



File number

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL ONTARIO)**

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Appellants

– and –

LAW SOCIETY OF UPPER CANADA

Respondent

- and

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ARCHDIOCESE OF VANCOUVER, CATHOLIC CIVIL RIGHTS LEAGUE, FAITH
AND FREEDOM ALLIANCE, WORLD SIKH ORGANIZATION OF CANADA**

Interveners

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CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)**

BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

Appellant

– and –

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Respondents

- and -

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PART I – OVERVIEW

1. Academic freedom is a right that attaches to every university teacher and professor, regardless of religious belief, field of study, or affiliation. Academic freedom does not belong to an institution such as Trinity Western University. It belongs to the individual faculty member and is not subject to restriction on the grounds of institutional autonomy.
2. Academic freedom is an important safeguard in the promotion and protection of diversity in post-secondary education. In respect to teaching and scholarship, academic freedom, by its very nature, does not mandate a particular conclusion or prescribed doctrine; it allows for the exploration of ideas without a pre-determined outcome.
3. Academic freedom in teaching and scholarship allows for challenge without fear of reprisal. Academic freedom encourages and provides a safe space for diversity and its restriction is fatal to a free exchange of ideas. In the context of these appeals, infringement on the academic freedom of faculty at the Trinity Western University proposed law school is a fundamental impediment to a legal education respecting all human rights.

PART II – POSITION ON QUESTIONS ON APPEAL

4. CAUT/ACPPU takes the position that a denial of academic freedom in the teaching and scholarship at Trinity Western University should be considered in the proportionate balancing of *Charter* rights and values at issue in these appeals.
5. As demonstrated by its consideration throughout the accreditation processes at issue, academic freedom was recognized as an important factor in assessing whether the proposed legal education at Trinity Western University meets the required standards for faculty at the University. Any conclusion that academic freedom would not be infringed at the proposed law school reflects, in CAUT/ACCPU view, a misunderstanding and misapplication of the concept of academic freedom as it applies in teaching and scholarship.

PART III - STATEMENT OF ARGUMENT

Academic Freedom as Claimed by Trinity Western University

6. Trinity Western University maintains that it respects academic freedom and relies on its *Academic Freedom* policy and its claimed compliance with the *Statement on Academic Freedom* of the Association of Universities and Colleges of Canada (AUCC, now Universities Canada).¹ The Special Advisory Committee Report to the Federation of Law Societies agreed.² However, the AUCC Statement conflates academic freedom with institutional mission and autonomy:

Unlike the broader concept of freedom of speech, *academic freedom must be based on institutional integrity*, rigorous standards for enquiry and *institutional autonomy*, which allows universities to set their research and educational priorities.

...

Academic freedom is constrained by the professional standards of the relevant discipline and the responsibility of the institution to organize its academic mission.

...

The constraint of institutional requirements recognizes simply that the academic mission, like other work, has to be organized according to institutional needs. [emphasis added]³

7. AUCC's institutional focus in defining and applying academic freedom reflects its nature as an organization of institutions, not of faculty. It is from this perspective that institutional mission is a valid filter for its exercise that grounds TWU's claim that academic freedom would be respected in the legal education at its proposed law school. However, such a position is inconsistent with the recognized meaning of academic freedom as a freedom attached to faculty and independent of institutional autonomy and thus institutional mission and faith tests.

¹ *Affidavit of W. Robert Wood*, August 22, 2014, and Exhibits "D" (TWU *Academic Freedom*) and "E" (AUCC *Statement of Academic Freedom*), *Appeal Book of the Appellants Trinity Western University and Brayden Volkenant*, Vol 1, 541-2. Also see Response to the Special Advisory Committee of the Federation of Law Societies of Canada on Trinity Western University's Proposed School of Law, Exhibit "I" to the *Affidavit of Janet Epp Buckingham*, December 15, 2014, *Record of the Respondents Trinity Western University and Brayden Volkenant*, Vol III at 40/52.

² *Special Advisory Committee on Trinity Western's Proposed School of Law Final Report*, December 2013, Exhibit "C" to the *Affidavit of Timothy E. McGee QC*, January 26th, 2015, *Record of the Appellant (LSBC)*, V. 6 at 1034/40

³ *AUCC Statement of Academic Freedom*, *supra*, at 541.

8. Institutional autonomy may be an important protection from *external* pressures in the exercise of academic freedom, but institutional autonomy cannot be used by a university to justify *internal* restrictions on academic freedom. A prescribed outcome is inconsistent with freedom in teaching and scholarship as it directs only one answer; it is the opposite to what academic freedom demands.
9. The effect of restraint or restriction on a freedom is illustrated by Dickson J., as he then was, in *Big M Drug Mart*:

Freedom can primarily be characterized by the absence of coercion or constraint. *If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.* [emphasis added]⁴

Institutional interference undermines the individual exercise of academic freedom.

Academic Freedom in its Appropriate Definition and Application

10. Harry W. Arthurs has described academic freedom as follows:

Academic freedom is a central, arguably the central value, of university life. Anything which interferes with it has to be justified by reference to prior or higher values. I can think of very few, other than perhaps the protection of human life: certainly not institutional solidarity; certainly not institutional reputation.⁵

11. In its application, David Schneiderman, a University of Toronto Professor of Law and Political Science, has stated:

Academic freedom typically is understood as entailing the freedom to teach, research, and write within parameters laid down by one's peers. It also entails an ability to continually renew and reshape knowledge and the standards by which professional knowledge is assessed. Academic freedom enables scholars to be free of outside constraints or considerations other than those expected from those working within the community of scholars. It is, in other words, an association or co-operative activity that insists upon self-regulation.⁶

12. As Wilson J. stated in *McKinney v. University of Guelph*, "The essential function which the principle of academic freedom is intended to serve is the protection and encouragement of

⁴ *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295.

⁵ Jon Thompson, "Preface" in James L. Turk, ed., *Academic Freedom in Conflict* (Toronto: James Lorimer & Company, 2014) 7.

⁶ David Schneiderman, "Academic Freedom and the Federal Idea" in *Academic Freedom in Conflict*, supra, 219.

the free flow of ideas.”⁷ In the same case, LaForest J. made the link between academic freedom and academic excellence:

Excellence in our educational institutions, and specifically in our universities, is vital to our society and has important implications for all of us. Academic freedom and excellence is essential to our continuance as a lively democracy.⁸

13. As suggested above, the freedom to continually reshape ideas is an essential element of academic freedom. As John Baker, in advancing what he calls, “the theses of the essential desirability of openness to revision,”

...[O]ne would hope that any academics engaging in serious study in preparation for teaching or engaging seriously in research would constantly be willing to pay attention to worries that might be raised not only about the substantial claims and theories that they accept and are teaching, but also about the methods that can and should be used in assessing such claims and theories and to revise these claims if need be in the light of those worries, if those worries turn out on investigation to be well-grounded. No doubt at any given time many of the claims and theories they accept are claims and theories they have no reason to revise or replace, but for any self-respecting academic nothing should be viewed immune to revision or abandonment if evidence, argument, or reason is found or offered for such revision or such abandonment.⁹

In the present context of legal education, we can add “changes in law” to Baker’s above list of those “worries” that would justify reassessment of claims and theories.

14. The ability of a faculty member to be open to revisions of claims and theories in teaching and scholarship should not be circumscribed by institutional interference, such as by insistence on teaching through the lens of a prescribed doctrine that permits no deviation. As Baker points out,

...[A]lthough it is essential that it be remembered and acknowledged that universities and institutions of higher learning need the freedom to make autonomous judgments as to how best to fulfill their institutional role as the developers of knowledges and providers of higher education in the community, it is equally essential to realize that in exercising this role they may infringe those very rights that those designated as academic staff in the institution need if they are to be able to fulfill their roles in the institution. The point is that *the needed institutional autonomy of the universities must*

⁷ *McKinney v. University of Guelph*, [1990] 3 SCR 229, at para. 256.

⁸ *McKinney v. University of Guelph*, *supra*, at para. 69.

⁹ John Baker, “Academic Freedom as a Constraint on Freedom of Religion” in *Academic Freedom in Conflict*, *supra*, 137.

*not be allowed to infringe the academic freedom rights of the academic staff in the university.*¹⁰ [emphasis added]

Institutional Autonomy Should Not Be Confused with Academic Freedom

15. In *Pridgen v. University of Calgary*, Paperny J. considered the relationship between academic freedom and institutional autonomy as it relates to the propensity for interference in the free exchange of ideas and opinions:

[114] Academic freedom is usually confined to the professional freedom of the individual academic in universities and other institutions of higher education; *the freedom to put forward new ideas and unpopular opinions without placing him or herself in jeopardy within the institution.* [emphasis added]¹¹

16. The individual nature of academic freedom and its distinction from institutional autonomy is also reflected in international sources. In *Keyishian v. Board of Regents*, Justice Brennan of the United States Supreme Court stated:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned... The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] that through any kind of authoritative selection." In *Sweezy v. New Hampshire*, 354 U.S. 234, 354 U.S. 250, we said:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. *To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation....* Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." [emphasis added]¹²

17. Section 202(2)(a) of the United Kingdom *Education Reform Act, 1988* supports the individual nature of academic freedom and protection from institutional interference in its exercise. The Act provides for University Commissioners to:

[E]nsure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, *without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions*;... [emphasis added]¹³

¹⁰ John Baker, *Ibid*, 135-6.

¹¹ *Pridgen v. University of Calgary*, 2012 ABCA 139 (CanLII).

¹² *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

¹³ *Education Reform Act, 1988*, Chapter 40, 1988, United Kingdom, Section 202(2).

18. In addressing the tension between academic freedom and institutional autonomy, the authors of a report for the UK's University and College Union, *Academic Freedom in the U.K.: Legal and Normative Protection in a Comparative Context* ("UCU Report"), state:

Individual autonomy and institutional autonomy are often conflated under the heading of "academic freedom"... Although these two concepts are linked, they are different. Wolff's study makes this distinction explicit viz. "academic freedom is the privilege individual academics may claim as the freedom to question and test received wisdom, to put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy of losing the jobs or privileges they may have at their institutions. Academic autonomy applies to the institution. It may be defined as the right of academic institutions to decide freely and independently how to perform their tasks."¹⁴

19. A focus of the UCU Report is a comparative review of academic freedom in EU countries in the context of the November 11, 1997 United Nations Educational Scientific and Cultural Organization *Recommendation Concerning the Status of Higher Education Teaching Personnel* ("UNESCO Recommendation"). Again, noting the distinction between academic freedom ascribed to the individual and institutional autonomy, the authors of the UCU Report state,

UNESCO's Recommendation was the first international attempt to provide a detailed description of the necessary parameters for academic freedom, seek international support for their implementation, and provide a mode of redress (via reports to the CEART).¹⁵ The Recommendation specifies the following major critical elements which are considered crucial to academic freedom:

- Individual rights and freedoms - "the principle of academic freedom should be scrupulously observed. Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies."¹⁶

¹⁴ Terrance Karran and Lucy Mallinson, *Academic Freedom in the U.K.: Legal and Normative Protection in a Comparative Context: Report for the University and College Union* (UCU Report)(Lincoln, University of Lincoln, 2017) 7-8.

¹⁵ CEART is the Committee of Experts on the Application of the Recommendation concerning Teachers.

¹⁶ UCU Report, *supra*, at p. 22, quoting from paragraph 27 of the *UNESCO Recommendation, infra*.

20. The *UNESCO Recommendation* represents an international consensus on the rights of academic staff to academic freedom based on faculty as persons and professionals. Further, the right to education, Article 13 of the United Nations *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”), has also been determined to include protection for academic freedom.

21. At its Twenty-ninth Session in Paris (1997) UNESCO adopted the *Recommendation concerning the Status of Higher-Education teaching Personnel* based on ICESCR Article 13 (*UNESCO Recommendation*). The *UNESCO Recommendation* addressed interference with academic freedom as follows:

20. Autonomy should not be used by higher education institutions as a pretext to limit the rights so higher-education teaching personnel provided for in this Recommendation or in other international standards set out in the appendix.¹⁷

...

27...Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without restriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution in which they work, *freedom from institutional censorship and freedom to participate in professional or representative academic bodies*. All higher-education teaching personnel should have the right to fulfil their functions without discrimination of any kind and without fear of repression by the state or any other source...[emphasis added]¹⁸

22. As stated by James L. Turk, in his introduction to *Academic Freedom in Conflict*,

Commonly the institutional autonomy of the university has been described as the basis of academic freedom – that which insulates academic staff from the inappropriate intrusion of outside forces. While there is a measure of truth to that – university autonomy helping make possible the academic freedom of its academic staff – *it is important not to conflate university autonomy with academic freedom*. To the extent that autonomy of the university as an institution is translated into “institutional academic freedom,” the stage is set for the institution to assert its institutional right to limit the academic freedom of its academic staff and to deny them any redress outside the institution. [emphasis added]¹⁹

¹⁷ United Nations Educational, Scientific and Cultural Organization, *Recommendation concerning the Status of Higher-Education teaching Personnel*, Twenty-Ninth Session (Paris: United Nations Educational Scientific and Cultural Organization, 1997), Volume 1 Resolutions, Articles 20 & 27.

¹⁸ *UNESCO Recommendation, supra*, Article 28.

¹⁹ James L. Turk, “Introduction” in *Academic Freedom in Conflict, supra*, 14.

Religious Doctrine and Academic Freedom

23. In “Academic Freedom as a Constraint on Freedom of Religion,” John Baker notes,

It is reasonably clear that a religious sect could endow and in various ways support a university without *necessarily* generating serious problems for the exercise of academic freedom.

It is much less clear that an institution could with plausibility claim that it respects the academic freedom of its academic staff even though it espouses (perhaps in a mission statement) specific religious tenets and in its various rules and practices requires, as a condition of employment or of continuation of employment, that its academic staff accept and comply with these tenets.²⁰

24. William Bruneau considers the state of academic freedom at Canada’s faith-based universities and colleges in the context of a faith test, based on an institution’s doctrinal mission. In the author’s view, “a faith test for faculty will have fatal consequences for academic freedom.” Moreover, Bruneau concludes that faith tests promote, “ideologically homogeneous communities. That homogeneity explains why presidents of faith-based institutions can reasonably say that ‘nobody complains at our place.’”²¹ Of course, deviation would not be an option in any event if employment is contingent, as at TWU, on continued support for the doctrine.

25. It need not be so. Bruneau notes that other religious based universities and colleges in Canada have demonstrated “a strong commitment to academic freedom.” Examples include Université St-Paul (Ottawa), St. Thomas Moore (University of Saskatchewan) and St. Francis Xavier, which have all agreed to academic freedom clauses in their collective agreements consistent with the accepted definition of academic freedom as discussed above.²²

26. An expert review panel was commissioned in British Columbia to review the proposed law degree program at TWU. The subsequent report included concerns over the TWU *Statement of Faith and Community Covenant* in respect to impact on academic freedom.

²⁰ John Baker, *supra*, 127.

²¹ William Bruneau, “Academic Freedom and Religious Conviction at Canada’s Faith-Based Universities and Colleges” in *Academic Freedom in Conflict*, *supra*, 149.

²² William Bruneau, *Ibid*, 157.

The Expert Panel Report noted, *inter alia*, the TWU “assertion that TWU faculty members are in fact free to challenge established doctrine and to pursue any line of critical scholarly inquiry they might wish to pursue.” The Expert Panel challenged the claim:

However, it is clearly inconsistent with the provisions of the Statement of Faith and Community Covenant set out above. This inconsistency is reinforced by the requirement that each faculty member must explicitly reaffirm annually that he or she agrees with the terms of the Statement of Faith and also agrees, “to support that position at all times before the students and friends of Trinity Western University.”²³

27. The Expert Panel Report noted that TWU “acknowledged that Canada had no law schools which impose a religious test on current or prospective faculty members.” The Panel went on to note the religious-based universities in the United States would be allowed to “extend a hiring preference to prospective faculty members who adhere to a particular religion, but not to have a blanket exclusion of other faculty members or a religiously based quota system.”²⁴

28. CAUT/ACPPU submits that the faith test arising from the TWU *Statement of Faith* and *Community Covenant* required to be met on appointment of faculty and thereafter confirmed every year as a condition of employment²⁵ constitutes a violation of academic freedom.

Thus,

a. The *Statement of Faith* requires a commitment to “historic orthodox Christianity,” where Scriptures must be believed and obeyed in their entirety;²⁶

b. The *Community Covenant* is

[A] solemn pledge in which members place themselves under obligations on the part of the institution to its members, the members to the institution, and the members to one another. In making this pledge, members enter into a contractual agreement and a relational bond...It is vital that each person who accepts the invitation to become a member of the TWU community carefully considers and sincerely embraces this community covenant.²⁷

²³ *Affidavit of Janet Epp Buckingham*, Record of the Appellant (LSBC), *supra*, at pp. 458-460, paras. 47-51 and para. 52; and Exhibit “Q”, *Degree Program Review Quality Assessment Report Workbook*, April 13, 2013, at 485-486.

²⁴ *Degree Program Review Quality Assessment Report Workbook*, *supra*, at 487.

²⁵ *Affidavit of Robert Wood*, August 22, 2014, *supra*, 509-525 at 512, paras. 12 and 13.

²⁶ *Statement of Faith*, Exhibit “B” to the *Affidavit of Robert Wood*, *supra*, at 532.

²⁷ *Community Covenant Agreement*, Exhibit “C” to the *Affidavit of Robert Wood*, *supra*, at 535-539.

c. Failing to abide by the *Statement of Faith* or *Community Covenant* may result in discipline or sanction.²⁸

d. Academic Freedom Policy requires doctrinal adherence:

Trinity Western University rejects as incompatible with human nature and revelational theism a definition of academic freedom which arbitrarily and exclusively requires pluralism without commitment, denies the existence of any fixed points of reference, maximizes the quest for truth to the extent of assuming it is never knowable, and implies an absolute freedom from moral and religious responsibility to its community.

*Rather, for itself, Trinity Western University is committed to academic freedom in teaching and investigation from a stated perspective, i.e., within parameters consistent with the confessional basis of the constituency to which the University is responsible... [emphasis added]*²⁹

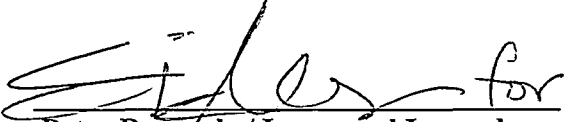
PART IV - SUBMISSIONS ON COSTS

29. CAUT/ACPPU does not seek costs and asks that it not be liable to pay the costs of any party or intervener.

PART V – ORDER REQUESTED

30. CAUT/ACCPU takes no position on the terms of the Order in these appeals.

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


Peter Barnacle / Immanuel Lanzaderas
Counsel for the Intervener,
Canadian Association of University Teachers

²⁸ *Community Covenant Agreement, Ibid*, at 535-539.

²⁹ *Academic Policies, Academic Freedom*, Exhibit “D” to the *Affidavit of Robert Wood, supra*, at 540.

PART VI - TABLE OF AUTHORITIES

	Name	Paragraph(s) Cited
A.	Cases	
	<i>McKinney v. University of Guelph</i> , [1990] 3 SCR 229	12
	<i>Pridgen v. University of Calgary</i> , 2012 ABCA 139 (CanLII)	15
	<i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 SCR 295	9
B.	International Authorities	
	<i>Keyishian v. Board of Regents</i> , (1967) 385 U.S. 589	16
	Terrance Karran and Lucy Mallinson, <i>Academic Freedom in the U.K.: Legal and Normative Protection in a Comparative Context: Report for the University and College Union</i> (Lincoln, University of Lincoln, 2017).	18, 19
	United Nations Educational, Scientific and Cultural Organization, <i>Recommendation concerning the Status of Higher-Education teaching Personnel</i> , Twenty-Ninth Session (Paris: United Nations Educational Scientific and Cultural Organization, 1997).	19, 20, 21
	United Nations Human Rights: Office of the High Commissioner, “Article 13,” <i>International Covenant on Economic, Social and Cultural Rights</i> .	20
C.	Secondary Sources	
	David Schneiderman, “Academic Freedom and the Federal Idea” in James L. Turk, ed., <i>Academic Freedom in Conflict</i> (Toronto: James Lorimer & Company, 2014) 218-228.	11
	James L. Turk, “Introduction” in James L. Turk, ed., <i>Academic Freedom in Conflict</i> (Toronto: James Lorimer & Company, 2014) 11-20.	22
	Jon Thompson, “Preface” in James L. Turk, ed., <i>Academic Freedom in Conflict</i> (Toronto: James Lorimer & Company, 2014) 7-10.	10
	John Baker, “Academic Freedom as a Constraint on Freedom of Religion” in James L. Turk, ed., <i>Academic Freedom in Conflict</i> (Toronto: James Lorimer & Company, 2014) 127-144.	13, 14, 23
	William Bruneau, “Academic Freedom and Religious Conviction at Canada’s Faith-Based Universities and Colleges” in James L. Turk, ed., <i>Academic Freedom in Conflict</i> (Toronto: James Lorimer & Company, 2014) 145-171.	24, 25

PART VII – STATUTES AND REGULATIONS

Tab	Name	Paragraph(s) Cited
12.	<i>Education Reform Act</i> , 1988, Chapter 40, 1988, United Kingdom.	17