
Faculty of Law

Faculty Publications

This is a post-review version of the following article:

Identifying the Institutional Religious Freedom Claimant

Kathryn Chan

2017/2018

The final copy of this article will be published at:

<http://www.cba.org/Publications-Resources/CBA-Journals/Canadian-Bar-Review>

Citation for this paper:

Kathryn Chan, "Identifying the Institutional Religious Freedom Claimant"
[publication pending] 95:3 Can Bar Rev.

IDENTIFYING THE INSTITUTIONAL RELIGIOUS FREEDOM CLAIMANT

Kathryn Chan*

The “institutional turn” that religious freedom litigation has taken in Europe and the United States is now discernible in Canada. If this institutional turn continues, the Supreme Court of Canada will soon need to decide whether the “everyone” entitled to freedom of conscience and religion under the Canadian Charter of Rights and Freedoms includes corporations. This paper argues that before we begin extending constitutional rights to corporate vehicles in Canada, we should have a workable account of institutional religious freedom and a sense of the corporate and trust law mechanics through which it will operate.

Recent American scholarship outlines two different accounts of “institutional conscience” that courts have relied upon in extending free exercise rights to non-profit and for-profit institutions: the “moral-association theory” and the “mission-operation theory”. This paper explores both theories through the lens of a particular case study: the dispute over the accreditation of Trinity Western University’s proposed law school. The paper concludes that the moral-association theory provides a stronger basis than the mission-operation theory for according constitutional protection to the University’s defence of its discriminatory covenant. Whatever theory the courts adopt, however, they must be mindful of the type of evidence required to support an institutional religious freedom claim.

* DPhil(law)(Oxon.); Assistant Professor, University of Victoria Faculty of Law. I thank Kirstn Mase and Andrew Mendelson for their excellent research assistance, and Benjamin Berger, Paul Bramadat, Deborah Curran, Hamar Foster, Mark Gillen, Donna Greschner, Howard Kislowicz, and two anonymous reviewers for their helpful comments on previous drafts. Any remaining errors are entirely my own.

Contents

1. Introduction	2
2. Identifying the Institutional Religious Freedom Claimant	7
A) Two Competing Accounts of Institutional Conscience	7
B) <i>Trinity Western University v the Law Societies</i> as Case Study	9
3. Applying the Mission-Operation Theory to TWU	11
A) Discerning the legal personality of a corporate charity	11
B) TWU's sole corporate object	15
4. Applying the Moral-Association Theory to TWU	19
A) Discerning the relevant stakeholders of a corporate charity	19
B) The legal members of TWU	21
C) Who else does TWU represent?	24
5. Conclusion	26

1. Introduction

The issue of institutional religious freedom is moving quickly towards the forefront of Canada's constitutional imagination. *Loyola High School v Quebec (AG)*, which arose from a Jesuit high school's effort to teach Quebec's Ethics and Religious Culture program from a Catholic perspective, placed an institutional religious freedom claim squarely before the Supreme

Court of Canada.¹ *Ktunaxa Nation Council v Minister of Forests, Lands and Natural Resource Operations*, which is currently under reserve at the Supreme Court of Canada, centres on the alleged rupture of a First Nation's spiritual connection with Grizzly Bear Spirit, and on the impact of this rupture on the beliefs and practices of the entire community.² Additionally, the three religious freedom cases that the Court is slated to hear this fall, *Wall v Highwood Congregation of Jehovah's Witnesses* and the pair of *Trinity Western University* appeals,³ are at heart about the scope of the institutional autonomy to which various faith-based organizations are entitled under section 2(a) of the *Canadian Charter of Rights and Freedoms*.⁴

The United States has already witnessed an “institutional” or “corporate” turn in its religious freedom jurisprudence.⁵ Three recent decisions of the United States Supreme Court have substantially (and controversially) extended the First Amendment protections that are available to corporate bodies. In 2010, the Court held in *Citizens United v Federal Election Commission* that corporations are rights holders entitled to protection under the First Amendment's Speech Clause.⁶ In 2012, the Court held in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* that “religious institutions” have a constitutional right to fire employees without regard for employment discrimination laws.⁷ Then in the 2014 decision of *Burwell v Hobby Lobby Stores Inc*, a majority of the Court held that for-profit corporations are “persons” capable of exercising religious liberty under the *Religious Freedom Restoration Act*.⁸ Institutional religious freedom has quickly become a major focus of American constitutional law, as jurists grapple with the difficult legal, political, and moral issues raised by these decisions.

¹ 2015 SCC 12, [2015] 1 SCR 613 [*Loyola High School*].

² 2016 CanLII 13739, 2016 CarswellBC 715 (WL Can) (SCC) (Factum of the Appellants at paras 67–68).

³ *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255, 404 DLR (4th) 48, leave to appeal to SCC granted, 37273 (13 April 2017); *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423, 405 DLR (4th) 16, leave to appeal to SCC granted, 37318 (23 February 2017); *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518, 398 DLR (4th) 489, leave to appeal to SCC granted, 37209 (23 February 2017).

⁴ *Canadian Charter of Rights and Freedoms*, s 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

⁵ Micah Schwartzman, Chad Flanders & Zoë Robinson, eds, *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2016) at xiii [Schwartzman et al].

⁶ 558 US 310 (2010) at 365.

⁷ 565 US 171 (2012) at 188, 190–94.

⁸ 134 S Ct 2751 (2014) at 2768–75 [*Hobby Lobby*].

The Supreme Court of Canada approaches these issues with a body of precedent that is deeply ambiguous about institutional religious freedom claims.⁹ The big unanswered question is the “constitutional personhood” question:¹⁰ are corporations included in the “everyone” that is entitled to the protections of freedom of conscience and religion under section 2(a) of the *Charter*? In *Loyola High School*, the majority of the Court declined to decide whether corporations “enjoy religious freedom in their own right under ... the *Charter*”, “since the Minister was bound ... to exercise her discretion in a way that respect[ed] ... [the] religious freedom of the members of the Loyola community who [wished to offer or] receive a Catholic education.”¹¹ However, the remaining three justices declared their willingness to recognize the religious freedom of a “non-profit religious corporation”, constituted for the purpose of offering a Jesuit education to Catholic children in Quebec.¹² The minority justices also proposed a general test for an institutional religious freedom claim, 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 these religious purposes.”¹³

We can take from *Loyola High School* that there is not yet a clear consensus amongst the Supreme Court of Canada justices on the “first-order” question of whether corporate entities enjoy the protection of section 2(a). However, if the Court does eventually affirm that at least some corporations enjoy section 2(a) rights,¹⁴ a number of “second-order” questions will quickly follow. These questions include the following:

- What does it mean for a corporation to enjoy freedom of conscience and religion? Is the religious/conscientious freedom of a corporation distinct from that of the natural persons who compose it, or do corporations simply represent the common individual interests of their stakeholders?
- If corporations do simply represent the interests of their stakeholders, which stakeholders do they represent?
- To what class of corporations, and what class of corporate acts, does religious (or conscientious) freedom extend? What criteria should

⁹ For an overview of this jurisprudence, see Victor M Muñoz-Fraticelli & Lawrence David, “Religious Institutionalism in a Canadian Context” (2015) 52:3 Osgoode Hall LJ 1049.

¹⁰ See Zoë Robinson, “Constitutional Personhood” (2016) 84:3 Geo Wash L Rev 605 [Robinson, “Constitutional Personhood”].

¹¹ *Supra* note 1 at paras 32–34.

¹² *Ibid* at para 101.

¹³ *Ibid* at para 100.

¹⁴ Of course, not all religious institutions are constituted as corporations. However, I focus mainly on incorporated bodies such as TWU for purposes of this piece.

be applied to determine the boundaries of institutional religious freedom?

- How should the rights of corporations be measured against the rights of individuals in cases where the two collide?¹⁵

The Supreme Court of Canada is unlikely to face (or answer) all of these questions at one time. However, the rapid rate at which American law has expanded both the *class* of protected religious institutions and the *scope* of protected institutional acts suggests we would be wise to start thinking about these issues.

The Court's evolving approach to the judicial review of administrative decisions involving *Charter* claims also points us toward a more careful examination of the identity of institutional religious freedom claimants. Pursuant to *Doré v Barreau du Québec*, the task of the reviewing court in such a situation is to determine whether the decision-maker reasonably balanced “the severity of the interference of the *Charter* protection with the statutory objectives” of her regulatory regime.¹⁶ In *Loyola High School*, as we have seen, the majority decided that it could make this determination without addressing whether the high school itself enjoyed section 2(a) rights.¹⁷ In many situations, however, it will only be by identifying the constitutional person(s) whose *Charter* rights an administrative decision has interfered with that a decision-maker will be able to accurately assess the severity of that *Charter* interference and determine if the interference is proportionate. If the constitutional claimant is a *corporate* person, we presumably also need some account of corporate religion or conscience upon which the extension of section 2(a) protections can be based in order to establish any interference at all. And the leading theories of corporate or institutional conscience, as we shall see, all rely on particular conceptions of the identity of the institution making the claim.

In my view, the “first order” and “second order” questions about institutional religious freedom are linked. Before we begin extending section 2(a) rights to various corporate vehicles, in other words, we should have a workable account of institutional religious freedom and some

¹⁵ A growing body of literature and case law has begun to address these questions. See e.g. Schwartzman et al, *supra* note 5 at xviii; Shawn Rajanayagam & Carolyn Evans, “Corporations and Freedom of Religion: Australia and the United States Compared” (2015) 37:3 Sydney L Rev 329 [Rajanayagam & Evans]; Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (New York: Oxford University Press, 2010) [Rivers]. In Canada, see Muñoz-Fraticelli & David, *supra* note 9; Howard Kislowicz, “Business Corporations as Religious Freedom Claimants in Canada”, RJTUM [forthcoming in 2018].

¹⁶ 2012 SCC 12 at para 56, [2012] 1 SCR 395 [*Doré*].

¹⁷ *Supra* note 1 at paras 32–34.

sense of the “corporate law mechanics” through which it will manifest.¹⁸ Scholarship from outside of Canada identifies two competing theories of institutional conscience that might provide a foundation for our own law’s development—the so-named “mission-operation” and “moral-association” theories. However, there is no academic or judicial consensus on which of these two theories is preferable, if either. As we begin considering the merits of each position, it seems useful to apply them to a specific set of facts. This paper therefore explores the debates over institutional religious freedom through the lens of a particular case study: the ongoing dispute over the accreditation of Trinity Western University (“TWU”)’s proposed law school. Given that we are in the very early stages of these debates in Canada, I do not take a position on which, if either, of these two theories of institutional religious freedom our courts should adopt. My more limited goals are: (1) to identify certain corporate law mechanics and evidentiary requirements that should be respected under either account, and (2) to highlight the conceptual differences between the two accounts by considering how TWU would fare under each.

The analysis proceeds in the following way. In Part 2, I outline the two theories of “institutional conscience” that have principally been relied upon to extend freedom of conscience and religion to corporate persons in Europe and the United States. I then briefly outline the facts of our TWU case study. In Part 3, I apply the mission-operation theory to TWU. I identify certain principles relevant to ascertaining the legal personality of a corporate charity and apply these principles by focusing on TWU’s sole corporate object. In Part 4, I apply the moral-association theory to TWU. I examine TWU’s corporate governance structure, identify its legal members, and consider who else TWU might be said to represent. I conclude that the moral-association theory provides a strong basis (far stronger than the mission-operation theory) for the extension of section 2(a) rights to TWU. However, I suggest that if the Supreme Court of Canada adopts a moral-association theory in this case, it should be cautious in identifying which individuals the Court treats as expressing their moral convictions through the vehicle of TWU.

¹⁸ For an argument that *Hobby Lobby* left these corporate law mechanics murky in the United States, see Elizabeth Pollman, “Corporate Law and Theory in *Hobby Lobby*” in Micah Schwartzman, Chad Flanders & Zoë Robinson, eds, *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2016) 149 [Pollman].

2. Identifying the Institutional Religious Freedom Claimant

A) Two Competing Accounts of Institutional Conscience

Recent American scholarship distinguishes two different accounts of “institutional conscience” that American courts have relied upon in extending free exercise rights to a variety of non-profit and for-profit institutions.¹⁹ The “mission-operation theory” posits that a corporation may have both moral agency and a conscience or religion that is expressed in its mission and operational structure. By harmonizing its decisions with its mission, proponents of the first theory claim, “an institution [may make] moral judgments and [strive] to maintain its integrity like a human being.”²⁰ Defining moral agency in terms of a capability to make decisions and act, the mission-operation theory locates the moral agency of corporations in the fact that they “have an identity larger than their constituent parts and an ability to carry out acts and affect individual lives.”²¹ By locating an institution’s conscience in its mission and operational structure, the “mission-operation theory emphasizes the value of allowing an institution to create and maintain institution-wide norms that give it a distinct identity.”²²

The second account of institutional conscience locates such conscience not in an institution’s mission and operational structure, but in the functioning of an associated group of people. The “moral-association” theory does not ascribe conscience to institutions themselves. Rather, “it ascribes conscience to a group of [individuals],” and recognizes the institution as the *vehicle* or “*means* by which [those] individuals express their moral convictions.”²³ Moral-association theory advocates argue that institutional conscience should be protected in order to respect “the conscience and morality of the individuals whose will and purposes the entities were created to effectuate.”²⁴ By locating institutional conscience in the acts of a group of stakeholders, the moral-association theory emphasizes the value of allowing individuals to “live out their conception of the good life in community

¹⁹ See e.g. Elizabeth Sepper, “Healthcare Exemptions and the Future of Corporate Religious Liberty” in Micah Schwartzman, Chad Flanders & Zoë Robinson, eds, *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2016) 305 [Sepper, “Healthcare Exemptions”]; Roger A Buchholz & Sandra B Rosenthal, “Integrating Ethics All the Way Through: The Issue of Moral Agency Reconsidered” (2006) 66 *J Business Ethics* 233 at 234–35.

²⁰ Elizabeth Sepper, “Taking Conscience Seriously” (2012) 98:7 *Va L Rev* 1501 at 1541 [Sepper, “Conscience”].

²¹ *Ibid.*

²² *Ibid.* at 1542.

²³ *Ibid.* at 1544 [emphasis added].

²⁴ Lynn D Wardle, “Protecting the Rights of Conscience of Health Care Providers” (1993) 14:2 *J Leg Med* 177 at 186, cited in Sepper, “Conscience,” *supra* note 20 at 1544, n 177.

with others, disassociate themselves from acts or individuals of whom they disapprove, and agree on institutional norms that reinforce their own convictions.”²⁵ In light of such reasoning, some scholars have characterized the moral-association theory as a reverse piercing of the corporate veil: since corporations cannot themselves have beliefs or a relationship with the divine, courts are attributing the religious beliefs of some individual or group of individuals to the corporation itself.²⁶

The mission-operation and moral-association accounts of institutional religious freedom reflect a broader corporate theory debate about “whether it is appropriate to equivocate the corporation and the people behind it in rights determinations.”²⁷ In the context of a legal dispute involving a section 2(a) claim, however, the selection of one or the other of these accounts is a matter of considerable *practical* importance, for each account relies in its application on a different set of evidence. If a court relies on the mission-operation theory to extend section 2(a) protections to a particular institution, it will need to hear evidence on the claimant’s mission, and on whether it operates consistently with that mission. The religious beliefs of the institution’s stakeholders should be irrelevant. As Elizabeth Sepper notes, “a hospital that has declared itself Baptist in its articles of incorporation . . . will remain Baptist [under the mission-operation theory] irrespective of whether its employees, directors, or shareholders are Baptist.”²⁸ If a court relies on the moral-association theory, on the other hand, different evidence will be required. A court will need to determine who the relevant stakeholders are, and the nature of their religious beliefs.

The mission-operation and moral-association theories are subject to ongoing academic and judicial debate. There is a growing global consensus that at least some corporate bodies should be authorized to bring religious freedom actions in appropriate circumstances. However, national and transnational courts have taken different views on whether corporations should *themselves* be considered possessed of religious beliefs and rights, whether they possess such beliefs and rights only to the extent that these can be attributed to the individuals that comprise them, or whether they should not enjoy religious freedoms at all.²⁹ The minority decision in *Loyola High School*, which would have accorded section 2(a) rights to organizations “constituted primarily for religious purposes”, suggests a leaning on the part of certain Supreme Court of Canada justices towards the mission-

²⁵ Sepper, “Conscience”, *supra* note 20 at 1544–45.

²⁶ See Rajanayagam & Evans, *supra* note 15 at 341–43.

²⁷ Pollman, *supra* note 18 at 155.

²⁸ Sepper, “Healthcare Exemptions”, *supra* note 19 at 309.

²⁹ See e.g. Rajanayagam & Evans, *supra* note 15; Rex Ahdar, “Companies as Religious Liberty Claimants” (2016) 5:1 Oxford J L & Religion 1.

operation theory of institutional religious freedom.³⁰ However, in several jurisdictions where institutional religious freedom claims have been more closely considered, the moral-association account prevails. The question in Canada remains open. Which, if either, of the mission-operation and moral-association theories provides a sound basis for the recognition of institutional religious freedoms in Canada? In order to explore this question, we turn to our case study.

B) *Trinity Western University v the Law Societies as Case Study*

The facts of the dispute between TWU and the provincial law societies are well known and will be only briefly summarized here.³¹ In December 2013, TWU received approval from British Columbia's Advanced Education Minister to open a law school. TWU has a "Community Covenant", which requires, among other things, that "members" of the TWU community refrain from "sexual intimacy that violates the sacredness of marriage between a man and a woman."³² In 2014, the law societies of three common law provinces—British Columbia, Ontario, and Nova Scotia—declined to accredit the law school on the basis that the Covenant discriminates against LGBTQI individuals who might apply to the law faculty. TWU sought judicial review of all three decisions, arguing, among other things, that they unreasonably infringed the religious freedom of TWU and the members of its religious community. In 2015, TWU received judgments in its favour from two of three superior courts, with only the Ontario Superior Court of Justice upholding its province's law society's denial of accreditation.³³ In 2016, the Ontario Court of Appeal affirmed that decision, while the appellate courts of Nova Scotia and British Columbia affirmed the contrary decisions of their superior courts.³⁴ The Supreme Court of Canada is slated to hear

³⁰ *Supra* note 1 at para 100.

³¹ For a fuller summation of the dispute, see Alice Woolley & Jennifer Koshan, "Trinity Western University Law School: Equality Rights, Freedom of Religion and the Training of Canadian Lawyers", *Law Matters* 40:2 (Summer 2015) 9.

³² Trinity Western University, "Community Covenant Agreement: Our Pledge to One Another" at 3, online: <www8.twu.ca/studenthandbook/twu-community-covenant-agreement.pdf> [TWU, "Community Covenant"].

³³ See *Trinity Western University v Law Society of British Columbia*, 2015 BCSC 2326, 329 DLR (4th) 722 [TWU v LSBC SC]; *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, 381 DLR (4th) 296 [TWU v NSBC SC]; *Trinity Western University v Law Society of Upper Canada*, 2015 ONSC 4250, 387 DLR (4th) 149 [TWU v LSUC Sup Ct].

³⁴ *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518, 398 DLR (4th) 489 [TWU v LSUC CA], aff'g 2015 ONSC 4250, 387 DLR (4th) 149; *Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59, 401 DLR (4th) 56, aff'g 2015 NSSC 25, 381 DLR (4th) 296; *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423, 405 DLR (4th) 16 [TWU v LSBC CA], aff'g 2015 BCSC 2326, 392 DLR (4th) 722.

appeals from the Ontario and British Columbia decisions in November 2017.

The *TWU* appeals raise a number of difficult issues. Before the Supreme Court of Canada, argument is likely to focus primarily on the *Doré* inquiry of whether the Benchers properly balanced “the severity of the interference of the *Charter* protection with the statutory objectives” of the law societies’ regulatory regimes.³⁵ As I have already suggested, however, questions about the identity of the person(s) whose section 2(a) rights have been interfered with lurk just below the surface of that inquiry. Several questions seem relevant to the balancing exercise. First, exactly whose religious freedom(s) did the Benchers interfere with in refusing to accredit *TWU*’s proposed law school? Second, if *TWU*’s religious freedom *qua* institution was interfered with, what is the nature of that religious freedom and what characteristics of *TWU* are relevant to its exercise? Third, if the Benchers’ decision interfered with the religious freedom of persons associated with *TWU*, who are the members of that group?

None of these questions about the identity of the religious freedom claimant(s) has been consistently or carefully answered in the decisions rendered so far. The courts have included both the institution and a range of people associated with the institution in their descriptions of those whose religious freedoms are engaged by the accreditation decisions, using terms such as “*TWU*”,³⁶ “the *TWU* community”,³⁷ “individual members, including teachers, students, and staff” of *TWU*,³⁸ “*TWU* graduates” and “those involved with *TWU*”,³⁹ and “Evangelical Christians.”⁴⁰ With regard to the identifying characteristics of *TWU* itself, these have not been put in issue at all. The law societies and the courts appear to have taken *TWU*’s position on this point at face value, adopting *TWU*’s descriptions of itself as a “private religious educational community” and as “an educational arm of the Evangelical Christian Church.”⁴¹ This lack of attention to *TWU*’s corporate personality stands in striking contrast to the manner in which the

³⁵ *Doré*, *supra* note 16 at para 56.

³⁶ See e.g. *TWU v LSBC CA*, *supra* note 34.

³⁷ See e.g. *ibid* at paras 178, 190.

³⁸ *TWU v LSUC CA*, *supra* note 34 at para 94.

³⁹ *TWU v NSBC SC*, *supra* note 33 at paras 5, 234.

⁴⁰ *Ibid* at para 235. See also *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772 [*TWU v BCCT*] (where the SCC referred to the interests of “individuals wishing to attend *TWU*” at paras 28, 65).

⁴¹ See e.g. *TWU v LSBC SC*, *supra* note 33 at para 2; *TWU v LSUC CA*, *supra* note 34 at para 15. *TWU* has used similar wording in its pleadings and written arguments: see e.g. *TWU v LSBC SC*, *supra* note 33 (Petition to the Court, part 2, para 4); *TWU v LSBC SC*, *supra* note 33 (Written argument of the Petitioners at para 1); *TWU v LSBC CA*, *supra* note 34 (Factum of the Respondents at para 2).

courts have scrutinized the corporate identity of the law societies, carefully parsing their enabling statutes to determine their regulatory objects and the limits of their powers.

While the descriptions of TWU that appear in the decisions rendered so far are not entirely inaccurate, I argue that there are more relevant ways to describe TWU in the context of its legal dispute with the law societies. TWU is a university, a not-for-profit society continued and constituted by private Act of a provincial legislature, a charitable corporation with fiduciary obligations, and a registered charity under the federal *Income Tax Act*. In addition, like the law societies, TWU has specific objects, duties, powers and decision-making procedures that are dictated by its governing documents. As we shall see in what follows, depending on what account of institutional conscience we adopt, these features of TWU may inform our assessment of the institution's position on the Community Covenant, and the nature of its religious freedom claim.

3. Applying the Mission-Operation Theory to TWU

The first basis upon which a court could extend section 2(a) rights to TWU would be to ascribe a religion to the institution itself, based upon evidence of its corporate mission and operational structure. This section outlines some general principles relevant to the identification of this evidence in the case of a corporate charity such as TWU. I then consider evidence of TWU's institutional mission and reflect on some of the difficulties of attributing the moral judgment behind TWU's defence of the Community Covenant to the institution itself.

A) Discerning the legal personality of a corporate charity

It is settled law that the primary source of rules for the administration of a charity is the constituting instrument created by the charity's settlor or founder.⁴² A charity's constituting legal instrument (often referred to as the charity's governing document) enshrines the particular charitable objects that the charity is bound to pursue. It also sets down the charity's fundamental rules of governance, and may include detailed directions about how to hold and manage charity property, how to select the property's managers, how to resolve disputes over the charity's governance, and how to distribute the charity property if the charity is wound up. Whether the governing document takes the form of a trust deed, a constitution, or an Act of Parliament, the principle of the document's primacy remains the same.

⁴² See e.g. Peter Luxton, *The Law of Charities* (New York: Oxford University Press, 2001) at 256; Kathryn Chan, *The Public-Private Nature of Charity Law* (Oregon: Bloomsbury Publishing, 2016) at 27–51 [Chan].

Charity directors and trustees are obliged to adhere to the terms of their governing documents.⁴³ For example, where a trust instrument stipulates that the object of the charitable trust is to provide education to young people, the trustees will breach the trust (and be strictly liable for their breach) if they use the fund to educate the elderly.⁴⁴ Similar obligations apply to the directors of non-profit and charitable corporations. The old BC *Society Act* prohibited a society from acting in pursuit of a purpose or activity that fell outside the society's corporate objects, in language that suggested such an act was *ultra vires* and thus void.⁴⁵ The new *Societies Act* seeks to protect third parties from the full effect of the *ultra vires* doctrine, but continues to prohibit a society from exercising powers inconsistent with its constitution and by-laws.⁴⁶ Where a charity's constituting instrument is a *statutory* instrument that is silent on the validity of acts contrary to that instrument, as in the case of TWU, the stricter *ultra vires* doctrine will continue to apply.⁴⁷

From these principles, it follows that when we are describing the mission of a charitable corporation for purposes of applying the mission-operation account of institutional religious freedom, our primary point of reference should be the corporation's governing documents. In TWU's case, there are two such documents: *An Act Respecting Trinity Western University* (the "*TWU Act*") and the corporate by-laws that TWU's Board of Governors approved and filed with the BC Registrar of Companies in 2011 (the "*TWU By-laws*").⁴⁸ The *TWU Act* continues and constitutes Trinity Junior College, the not-for-profit corporation that seven individuals incorporated under the *Societies Act* in 1962, as TWU.⁴⁹ It establishes TWU's basic governance structure, articulates its corporate object, and incorporates the *TWU By-laws* by reference.⁵⁰ The *TWU By-laws* set out more detailed rules about the governance and administrative organization of the University. They establish the powers of the President and Chancellor, provide for the

⁴³ Jean Warburton, *Tudor on Charities*, 9th ed (London, UK: Sweet & Maxwell, 2003) at 263; see also Lionel Smith, "The Duties of Trustees in Comparative Perspective" (2016) 24 Eur R Priv L 1031 [Smith, "Duties"].

⁴⁴ Strict liability follows a trustee's failure to adhere to the trust instrument, without any inquiry into fault: see Smith, "Duties", *supra* note 43 at paras 3–4.

⁴⁵ *Society Act*, RSBC 1996, c 433, s 4(1)(d) ("the members of a society are members of a corporation with the powers and capacity of a natural person of full capacity *as may be required to pursue its purposes* [emphasis added]").

⁴⁶ *Societies Act*, SBC 2015, c 18, s 7(2). The *Canada Business Corporations Act*, RSC 1985, c C-44, s 16(3) contains a similar provision. However, there is no such provision in *An Act Respecting Trinity Western University*, SBC 1969, c 44 [*TWU Act*].

⁴⁷ I thank Mark Gillen for bringing this point to my attention.

⁴⁸ The *TWU By-laws* [*TWU By-laws*, 2011] and Certificate of Incorporation can be obtained from the BC Registrar of Companies.

⁴⁹ *TWU Act*, *supra* note 46, s 3(1); Trinity Junior College, *Societies Act*, "List of First Directors" (13 June 1962).

⁵⁰ *TWU Act*, *ibid*, ss 3(2), 9, 10.

distribution of TWU's assets on dissolution, and clarify the nature of TWU's affiliation with the Evangelical Free Church. Much like the enabling statutes of the provincial law societies, then, the *TWU Act* and the *TWU By-laws* set the boundaries of lawful action for TWU. Together, the two governing documents define the object that TWU is bound to pursue, the procedures it is bound to follow, and the duties and powers that are imposed upon its managers.

Despite their constitutive character, however, the *TWU Act* and the *TWU By-laws* have not so far figured prominently in the judicial descriptions of the institutional religious freedom claimant at the heart of this dispute. The BC Supreme Court decision does not cite their provisions at all. Instead, the decision describes TWU in terms drawn from the "Mission Statement" that TWU posts online:

Trinity Western University ("TWU") is a private religious educational community with an evangelical Christian mission. It was founded to be, and remains, an educational arm of the Evangelical Christian Church. Its mission statement is: ... "to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life."⁵¹

The basic objection to this description is that it does not track or make direct reference to the governing documents that are constitutive of TWU's legal personality. To be sure, a charity's policies and practices may provide additional evidence of its institutional "mission". However, if the courts pay insufficient attention to the governing documents in describing an institutional religious freedom claimant, they may end up setting the boundaries of institutional religious freedom on the basis of ambiguous or inaccurate findings of fact.

We may identify an instance of such ambiguity/inaccuracy in the BC Supreme Court's acceptance that TWU "was founded to be, and remains, an educational arm of the Evangelical Christian Church."⁵² This is a significant factual finding, since it rhetorically positions TWU as more "church" than "university", and thus potentially strengthens its religious freedom claim. However, a close examination of TWU's past and present governing documents casts doubt on the latter part of this finding, revealing an institutional relationship that has evolved over time towards greater

⁵¹ *TWU v LSBC SC*, *supra* note 33 at para 2.

⁵² Interestingly, the Ontario Court of Appeal backed away from this finding in *TWU v LSUC CA*, *supra* note 34 (stating only that TWU "is said to be an arm of the Evangelical Free Church of Canada" at para 15).

independence for TWU. Historically, it was likely fair to describe TWU as an “arm” of the Evangelical Free Church (though not of the broader Evangelical Christian community).⁵³ The original *Trinity Junior College Act*, section 3(3), provided that the General Conference of the Evangelical Free Church “shall exercise general direction and sponsorship of the College” and made the Board of Governors of the College responsible to the Conference “[i]n the carrying-out of its powers and duties.”⁵⁴ The Evangelical Free Church also historically controlled the composition of the Board of Governors: until 2011, the *TWU By-laws* provided that the majority of the members of the Board must be elected by the Annual Meeting of the Evangelical Free Church of America (“EFCA”) or the Annual Conference of the Evangelical Free Church of Canada (“EFCC”).⁵⁵

More recently, however (and since the 2001 Supreme Court of Canada decision in *Trinity Western University v British Columbia College of Teachers*⁵⁶), TWU has taken significant steps to create a formal distance between itself and the Evangelical Free Church, transforming itself from a body that could reasonably be called an “arm” of the Church to a more independent, “arm’s-length” institution. By 1977, the BC legislature had repealed section 3(3) of the *Trinity Western College Act* and provided that the Board of Governors should be responsible to the *College* rather than the EFCC in the carrying out of its powers and duties.⁵⁷ In 2011, TWU confirmed this distancing in its own governing documents. The Board of Governors deleted the old by-laws in their entirety and filed a new set in their stead, omitting the historical statement regarding the Evangelical Free Church’s “direction” of TWU, and changing the rules on the composition of the Board of Governors so that EFCA and EFCC no longer controlled the Board’s make-up.⁵⁸ The changes that TWU effected to its relationship with

⁵³ The Evangelical Free Church comprises a far smaller group of churches than the Evangelical Christian movement: see Evangelical Free Church of Canada, “Churches”, online: <<http://www.efccm.ca/wordpress/aboutus/efcc-national-missions/churches/>> (displaying a list of the member churches in Canada).

⁵⁴ *Trinity Junior College Act*, 1969, c 44, ss 3(3), 9(3) [*Trinity Junior College Act*].

⁵⁵ *By-laws of Trinity Western College*, 1977, part III(C)(2); *By-laws of Trinity Western College*, 1979, part III(2)(1); *By-laws of Trinity Western College*, 1985, part III(2)(1); *By-laws of Trinity Western University*, 1991, part III(2)(1); *By-laws of Trinity Western University*, 2004, part III(2)(1).

⁵⁶ *Supra* note 35.

⁵⁷ *An Act to Amend the Trinity Western College Act*, SBC 1977, c 85, ss 4, 5. A previous Act had substituted the name “Trinity Western College” for the name “Trinity Junior College”: see *An Act to Amend the Trinity Junior College Act*, SBC 1972, c 65. The word “college” was later replaced with the word “university”: see *An Act to Amend the Trinity Western College Act*, SBC 1985, c 63, s 3.

⁵⁸ *TWU By-laws, 2011*, *supra* note 48, art 2(1). The reference to the Evangelical Free Church’s “direction” was originally removed in 2004: *By-laws of Trinity Western University, 2004*, part II.

the Evangelical Free Church may have been driven by a desire to evolve into a more transdenominational organization or by a concern to keep itself within the rules of the *Income Tax Act*.⁵⁹ Whatever the motivation, it appears that TWU is no longer “an arm of” the Evangelical Free Church because it has chosen to constitute itself in a manner that is more compatible with its legal status and goals. Since this fact may be relevant to the consideration of TWU’s institutional religious freedom claim, it should be accurately represented in the proceedings and reasons for judgment.

B) TWU’s sole corporate object

Of all the rules established in and by the constituting instrument of a corporate charity, the most fundamental is the statement of corporate object(s). The wording of any charity’s object is vital because charitable status attaches to an institution by virtue not of its form, but of the purposes that it carries out.⁶⁰ The wording of a corporate charity’s object is also vital because it defines the content of the obligations owed by the directors of the charity. We have already noted the limits imposed by the duty of adherence and the *ultra vires* doctrine. The former requires that any powers held by directors of a charitable corporation be used only for the charity’s corporate object, while the latter means that any act directing those powers towards another end will be void. Directors of charitable corporations are also fiduciary officers, a status that comes with strict obligations. These include a duty of undivided loyalty to the charity and a positive duty to advance the corporation’s interests by furthering its corporate object.⁶¹ A charity’s policies and practices may provide additional evidence of its institutional “mission”, as we have already seen. However, the corporate object remains the primary articulation of a corporate charity’s mission and the benchmark against which all of its other statements and actions must be measured.

TWU is a charitable corporation with only one corporate object. This object is not set out in the “TWU Mission Statement” that has figured prominently in the pleadings and reasons for judgment,⁶² but rather in TWU’s constituting statute. Section 3(2) of the *TWU Act* provides:

⁵⁹ For purposes of the registered charity regime of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), a charitable organization must maintain “direction and actual control” over its activities and the expenditure of its resources: see *Canadian Magen David Adom for Israel v MNR*, 2002 FCA 323 at para 66, 218 DLR (4th) 718.

⁶⁰ Chan, *supra* note 42 at 39–40.

⁶¹ *Harries v Church Commissioners for England* (1991), [1993] 2 All ER 300 at 304, [1992] 1 WLR 1241 (Ch).

⁶² See e.g. *TWU v LSBC SC*, *supra* note 33 (Written argument of the Petitioners at paras 24–27); see also *TWU v LSUC CA*, *supra* note 34 at para 90 (describing the TWU Mission Statement as a “foundational document”).

The objects of the University shall be to provide for people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian.⁶³

At first glance, the existence of this sole corporate object would seem to simplify the task of identifying TWU's mission, and thus make TWU a good candidate for the application of the mission-operation theory of institutional conscience. In my view, however, both the wording of TWU's corporate object and the nature of the fiduciary duties of its governors make it difficult to attribute the moral judgment behind TWU's defence of the Community Covenant to the institution itself.

Let us turn first to the wording of section 3(2) of the *TWU Act*. The terms in which the BC legislature articulated TWU's corporate object make it difficult to state with any certainty what religious beliefs may properly be attributed to the institution, if any. The ambiguity stems both from the absence in section 3(2) of any reference to "Evangelical" Christianity or the "Evangelical Free Church" and from the object's emphasis on providing university education "for people of any race, colour, or creed." The difficulty with attributing TWU's current position on the Community Covenant to the institution itself becomes clearer if one imagines a large-scale change in TWU's governance. If a group of progressive United Church ministers gained control of the TWU board and amended the provisions of the Covenant that prohibit same-sex relationships, could we say that TWU had ceased to operate in accordance with its institutional mission? Based on the wording of section 3(2), the answer seems to be no.

We may consider the point more finely by analyzing how TWU would fare under two legal standards that arguably seek to operationalize the mission-operation theory in Canadian law. The first is the *Loyola* minority test for an institutional religious freedom claim. We have already seen that in *Loyola High School*, a minority of the Supreme Court of Canada sought to extend section 2(a) protections to organizations that are "constituted primarily for religious purposes" and operate accordingly.⁶⁴ The minority's intention in establishing this threshold may have been to exclude for-profit corporations from section 2(a) protection, and thus distinguish its position from that of the US Supreme Court in *Hobby Lobby*.⁶⁵ Nevertheless, it is unclear whether a charity like TWU, which is constituted to provide general university education with an underlying Christian viewpoint, would meet the proposed test. A charity lawyer might equally characterize TWU's stated

⁶³ *TWU Act*, *supra* note 46, s 3(2).

⁶⁴ *Supra* note 1 at para 100.

⁶⁵ For a suggestion to this effect, see Victor M Muñiz-Fraticelli & Lawrence David, "Religious Institutionalism in a Canadian Context", *Osgoode Legal Studies Research Paper No 43/2016*.

purpose as a primarily *educational* purpose, albeit one with a religious character.⁶⁶

Given two plausible characterizations of TWU's corporate object, a court might defer to TWU's "self-understanding" and accept that it is constituted primarily for religious purposes. However, if TWU qualifies as an institutional religious freedom claimant because it educates people from a Christian viewpoint, the range of childcare centres, health care facilities, and schools that are protected by section 2(a) of the *Charter* may be very wide indeed. And what about the summer camp that teaches children about the environment from the perspective of ethical humanism? Following the Supreme Court of Canada's decision in *Mouvement laïque québécois v Saguenay (City of)*, there is a strong argument that such an organization would be equally entitled to the protection of section 2(a).⁶⁷ The wording of TWU's corporate object thus highlights the broader challenge of determining just how religious or conscientious an institution's purpose should be before we decide to grant it section 2(a) protection under a mission-operation account of institutional conscience.

A second legal test that appears to rely on a mission-operation theory of institutional conscience is the test for the group rights exemption in British Columbia's *Human Rights Code*.⁶⁸ Like the *Loyola High School* minority judgment, section 41 of the *Code* extends special legal protection—here, an exemption from various prohibitions on discriminatory behavior—to institutions identified by their primary purposes.⁶⁹ The section states, in relevant part:

If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit *has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by ... a common ... religion ...* that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.⁷⁰

TWU has relied heavily on section 41 throughout its dispute with the provincial law societies. In its pleadings and written arguments, the institution

⁶⁶ The Charity Commission for England and Wales, for example, classifies several colleges that are constituted to advance education consistently with the religious intention of the founders as "education/training" charities on its register.

⁶⁷ 2015 SCC 16, [2015] 2 SCR 3 ("[f]or the purposes of protections afforded by the charters, the concepts of 'belief' and 'religion' encompass non-belief, atheism and agnosticism" at para 70).

⁶⁸ *Human Rights Code*, RSBC 1996, c 210 [*Code*].

⁶⁹ *Ibid*, s 41.

⁷⁰ *Ibid* [emphasis added].

has consistently argued that it exists primarily to serve the educational needs of Canada's evangelical Christian community.⁷¹ This position is fundamental to TWU's assertion that the provision protects its right to maintain the Community Covenant, and thus that its "discrimination" against LGBTQI applicants to TWU is lawful. The law societies appear to have accepted this position, based on a passage from the 2001 decision of *Trinity Western University v British Columbia College of Teachers* where the Supreme Court of Canada indicated (with little accompanying analysis) that TWU fell within the terms of the exemption.⁷²

If one examines the wording of TWU's corporate object closely, however, it becomes more difficult to characterize TWU as a charitable corporation with a primary purpose falling within the terms of section 41. In particular, it is unclear how an institution whose sole corporate purpose is to provide university education "for people of any race, colour, or creed" could have, as a primary purpose, the promotion of the educational needs of Evangelical Christians, or how it could refuse to educate LGBTQI individuals who embrace their sexuality in the light of their faith. The Supreme Court of Canada did not address this issue in the 2001 *TWU v BCCT* decision; indeed, the BC Supreme Court was the only court to include TWU's corporate object in its reasons for judgment in the earlier proceeding.⁷³ However, if we accept that section 3(2) of the *TWU Act* sets the boundaries of lawful action for TWU, we must analyze the tension between its terms and the terms of section 41 more closely this time around.

Finally, while TWU's governors are all under a fiduciary duty to further its corporate object, the nature of that fiduciary duty makes it difficult to attribute the moral judgment behind TWU's defence of the Community Covenant to the institution itself. One distinctive trait of the fiduciary duty of loyalty is that it focuses on the motive of the actor, rather than the actor's intention or the result of their act. As Lionel Smith has explained, the duty of loyalty requires that the fiduciary "act with a particular motive: in general, she must act (or not act) in what she *perceives* to be the best interests of the person to whom the duty is owed."⁷⁴ Since TWU is constituted for a single object, the duty of fiduciary loyalty can be understood as imposing on each TWU governor a legal obligation to pursue the course of action (or

⁷¹ See e.g. *TWU v LSUC* Sup Ct J, *supra* note 33 (Petition to the Court at para 4); *TWU v LSBC SC*, *supra* note 33 (Written argument of the Petitioners at para 15); *TWU v LSBC SC*, *supra* note 33 (Petition to the Court at part 2, para 5).

⁷² *TWU v BCCT*, *supra* note 40 at para 25; see also para 35.

⁷³ *Trinity Western University v College of Teachers (British Columbia)* (1997) 41 BCLR (3d) 158 at para 9, [1998] 4 WWR 550.

⁷⁴ Lionel Smith, "The Motive, Not the Deed" in Joshua Getzler, ed, *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: LexisNexis, 2003) 53 at 69 [emphasis added] [Smith, "The Motive"].

inaction) that he or she perceives will best fulfill that corporate object.⁷⁵ If a governor believes that defending the Community Covenant in its current form will best support TWU's object of providing university education with an underlying philosophy and viewpoint that is Christian, in other words, fiduciary doctrine requires that governor to act in its defence.⁷⁶ However, if another governor believes that *removing* the Community Covenant will best support that object, the same principle also applies. This characteristic of fiduciary doctrine tends to support an image of TWU as a moral association of individuals, rather than an entity with a moral judgment that transcends its constituent parts.

4. Applying the Moral-Association Theory to TWU

The second basis upon which a court could extend section 2(a) rights to TWU would be to ascribe certain religious convictions to a group of individuals, and recognize TWU as the vehicle or means by which those individuals express those convictions. The application of the moral-association theory of institutional conscience would require identification of the relevant stakeholders of TWU and evidence of their religious beliefs. This section briefly outlines the approaches that other courts have taken to these tasks. I then consider evidence of TWU's governance structure, arguing that TWU's closely held membership strengthens its religious freedom claim under a moral-association theory. Finally, I reflect on some difficulties of attributing the religious convictions of TWU's legal membership to a broader group of individuals associated with TWU.

A) Discerning the relevant stakeholders of a corporate charity

We have seen that the moral-association theory of institutional religious freedom portrays the institution not as *itself* a conscience-holder, but rather as a *vehicle* by which certain individuals express their religious or moral convictions. For this reason, the moral-association theory raises difficult questions about what group of individuals an institution can be said to represent. These questions appear to have only rarely been in issue in cases where courts relied on the moral-association theory to extend religious freedoms to institutions. Nevertheless, we can discern a variety of possible approaches in the jurisprudence of the American and European courts.

The European human rights regime is an important legal regime that has adopted a moral-association account of institutional religious freedom.

⁷⁵ See *ibid*, and the cases cited therein.

⁷⁶ The exercise of a power to vote against the legal defence of the Community Covenant would be reviewable if the governor acted with an improper motive: see Smith, "The Motive", *supra* note 74 at 69.

The judicial organs that enforce the European Convention on Human Rights (“the Convention”) have repeatedly affirmed that a church body or an association with religious and philosophical objects is capable of possessing and exercising the right to freedom of religion under Article 9 of the Convention only because an application by such a body is in reality lodged on behalf of its members.⁷⁷ The Strasbourg organs have never required churches and other religious associations to demonstrate that they are a “perfect representation” of the interests of their members in order for that institutional right to be exercised.⁷⁸ In *Hautaniemi v Sweden*, for example, where a Finnish-speaking parish of the Church of Sweden dissented from a decision of the Church’s governing body, the European Commission of Human Rights nonetheless accepted the Church’s right to manifest religion on its members’ behalf.⁷⁹ However, in that case there was no suggestion that the dissenting parishioners were not “members” of the Church; the Commission’s decision implied only that since they *were* members, the Church could make decisions on their behalf.

Thus far, the Strasbourg organs have refused to recognize the right of for-profit companies to make religious freedom claims under the Convention.⁸⁰ However, other jurisdictions, including England and the United States, have relied on a moral-association theory of institutional religious freedom to take this further step. In extending free exercise rights to the for-profit corporate claimants in *Hobby Lobby*, for example, the majority of the United States Supreme Court adopted an instrumental or “aggregate” view of the corporation, describing it as “simply a form of organization used by human beings to achieve desired ends.”⁸¹ The majority held that the *Religious Freedom Restoration Act* recognized the corporation as a subject of religious freedom in order to protect the religious liberties of persons associated with it; the corporation itself could not “do anything at all.”⁸² In extending free exercise rights to a for-profit company in the UK, a First-Tier Tribunal employed similar reasoning, holding in *Exmoor Coast Boat Cruises Ltd v Revenue and Customs Commissioners* that a for-profit company could enjoy religious freedom under the *Human Rights Act 1998* (UK) “if and to the extent it is the alter ego of a person (or, potentially, a group of people).”⁸³

⁷⁷ *X and Church of Scientology v Sweden* (1979), No 7805/77, 16 Eur Comm’n HR DR 68 at 70; *Kustannus v Finland* (1996), No 20471/92, 85A Eur Comm’n HR DR 29; see also Ioana Cismas, *Religious Actors and International Law* (New York: Oxford University Press, 2014) at 100 [Cismas]; Rivers, *supra* note 15 at 54.

⁷⁸ Cismas, *supra* note 77 at 100.

⁷⁹ (1996), No 24019/94, 85A Eur Comm’n HR DR 94.

⁸⁰ Cismas, *supra* note 77 at 102.

⁸¹ *Supra* note 8 at 2768.

⁸² *Ibid.*

⁸³ [2014] UKFTT 1103 (TC) at para 71 [emphasis added] [*Exmoor*].

Now that the English and American courts have affirmed that for-profit corporations may possess religious freedom derivatively on behalf of individuals, determining which individuals associated with corporations count in the analysis of the institution's beliefs has become more pressing.⁸⁴ The Tribunal in *Exmoor* did not have to delve deeply into this issue on the facts: the boat cruise company in that case had a sole director and shareholder, and the Tribunal had no difficulty in concluding that the company was that individual's alter ego for purposes of the claim.⁸⁵ In *Hobby Lobby*, the corporate claimants were larger and more complex organizations, which respectively had 950 and 13,000 employees.⁸⁶ The majority identified several groups of individuals who would be associated with such a corporation, but ultimately identified the relevant stakeholders by reference to criteria of ownership and control:

An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights ... are extended to corporations, the purpose is to protect the rights of these people ... And protecting the free-exercise rights of corporations like Hobby Lobby ... protects the religious liberty of the humans who own and control these companies.⁸⁷

In *Hobby Lobby*, two parents and three children owned or controlled all shares of Hobby Lobby's stock and served as executive officers of the corporation.⁸⁸ It was the religious beliefs of these shareholders/officers that the Court attributed to Hobby Lobby itself.⁸⁹

B) The legal members of TWU

What insight do these authorities on the application of the moral-association theory provide into TWU's institutional religious freedom claim?

In the debate over the Community Covenant, religious community membership has been an important theme. The Covenant applies, in its terms, "to all members of the TWU community, that is, administrators, faculty and staff employed by TWU and its affiliates, and students enrolled at TWU or any affiliate."⁹⁰ In accordance with this language, TWU's leaders have described the Community Covenant as "the expression of how the members

⁸⁴ See e.g. discussion in Pollman, *supra* note 18 at 157.

⁸⁵ *Exmoor*, *supra* note 83 at para 10.

⁸⁶ *Supra* note 8 at 2764–65.

⁸⁷ *Ibid* at 2768 [emphasis added].

⁸⁸ *Supra* note 8 at 2775. See also Pollman, *supra* note 18 at 152.

⁸⁹ Pollman, *supra* note 18 at 150–51, 153.

⁹⁰ TWU, "Community Covenant", *supra* note 32 at 5 [emphasis added].

of the TWU community ... wish to study, work and live together.”⁹¹ The courts have similarly described the Covenant as a code of virtues to which the “members of the TWU community” commit.⁹² In the context of the TWU proceedings, then, the concept of “membership” has functioned to define both the status from which LGBTQI individuals are being excluded and the individuals whose religious freedoms are engaged by the dispute. In both of these contexts, the term “member” is being used broadly to include TWU’s administrators, faculty, students, and staff.⁹³

In striking contrast to the Community Covenant and the judicial decisions about it that cast membership in the TWU community broadly, TWU’s governing documents restrict membership in TWU to a far narrower class. The original *TWU By-laws* envisioned the institution having a membership that grew incrementally over time, giving existing members the power to propose new members for the approval of the directors.⁹⁴ However, the *Trinity Junior College Act* put an end to this structure, providing instead that “the members of the Board of Governors may exercise all the powers of the College *and are the members of the College*.”⁹⁵ This provision has remained in place and has been supplemented by by-laws that structure the Board of Governors as a self-perpetuating management body. Article 2(4) of the *TWU By-laws* provides that new members of the Board of Governors are to be elected by the Board of Governors upon recommendations from a Governance Committee that is also composed of members of the Board of Governors.⁹⁶ Article 3(4) makes the TWU President a (non-voting) *ex officio* member of the Board and its committees, but specifies that no other member of the faculty or administrative staff shall be a member of the Board.⁹⁷ The net result is that TWU’s faculty, students, and staff are precluded from becoming members of TWU, and excluded from having any direct role or representation in the institution’s administration.

In drawing attention to TWU’s corporate governance structure, I do not suggest that it is not entitled to constitute itself in this way. Not-for-profit organizations in Canada are generally permitted to structure themselves as closely held corporations with self-perpetuating boards, and many organizations choose to do so. Moreover, international human rights law has recognized that religious associations have a right of structural internal

⁹¹ Earl Phillips, “Trinity Western University’s Community Covenant”, *Law Matters* 40:2 (Summer 2015) 13 at 13.

⁹² *TWU v LSUC CA*, *supra* note 34 at para 22.

⁹³ *Ibid.*

⁹⁴ *By-laws of Trinity Junior College*, 1962, art 2.

⁹⁵ *Trinity Junior College Act*, *supra* note 54, s 9(2) [emphasis added]; *TWU Act*, *supra* note 46, s 9(2).

⁹⁶ *TWU By-laws*, 2011, *supra* note 48, art 2(4).

⁹⁷ *Ibid.*, art 3(4).

autonomy, which includes the right to organize in such a way as to stifle dissident movements that might pose a threat to their cohesion, image, or unity.⁹⁸ TWU is under no obligation to structure itself as a miniature democracy, or to model its mode of governance on that of other Canadian universities.

Indeed, under a moral-association theory of institutional religious freedom, TWU's closely held membership and self-perpetuating board must be considered to strengthen its section 2(a) claim. We have seen that in *Hobby Lobby*, the majority of the United States Supreme Court identified the individuals on whose behalf the corporation enjoyed religious freedom protections by reference to criteria of ownership and control.⁹⁹ The fact that the companies were "closely held corporations, each owned and controlled by members of a single family,"¹⁰⁰ made it easier for the Court to identify the religious beliefs of the relevant individuals and attribute religious beliefs to the corporate claimants on their behalf. Similar reasoning can be relied upon to attribute religious beliefs to a closely held *not-for-profit* organization. Like in for-profit corporate law, the notion of control in not-for-profit corporate law refers to the individuals "who hold sufficient voting power to elect a majority of the corporation's board of directors, which manages the corporation's affairs in its own business judgment."¹⁰¹ In TWU, this control is held by the members of the Board of Governors that also exercise all the powers of the University. While TWU has not adduced evidence from all or a majority of these individuals in its proceedings against the law societies,¹⁰² as the moral-association theory would seem to require, the 19 members of the Board of Governors appear so far to have acted with one voice in defending the proposed TWU law school. Assuming the evidence was to establish this defence as a true reflection of the members' position on the Community Covenant, it would be relatively unproblematic to attribute their religious views on the Covenant to TWU itself.

⁹⁸ *Sindicatul "Păstorul cel Bun" v Romania*, No 2330/09, [2014] 58 EHRR 10 at paras 136–37; see also Rivers, *supra* note 15 at 57–58.

⁹⁹ *Supra* note 8 at 2768.

¹⁰⁰ *Ibid* at 2774.

¹⁰¹ Pollman, *supra* note 18 at 158. In a for-profit corporation, these controlling individuals are the shareholders. In a not-for-profit corporation, they are simply referred to as members.

¹⁰² Of the 18 individuals who swore affidavits in support of the original TWU petition in British Columbia, only one is listed on the CRA charities register as having been a member of the TWU Board of Governors at the time of the petition: *TWU v LSBC SC*, *supra* note 33 (Petition to the Court at part 4).

C) Who else does TWU represent?

Based on the foregoing discussion, we may conclude that under a moral-association theory of institutional religious freedom, TWU likely has a strong argument that its position on the Community Covenant is entitled to section 2(a) protection. However, if TWU's religious freedom claim is being understood as a claim *on behalf of its members or those who comprise or control the institution*, we need to carefully consider the scope of the class of people to whom TWU's claim extends. It is one thing to not require that an institution "perfectly represent" the interests of its members in order to exercise an institutional religious freedom right. It is another to attribute the religious convictions of an institution to individuals it does not represent. When individuals sue to obtain legal protections on the basis of their religious convictions, they must attest to those convictions in court. In my view, if we are to extend section 2(a) rights to institutions on the basis that certain individual religious convictions can be attributed to institutions, we should be careful to not attribute those religious convictions to a broader group of individuals who have not been heard in court.

Another way of approaching this issue is to ask whom an institution has standing to represent in an institutional religious freedom claim. Personhood and standing are distinct concepts in constitutional law: the former denotes "a person's status as a constitutional rights holder", while the latter denotes a person's entitlement to vindicate the violation of either one's own or someone else's right.¹⁰³ The Supreme Court of Canada has adopted a liberal approach to public interest standing in constitutional law, holding that the court has the discretion to grant standing to individuals with no personal interest in a matter in order to vindicate a public interest.¹⁰⁴ However, Canadian law on the standing of an institution to vindicate the rights of its stakeholders or associates is less developed. In an influential 1995 article, Australian scholar Peter Cane distinguished what he called "associational standing" from three other categories of standing: personal standing, surrogate standing, and public interest standing. The passage on associational standing bears repeating in full:

A litigant who claims to represent the interests of identifiable individuals cannot do so convincingly unless there is a reasonably effective mechanism by which the representative can ascertain what the represented believe their interests to be. In order to be a legitimate representative, the claimant must be able to convince the court that the views put forward by it are a fair reflection of the views of the represented. In other words, the represented must have some degree of control over

¹⁰³ Robinson, "Constitutional Personhood", *supra* note 10 at 613, 618.

¹⁰⁴ See *Downtown Eastside Sex Workers United Against Violence Society v Canada (AG)*, 2012 SCC 45 at paras 1–2, [2012] 2 SCR 524.

or some “democratic stake” (as I will call it) in the conduct of the representative. Without some such nexus between the represented and the representative, the claimant may simply be expressing “a well-informed point of view.”¹⁰⁵

In a footnote, Cane acknowledged that his concept of a “democratic stake” might function differently in different associational contexts.¹⁰⁶ Courts, he wrote, would be justified in requiring less evidence of a democratic stake where individuals had voluntarily associated themselves with a representative organization and could disengage from it at will without undue cost.¹⁰⁷ “[T]he greater the likely impact of the court’s decision on the represented individuals personally”, however, “the greater the control a court should require that they have over the representative’s actions.”¹⁰⁸

How do these principles apply to TWU? So far, the working assumption in the legal proceedings against the law societies appears to have been that TWU is acting to protect the religious freedom of everyone who has signed the Community Covenant—every “non-legal” member of TWU. To take just one example, a passage in the recent decision of the Ontario Court of Appeal states:

It is only through TWU that the claim to operate a degree-granting accredited law school from an evangelical Christian perspective can possibly be advanced. In this way, TWU acts as the vehicle through which the religious freedoms of its individual members, including teachers, students, and staff, can be manifested, pursued and achieved.¹⁰⁹

Fiduciary law may require that TWU’s governors consider the interests of TWU’s students and employees in determining how best to fulfill TWU’s corporate object.¹¹⁰ However, TWU’s students, faculty, and staff neither own nor control TWU; and do not appear to have any “democratic stake” in TWU’s defence of the Community Covenant. They have presumably voluntarily associated with the institution, but it is questionable whether all of them could *dissociate* without undue cost. At a minimum, the matter merits further thought: in light of its governance structure and the evidence of its intention not to endow its academic members with any legally enforceable rights, is TWU a legitimate representative of the individuals who work and study there? The question is a complex one, and the answer may well vary in respect of TWU’s students, faculty, and staff. However, the

¹⁰⁵ Peter Cane, “Standing up for the Public” (1995) Public L 276 at 278.

¹⁰⁶ *Ibid* at 278, n 12.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*. Cane’s framework would pose a significant challenge to hierarchical religious institutions such as the Catholic Church.

¹⁰⁹ *TWU v LSUC CA*, *supra* note 34 at para 94 [emphasis added].

¹¹⁰ *Re BCE Inc*, 2008 SCC 69 at paras 36–38, [2008] 3 SCR 560.

anecdotal evidence of internal debate within TWU over the appropriateness of the Community Covenant should, at a minimum, cause the courts to be cautious in describing the individuals that are represented by the institution's religious freedom claim.¹¹¹

5. Conclusion

The “institutional turn” that religious freedom litigation has taken in other jurisdictions is now discernible in Canada. If this institutional turn continues, it seems unlikely that the Supreme Court of Canada will be able to maintain its historically ambiguous stance towards institutional religious freedom claimants. Sooner or later, the “constitutional personhood” question will need to be answered. The Court will have to determine whether the “everyone” that is entitled to freedom of conscience and religion under section 2(a) of the *Canadian Charter of Rights and Freedoms* includes corporations. And the moment the Court answers that first-order question, a number of second-order questions about the scope and nature of that constitutional personhood will inevitably arise.

I have argued that we would be well-advised to grapple with these second-order questions before we provide an affirmative answer to the first. I have sought to make this point by grappling with the identity of Trinity Western University, the institution at the heart of a difficult debate about how to reconcile religious freedoms and equality rights. Looking to jurisdictions where the law on institutional religious freedom is substantially more developed, I have outlined two competing theories of institutional conscience that Canadian courts could rely upon in extending section 2(a) rights to a range of corporate entities. I have applied the “mission-operation” and “moral-association” theories to TWU, and concluded that the latter theory provides a stronger basis than the former for according constitutional protection to TWU's position on the Community Covenant.

Recognizing that we are in an early stage of these debates, I have not extended this conclusion into a broader claim about which account of institutional conscience the Supreme Court of Canada should adopt, if either. Instead, I have offered my views on the proper implementation of each. Those views may be summarized as follows. First, if the courts adopt a mission-operation theory of institutional religious freedom, they should apply that theory in a way that respects the corporate and trust law mechanics that govern the institutional pursuit of commercial, not-for-profit, and charitable purposes. The vital evidence will be documentary, and the most important documents will be those that constitute the institution

¹¹¹ Douglas Todd, “TWU Faculty Tense Over Gays, Donors and Academic Freedom”, *Vancouver Sun* (21 June 2014), online: <vancouver.sun.com>.

and set the boundaries of its lawful operation. Second, if the courts adopt a moral-association theory of institutional religious freedom, they should apply that theory in a way that respects the moral convictions of individuals that may be associated with, but not represented by, the institution making the claim. The vital evidence will be testamentary, and will address the religious/conscientious beliefs of whatever individuals the courts decide “control” or “comprise” the institution. Attention to these second-order points will orient the courts towards coherence as they address the difficult first-order question of whether institutions enjoy freedom of conscience and religion under the *Charter*.