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**ASSOCIATION OF TREASURERS
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CONFERENCE**

Moncton, NB - September 24, 2022

**TRANSITIONING AND
CONGREGATIONAL
RESTRUCTURING:
CIVIL LAW ISSUES TO CONSIDER**

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OVERVIEW

- A. Setting the Stage
- B. Governance Transitioning of Civil Law Entities
- C. Corporate Restructuring of Civil Law Entities
- D. Key Takeaways

A. SETTING THE STAGE

- Many religious institutes are having to face the reality of reduced membership
- As a result, some institutes are looking at possible unification, both inside and outside of Canada, as well as the possibility of suppression as a province or even as an institute
- When reviewing options from a canon law perspective, it is essential to understand the civil law parameters of what can and cannot be done, as well as the interrelationship between canon law and civil law
- In its most basic terms, a civil law entity is the manifestation of the religious institute that exist at canon law for purposes of managing property and interfacing with civil society

- Understanding this interrelationship is essential, as otherwise governance or restructuring decisions may be made that are compliant with canon law but not civil law, potentially resulting in the legitimacy of those decisions being put in jeopardy
- This presentation looks at the civil law issues faced by religious institutes when considering governance transitioning and/or corporate restructuring
- Various issues and options are canvassed, but have been kept at a high level only in order to keep focused on the “big picture” of what can and cannot be done
- As such, it is not possible for everything of relevance to be canvassed within this presentation
- For more information on issues at play between canon law and civil law, reference can be made to the following earlier presentations given at ATRI:
 - [2018 Canon Law Meets Civil Law in the Operation of Religious Institutes: Outline of Select Issues to Consider](#)
 - [2019 Legal Challenges and Options for Boards of Religious Institutes in Transition](#)
- As well, additional information on civil law requirements for charities are available on the Carters website at carters.ca including the [Carters Fall Charity and Not-for-Profit Law Webinar](#) on November 10, 2022
- It is essential for a religious institute to obtain specific legal advice before following any course of action referenced in this presentation

B. GOVERNANCE TRANSITIONING OF CIVIL LAW ENTITIES

1. Understanding the Context

- A religious institute must be understood as both a public juridic person at canon law as well as a corresponding corporate entity at civil law
- Failure to remember this duality can lead to problems when choosing governance options as well as ensuring compliance with civil law requirements
- In this regard, it is essential to recognize that as the members of a religious institute under canon law diminish, the civil law entity through which it has operated will continue to exist – this is the case regardless of whether there are any religious left – unless specific steps have been taken to dissolve the corporation
- As such, the board of directors of a religious institute, in its civil law form, need to be aware of its different civil law layers in order to understand how its governance can be restructured in order to achieve canon law objectives

2. Understanding the Basics of Civil Law Structures

(a) Corporate Legislation

- Each civil law entity as an embodiment of a public juridic person has its genesis in civil law legislation of some form
- The legislation can be a public corporate act (*e.g.* a general incorporating statute), or it can be a private act (*e.g.* a special act incorporating a religious institute)
- If the religious institute is incorporated under a public corporate statute, it might be under a federal act, such as, the *Canada Not-For-Profit Corporations Act* (CNCA) or, alternatively, a provincial act, such as the *Ontario Not-for-Profit Corporations Act, 2010* (ONCA), formally the *Ontario Corporations Act*
- It is essential to be familiar with and to ensure compliance with all applicable corporate legislation before considering governance and restructuring options
- If the religious institute is instead incorporated under a special act, then it is necessary to review the special act's provisions as well as any applicable general corporate legislation (*e.g.* the ONCA in Ontario for special act corporations)
- As well, each civil law entity needs to ensure that their corporate documentation is up to date with applicable changes in corporate legislation, *e.g.* the ONCA in Ontario, the *Non-Profit Corporations Act, 1995* in Saskatchewan or the *Societies Act* in British Columbia., and that the bylaws and policies of the civil law entities are also compliant with such legislation

(b) Corporate Purposes

- Whether incorporated under a public act or a private act, the civil law entity will have corporate purposes, as well as a board of directors, members and officers
- Before any transitioning in governance and/or restructuring can be undertaken, it is important to first review the corporate purposes of the civil law entity to see if the corporate purposes are in line with the mission of the religious institute
- If it is necessary, a change to the corporate purposes would be done by approval by the board of directors and members of the corporation, the issuance of articles of amendment, as well as approval from the Canada Revenue Agency (CRA)

(c) Directors

- The board of directors are responsible to manage or supervise the management of the civil law entity and have a high fiduciary duty to the corporation similar to that of trustees over charitable assets

(d) Members

- The members of a civil law entity have the power to elect the board of directors but do not have any proprietary interest in the corporation, although they do appoint the auditors for the corporation and approve fundamental changes, such as articles of amendment and new/amending bylaws

(e) Officers

- The officers of a civil law entity are generally the president (the chair), vice president (vice chair), secretary, and treasurer, with the role of carrying out the instructions of the board of directors but, except for the chair, are not required to be directors

3. Governance Options for the Board of Directors

a) Reducing Size of the Board

- A religious institute with reduced members can reduce the size of its board of directors
- However, generally, charitable corporations at civil law must have a minimum of three directors

b) Include Other Religious on its Board of Directors

- An institute could add religious from another province within the institute or religious from another institute in order to maintain an effective Catholic board of directors
- An institute could also include the Major Superior or someone approved by the Major Superior as members of the board, provided that the majority of the board of directors are residents of Canada for tax purposes in accordance with the unwritten position taken by the CRA

c) Include Laypersons on the Board of Directors

- A religious institute could also include Catholic or non-Catholic laypersons on the board of directors
- Appropriate board eligibility requirements would need to be set out in the bylaw for such laypeople, including their approval by the Major Superior or other canonical leader

- Can limit the number of laypersons on the board compared to the number of religious, such that the religious make up majority of the board
- The bylaws could also require that the Major Superior be part of a quorum for meetings of the board and that the Major Superior needs to vote in favour of a board resolution to pass

4. **Governance Options at the Membership Level**

- Corporate membership of a civil law entity can be either broad or narrow
- At the broadest level, the corporate membership could be made up of the board of directors, religious who make up the province or the institute itself
- As the numbers of the province or institute diminish, then the size and definition of the membership in a civil law entity can be correspondingly adjusted by amending its bylaws
- Corporate membership could also be adjusted to be the same as whoever is on the board of directors of the civil law entity
- Corporate membership could be limited to only the Provincial Superior and/or the Provincial Council
- If there is no longer a Provincial Superior and/or Provincial Council, then the corporate membership could be limited to the Major Superior of the institute
- Alternatively, the Major Superior could constitute a separate membership class with reserve powers over fundamental decisions, such as changes to the bylaws or sale of assets
- Having a separate membership class made up of the Major Superior could avoid the CRA thinking that the civil law entity as a registered charity, was acting under the *de facto* control of a foreign entity
- Finally, it is possible to appoint organizations like Catholic Religious Stewardship (CRS), Catholic Health Sponsors of Ontario (CHSO), or similar organizations to act as a sole corporate member of the civil law entity (including apostolates) in order to ensure that directors are elected who are true to maintaining the mission of the institute

5. **Governance Options at the Officer Level**

- While the key officer position of president (chair) needs to be held by the Provincial or Major Superior and must be a director, there is no requirement at civil law that the secretary or treasurer of a civil law entity must be a director

- As such, subject to canon law and what the constitution of an institute may say, it is possible for a layperson to be a treasurer of a civil law entity of a religious institute

C. CORPORATE RESTRUCTURING OF CIVIL ENTITIES

1. Understanding the Context of Corporate Restructuring

- As earlier explained, when a religious institute is facing reduced membership, it may have to consider unification (fusion) with another province or institute, or it may be facing suppression where the province is simply absorbed into the institute and ceases to be a canonical entity
- When either occur, potentially complicated situations can arise because public juridic persons are not limited to operating within national boundaries and, therefore, can be international in scope, as can a province of a religious institute
- However, a corresponding civil law entity in Canada cannot operate in this manner
- In addition, there are numerous civil law issues that need to be considered before proceeding with corporate restructuring involving civil law entities, *e.g.*:
 - Are there restricted gift agreements for property held by the institute?
 - Has there been compliance with the corporate purposes of the civil law entity?
 - What is the dissolution clause of the civil law entity?
 - Are there existing or contingent liabilities involving the institute?
- The main issue at play involving restructuring of civil law entities arising out of reduced membership include the following;
 - unification within Canada
 - unification outside of Canada
 - options for distribution of assets outside of Canada
 - timing and congregational intent involving distribution of assets
- Each of these key issues will be described next

2. Considerations Involving Unifications Within Canada

- Since both the institute being unified with the province/other institute will normally be registered charities in Canada (which must be confirmed), then the unification process will be much simpler
- The creation of a new province in Canada as a civil law entity to reflect a canonical unification can be done in various ways:

1. Amalgamation where the two civil law corporations become one
 2. Transfer of assets from one civil law corporation to another corporation with the transferor corporation later being dissolved
 3. Forming a new civil law corporation to be the civil personification of the new province, having assets being transferred to it by the two existing corporations followed by their dissolution
- While there are pros and cons with these options that are beyond the scope of this presentation, there are basic legal considerations that the directors of the religious institutes as civil law entities need to consider:
 1. Need to conduct the necessary due diligence in order to know the full extent of the assets and liabilities of both corporations
 2. Need to review the insurance policies of both corporations and determine what liability insurance will continue and for how long
 3. Need to know the extent of the corporate indemnification that is available for the directors and officers of both corporations, particularly with regard to non-religious individuals on the board of directors or serving as officers of the corporations

3. Considerations Involving International Unification

- Although at civil law it is possible for a foreign corporation to operate and/or own property in Canada in order to correspond with the establishment of an international province, it is not possible for the foreign corporation to operate under the *Income Tax Act* (“ITA”) as a Canadian registered charity
- A Canadian registered charity must be resident in Canada which, for a corporation, means that it is incorporated in Canada and under the control of its board of directors
- As a general rule, it is recommended that the board of directors of a Canadian registered charity consist of a majority of Canadian residents for income tax purposes
- As well, as a registered charity, the assets of the Canadian corporation must either remain under its ownership and direction and control or be transferred to another qualified donee under the ITA (*e.g.* another Canadian registered charity), subject to recent amendments to the ITA permitting qualifying disbursements as described below

4. Options for Distribution of Assets Outside of Canada

- A religious institute that wishes to transfer any of its resources to another province or generalate outside of Canada, cannot simply make a gift outright

- Instead, it must ensure that any distribution of its funds and other resources is done in a manner which is compliant with the CRA's requirements under the ITA
- There are four options for a religious institute that is a Canadian registered charity to distribute its assets to a provincialate or generalate outside of Canada:
 - a) The payment of invoices for specific goods or services received at fair market value or below (*e.g.* the payment of air fare to fly the Major Superior to Canada to visit the operations of the institute)
 - b) Charitable programs undertaken under the direction and control of the religious institute as a Canadian registered charity through a third-party intermediary (*e.g.* the generalate or provincialate) by means of a documented arrangement acceptable to the CRA to evidence direction and control by the Canadian institute:
 - *e.g.* Consultant or Agency Agreement
 - *e.g.* Contract for service
 - *e.g.* Joint Venture Agreement
 - *e.g.* Co-operative Participant Agreement
 - c) Recurring payments, such as tithes, membership fees, or "annual tax," by the religious institute in consideration of receiving ongoing value in the form of goods and services from the generalate or provincialate
 - These goods and services need to be equivalent in value to the amount that is paid to the generalate or provincialate as a "head body" in excess of the permitted *de minimis* threshold (*i.e.* the lesser of 5% of the expenditures of the charity or \$5,000.00)
 - It would be important to document the arrangement through a written agreement (*e.g.* a "head body" agreement)
 - The agreement would need to document the goods and services that the religious institute receives from the generalate or provincialate (*e.g.* administrative services, spiritual resources, ongoing training and guidance, entitlement to use the name of the institute in Canada, etc.)
 - The amount to be paid would need to be determined and paid in accordance with a regular schedule to be agreed upon by the institute and the generalate or provincialate
 - It is important that payments to a generalate or provincialate under a "head body" agreement not include payments to fund charitable programs, as such programs need to be funded through the generalate or provincialate through appropriate documentation that evidences direction and control by the Canadian institute

d) New qualifying disbursement regime

- Recent amendments to the ITA passed on June 23rd, 2022 establishes a new regime of (in addition to the direction and control regime) of “qualifying disbursements” that can now be made to “grantee organisations”
 - A “qualifying disbursement” is a disbursement made by a charity, by way of gift or by otherwise making resources available to a qualified donee (subject to certain requirements) or to a “grantee organization,” provided that certain conditions are met (see below)
 - A “grantee organization” includes a person, club, society, association or organization or prescribed entity, but does not include a qualified donee
- A qualifying disbursement to “grantee organization” requires that:
 - The disbursement furthers a charitable purpose of the transferor charity
 - The charity ensures that disbursement is exclusively applied to charitable activities in furtherance of the said charitable purpose
 - The charity maintains documentation sufficient to demonstrate the purpose for which the distribution was made and that the distribution was exclusively applied by the grantee organization to charitable activities to further the charity’s intended charitable purpose
- It is hoped that “impact investing” (*e.g.* investments that achieve a charitable purpose) will become easier to do (See June, 2022 CAGP presentation on [Impact Investing](#) at [carters.ca](#) for more details)
- Although “qualifying disbursements” are now part of Canadian law, the CRA has not yet released a policy guidance
- Until a guidance is released, religious institutes should be cautious and delay making qualifying disbursements to provincialates or generalates outside of Canada
- New anti-directed giving rule prohibits registered charities from accepting a gift, the granting of which is expressly conditional on the charity making the gift to another person or organization that is not a qualified donee
- For more details, see Carters Charity and NFP Law Bulletin [#511](#) and [#513](#)

5. Timing and Congregational Intent Involving Distribution of Assets

a) **Explaining the Context**

- A religious institute with reduced membership will be understandably concerned about where its assets will go upon unification or suppression, whether it be within or outside Canada
- The two main issues to consider include:
 - Timing of distribution
 - Ensuring congregation intent is followed

b) **Timing of Distribution**

The time for distribution of assets involves the following three possibilities:

I. Immediate Distribution

- This will occur for a unification within Canada at the time that the unification of civil law entities actually occurs, *e.g.* at the time of the asset transfer
- It can happen with a unification outside of Canada at the time of making a qualifying disbursement referenced above
- It can also happen prior to unification where the institute transfers assets to other registered charities which it wishes to support as part of implementing its legacy

II. Graduated or Incremental Distribution

- For canonical unification inside or outside of Canada when the Canadian civil law entity will continue to exist in the foreseeable future, the religious institute could complete its asset distribution on a graduated or incremental basis over a short or extended period of time through the options described at section 4, slide 21, above
- The advantage of doing an incremental distribution is that the institute retains full control over deciding to whom the assets are to be distributed and the timing of such distribution
- As well, a graduated or incremental distribution of assets to achieve the institute's charitable purpose could reduce the risk of a distribution being challenged at a later time by those having possible claims against the institute

III. Longer Term Distribution and Respecting Intent

- With longer term distribution of assets, both inside and outside of Canada, the issues become how to ensure that the intent of the religious institute will be respected at the time of a future triggering event (*e.g.* when there are only x religious left)
- There are a number of options to ensure congregational intent in this regard:
 - (a) Transfer assets to a separate parallel foundation for the religious institute that is under the control of a lay board of directors approved by the institute (Major Superior) who are committed to using the assets to support the institute's charitable purpose or, when the religious institute no longer exists, to utilize those assets for programs consistent with the institute's charitable purpose
 - (b) Transfer assets to a "Catholic community foundation" in order to ensure that the institute's mission and charitable purpose will continue through the oversight of a Catholic sponsor:
 - *e.g.* Foundation of Canadian Catholic Congregation (FCCC), sponsored by foundation of Canada Religious Stewardship (CRS)
 - *e.g.* Catholic Congregational Legacy Charity (CCLC)
 - *e.g.* Roncalli International Foundation
 - (c) Include in deed of gift transferring the assets of the religious institute's assets in the two options referenced above terms and conditions to establish a binding and enforceable restrictive charitable purpose trust over the assets being transferred
 - (d) Declaration of trust by the religious institute as a trustee of the assets, with provision for a subsequent trustee to take over control of the institute in order that its assets will continue to be used for the charitable purposes set out in the declaration of trust reflecting the institute's intent

D. KEY TAKEAWAYS

- Governance transitioning and corporate restructuring due to reduced membership require careful coordination of civil law and canon law principles
- There are many governance options for civil law entities in transition including revising the composition of its directors, members and officers
- When the institute is faced with unification or suppression, the options and timing for distribution of assets inside and outside of Canada need to be done in compliance with civil law

- Recent amendments to the ITA allowing for qualifying disbursements may provide a welcome new option for distribution of assets outside of Canada
- A graduated approach to the distribution of assets over a period of time can allow for more effective control by the religious institute in achieving its mission and charitable purposes

DISCLAIMER: This outline is a work in progress, as civil and canon law are constantly evolving, including the circumstances in which these systems operate. As well, this outline reflects a summary of current legal and canonical issues provided for information purposes only. This presentation is only current as of the date of the summary and does not reflect subsequent changes in the law. The outline is distributed with the understanding that it does not constitute legal advice. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.



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