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## **DISSENSION IN THE RANKS: THE RELATIONSHIP BETWEEN LAW, POLITICS AND CHURCH DISCIPLINE**

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### **A. INTRODUCTION**

Recent news reports concerning the contemplated excommunication of Roman Catholic politicians, including Canada's own Prime Minister Paul Martin, for publicly promoting the legalization of same-sex marriage have placed a spotlight on "church discipline," an often misunderstood, and controversial area of religious life. Not unexpectedly, the current debate surrounding the possible excommunication of high profile politicians resurrects the long-standing debate over the separation of church and state. While many reports have questioned the wisdom of denying the rite of Holy Communion for Roman Catholic politicians as a means of discipline, the real question concerns the boundary between religious law and civil law. This *Church Law Bulletin* briefly examines standards Canadian courts have set out for the recognition of a religious institution's right to discipline its members.<sup>1</sup>

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<sup>1</sup> See also, Terrance S. Carter, *A Legal Analysis of Church Discipline in Canada and Church Discipline Update* (15 January 1995), available at [www.churchlaw.ca](http://www.churchlaw.ca); Mervyn F. White, "Recent Decision Casts Doubt On Use of Matthew 18:15-18 to Address Church Disputes" in *Church Law Bulletin No. 3* (27 April 2004), available at [www.churchlaw.ca](http://www.churchlaw.ca); and Terrance S. Carter and Esther S.J. Oh, "Same Sex Marriage: What Churches and Religious Organizations Can Do in Response" *Church Law Bulletin No. 1* (17 December 2003), available at [www.churchlaw.ca](http://www.churchlaw.ca); Terrance S. Carter and Anne-Marie Langan, "Implications of Recent Amendments to *Civil Marriage Act* for Religious Groups and Officials" *Church Law Bulletin No. 12* (6 September 2005), and Terrance S. Carter and Mervyn F. White, "Update Regarding Same-Sex Marriage Legislation (Bill C-38 and Bill 171)" *Church Law Bulletin No.8* (28 February 2005), available at [www.churchlaw.ca](http://www.churchlaw.ca).

## B. RELIGION IN A LEGAL FRAMEWORK

As was explained in *Church Law Bulletin No. 1*, available at [www.charitylaw.ca](http://www.charitylaw.ca), most organized religions operate simultaneously in two distinct realms: the first being the “religious law realm,” which is generally governed by the religion’s understanding of its sacred texts, and the second being the “civil law realm,” which involves the application of the relevant secular statutory law and relevant case law to these institutions. Although religious law and civil law are separate in many respects, they also overlap. When overlap occurs, religious law will generally not be permitted to violate civil law.

Within the religious law context, the identity of an organized religion is generally derived from its sacred texts and its interpretation of scripture. Some religions have codified their doctrines (eg. Canon Law for Roman Catholics, Koran (Qur’an) for Muslims, or the Torah for Jewish people). Within the civil law context, the legal nature of a religion is characterized as a voluntary association of persons who come together for a collective purpose as reflected in the organization’s constitutional documents.

Where individuals have voluntarily decided to associate together in order to fulfill the religious objectives of the collective, the courts have generally recognized the existence of and the right of a religion to fulfill its religious objectives. However, these religions must ensure that their identity derived from the religious law context is adequately articulated within the civil law context so that it can be protected at civil law. The primary means through which a religion articulates its religious law identity in the civil law context is generally through its constitution. The need for a clear articulation of a religion’s identity and beliefs is particularly important in the context of “church discipline.”<sup>2</sup>

## C. HOW THE COURTS REVIEW “CHURCH DISCIPLINE”

While courts have previously been called upon to adjudicate on internal affairs of a variety of religious institutions, they have been reluctant to become overly involved in such matters. Canadian courts have recognized that religious belief involves not only respecting religious doctrine and rituals, but also faith in action, and that faith extends to discipline over many aspects of the lives of those who have voluntarily become members and succumbed to its authority, including over their professional lives. In such cases, the

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<sup>2</sup> This term is intended to encompass discipline within any organized religion, whether it is a church, synagogue, temple, mosque, etc.

courts do not look to the merits of an institution's disciplinary decision on the basis of a theological analysis of doctrine. For example, whether the Roman Catholic Church has a sound basis in scripture for opposition to what Pope Benedict XVI refers to as the "tyranny of relativism" is not a consideration. Were a court to enter into a theological debate and tell parties how they should read their sacred texts, the court would be encroaching on religious freedom.<sup>3</sup> However, secular courts should not be prohibited from overseeing the conduct of religious institutions. Religious freedom can only be enjoyed to the extent that it does not violate the laws of the land, or the rights and freedoms of others. Accordingly, no institution, regardless of its origin, makeup or mandate, should be above the law. As such, Canadian courts look at whether the decision to discipline is consistent with that religion's doctrine, and whether there is an application of procedural fairness and the rules of natural justice, as well as an absence of *mala fides* or bad faith.<sup>4</sup>

In the *Same-Sex Reference* case, the Supreme Court of Canada reiterated that, "[t]he right to freedom of religion enshrined in s. 2(a) of the *Charter* encompasses the right to believe and entertain the religious beliefs of one's choice, the right to declare one's religious beliefs openly and the right to manifest religious beliefs by worship, teaching, dissemination and religious practice. ... The performance of religious rites is a fundamental aspect of religious practice."<sup>5</sup> This principle was also applied in an Ontario case, wherein the court concluded that a competent adult, "[h]aving freely chosen to stay in the religion and accept its principles, ... cannot later complain that [they have] suffered harm as a result of [their] own decision."<sup>6</sup> As such, religious institutions are justified in disciplining members who violate established standards in situations where members have either participated in establishing, or at least have voluntarily agreed to submit to those standards.

#### D. THE IMPORTANCE OF SETTING STANDARDS

What the case law makes clear is that a religious institution's ability to discipline members is dependent, in part, on the application of natural justice and the doctrine of fairness. These elusive terms have many implications in the arenas of philosophical and moral discourse, but one concept that is important in terms of "church discipline" is the member's ability to understand the standards to which they will be held. As such, it is essential for a religious institution to clearly articulate its rules and standards and base them in their

<sup>3</sup> See especially *Church Law Bulletin No. 3*, *supra* note 1.

<sup>4</sup> *Brewer v. Incorporated Synod of the Diocese of Ottawa of the Anglican Church of Canada*, [1996] O.J. No. 634 [*Brewer*].

<sup>5</sup> *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698 [*Same-Sex Reference*].

<sup>6</sup> *V.B. v. Cairns*, [2003] O.J. No. 2750.

respective scriptures. If a church or other religious institution fails to articulate what it is and what it believes, then by default the courts will be called upon to determine the religion's beliefs and identity based upon the materials that are available for review by the court. If this occurs, the religion may then be left more vulnerable to challenge. Articulating the beliefs and standards to which members must adhere can be done in various ways, including through the religious institution's constitution, policy statements, or a statement of faith.

For example, the Roman Catholic Church's position on the legal recognition of same-sex unions, and the Catholic politicians' required response to it, was clearly stated in the 2003 policy statement by the Congregation for the Doctrine of Faith headed by then Cardinal Ratzinger, who has since been elected Pope Benedict XVI. In this policy, Catholic politicians are charged with the responsibility to clearly oppose legislation recognizing same-sex marriage, and if the legislation comes into force, to do everything within their power to limit its impact on society. This clear articulation of the Roman Catholic Church's position on same-sex marriage sets the stage for the Church to discipline those members who do not adhere to these standards.

## E. APPLYING THE STANDARDS

To articulate one's beliefs and set the standard is not sufficient in order to protect a religious institution's ability to discipline dissident members. The Roman Catholic Synod of Bishops recognized this concept in the *Instrumentum Laboris*, the working document that formed the basis for discussions at their October 2005 meeting in the Vatican. In discussing the relationship between the Eucharist and the moral life, the document made the link between the Roman Catholic Church's beliefs and the believer's actions in the secular world, suggesting that if they are mutually exclusive, it leads to "a crisis in the meaning of belonging to the Church."<sup>7</sup> Avoiding such devaluing of beliefs necessitates the enforcement of the institution's standards, and it can be argued that the principle of procedural fairness articulated in the Ontario court's decision in *Brewer*<sup>8</sup> requires not only that the institution enforce standards, but that it does so in a consistent manner.

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<sup>7</sup> Synod of Bishops, "The Eucharist: Source and Summit of the Life and Mission of the Church – *Instrumentum Laboris*" at para. 73.

<sup>8</sup> *Supra*, note 4.

Consider the example of Prime Minister Martin, who describes himself as a “strong Catholic.” He also believes in the separation of church and state. Yet, the Roman Catholic Church is clear on this issue: to be in communion with the Church, one cannot publicly espouse views and promote legislation that is contrary to its official teaching. As such, a politician’s decisions and the religion’s basic tenets are inseparable. Pope Benedict XVI confirmed this sentiment for Roman Catholics in his homily delivered at the opening Mass of the Synod of Bishops on October 2, 2005, as follows: “Tolerance that only admits God as a private opinion, but that denies him the public domain, the reality of the world and of our life, is not tolerance but hypocrisy.”<sup>9</sup> The Roman Catholic Church recognizes that the potential effect of not disciplining politicians who are members but who publicly promote values that are not in keeping with their teachings is that it may result in the trivialization of what it means to be a member of the Roman Catholic Church.

Yet, the obvious question remains: how far should the Roman Catholic Church or any other religious institution go in disciplining a member on a controversial issue like same-sex marriage legislation. Several news reports have highlighted the fact that many Catholics are ignoring the Church’s policies regarding same-sex marriage. For example, MacLean’s reports that approximately 100 out of 130 Catholic Members of Parliament (“MPs”) voted in favour of the *Civil Marriage Act*<sup>10</sup> which recognized the right of same-sex partners to marry.<sup>11</sup> Some MPs have been reprimanded by their bishops and some have not.

While many of the news reports suggest that disciplining these politicians is an inappropriate intrusion of religion in political affairs, it is arguably essential for the Roman Catholic Church to follow through with its internal discipline to maintain its validity in both the religious law realm and civil law realm. To not discipline errant members is to ignore the basic tenets of its religion, and to discipline inconsistently is to deny some members the procedural fairness and natural justice that is their right, which could lead to the civil law’s denial of the Roman Catholic Church’s right to discipline at all.

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<sup>9</sup> Papal Homily at Opening of Synod, “Lord: Help Us to Be Converted!” (2 October 2005).

<sup>10</sup> S.C. 2005, c. 33 (in force July 20, 2005).

<sup>11</sup> Joan Bryden, “‘Exile’ for Same-Sex Support: Will Catholic MPs have to toe the line, or else?” in *Maclean’s* (17 October 2005) at 31.

## F. CONCLUSION

The right of a religious institution to discipline and remove dissident members of their faith is clearly established in Canadian law. By becoming a member of a religion, individuals have voluntarily agreed to subject themselves to the standards set by the collective, and as such there is no room for the courts to enter a theological debate. Canadian courts have recognized the challenges that organized religions face, noting that one member straying from the standards of the institution can present an adverse example to the rest of the members. As such, it could be argued that a religious institution not only has the right to, but must discipline those members who ignore their duties as members of their faith, and that correspondingly, there should be no exemptions made for politicians, whether high profile or not.