 2(a) protection.

20. The Victorian Court of Appeal in Australia expressed a similar view in *Christian Youth Camps Ltd v. Cobaw Community Health Services Ltd.* In that case, the court concluded that a statutory exemption for "discrimination by a person" on religious grounds did not apply to a corporation. Neave J.A. reasoned that because a corporation "has neither 'soul nor body', it cannot have a conscious state of mind amounting to a religious belief or principle."[20]

21. This may be contrasted with the decision of the United States Supreme Court in *Burwell v Hobby Lobby Stores Inc*.[21] In that case, the court had to interpret the *Religious Freedom*

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[17] Rajanayagam, Shawn & Evans, Carolyn, "Corporations and Freedom of Religion: Australia and the United States Compared" (2015) 37 *Sydney L. Rev.* 329 at 330.
[18] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para 49.
[19] [1986] 2 S.C.R. 713 at 784.
[20] [2014] VSCA 75 at para. 414.
[21] 134 S Ct 2751 (2014).

Restoration Act which provided that government may not "substantially burden a person's exercise of freedom of religion." A number of corporations argued that their religious freedoms were impaired by a requirement to provide health services that included contraceptives with which they disagreed on religious grounds.

22. The Third Circuit rejected the corporate claim on the ground that "business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion."[22] The USSC reversed. Alito J. noted that under the *Dictionary Act* a person was defined to include a corporation and he did not think there was anything in the act which compelled a contrary conclusion.

23. The view of the Third Circuit and the Victoria Court of Appeal are more consistent with the approach of this Court. As noted, in *Edward Books* the majority accepted that corporations are incapable of possessing religious beliefs. Moreover, in *Irwin Toy*, the Court did not accept that corporations enjoy "security of the person". The context suggested otherwise notwithstanding that a corporation is considered a legal person.

24. In *Loyola* the minority stated that "[t]he communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations."[23] But this objective is not thwarted by finding that corporations do not enjoy freedom of religion. If the government were to disband a religious organization the individual members could invoke their <u>personal</u> rights to challenge the measure. If the government were to prohibit the meeting of people for the purpose of religious worship then the affected individuals could invoke their freedom of association under s. 2(d). And in both examples the corporation would have standing to challenge the measure on behalf of the

[22] *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 at 385 (3rd Cir. 2013).
[23] *Loyola*, at para. 91.

individuals whose s. 2(a) rights were engaged.[24]

There are two possible bases upon which this Court could extend s 2(a) rights to TWU

25. In *Edward Books* Chief Justice Dickson questioned "whether a corporate entity ought to be deemed in certain circumstances to possess the religious values of specified natural persons."[25] If this Court were to deem TWU to possess the religious values of certain persons associated with TWU, it would align itself with one of two theories of corporate conscience that some courts in the United States have relied upon to extend religious freedom to corporations. The so-called "moral-association" theory ascribes religious belief to a specified group of individuals, and recognizes the corporation as the vehicle by which those individuals express their religious belief.[26]

26. There are a number of reasons why this Court should not confer religious freedom rights on corporations on the basis of a moral-association theory. First, such an approach would be inconsistent with the existing *Charter* jurisprudence. As noted above, this Court has consistently answered the question of whether a corporation enjoys a particular *Charter* right by identifying the nature and purpose of the protection in question and considering whether the framers intended corporations to fall within its ambit. An attribution of human values to the corporate form has not been the approach.

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[24] See *Loyola* at para. 34 ("Loyola is entitled to apply for judicial review and argue that the Minister failed to respect the values underlying the grant of her discretion as part of its challenge of the merits of the decision" and thus had standing to argue in favour of "the *Charter*-protected religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education"); *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295 at 314 (permitting a corporation charged with a statutory violation to argue that the law infringes religious freedom); *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at paras. 32-44 (permitting a corporation in civil regulatory proceedings to argue a law violates constitutional rights that the corporation does not enjoy in its own right). See also *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524 at para. 35.

[25] *Edward Books*, at 785.

[26] See Chan, note 1 at 5 and the articles cited therein.

27. Secondly, attributing the religious beliefs of individuals to a corporation would be contrary to the fundamental principle that "a corporation is a separate legal entity from the natural persons or other corporations that comprise the shareholders."[27] For this reason, the moral-association theory has been criticized as a form of "reverse veil piercing." Typically, a corporation's veil cannot be pierced in order to make members of the company liable for the acts of the corporation. There is a strong argument that having taken advantage of the corporate form for this and other reasons, members should not be able to pierce the veil in reverse by attributing their rights to the company.[28]

28. Third, the adoption of a moral-association theory would raise additional difficult questions of law and fact. As Chief Justice Dickson noted in *Edwards Books,* it would be necessary to decide whose religion is relevant. Is it the directors, shareholders or even employees of the corporation that should be considered? And what happens, the Chief Justice asked, "if there is a divergence of religious beliefs within the corporation?"[29]

29. The second basis upon which this Court could extend s 2(a) rights to corporations would be by accepting that a corporation may *itself* have a religion or conscience that is expressed in its mission and operational structure. This is sometimes referred to as a "mission-operation" theory of corporate conscience.[30]

30. A minority of this Court arguably adopted a mission-operation theory of corporate conscience in *Loyola.* In that case, a private Catholic high school for boys challenged the government's refusal to grant it an exemption from the normal curriculum so as to permit it to teach about other religions from a Catholic perspective. As the school was a corporation, the Attorney General argued it was not entitled to s.2(a) protection.

31. A majority of the Court accepted that Loyola had standing to challenge the Minister's exercise of discretion to ensure that it properly protected the "religious freedom of members of

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[27] Rajanayagam & Evans, note 17 at 330.
[28] *Ibid*. at 341-46.
[29] *Edward Books*, at 785. See Chan, note 1 at 15-20 for a discussion of this problem in the context of this case.

[30] See Chan, note 1 at 5 and the articles cited therein.

the Loyola community who seek to offer and wish to receive a Catholic education" (at para. 33). It thus found it unnecessary "to decide whether corporations can enjoy freedom of religion in their own right under s. 2(a)" (at para. 34).

32. The minority, however, decided that "religious organizations" may "in a very real sense have religious beliefs and rights."[31] It also proposed a qualifying test, stating that an organization should "meet the requirements for s. 2(a) protection if (1) it is constituted primarily for religious purposes, and (2) its operation accords with those religious purposes".[32] In contrast to *Edwards Books,* the *Loyola* minority test suggests that a corporation may *itself* have a religion or conscience that is expressed in its mission and operational structure.

33. There are a number of reasons why this Court should not confer religious freedom rights on corporations on the basis of a mission-operation theory. We have already seen that it is unnecessary to extend constitutional protection to corporations in their own right in order to vindicate the rights of individuals, and that the extension of religious freedom to corporations would be inconsistent with a purposive approach to s 2(a). In addition, the adoption of a mission-operation theory of corporate conscience would raise difficult questions of law and fact about what qualifies as a (corporate) religious purpose, and whether 2(a) protection should extend equally to organizations constituted for purposes of non-belief.[33] This is addressed below in relation to the facts of this case.

Implications for this case

34. As the entity that wishes to set up an accredited law school program, TWU has standing to challenge an administrative decision denying accreditation. It cannot sue on the ground that its own constitutional rights are infringed because, as a corporation, it does not enjoy s. 2(a) rights. Instead, TWU may be able to bring this challenge on the ground that the decision violated the religious freedom of students who wish to attend the proposed TWU law school or other specified natural persons whose rights are engaged.

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[31] *Loyola*, at para. 99.
[32] *Loyola* at paras 100-101.
[33] *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3.

35. In order to be granted standing, however, the corporation "must be able to convince the court that the views put forward by it are a fair reflection of the views of the represented."[34] The evidence of a prospective student is from Brayden Volkenant, a party to both the British Columbia and Ontario proceedings. The question for the Court is whether that evidence meets the test for an infringement of freedom of religion.

36. If contrary to the submissions of FFC this Court finds that a corporation may enjoy freedom of religion in its own right it will be necessary to propose a test for determining whether TWU is entitled to freedom of religion. FFC submits that the claims by corporate entities should be subject to close scrutiny and that evidence relevant to both the mission-operation theory and moral-association theory should be required.

37. FFC submits that the *Loyola* minority test raises difficult questions of law and fact concerning what it means for an organization to be "constituted primarily for religious purposes". "Constituted" implies reference to the wording of its corporate objects. However, in the courts below TWU's sole statutory object was never analyzed to determine whether TWU is constituted primarily for religious purposes.[35]

PART IV – SUBMISSION ON COSTS

38. FFC does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

39. FFC does not seek any orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of September, 2017.

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[34] Cane, Peter, "Standing up for the Public" (1995) *Public Law* 276 at 278, quoted in Chan, note 1 at 19-20.

[35] See Chan, note 1 at 9-15 examining the difficulties of applying this theory to TWU.

PART VI – LIST OF AUTHORITIES