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**ASSOCIATION OF TREASURERS OF  
RELIGIOUS INSTITUTES 32<sup>nd</sup>  
ANNUAL CONFERENCE  
Calgary – September 29, 2019**

**LEGAL CHALLENGES AND  
OPTIONS FOR BOARDS OF  
RELIGIOUS INSTITUTES IN  
TRANSITION**

**By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent**

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**A. INTRODUCTION**

- ◆ Many religious institutes are having to deal with governance and succession challenges as a result of reducing membership
- ◆ This presentation identifies some of the legal challenges that boards of religious institutes in transition can face as civil law entities as well as some options and suggestions to consider in response
- ◆ This is a complicated area of the law because of (i) the interplay between canon law and civil law; (ii) the breadth of civil law that can apply, *e.g.* different corporate legislation depending on the jurisdiction that the civil law religious institute is incorporated in; as well as (iii) implications under the *Income Tax Act* for religious institutes as registered charities
- ◆ As such, what follows is neither a detailed nor a comprehensive discussion of the topic, but rather only an overview of the legal issues that a religious institute may need to consider
- ◆ It is therefore important that religious institutes seek advice to determine what they should do with regard to their own unique fact situations

**B. SETTING THE STAGE**

**1. Interplay Between Canon and Civil Law**

- ◆ It is impossible to discuss the legal challenges faced by boards of religious institutes as civil law entities and the options that are available without understanding the interrelationship between canon and civil law

- ♦ In its most basic terms, a civil entity for a religious institute is the manifestation of the religious institute at canon law under civil law for purposes of managing property and interfacing with civil society
- ♦ The following is a brief overview of the organizational structures of both canon and civil law<sup>1</sup>

## 2. An Overview of Organizational Structures at Canon Law

- ♦ Canon law recognizes three different kinds of “persons”
  - ♦ Physical persons (canon 96): individuals who have received baptism and thereby constitute the Church
  - ♦ Moral persons (canon 113.2): institutions that came into existence through the aid of no legislator (*e.g.* the Apostolic See and the Catholic Church itself)
  - ♦ Juridical persons (canon 113.1): creations of the law to enable people to come together to perform a work or carry out a mission of the church and have perpetual existence
  - ♦ There are also apostolates that are not operating as a distinct division, but as the work of the local community
- ♦ Canon law distinguishes between two types of juridic persons
  - ♦ Private juridic persons (canon 116.2) function under their own name:
    - ♦ Their goods are not considered ecclesiastical goods
    - ♦ Their works are considered more the work of Catholics than Catholic works
  - ♦ Public juridic persons (canon 116.6) operate under the name of the Church
    - ♦ Their temporal goods are ecclesiastical goods
    - ♦ They represent the Church in the same sense as a diocese or religious institute
    - ♦ Charitable works can be done through an apostolate as an internal division of the public juridic person

## 3. An Overview of Organizational Structures at Civil Law

- ♦ Charitable Trusts
  - ♦ One or more persons holding legal title to property for a charitable purpose
  - ♦ Usually established by trust documents or instruments like a will
  - ♦ Not commonly used as an organizational structure, but charitable trusts are still relevant for religious institutes with regard to a restricted charitable purpose trust

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<sup>1</sup> Sections 2, 3, 4, 5 and 6 of this handout have in part been abstracted from a presentation that the author gave with Father Francis G. Morrisey at ATRI Conference in September 2018 titled “Canon Law Meets Civil Law in the Operation of Religious Institutes”

- ◆ Holds title to property through trustees
- ◆ Trustees can be exposed to personal liability
- ◆ Unincorporated Associations
  - ◆ Not a separate legal entity and has no legal status apart from its members
  - ◆ It reflects a coming together of persons by agreement for a particular purpose
  - ◆ Relationship is generally contractual in nature and usually established by a constitution or a memorandum of understanding
  - ◆ Unable to hold title in its own name, it must hold title through trustees
  - ◆ Members of the unincorporated association are exposed to personal liability
- ◆ Corporations
  - ◆ Separate legal entity or legal persons at civil law independent of its members
  - ◆ Can be structured as either a for-profit corporation with shareholders or a not-for-profit corporation with members
  - ◆ Institutes are generally structured as not-for-profit corporations with a membership base
  - ◆ Corporations are created by general legislation (*e.g. Canada Not-for-profit Corporations Act* (“CNCA”), *Ontario Corporations Act* (“OCA”), *Saskatchewan’s The Non-profit Corporations Act, 1995* or *British Columbia Societies Act*), or by special legislation
  - ◆ A not-for-profit corporation that is incorporated by general legislation will have corporate members, a board of directors, and officers
  - ◆ A corporation that is incorporated by special legislation may have a different structure (*e.g. a corporation sole will have only one person, i.e. the Bishop, who performs all of these functions, along with other officers or officials as the Bishop may appoint, or a corporation with trustees as board members but not corporate members*)
  - ◆ Corporations can own property and sue and be sued in their own name
  - ◆ Members of the corporation are protected from personal liability

#### 4. Official Roles within the Public Juridic Person

- ◆ Major Superior (canon 620)
  - ◆ Responsible for governing the entire religious institute, a province, or an autonomous house
- ◆ Council Members (canon 627)
  - ◆ Advise the major superior

- ♦ Superiors are not normally members of council
- ♦ Minimum of two council members is required
- ♦ Treasurers (canon 636)
  - ♦ Responsible for financial affairs of the religious institute
  - ♦ Advisor to the general administration for the institute
  - ♦ Prepares accounts for external audit

## 5. **Official Roles within Civil Corporations**

- ♦ Board of Directors
  - ♦ Directors are collectively responsible for managing or supervising the management of the affairs of the corporation
  - ♦ Most corporate legislation will require three directors, which reflects the minimum for basic good governance
  - ♦ Decisions are made on a collective basis and generally no one director has any more authority than another director, unless the bylaws provide that the major superior's presence is required for quorum and/or for a majority vote by the board
  - ♦ Important that separate corporate records be kept for the civil corporation, including separate members and board of directors meetings
- ♦ Officers
  - ♦ Generally consists of chair, vice chair (or president and vice president), secretary and treasurer
  - ♦ Officers can be directors but not always a necessity; however, the chair or vice chair should be directors in order best to fulfill their function
  - ♦ The role of officers is to execute the decision of the board of directors
  - ♦ The role of the treasurer is to be responsible for the financial affairs and records of the corporation
  - ♦ There is no reason why a treasurer at civil law could not be a lay person as distinct from having to be a religious of the institute, unless the corporate documents specify otherwise
- ♦ Corporate Members
  - ♦ Members of a not-for-profit corporation are akin to that of shareholders of a share capital corporation in that they elect and can remove directors of the corporation
  - ♦ However, unlike shareholders, members of a not-for-profit corporation do not have any proprietary ownership in the underlying assets of the corporation
  - ♦ Members have statutory protections from liability as members

- ◆ Member rights have become much more robust under new corporate legislation, such as the CNCA, Ontario *Not-for-profit Corporations Act* (“ONCA”) and British Columbia *Societies Act*
- ◆ Members have ultimate accountability for the civil corporation through their ability to elect and remove the board of directors
- ◆ There is no limit on the number of members, so it may be possible to have as little as one corporate member

## 6. The Reality Check

- ◆ As members of a religious institute under canon law diminish, the civil entity through which it has operated will continue to exist whether or not there are any religious left
- ◆ Therefore, the board of directors of the religious institute as a civil law entity need to be aware of the unique obligations and legal challenges that are encountered from a reduction in the number of religious

## C. SELECT LEGAL CHALLENGES THAT BOARDS MAY FACE

- ◆ The following is a summary of some of the more important legal challenges that boards may face when a religious institute is in transition

### 1. Understanding the Duties of Directors of Civil Law Entities

- ◆ The following is an outline of the duties that apply to directors of not-for-profit corporations, which would include directors of religious institutes as civil law entities
- ◆ Management of the Corporation
  - ◆ Directors are jointly responsible for all aspects of the corporation’s operations
  - ◆ As such, directors must manage or supervise the management of the activities and affairs of the corporation
  - ◆ To fulfill their duties, directors must ensure
    - ◆ The objects or purposes of the corporation are properly carried out and activities undertaken fit within those objects or purposes
    - ◆ The corporation is financially stable
    - ◆ The overall operating performance of the corporation
    - ◆ Proper hiring, training, and supervision of management, staff and volunteers
  - ◆ Failure to act, *i.e.*, inaction, can result in personal exposure to liability
  - ◆ Supervising management of the corporation, though, does not involve interference with day to day operations by management

- ◆ Standard of Care and Duty of Care
  - ◆ Generally, directors of for-profit corporations are held to an objective standard of care under the *Canada Business Corporations Act* and the *Ontario Business Corporations Act*
  - ◆ Directors of not-for-profits under the CNCA, ONCA (expected to be proclaimed in 2020), OCA, British Columbia *Societies Act*, Manitoba's *The Corporations Act*, Newfoundland and Labrador *Corporations Act*, and Saskatchewan's *The Non-profit Corporations Act, 1995*, are subject to
    - ◆ Objective standard of care
    - ◆ Duty to exercise the “care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances”
  - ◆ “Business Judgment Rule” protects directors and senior officers against hindsight and second guessing by third parties and the courts
- ◆ Summary of General Fiduciary Duties of Directors
  - ◆ Duty to Act in Good Faith with Honesty and Loyalty
    - ◆ A director's sole interest is to the corporation
    - ◆ A director's duty is to the corporation and not to the interest of those who the director may be representing on the board, *e.g.* where a director is an appointee from another organization
    - ◆ The interests of the director must not be placed in conflict with those of the corporation
  - ◆ Duty of Diligence
    - ◆ Directors need to diligently attend to duties by being familiar with all aspects of corporation
    - ◆ This can be complied with by being familiar with all aspects of the corporation's operations through attending board meetings, and reviewing the minutes of missed board meetings
    - ◆ Where necessary, the advice of qualified professionals should be sought
  - ◆ Duty to Exercise Power
    - ◆ Directors are responsible for managing or supervising the management of the corporation
    - ◆ In order to justify accounts and decisions made regarding corporate assets, directors must ensure that there is proper maintenance of books, accounts, records and minutes of the corporation

- ♦ Delegation to management, staff and volunteers is permissible and generally advisable, but directors must always supervise and require accountability from staff and volunteers
- ♦ Duty of Obedience
  - ♦ Directors must comply with applicable legislation and the corporation's governing documents (articles, letters patent, bylaws, *etc.*)
  - ♦ All valid corporate decisions must be implemented
  - ♦ Directors must become familiar with all applicable laws and related procedures
  - ♦ Directors cannot rely solely on the management to ensure compliance with the laws
  - ♦ It is the obligation of the directors to be familiar with applicable laws
- ♦ Duty of Confidence
  - ♦ In general, directors must not disclose confidential information that they acquire in the course of their duties to anyone other than other directors
  - ♦ This means that directors must protect discussions at any board or committee meeting and ensure the confidentiality of information of the corporation, its directors, employees and members
- ♦ Duty to Avoid Conflict of Interest
  - ♦ Directors must declare and avoid any conflicts of interest or anything that gives a director an actual or appearance of a personal benefit
  - ♦ In general, a conflict of interest will occur when a director has a material interest outside of the corporation that could influence him or her, or be perceived to influence him or her to act in a manner contrary to the best interests of the corporation
- ♦ Duty to Continue
  - ♦ Directors have continuing obligations to the corporation which cannot be relieved by simply resigning if the corporation is facing difficulties
  - ♦ Resignation to avoid personal liability may be ineffective and constitute a breach of fiduciary duty where a director puts his or her own self interests ahead of those of the corporation
- ♦ High Fiduciary Duties regarding Charitable Property
  - ♦ The following duties relate specifically to the high fiduciary duties involving not-for-profit corporations that are charities
  - ♦ Duty to Carry Out the Charitable Purpose
    - ♦ The charity's resources must be used to carry out the purposes of the charity

- ♦ Directors have a positive duty to further the charitable purposes of the corporation
- ♦ Duty to Protect and Conserve Charitable Property
  - ♦ Directors must ensure the protection of charitable property
  - ♦ Restricted charitable purpose trusts are no longer recognized as separate trusts distinct from the general assets of the charity for purposes of exigibility (*i.e.* claims by third parties)
  - ♦ Therefore, it is important for directors to consider what steps can be taken to assist in protecting restricted charitable purpose trusts in the future
- ♦ Duty to Invest
  - ♦ According to the Ontario and British Columbia *Trustee Act*, for instance, directors of charitable corporations, as quasi-trustees, must, unless provided otherwise in the constating documents, “exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments”
  - ♦ This includes the ability to delegate investment decision making to an investment manager, but only in accordance with the requirements of the respective *Trustee Act*
- ♦ Duty to Act Gratuitously for the Charity
  - ♦ Directors in Ontario cannot receive any remuneration, either directly or indirectly, from the charity unless authorized by statute
  - ♦ A director can seek approval for remuneration by a consent order under section 13 of the *Charities Accounting Act* (“CAA”) for payment for services other than as a director but not easy to obtain
  - ♦ Regulations under the CAA now permit directors to receive remuneration under limited circumstances that need to be carefully complied with

## 2. Understanding the Corporate Authority of the Religious Institutes at Civil Law

- ♦ Often, directors of religious institutes as civil law entities do not fully understand the corporate authority at civil law that applies
- a) **Corporate Legislation**
- ♦ General federal legislation (*e.g.* CNCA)
  - ♦ General provincial legislation (*e.g.* OCA, soon to be replaced by the ONCA, Alberta *Societies Act*, British Columbia *Societies Act*, Manitoba’s *The Corporations Act*, Nova Scotia *Societies Act*, New Brunswick *Companies Act*, Saskatchewan’s *The Non-profit Corporations Act, 1995*)

- ◆ Special incorporating legislation that create a religious institute at both the provincial and federal level

**b) Incorporating Documentation**

- ◆ Incorporating documentation constitutes the “birth certificate”, as well as the “DNA” of the corporation, as it includes its corporate purposes
- ◆ The incorporating documentation can be in the form of
  - ◆ Letters Patent and Supplementary Letters Patent (*e.g.* in Ontario at present under the OCA, Québec, Prince Edward Island and New Brunswick)
  - ◆ Articles of Continuance, Articles of Incorporation and Articles of Amendment, (*e.g.* Federal CNCA, ONCA, Newfoundland and Labrador, Manitoba and Saskatchewan)
  - ◆ Certificate of Incorporation (*e.g.* in British Columbia, Alberta and Northwest Territories, Nova Scotia, Nunavut, Yukon)

**c) General Operating Bylaw**

- ◆ The constitution of a religious institute that is used by the congregation leadership team to govern the congregation is not the same thing as a general operating bylaw for the civil entity of the religious institute
- ◆ A general operating bylaw needs to reflect requirements of the underlying general corporate legalisation, or if applicable, special incorporating legislation
- ◆ However, the general operating bylaw must also be coordinated with the constitution of the religious institute and can incorporate by reference parts of the constitution

**d) Governance Policies**

- ◆ Governance policies of the religious institute as a civil law entity can expand on responsibilities and authorities of the directors, *e.g.* policies on
  - ◆ Committees generally
  - ◆ Audit committee
  - ◆ Finance committee
  - ◆ Nominating committee
  - ◆ Conflict of interest policy
  - ◆ Confidentiality policy

**3. Challenges involving Corporate Purposes vs. Canonical Mission**

- ◆ Corporate purposes at civil law must
  - ◆ Be broad enough to encompass all activities of the religious institute as a charity

- ◆ Where the religious institute is a registered charity, the purposes must be exclusively charitable
- ◆ The canonical mission of a religious institute as a public juridic person is often outward-facing and may therefore not describe the inward religious community nature of the institute
- ◆ It is therefore important that the corporate purpose be broad enough to encompass all of the works of the religious institute and also articulate the implicit mission of the religious institute at canon law
- ◆ Otherwise the directors may be left open to liability for allowing the corporation to act outside of its corporate purposes
- ◆ It is also important to incorporate the Roman Catholic faith and canon law into the incorporating documents of the institute, where possible, by including a clause, such as
  - ◆ “In the operation of the corporation, the canon law of the Catholic Church as amended from time to time, except where such is contrary to applicable legislation, shall be complied with and observed”
  - ◆ This is particularly important for religious health care organizations

#### 4. Challenges involving Qualification Issues for Directors

- ◆ General Corporate Eligibility Requirements
  - ◆ 18 years or older
  - ◆ Must not be incapable or mentally incompetent
  - ◆ Must not be an undischarged bankrupt
  - ◆ In some corporate legislation, like OCA, the director must also be a member
  - ◆ These qualification requirements are not standard across jurisdictions, *e.g.* the *Alberta Societies Act*, *Nova Scotia Societies Act*, *Prince Edward Island Companies Act* do not contain any qualification requirements for directors
- ◆ *Income Tax Act* Eligibility Requirements
  - ◆ Must not be an “ineligible individual”
  - ◆ Directors, officers, trustees and managers of charities can become “ineligible individuals” and be prohibited from being a director, officer, trustee, manager or a person in control of another registered charity for a period of five years, if amongst other reasons they were a director, trustee, officer, manager or was in control of a charity during a period of a serious non-compliance that resulted in the loss of charitable status within the last five years
- ◆ Catholic Identity Eligibility Requirements
  - ◆ Have Catholic identity requirements been addressed in the bylaw?

- ♦ Requirements in this regard need to be clearly set out in the bylaw and relate back to the corporate objects of the religious institute
- ♦ Such requirements may on its face be perceived as discriminatory, but are generally permissible under most provincial human rights under legislation, *e.g.* section 18 of the *Ontario Human Rights Code*, section 41 of the *British Columbia Human Rights Code*, the *Alberta Human Rights Act* subsection 3(3) and paragraph 10.1(a)
- ♦ Removal of Directors
  - ♦ With lay directors, it is important to be able to remove directors when necessary
  - ♦ Removal of directors is often provided for in general corporate legislation through a majority vote of the members (*e.g.* CNCA, OCA, ONCA, Manitoba's *The Corporations Act*, Newfoundland and Labrador *Corporations Act*, and Saskatchewan's *The Non-profit Corporations Act, 1995*; a special resolution, *i.e.* at least 2/3 vote, is required under the *British Columbia Societies Act*)
  - ♦ This right of removal should be included in the general operating bylaw of the religious institute, but needs to be consistent with general corporate legislation where applicable
- ♦ Consent to be a Director
  - ♦ Where directors are elected (as opposed to *ex officio* directors where permitted by corporate legislation, *e.g.* in Ontario, British Columbia, Manitoba, and Newfoundland and Labrador), having written consent to be a director may be required by general corporate legislation prior to or shortly after an annual general meeting electing the directors (*e.g.* in certain circumstances, under the CNCA, ONCA, and *British Columbia Societies Act*)
  - ♦ Written consent, though is generally good practice, particularly in the context of recruiting lay directors

## 5. Challenges involving Voting by Directors

- ♦ Must be done by the directors themselves
- ♦ Voting cannot be delegated to an alternative director, or exercised by a power of attorney in the event of incompetency, or by appointing a proxy (*i.e.* authorising another person in writing to vote on their behalf)
- ♦ Some corporate legislation deems that the directors will have voted in favour of a particular resolution unless the directors register a dissent either at a meeting or shortly thereafter, *e.g.* the CNCA, ONCA, OCA, *Quebec Companies Act*, Manitoba's *The Corporations Act*, and the *Newfoundland and Labrador Corporations Act*
- ♦ Written resolutions by the directors are possible but most corporate legislation requires that the resolution needs to be unanimous, *e.g.* the CNCA, ONCA, OCA, *Quebec Companies Act*, Manitoba's *The Corporations Act*, the *Newfoundland and Labrador Corporations Act*

- ◆ Directors can participate in a board meeting by telephone, but generally requires the unanimous consent of all directors, *e.g.* the CNCA, ONCA, OCA, Quebec *Companies Act*, Manitoba's *The Corporations Act*, the Newfoundland and Labrador *Corporations Act*
  - ◆ Therefore, best to include a consensus on a telephone option by all directors when they consent to be directors in writing
- ◆ Without a quorum of directors, the directors cannot make a decision
  - ◆ Most corporate legislation will provide that a majority of the stated number of directors (as opposed to those left in office after resignation) will constitute a quorum for board meetings, *e.g.* the CNCA, ONCA, Manitoba's *The Corporations Act*, the Newfoundland and Labrador *Corporations Act*
  - ◆ If there is a quorum of directors, most corporate legislation will permit the remaining directors to appoint replacement directors, *e.g.* CNCA, ONCA, Manitoba's *The Corporations Act*, the Newfoundland and Labrador *Corporations Act*
  - ◆ If there is an insufficient number of directors to reach quorum, then most current legislation will require the directors to call a special meeting of members to elect replacement directors, *e.g.* CNCA, ONCA, Manitoba's *The Corporations Act*, the Newfoundland and Labrador *Corporations Act*

## 6. Challenges involving Corporate Members

### a) **Rights of Members at Corporate Law**

- ◆ Under most corporate legislation corporate members have basic rights
  - ◆ The right to elect directors
  - ◆ The right to remove directors
  - ◆ The right to appoint an auditor
  - ◆ The right to receive timely notice of membership meetings
  - ◆ Voting members will also have the right to vote at members meeting in person or in an acceptable alternative voting if the corporate legislation permits it (proxy or mail in ballots)
- ◆ However, corporate members are not entitled
  - ◆ To usurp the role and authority of the board
  - ◆ Have access to minutes of the board of director meetings

### b) **Reserve Powers as Additional Rights of Members**

- ◆ Reserve powers (also sometimes referred to as reserve responsibilities) give additional rights to members rather than granting them a particular "power"

- ◆ When drafting additional reserve rights of members, it would be best to describe them as passive rights of approval as opposed to active rights to initiate matters
  - ◆ *E.g.*, retaining a right to approve a transaction above a certain monetary level or approve the hiring of senior staff, or approve who has signing authority for financial transactions
- ◆ Need to be careful that additional rights of membership do not lead to a derogation of the authority of the board of directors to make decisions, as otherwise the members exercising overly broad rights of membership may run the risk of being seen as *de facto* directors and become potentially exposed to liability as directors of the corporation

**c) Voting by Corporate Members**

- ◆ Members must exercise the power to vote themselves or by proxies (i.e. by authorising another person in writing to vote on their behalf) when appointed in accordance with applicable corporate legislation unlike directors who are not able to appoint proxies to vote on their behalf
- ◆ Under the CNCA, for example, proxy requirements can be complicated
- ◆ Members cannot have their vote exercised through a power of attorney, as a right to vote as a member is not a property right like that of a shareholder and therefore the attorney under a power of attorney for property has no authority under the power of attorney to exercise a vote for the member
- ◆ The appointment of a proxy by a member may not be possible for a corporate member of the religious institute under special legislation unless the special legislation or applicable general corporate legislation permits it

**7. Challenges involving Canonical Unification**

**a) Setting the Stage**

- ◆ When a religious institute or province is facing canonical unification with another institute or province as a result of fewer religious or because of other circumstances (as opposed to when a province is simply absorbed into an institute and ceases to be a separate civil and canonical entity), there are certain legal issues that the board of directors of the religious institute or province as a civil law entity must consider
- ◆ Different considerations will apply when it is a unification domestically in Canada, compared to one that is done internationally, particularly with a US province involving the creation of cross border province

**b) Considerations involving Unifications within Canada**

- ♦ Because both provinces will be registered charities in Canada (which should be confirmed), then the unification process is much simpler because it involves two Canadian registered charities negotiating with each other
- ♦ The options that are available to create a civil entity to reflect a canonical unification creating a new province in Canada are as follows
  1. Amalgamation where the two corporations become one
  2. Transfer of assets from one corporation to another corporation with the transferor corporation being dissolved in time
  3. Forming a new corporation to be the civil personification of the new province with the dissolution of the two transferring corporations
- ♦ While there are pros and cons involving these options that are beyond the scope of this outline, there are legal considerations that the directors of the religious institute as a civil law entity need to consider before proceeding with a corresponding civil law unification
  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 religious institutes 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

**c) Considerations involving Cross Border Unification<sup>2</sup>****i) Canon Law Perspective**

- ♦ Since public juridical persons are not limited to operating within national boundaries, religious institutes can be international in scope
- ♦ Similarly, a province of a religious institute can have international boundaries
- ♦ This flexibility in operating structure has meant that Canadian institutes have been able to unite their Canadian and American provinces (or with provinces in other countries) to create a single international province

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<sup>2</sup> This section has in part been abstracted from a presentation that the author gave with Father Francis G. Morrisey at ATRI Conference in September 2018 titled “Canon Law Meets Civil Law in the Operation of Religious Institutes”, referred to in note 1, above

- ◆ However, when doing so, it is important to ensure compliance with civil law requirements that, if not followed, would prejudice the ability of the Canadian institute to continue to operate as a registered charity in Canada and protect its charitable property
- ◆ Administrators must protect the ownership rights of ecclesiastical goods by civilly valid methods (canon 1284)
- ◆ Administrators must also follow both canon law and civil law as well as the conditions imposed by a founder, donor, or legitimate authority. Importantly, the administrator must guard against damage happening to the Church as a result of non-observance of civil law

**ii) Civil Law Perspective**

- ◆ Although at corporate law it is possible for a foreign civil 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* as a Canadian registered charity
- ◆ A registered charity in Canada must be resident in Canada which, in the case of a corporation, means that it is incorporated in Canada and must be under the control of its board of directors
- ◆ As a general rule, it is advisable that the board of directors of the Canadian registered charity be made up of a majority of residents of Canada for income tax purposes
- ◆ As well, the assets of the Canadian corporation must either remain under the ownership and control of the Canadian corporation in its capacity as a registered charity, or be transferred to another qualified donee under the *Income Tax Act* (e.g. another Canadian registered charity)
- ◆ However, the Canadian corporation cannot transfer its assets to a foreign corporation, as this would involve gifting assets to a non-qualified donee, which would expose the Canadian charity to sanctions and revocation of its charitable status and potential loss of its charitable property
- ◆ However, the Canadian corporation may transfer assets to a foreign corporation if done under its direction and control through a contract for services or agency agreement
- ◆ It is essential that the Canadian corporation as a registered charity maintain ownership of its assets as well as its independence in order to avoid concerns by the Canada Revenue Agency (“CRA”) on an audit that there may have been a loss of direction and control by the Canadian charity over its property

- ♦ The following are some considerations when restructuring a Canadian corporation as part of an international province in order to ensure that the Canadian corporation remains independent for purposes of the CRA
  - ♦ While it is possible for the leadership of the cross border province to make up all or a part of the corporate membership of the Canadian corporation, it may be problematic if the majority or more of the board of the Canadian corporation is made up of the provincial leadership of the foreign corporation
  - ♦ Similarly, the reserve powers or responsibility granted to the corporate member of the Canadian corporation (*e.g.* the provincial leadership in a foreign country) need to be carefully implemented and utilized, as an overly broad reserve power (*e.g.* such as extending the reserve power by members to require membership approval for the rental of property or the receipt of gifts) could be seen as granting excessive power to the corporate members and thereby conflating the role of corporate members and directors into a combined *de facto* board of directors under the control of a foreign corporation
  - ♦ As well, the board of directors and corporate members of the Canadian corporation must meet separately from that of the provincial leadership and keep separate minutes of their meetings
  - ♦ In addition, all decisions concerning the operations and the handling of property by the Canadian corporation as a charity must be made by its board of directors. Decision cannot be made by the provincial leadership in the foreign jurisdiction by fiat in Canada
  - ♦ In the event of a charity audit, the CRA will look to see if there is adequate evidence of direction and control by Canadian board of directors, or whether there is *de facto* control by the provincial leadership in the foreign jurisdiction where the provincial leadership is located
  - ♦ As well, all financial activities and records, as well as corporate records of the Canadian charity, must be located in Canada and be kept at the head office of the Canadian corporation
  - ♦ It is important to remember that the CRA can request a copy of all emails and other communications involving the Canadian corporation on a charity audit, so if there is an email chain evidencing *de facto* control by a cross border province, the CRA can use such evidence to allege that the Canadian corporation does not have actual direction and control over its operations, and thereby prejudice the ability of the Canadian corporation to maintain its charitable status

## D. SUGGESTIONS AND OPTIONS FOR BOARDS IN TRANSITION

### 1. No One Size Fits All

- ◆ The following suggestions and options are provided so that boards in transition will know what is available at civil law
- ◆ However, which suggestion or option described below will prove to be the right choice for the religious institute will depend upon the circumstances of each religious institute and the legal jurisdiction under which it operates
- ◆ As such, what follows has intentionally been kept to a very high level, as each religious institute must undertake careful due diligence to determine what suggestion or option may be right for the religious institutes in their particular circumstances

### 2. Review and Update Charitable Purpose

- ◆ The charitable purpose in the original incorporating documentation for the religious institute may be out of date and fail to reflect the full extent of the ministry of the religious institute
- ◆ A revised charitable purpose would need to include a statement to reference the Roman Catholic faith and canon law into its purpose as indicated above
- ◆ A change of charitable purpose can be done by adopting either supplementary letters patent or articles of amendment for religious institutes incorporated under general corporate legislation, like the OCA in Ontario or CNCA federally
- ◆ However, for a religious institute incorporated by special legislation, it would require an amendment in the legislation or, alternatively, a continuance of the special act corporation under general corporate legislation within their incorporating jurisdiction in order to be able to amend their corporate purpose under general corporate legislation
- ◆ Whichever way that the charitable purpose of the corporation is to be amended, the revised charitable purpose will be subject to obtaining approval of the CRA as a regulator of registered charities under the *Income Tax Act*

### 3. Board Level

- ◆ Possibly reduce the size of the board of the civil law religious institute to reflect the number of congregational leaders who are able to provide the legal authority that the director of a charitable corporation is required to provide as explained in this presentation
- ◆ Expand the eligibility requirements to be a director of the civil law religious institute in its bylaws so that lay people or members of other religious institutes can become directors and/or officers as may be required
- ◆ In doing so, revisit the eligibility requirements to be directors to ensure that lay people will remain true to the mission of the religious institute, including
- ◆ Confirmation of Catholic identity

- ◆ Commitment to uphold and fulfil the charitable purpose of the religious institute

#### 4. **Corporate Membership**

- ◆ There are numerous different combinations involving corporate memberships of the religious institute as a civil law entity that are available
- ◆ Which model is correct for a religious institute at any one point may need to be rethought over time
- ◆ Corporate membership can include
  - ◆ Closed membership (*e.g.* limited to its board of directors) and/or small groups of trusted advisors
  - ◆ Or it can be open to include a large based membership (*e.g.* all professed members within a religious institute as corporate members)
  - ◆ Or it can be limited to one or more spiritual leaders (*e.g.* the major superior on her own or with members of her council)
  - ◆ Or it can be limited to external sponsors to ensure Catholic identity
    - ◆ *e.g.* Canadian Religious Stewardship (CRS)
    - ◆ *e.g.* Catholic Health Sponsors of Ontario (CHSO/CHCO)
- ◆ It is also possible to have two classes of members, *e.g.* regular members and a special class of members, in order to exercise additional rights of members as described above

#### 5. **Protection of Assets**

- ◆ In addition to restructuring of the religious institute as a civil law entity, there are also other options that can be considered by boards in transition
- ◆ While it is beyond the scope of this presentation to make mention of anything other than a few options in passing, it is still important to be aware that they exist and may therefore need to be considered by a board in transition
  - ◆ Transfer assets to a separate parallel foundation for the religious institute that is under the control of a lay board of directors committed to using the assets to support the work of the religious institute or, when the religious institute no longer exists, to utilize those assets for similar works and charitable purposes of the religious institutes
  - ◆ Transfer assets to a “Catholic community foundation” in order to ensure that its mission or charitable purposes can continue through the oversight of a Catholic sponsor
    - ◆ *e.g.* Canadian Religious Stewardship (CRS)
    - ◆ *e.g.* Foundation of Canadian Catholic Congregation (FCCC)
    - ◆ *e.g.* Canadian Congregational Legacy Charity (CCLC)

- ♦ A deed of gift to transfer the assets of the religious institute could contain terms of reference that would be able to constitute an enforceable restrictive charitable purpose over the assets being transferred
- ♦ Declaration of trust by the religious institute as a trustee of the assets with provision for a possible subsequent trustee to be able to take over control of the religious institute in order to ensure that the assets will continued to be used for the charitable purposes of the declaration of trust in order to reflect the intentions of the religious institute immediately before a triggering event has occurred, *e.g.* when the number of religious fall below a certain number

**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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