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**SAINT PAUL UNIVERSITY
FACULTY OF CANON LAW
Ottawa – June 13, 2023**

**INTERACTION BETWEEN CANON
LAW AND CIVIL LAW**

**By Sr. Bonnie MacLellan, CSJ, JCD, Ph.D. and
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Interaction Between Canon Law and Civil Law

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A. Where Canon Law Intersects with Civil Law

1. What does Canon Law say about Civil Law?

- “Those civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise.” (canon 22)
- “Institutes of consecrated life and societies of apostolic life should obtain, as far as possible, juridical and civil identity in the countries in which they operate.” (2018 Guidelines, no. 69)¹
- “Where the institute has to assign the assets to an entity other than a natural person, the Superior who has granted the permission should maintain adequate documentation attesting to the actual ownership, in order to avoid the possibility of civil litigation.” (2018 Guidelines, no. 69)

2. What does Civil Law say about Canon Law?

- “While Canon Law is not determinative of responsibilities imposed by the civil law, it can define the relationships among various parts of a religious organization such as the Catholic Church” (John Doe)²
- “Defining the Canon Law relationships is the starting point for an assessment of civil law responsibility. ... The Court will be deferential to matters of internal processes in the Church. However, in this case, those internal processes are relevant in the adjudication of the rights as between the Plaintiffs and the Defendant.” (John Doe)

3. What are the Three Types of Canon Law?

- Universal law of the Church, as found in the Code of Canon Law and subsequent universal documents (canons 8.1, 12)
- Particular law, related to territory, such as the decisions of the Canadian Conference of Catholic Bishops, which are binding in Canada, but not elsewhere (canons 8.2, 13)
- Proper law, which applies to persons, no matter where they may be situated, such as the Constitutions of a religious institute, which apply to all members of the community, no

¹ Collection of Vatican Documents, *Economy at the Service of the Charism and Mission: Guidelines*, 2018 [2018 Guidelines].

² *John Doe (GEB #25) v The Roman Catholic Episcopal Corporation of St. John's*, 2018 NLSC 60 at paras 169-170 [“John Doe”].

matter in what part of the world they may be living; these norms do not apply to other religious (who have their own Constitutions) (canon 587)

4. What are the Basic Components of Civil Law?

- Common law consisting of the body of case law used by the courts as precedents (outside of Quebec)
- General federal and provincial (including *Civil Code of Québec*) legislation adopted by elected legislative bodies
- Special federal and provincial legislation incorporating a religious institute

5. What Areas of Civil Law Most Frequently Intersect with Canon Law Regarding Religious Institutes?

- Corporate Law
 - Federal general legislation (*e.g. Canada Not-for-profit Corporations Act*)
 - Provincial general legislation (*e.g. Ontario Not-for-Profit Corporations Act, British Columbia Societies Act, Nova Scotia Societies Act, New Brunswick Companies Act, Saskatchewan Non-profit Corporations Act*)
- Tax Law
 - Federal tax legislation, such as the *Income Tax Act* (*e.g.* in obtaining and maintaining charitable status) and *Excise Tax Act* (HST and GST)
 - Provincial tax legislation, such as provincial sales tax (*e.g.* PST, QST), land transfer tax, and employer health tax
 - Municipal tax, such as property tax (under provincial assessment legislation)
- Trust Law (common law)
 - Restricted charitable purpose trusts
 - Compliance with donor intent and restrictions
 - Exposure of directors and officers to breach of trust
 - Provincial trustee legislation concerning authority and duty with investing charitable funds
- Charity-Specific Legislation
 - *Charities Accounting Act* in Ontario authorising the Public Guardian and Trustee to oversee the handling of charitable property
 - Fundraising legislation (*e.g. Alberta Charitable Fund-raising Act*)
 - Protection of charitable property (*e.g. BC Charitable Purposes Preservation Act*)

- Property law
- Provincial legislation governing the conveyancing of property
- Specific legislation dealing with holding and conveyancing of property held by religious organizations (*e.g.* Ontario *Religious Organizations' Lands Act*, Alberta *Religious Societies' Land Act*, Nova Scotia *Religious and Charitable Corporations Property Act*)
- Employment Law
 - Provincial employment standards legislation
 - Regulatory legislation concerning employment matters (*e.g.* Ontario *Workplace Safety and Insurance Act*, Prince Edward Island *Occupational Health and Safety Act*)
 - Common law principles involving wrongful dismissal
- Human Rights Law
 - Federal human rights protection
 - Federal legislation (*e.g.* *Canadian Human Rights Act*, *Canadian Charter of Rights and Freedoms*)
 - Decisions of the Canadian Human Rights Commission
 - Provincial human rights protection
 - Provincial human rights legislation (*e.g.* Newfoundland and Labrador *Human Rights Act*, Ontario *Human Rights Code*)
 - Provincial human rights commissions, which are independent government agencies that administer the provincial human rights act (*e.g.* Nova Scotia Human Rights Commission, Yukon Human Rights Commission)
 - Provincial human rights tribunals that function as the 'court' in making decisions on matters of human rights complaints (*e.g.* BC Human Rights Tribunal)

6. When Will the Courts Intervene in Matters of Canon Law?

- *Wall* decision³ – The Supreme Court of Canada has held that courts cannot review matters concerning religious doctrine, including procedural rules that require the interpretation of such doctrine:
 - "...[C]ourts should not decide matters of religious dogma. As this Court noted in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 50, "Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."

³ *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 36 ["Wall"].

- *Aga* decision⁴ – However, considerations of doctrine may be tangentially relevant in legal disputes regarding other matters:
 - “Thus, while purely theological issues are not justiciable, where a legal right is at issue, courts may need to consider questions that have a religious aspect in vindicating the legal right. As this Court explained in *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at para. 41, “[t]he fact that a dispute has a religious aspect does not by itself make it non-justiciable”. Rather, as the trial judge in that case correctly held, “a claim for damages based on a breach of a civil obligation, even one with religious aspects, remains within the domain of the civil courts”. For example, courts adjudicating disputes over church property may need to consider adherence to the church's internal rules, even where those rules are meant to give effect to religious commitments.”
- *Ivantchenko* decision⁵ - the court, in considering a claim of wrongful constructive dismissal, summarized the approach that courts take when dealing with matters of a religious organization
 - “The typical pattern in court decisions is to carefully explicate the polity of the religious organization based on expert evidence... These authorities show that once the ecclesiastical relationships are properly understood, the court will oblige the religious organization and its member to comply with its internal law; this may include, for example, refusing to permit a civil suit to proceed until the internal routes are exhausted and found wanting.”
- *Huo* decision⁶ – similar to *Ivantchenko*, the court in *Huo* explained the role courts will play in adjudicating disputes between members of a religious organization, in the context of individuals challenging their termination of membership from a church:
 - “In general, the Superior Court of Justice has jurisdiction to adjudicate disputes where legal rights are at stake. In reviewing decisions of incorporated religious organizations, however, a court’s inquiry must be restricted to whether the corporation’s decisions were lawfully made pursuant to its own rules (i.e., its by-laws) and consistent with the rules of natural justice... Courts must not adjudicate theological disputes.”
- *Hart* decision⁷ –the court declined to intervene because the plaintiff had not exhausted the internal processes of the church. Even though the plaintiff had framed the action as a matter of property and civil rights, which are areas where the courts will intervene, the Ontario Superior Court held that the dispute was really a matter of canon law, and therefore would not interfere.
 - “The essence of the claim between Father Hart and the Archdiocese is ecclesiastic in nature and this court has no jurisdiction over that dispute. Moreover, the internal processes that are designed to deal with that dispute do not offend the principles of

⁴ *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga*, [2021] SCJ No 22 at para 28 [“*Aga*”].

⁵ *Ivantchenko, et al v The Sisters of Saint Kosmas Aitolos Greek Orthodox Monastery*, 2011 ONSC 6481 at para 11

⁶ *Huo v. Mississauga Chinese Christian Church*, 2022 ONSC 3107 at para 14 [“*Huo*”].

⁷ *Hart v Roman Catholic Episcopal Corp of the Diocese of Kingston*, 2010 ONSC 4709, 2010 CarswellOnt 6518 at para 45 [“*Hart*”].

natural justice and Father Hart has not exhausted the internal processes available to him. For these reasons, these proceedings constitute an abuse of process and are stayed. ”

- *Dodd* decision⁸ – the court, in confirming the membership termination of five individuals who had been professed sisters of the Roman Catholic Church, deferred completely to canon law rather than civil law.
 - “The reluctance of civil Courts of law to interfere in internal church matters was well stated by Patterson JA., in *McPherson v McKay* (1880)...:

The functions of a Court of law exclude the discussion of the doctrines, government, or discipline of voluntary religious associations, except when they become elements in the adjudication of controversies respecting property, contracts, or other civil rights. The attempt to deal with such questions is always a matter of delicacy, and cannot be undertaken with any confidence without ample information upon all the topics which require consideration. When it becomes necessary, however, the duty must be discharged as best it may, and as has been done in many cases ...”

- Subject to the above limitations, the courts may be prepared to intervene in the following situations:⁹
 - When church tribunals do not follow their own procedural and substantive rules
 - Where internal tribunals do not comply with the rules of natural justice, although *Wall* clarifies that a court cannot justify its intervention with the decision of a religious institute on the “sole basis that there is an alleged breach of the rules of natural justice...”¹⁰
 - Where tribunals acted in an *ultra vires* fashion, with malice, *mala fides*, or bias, or other improper fashion
 - Where disciplinary disputes occur within a religious organization that is incorporated under civil law, and thereby making a dispute subject to legislated procedural requirements
 - Where the dispute was related to a property or civil right
 - In other unique circumstances, such as where a civil court was called upon to carry out a punishment by an internal tribunal
 - Interpretation of civil law legislation that allows religious institutions to hold land or property in trust (*e.g.* Ontario *Religious Organizations’ Lands Act*)

⁸ *Dodd et al v Society of the Love of Jesus* (1975), 53 DLR (3d) at para 42 [“*Dodd*”].

⁹ MH Ogilvie, “Are Members of the Clergy Without the Law? Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston” (2014) 39:2 Queen’s LJ 441 at 451, lists the first six of the seven factors outlined here.

¹⁰ *Wall*, *supra* note 3 at para 24.

B. Understanding Differences in Organizational Structures

1. 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 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 in 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 in 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

2. 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 the restricted charitable purpose trust
 - 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* or *Ontario Corporations Act* or *BC 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 (*i.e.* 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)
 - Corporations can own property and sue and be sued in their own name
 - Members of the corporation are protected from personal liability

3. Intersection of Public Juridic Persons and Civil Corporations

- Where a public juridic person include multiple civil corporations
 - *E.g.* a local house that is both a public juridic person and a civil corporation operates a school as a sponsored work of the local house as its apostolate, but through the auspices of a separate civil corporation
 - In such situations, problems can arise in transferring property and funds between the two civil corporations as parts of a single public juridic person unless both civil corporations are registered charities
- Where a civil corporation includes multiple public juridic persons
 - *E.g.* an incorporated diocese and its parishes that are not separately incorporated
 - *E.g.* an incorporated local house, as a public juridic person, sponsors a school that is recognized as a separate public juridic person
 - The separate public juridic persons in both situations could obtain separate charitable status as an “internal division” of the parent organization, even though not separately incorporated, but are not required to do so

- If a canonical public juridic person does not incorporate separately, all liabilities of the canonical public juridic persons will be the responsibility of the single corporate civil entity (*e.g.* an incorporated diocese will be liable for its unincorporated parishes)

4. Corporate Purposes v. 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
- It is also important to incorporate 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.”*
- Special legislation that incorporates a religious institute will normally take precedent over general corporate legislation where a conflict arises. This principle has been reflected in some corporate legislation (*e.g.* section 5 of the *Ontario Not-for-profit Corporations Act*)

5. Official Roles within Public Juridic Persons

- 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

6. Official Roles within Civil Corporations

- Board of Directors
 - Directors are collectively responsible for managing or supervising the management of the affairs of the corporation
 - As directors of a charitable corporation, they have a high fiduciary duty to put the best interest of the corporation ahead of their own, avoid conflicts of interest, and to ensure that the charitable property of the corporation is applied to its intended charitable purposes
 - Directors can be exposed to personal liability for breach of fiduciary duty and/or breach of trust
 - Decisions are made on a collective basis and no one director has any more authority than another director, unlike that of a major superior and her council
 - 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 a necessity; however, the chair or vice chair should be directors in order to best 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
 - Similarly, there is no reason at civil law why a lay person as a treasurer of a civil corporate entity for an institute could not also act as the treasurer of the religious institute
 - As such, corporate articles and by-laws under civil law frequently require that the treasurer be a member in perpetual vows.
- 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
 - Member rights have become much more robust under new corporate legislation, such as the *Canada Not-for-profit Act* the *Ontario Not-for-profit Corporations Act*, and the *Saskatchewan Non-profit Corporations Act*

- Corporate membership can be
 - Closed (*e.g.* limited to its board of directors) and/or a small group of trusted advisors
 - Or it can be open to include a large base membership (*e.g.* all professed members within an 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)
- Members have ultimate accountability for the civil corporation through their ability to elect and remove the board of directors
- In addition, members can also be given enhanced authority through reserve powers, such as the right to approve the sale of property that the board of directors of the corporation would not normally have authority to exercise

7. Issues on Dissolution

- Generally under canon law, if a public juridic person is being suppressed, then its assets must be transferred to its canonical parental public juridic person
- However, problems arise if that canonical parent body is not a registered Canadian charity to which a gift of assets can be given
- As well, the dissolution clause in the incorporating documents for the civil corporation may be different from what canon law requires
- In addition, a transfer of assets upon dissolution may need to comply with applicable donor restricted charitable purpose trusts

C. Reporting Requirements Regarding Sexual Abuse

1. Reporting Requirements Under Canon Law

- Recent changes on reporting requirements in cases of alleged sexual abuse. (See *Vos etis lux mundi*) 25 March 2023)
 - Original document promulgated 7 May 2019 ad experimentum for 3-year period
 - Observations & advice received from episcopal conferences and Dicasteries of the Roman Curia ...
 - Scope of Application
 - Applies to reports regarding clerics or members of Institutes of Consecrated Life or Societies of Apostolic life or moderators of international associations of the faithful recognized or erected by the Apostolic See

- Includes delicts against the Sixth Commandment
 - Committed with violence or threat or by abuse of authority, or in forcing someone to perform or submit to sexual acts ...
 - Immoral acquisition, retention, exhibition or dissemination ... of pornographic images of minors or persons habitually having an imperfect use of reason ...
- Reporting
 - Any person, especially lay faithful holding offices or exercising ministries in the Church... can file a report relating to one of the facts mentioned in article 1
- Protection of the person submitting the report
 - Making the report ... shall not constitute a violation of office confidentiality
 - An obligation to keep silent cannot be imposed on the person making the report, the person claiming to have been offended, and witnesses ...
- Care for persons
 - The ecclesiastical Authorities shall commit themselves to ensuring that those who state that they have been harmed, together with their families are to be treated with dignity and respect and, in particular, are to be:
 - Welcomed, listened to and supported ...
 - Offered spiritual assistance
 - Offered medical assistance, including therapeutic and psychological assistance ...
 - ... confidentiality of personal data must be protected
- Procedures for Bishops ...
- Procedure applicable to Supreme Moderators of Institutes of Consecrated Life or Societies of Apostolic Life
 - Reports concerning those who are or who have been Supreme Moderators of Institutes of Consecrated Life or Societies of Apostolic Life of Pontifical Right, as well as of monasteries *sui iuris* ... are to be forwarded to the competent dicastery
- Carrying out the Investigation
 - ... If it is necessary to hear from a minor or a vulnerable adult, the Metropolitan shall adopt appropriate procedures which take into account the condition and the laws of the State.

- ... The person under investigation enjoys the presumption of innocence and the legitimate protection of his or her good name.
- Compliance with State Laws
 - These norms apply without prejudice to the rights and obligations established in each place by state laws, particularly those concerning any reporting obligations to the competent authorities.

2. Reporting Requirements Under Civil Law

(a) Reporting Sexual Abuse of Children

- Mandatory reporting requirements apply under provincial child protection legislation across Canada where there are reasonable grounds to suspect abuse of a child. Each province has its own statute with different definitions and requirements.
- In Ontario, the Child, Youth and Family Services Act (“CYFSA”) defines a “Child” as a person under the age of 18 years and sets out mandatory reporting requirements to report suspected child abuse
 - These mandatory reporting requirements do not apply in respect of a Child who is 16 or 17 years of age
- A person who has a duty to report shall do so directly to the Children’s Aid Society and shall not rely on any other person to report on the person’s behalf
- The Ministry of Children and Youth Services states that if a person has reasonable grounds to suspect that a child “is or may be in need of protection”, then they must promptly report the suspicion and the information on which it is based
 - "Reasonable grounds" refers to the information that an average person, using normal and honest judgment, would need in order to decide to report
- Persons who perform professional or official duties with respect to children, including religious officials, and others, are guilty of an offence if
 - the person fails to report suspected abuse and
 - the information regarding suspected abuse was obtained in the course of the person’s professional or official duties
 - penalties may include significant monetary fines of thousands of dollars
- Local police may also be contacted or 911 may be called in emergencies
- It is important to keep strictly confidential all information relating to allegations against an accused perpetrator, unless disclosure is reasonably required to protect children

(b) Reporting Sexual Abuse of Vulnerable Adults

- The term “Vulnerable Person” is broad and could encompass persons with physical and/or mental disabilities, the elderly and others
- No uniform approach taken on reporting abuse of vulnerable adults across Canada.
- Some provinces have statutes to protect one segment of the vulnerable population.
 - In Manitoba *The Vulnerable Persons Living with a Mental Disability Act* requires mandatory reporting where a person believes on reasonable grounds that a “vulnerable person” as defined in the Act (i.e. a person with a mental disability) is, or is likely to be abused or neglected.
 - In Ontario, there are mandatory requirements to report abuse of senior residents of long-term care homes under the Long-term Care Homes Act, as well as senior residents of retirement homes under the *Retirement Homes Act*.
- The mandatory reporting requirements underscore the importance of carrying out appropriate screening of individuals who will work with vulnerable persons (including children and vulnerable adults)
- Vulnerable sector checks are a documentary snapshot of police records at a given moment in time and are insufficient by themselves to properly screen potential volunteers and/or employees
- Catholic organizations who work with vulnerable populations are expected under civil law to adopt appropriate policies, such as a child protection policy or a vulnerable persons’ policy, including screening, to protect vulnerable persons in addition to reviewing insurance coverage.

(c) Reporting Sexual Abuse of Non-Vulnerable Adults

- Allegations of sexual abuse against adults who are not vulnerable, may also arise from time to time, particularly with regards to staff
- While there might not be any statutory requirements to report sexual abuse in this context, reporting the abuse to police reflects transparency and accountability by the leadership of the organization and also reflects best practice in allowing the police with the opportunity to investigate unhindered.

D. Selling Property

1. Selling Property under Canon Law

- The Vatican has issued two documents related to the proper administration of temporal goods

- On August 2, 2014, the Vatican issued *Guidelines for the Administration of the Assets in Institutes of Consecrated Life and Societies of Apostolic Life (2014 Guidelines)*
- On January 6, 2018, the Vatican issued *Economy of the Service of the Charism and Mission (2018 Guidelines)*
- Keeping in mind that the canonical rules on alienation apply only to stable patrimony and not to free or unrestricted assets (canon 1291), the *2018 Guidelines* define “stable patrimony” as a composition “of the immovable and movable goods that guarantee the subsistence of the institute, the provinces, the legitimately erected houses and assure the realization of the mission.”¹¹
- Under Article 83 of the *2018 Guidelines*, in accordance with Canon 1296, when ecclesiastical goods are disposed of in a way that violates canonical norms, yet is civilly valid, then the competent superior must decide whether to take action to claim the rights of the church.¹²
- It is a debatable point under civil law whether failure to comply with canon law will invalidate the sale of property
 - Transactions that are invalid under canon law (e.g. if the law of the church required written consent to complete borrowing transactions) may still be held as valid by civil courts if it is otherwise legal; these canonically invalid transactions can therefore be binding on the church (*Leonard*)¹³
- To establish a basis for requiring compliance with canon law on the sale of property, it is best to ensure that canon law is incorporated into civil law corporate documentation, as indicated above

2. Selling Property under Civil Law

- Under civil law, canonical juridical persons require civil capacity to undertake juridical affairs effectively, either because they are constituted in accordance with secular law or because secular law recognizes the civil personality of the canonical juridical person
- Need to look at both general and special corporate legislation, if applicable
- Review corporate law requirements (*e.g.* Ontario *Not-for-Profit Corporations Act* currently requires members’ approval where there is a sale of all or substantially all of the assets of the corporation)
- Need to review approval requirements under general operating by-laws of the civil corporation for the sale of property, if applicable (*e.g.* reserve powers)
- It may also be prudent to obtain corporate membership approval when possible even if it is not legally required

¹¹ *2018 Guidelines*, *supra* note 1 at pg 103.

¹² *Ibid*, at pg 113.

¹³ *Leonard v. St. Patrick Parish* [1922] 1 W.W.R. 601, 66 D.L.R. 304.

- Decisions of the board of directors as well as the members authorising the sale of property need to be recorded in separate minutes
- If selling to an entity that is not a qualified donee under the *Income Tax Act* (e.g. not to another registered charity), then it is essential to document that the sale of property is being done at fair market value, pursuant to a qualified appraisal.
- Need to review documentation by which the property being sold was acquired, including the original deed, to determine if there was a direct or indirect donor restricted charitable purpose trust, which might impact the corporation's ability to sell the property (e.g. there may be a requirement that the property may only be used by the Catholic church) or restrict the corporation's use of the proceeds from the sale
- Proceeds of sale would need to be invested in accordance with the investment policy of the religious institute reflecting applicable Provincial *Trustee Act* requirements

E. Termination of Membership

1. Voluntary Termination of Membership

- If a religious voluntarily leaves a religious institute and is a member of the corresponding civil corporation, then the departure of the religious may require a corresponding mechanism to remove the individual as a corporate member
- Legal actions against a religious institute can arise where a departing religious is not satisfied with the charitable subsidy offered to them on the occasion of their departure
 - For example, in the *Thompson* decision,¹⁴ a former nun made a claim against her former congregation for unjust enrichment one year after being released from her vows and withdrawing from the Congregation. While this case dealt with a different legal issue, this case is an example of the type of action that may arise after a religious has departed from the religious institute
- The potential for legal action emphasizes the importance of having a written acknowledgment recognizing that if a religious leaves the institute, she has no right to compensation for services rendered, for the salary that she has handed over to the institute, or for future considerations.
- In the *Glendinning* decision¹⁵ – the court, in considering whether the Roman Catholic Church had legal status that would allow it to be sued, acknowledged the contractual nature of the church, which is recognized as a voluntary association under the civil law. In the decision, the court referred to the Canadian Encyclopedic Digest, which states:
 - “... The authority of a religious organization over its members rests upon their voluntary membership and mutual, contractual consent to the doctrine and discipline of the organization. Since contract is the legal basis for the authority of a religious organization over its members and affairs, the courts should interpret internal rules according to the

¹⁴ *Thompson v Our Lady of the Missions*, 2011 ONSC 382.

¹⁵ *S(JR) v Glendinning*, 2000 CanLII 22641 (ON SC), 191 DLR (4th) 750, at para 8, citing the Canadian Encyclopedic Digest, (3d) vol 4, titled “Religious Organizations”, Part V para 117 [“*Glendinning*”].

principles for the interpretation of contracts, and should not interfere with them unduly; interference with such internal rules will be justified, however, where they interfere with civil rights.”

- However, in the *Aga* decision, the Supreme Court of Canada stated that membership is contractual only where the conditions for contract formulation are met:
 - “In sum, courts can only intervene in the affairs of a voluntary association to vindicate a legal right, such as a right in property or contract. Membership in a voluntary association is not automatically contractual. Even a written constitution does not suffice. Membership is contractual only where the conditions for contract formation are met, including an objective intention to create legal relations. Such an intention is more likely to exist where property or employment are at stake. It is less likely to exist in religious contexts, where individuals may intend for their mutual obligations to be spiritually but not legally binding. A voluntary association will be constituted by a web of contracts among the members only where the conditions for contract formation are met.”¹⁶
- Important to require that the individual obtain independent legal advice before signing an acknowledgment

2. Involuntary Termination of Membership

- Principles from the Supreme Court of Canada’s *Wall* decision on termination of membership:
 - Religious groups (and other voluntary associations) are private, non-governmental bodies and not state actors or public bodies. These entities have autonomy to make basic decisions as private bodies, free from the statutory constraints that are imposed on public bodies
 - Matters of religious doctrine are beyond the scope of the court’s jurisdiction and are not subject to review. This includes procedural rules that involve the interpretation of religious doctrine that involves the termination of membership
 - Courts, however, may review procedural rules that are “based on a contract between two parties, even where the contract is meant to give effect to doctrinal religious principles.”
 - Courts should not interfere in decisions of voluntary associations, even where procedural fairness and principles of natural justice are alleged to have been breached, unless a legal right has been violated
- Issues of how a former religious obtains legal funds to defend against criminal charges
 - Legal counsel should be sought concerning the religious institute’s obligation, if any, as well as its ability to use charitable funds to pay for legal defence claims as there is no simple solution given all of the legal variables at play.

¹⁶ *Aga* at 49.

- For example, in *DeJaeger*,¹⁷ the court provided DeJaeger with court-appointed counsel to defend his appeal against his criminal conviction and sentence after the Legal Services Board of Nunavut declined to assist him. The court held that a court-appointed counsel was appropriate because DeJaeger, who is a member of the Oblates of Mary Immaculate but had been dismissed from the clerical state, did not have the support of his institute in furthering appeals nor the financial means to appoint his own counsel, but his appeal had enough merit. The case is still ongoing

F. Provinces with Boundaries Beyond Canada

1. 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
- 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 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

2. 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

¹⁷ *R v DeJaeger*, 2017 NUCA 2.

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 as a “qualifying disbursement” as described below

- 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 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 CRA:
 - While it is possible for the leadership of the international 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 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 CRA can request a “data dump” 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 the US corporation, 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

G. Payments Outside of Canada

1. Canon Law Perspective

- Canadian religious institutes may be required from time to time to make payments outside of Canada to the generalate or provincialate for either payments of an “annual tax” or to participate in funding charitable programs

2. Civil Law Perspective

- Canadian religious institutes as registered charities cannot simply make a gift or a grant of money or property to a generalate or provincialate that is not a Canadian registered charity, since to do so would be to make a gift to a non-qualified donee contrary to the requirement of the *Income Tax Act* and open the Canadian charity up to penalties, suspension of receipting privileges, and even revocation of charitable status
- The following are different options which may be considered (subject to legal advice) for use by a religious institute that is a Canadian registered charity in making payments to a generalate or provincialate outside of Canada:
 1. The payment of invoices for specific goods or services at fair market value or below (*e.g.* the payment of air fare to fly the superior to Canada to visit the operations of the institute)
 2. Charitable programs done under the direction and control of the religious institute as a 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 and direction and control by the Canadian institute:
 - *e.g.* Consultation or Agency Agreement
 - *e.g.* Contract for service
 - *e.g.* Joint Venture Agreement
 - *e.g.* Co-operative Participant
 3. Recurring payments, such as tithes, membership fees, or “annual tax”, by the Canadian religious institute in consideration of receiving ongoing value in the form of goods and services from the generalate or provincialate. These goods and services would 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 income of the charity or \$5,000.00) as provided for under Appendix C of CRA Guidance on Carrying on Activities Outside of Canada
 - It would be important to document the arrangement through a written agreement (*e.g.* such as a “head body” agreement)
 - The agreement would need to document the goods and services that the religious institute in Canada 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, advise on canonical matters, *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, though, that payments to a generalate or provincialate under a “head body” agreement not include payments to fund charitable programs, as such programs would need to be funded through the generalate or provincialate in accordance with appropriate documentation that evidences direction and control by the Canadian religious institute rather than making a payment in return for goods and services received from the generalate or provincialate as a “head body”
4. Recent amendments to the ITA passed on June 23rd, 2022 have established a new regime (in addition to the own activities and direction and control regime) of “qualifying disbursements” that can now be made to “grantee organizations”
- 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

Although “qualifying disbursements” are now part of Canadian law, the CRA has only released a [Draft Guidance](#) to date, which is expected to be revised and issued in final form at the end of June 2023

New anti-directed giving rule prohibits registered charities from accepting a gift, the granting of which is expressly or implicitly 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 Bulletins [#517](#) and [#519](#)

DISCLAIMER: This outline is a work in progress, as civil and canonical 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.