SCC Court File No. 37273

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JUDICIAL COMMITTEE OF THE HIGHWOOD CONGREGATION OF JEHOVAH'S WITNESSES (VAUGHN LEE - CHAIRMAN AND ELDERS JAMES SCOTT LANG AND JOE GURNEY) AND HIGHWOOD CONGREGATION OF JEHOVAH'S WITNESSES

Appellants

- and -

RANDY WALL

Respondent

- and -

THE EVANGELICAL FELLOWSHIP OF CANADA and CATHOLIC CIVIL RIGHTS LEAGUE, CANADIAN COUNCIL OF CHRISTIAN CHARITIES, ASSOCIATION FOR REFORMED POLITICAL ACTION, CANADIAN CONSTITUTION FOUNDATION, CHRISTIAN LEGAL FELLOWSHIP, WORLD SIKH ORGANIZATION OF CANADA, SEVENTH-DAY ADVENTIST CHURCH IN CANADA and CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS IN CANADA, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN MUSLIM LAWYERS ASSOCIATION

Interveners

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The Social Ontology of Religious Freedom

Víctor M. Muñiz-Fraticelli*

How should we conceive of religious institutions? Are they aggregations of individuals or discrete agents? Are they joint endeavours of like-minded persons committed to a common spiritual pursuit and for whose common interest the congregation is valued, protected and sustained? Or are they organizational or corporate agents, perhaps sustained by common interest but ultimately constituted through authoritative rules developed through positive enactment or long practice?

The return of religious institutions to constitutional discourse, following recent judicial decisions in Canada,[1] the United States,[2] the United Kingdom[3] and the European Union,[4] has given renewed relevance to these questions. They were, of course, always relevant to theologians and ecclesiastical historians. But the question of the nature of the religious institution and the way that it would be recognized in law was for a long time obscured by an exclusive emphasis on religious freedom as an individual right. Now that courts have begun to address the status of religious institutions directly, and to determine if these institutions

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1 *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, [2015] 1 S.C.R. 613, 2015 SCC 12 (S.C.C.) [hereinafter "*Loyola*"].

2 *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171, 132 S. Ct. 694 (2012) [hereinafter "*Hosanna Tabor*"] and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014) [hereinafter "*Hobby Lobby*"].

3 *R. (E.) v. Governing Body of JFS*, [2010] 1 All E.R. 319, [2009] U.K.S.C. 15.

4 *Obst v. Germany*, No. 425/03 (September 23, 2010); *Schüth v. Germany*, No. 1620/03 (September 23, 2010); *Siebenhaar v. Germany*, No. 18136/02 (February 3, 2011); *Fernández Martínez v. Spain*, No. 56030/07 (June 12, 2014).

have rights distinct from those of their individual members, it is increasingly important to clarify what kind of entities they are talking about.

I refer to the inquiry into the nature of religious organizations as "ontological" following Carol Gould,[5] John Searle,[6] Christian List and Philip Pettit,[7] and Raimo Tuomela.[8] Applied to social institutions, then:

> social ontology… can be broadly understood to cover all kinds of entities and properties that rational study of the social world is taken to need. Understood in this wide sense, social ontology is not only a study of the basic nature of social reality but at least in part a study of what the best-explaining social scientific theories need to appeal to in their postulated ontologies.[9]

So, in legal theory, social ontology should elucidate the presuppositions that the legal system relies upon when identifying the entities that populate the legal universe. In the case of law, however, these entities are not wholly given; they do not appear in the world to be studied by the jurist. Rather, the law has a hand in creating them or shaping them through regulation. As individuals — natural persons — exist without (or with minimal) qualification, so other social entities — legal persons, families, corporations, partnerships, trusts — also exist in more or less qualified forms. Yet some of these entities are understood as creations of state law, and others are considered (either by the law itself or by the individuals who participate in them) as existing independently of or prior to state law and thus deserving of special recognition or deference. This is most clearly the case with religious organizations. In claiming authority or legitimacy for religious activity, nearly every religious group appeals to principles, values, standards, or norms that are internal to the social practice of the group and do not, in the group's view, depend on the sanction of the state for their validity. The group comes before the law, as it were, already formed, and demands to have this form recognized.[10]

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[5] Carol Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society* (Cambridge: Cambridge University Press, 1988).

[6] John Searle, *The Construction of Social Reality* (New York: Free Press, 1995) [hereinafter "Searle"].

[7] Christian List & Philip Pettit, *Group Agency* (Oxford: Oxford University Press, 2011).

[8] Raimo Tuomela, *Social Ontology* (Oxford: Oxford University Press, 2013).

[9] *Id*., at ix.

[10] Business associations, by contrast, readily accede to the state law's authority to regulate their form, even if they sometimes seek to deviate from default rules, because in regulation they reduce transaction costs and assure investors, clients and third parties.

I will not elaborate on the various competing accounts of joint action and group agency here. Neither will I defend the claims to independence or priority of certain groups and associations.[11] My aim is more modest. I wish to illustrate the relevance of the socio-ontological problem in relation to a historically specific kind of social entity: the religious organization. The social ontology of religious organizations is not an esoteric inquiry or an academic dispute. Recent jurisprudence suggests there are important legal consequences that follow from the conception of churches and other religious institutions either as communities of interest or as discrete corporate agents. At stake is the capacity of religious groups to set up internal structures of governance, determine their conditions of membership, define their purposes and direct their efforts (as well as their property) toward those ends with some degree of finality; that is, without state courts second-guessing those motives or substituting judicial judgment for the deliberation of ecclesiastical officials. Ultimately, the question of the social ontology of religious institutions is a question about how authority is constituted and recognized in a pluralist society.[12]

I. RELIGIOUS INSTITUTIONS IN CANADIAN LAW

The recent *Loyola* decision of the Supreme Court of Canada[13] provides an especially opportune vehicle to answer this question, as it lays out two competing and ontologically different understandings of what a religious organization is to the law and suggests possible consequences of each approach in the development of legal doctrine. Of course, the issue is not exclusive to Canada. It has emerged with great force in the United States following *Hosanna Tabor* and *Hobby Lobby*[14] and has already generated a substantial literature.[15] It has also presented itself to European courts,

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[11] I have done this elsewhere, in *The Structure of Pluralism: On the Authority of Associations* (Oxford: Oxford University Press, 2014).

[12] As will be obvious, throughout this chapter I sometimes refer to religious organizations, associations, or institutions as "churches". Except in special cases where the organization in question is clearly Christian or clearly not, the use of "church" is not exclusive to one religious tradition but rather an evocation of the duality of church and state, which breaks the awkwardness of the more general "religious organization".

[13] *Loyola*, *supra*, note 1.

[14] *Hosanna Tabor*, *supra*, note 2.

[15] The best and most current compilation of scholarship on this line of cases is Micah Schwartzman, Chad Flanders & Zoë Robinson, eds., *The Rise of Corporate Religious Liberty* (Oxford: Oxford University Press, 2016).

although there the institutional setting is different due to the historic establishment or special recognition of specific churches.[16] In the Canadian context, however, there is a marked shift in the treatment of religious institutions in the *Loyola* case, and two clear paradigms that emerge as alternatives, more so, even, than in the American decisions. It is a case study ripe for theoretical picking.[17]

1. Religious Institutions under the *Constitution Act, 1867*

It would be convenient to preface the analysis of the *Loyola* decision with a brief historical overview of the institutional aspects of religious freedom in Canada. As in many colonial empires, British North America and Nouvelle France privileged the established churches of the metropole. With the end of the Seven Years War, in which Britain acquired the French colonial possessions in North America and their substantial Roman Catholic population, the problem of accommodation presented itself. As part of the Treaty of Paris, which ended the war, the free exercise of Roman Catholicism in the former French colony was protected and the first steps taken toward a wider scope of freedom of religion.[18] The Quebec Act of 1774, however, enlarged these protections with regard to political rights (allowing professed Roman Catholics to hold political office) but also entrenched the special status of the Roman Catholic Church in Quebec, allowing it to collect tithes and permitting

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[16] See cases cited *supra*, notes 3 and 4. For a comparative assessment, see Zachary R. Calo, "Constructing the Secular: Law and Religion Jurisprudence in Europe and the United States" (2014) European University Institute Working Paper No. R.S.C.A.S. 2014/94. For a survey of recent work on the European context, see Mark Hill, "The Changing Landscape of Law and Religion in Europe: Secularism and Cultural Heritage" (2016) 31:3 J.L.R. 321. Several discussions of the European case law presented at a 2010 American Association of Law Schools panel and published in the *Journal of Law and Religion* include Zachary R. Calo, "Pluralism, Secularism and The European Court of Human Rights" (2010) 26:1 J.L.R. 261; Gerhard Robbers, "Church Autonomy in the European Court of Human Rights—Recent Developments in Germany" (2010) 26:1 J.L.R. 281; Evans Carolyn, "Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture" (2010) 26:1 J.L.R. 321.

[17] Lawrence David and I discuss the doctrinal aspects of the *Loyola* decision at length in Victor M. Muñiz-Fraticelli & Lawrence David, "Religious Institutionalism in a Canadian Context" (2015) 52.3 Osgoode Hall L.J. 1049-1114 [hereinafter Muñiz-Fraticelli & David, "Religious Institutionalism"]. The following discussion draws from that article but focuses instead on the philosophical implications of the decision.

[18] *Definitive Treaty of Peace Between Great Britain and the United States of America*, United States, France, Great Britain, and Spain, February 10, 1763, 42 Cons. T.S. 279 ("Treaty of Paris").

the Jesuits to remain in the province.[19] The latter provision was especially important, as the Jesuits had founded the first educational institutions in Quebec and would remain its pre-eminent educators until well into the 20th century.[20]

The creation of the Canadian confederation in the British North America Act of 1867 again extended special protections to Roman Catholics and Protestants, especially with regard to schooling. Section 93 of the Act left to the provinces the power to "make Laws in relation to Education, subject and according to the following Provisions: (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union". This meant that the existence of separate Roman Catholic schools in Upper Canada (now Ontario) and separate Protestant schools in Quebec was constitutionally guaranteed.[21]

The extensive institutional protection of religious communities did not call attention to the theoretical and normative justification of these guarantees. Protestant and Roman Catholic identities were political as well as religious markers, and as long as their accommodation preserved the peace and smoothed the workings of government, the ontological subtleties of the church did not matter much. But this perpetuated strange asymmetries between the Roman Catholic and Protestant institutional structures, which reflected both the denominational diversity of Protestantism as well as its general ecclesiology. Simply stated, the Roman Catholic Church in Canada was (and remains) something like a state, or at least a large and complex corporate agent with many subordinate subsidiaries. Canadian Protestantism, by contrast, was (and remains) a general category referring to different denominations with different organizational structures, which — in the Canadian constitutional typology — shared only the virtue of not being Roman Catholic. This is most evident in the case of denominational schools.

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[19] *An Act for Making More Effectual Provision for the Government of Québec in North America, 1774*, 14 Geo. III, c. 83 [hereinafter "Quebec Act"].

[20] Roger Magnuson, *A Brief History of Quebec Education from New France to Parti Québécois* (Montreal: Harvest House, 1980), at 1-10. Loyola High School, the plaintiff in the later Supreme Court case, is, of course, also a Jesuit institution.

[21] By extension, in the same article, provision was made for protecting denominational schools for religious minorities in other provinces. Once established, any legislation affecting them could be appealed to the Governor General. The system would persist in Quebec until 1997; Quebec exercised its unilateral constitutional amendment powers under s. 45 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, to effectively render s. 93 inapplicable in the province (as the current s. 93A of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 indicates). It still persists in Ontario with respect to Roman Catholic schools. See M.H. Ogilvie, "What is a Church by Law Established?" (1990) 28.1 Osgoode Hall L.J. 179.

Protestant schools were run mostly by laypersons from various congregations and did not answer to a discrete ecclesiastical hierarchy. They were the schools of the Protestant "community", in part, because they were not wholly controlled by any given Protestant hierarchy.[22] Roman Catholic schools, by contrast, were directly overseen by a commission composed of bishops and laypersons and subject to the provisions of Canon Law.[23] They responded to the institution, whose leaders set the goals of the community. These two different arrangements were accommodated in one stroke of constitutional ink, without attention to the differences in institutional structure and the resulting conception — or rather, conceptions — of the church carried over into law.

During this early period, the Supreme Court of Canada generally declined to intervene in internal disputes or overrule established church authority, suggesting greater deference to a corporate conception of the religious institution. Cases are scant, however. Matters of church discipline, for instance, had the Supreme Court applying the requirement of due notice in contract law to secure a congregant's lease of a church pew[24] but refusing to inquire into the propriety of the dismissal of a minister over the judgment of the ecclesiastical tribunal.[25] On matters of church property and of mergers or schism within churches, however, the courts often slavishly followed the secular instruments of the organization (often Acts of Parliament or of the provincial legislatures) with little regard for the internal rules, principles, or practices of the institution.[26] Yet the entire period sheds little light on the way in which the state law viewed the church — as joint communal endeavours or as a discrete corporate agent.

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[22] Roderick MacLeod & Mary Anne Poutanen, *Meeting of the People: School Boards and Protestant Communities in Quebec* (Montreal: McGill-Queen's University Press, 2004), at 5-6.

[23] The Code of Canon Law of 1917 was rather vague on the structure of Catholic education (cc 1372-1383) but clearly subjected Roman Catholic schools to the control of the Ordinary (the church officer, usually a bishop, invested with the relevant authority). The Code of Canon Law of 1983 goes into much more detail about the goals and purposes of Catholic education (book III, title III, c I, cc 796–806).

[24] *Johnstone v. St. Andrew's Church (Montreal)*, [1877] S.C.J. No. 6, 1 S.C.R. 235 (S.C.C.).

[25] *Ash v. Methodist Church*, [1901] S.C.J. No. 51, 31 S.C.R. 497 (S.C.C.).

[26] See, *e.g.*, *Ukrainian Greek Orthodox Church of Canada v. Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.J. No. 34, [1940] S.C.R. 586 (S.C.C.). See also the various decisions that followed the creation of the United Church of Canada from the merger of Congregationalists, Methodists and (some) Presbyterians, *e.g.*, *Ogle v. Clugston*, [1926] O.J. No. 375, [1926] 30 O.W.N. 98 (Ont. H.C.); *Aird v. Johnson*, [1929] O.J. No. 44, 64 O.L.R. 233, [1929] 4 D.L.R. 664 (Ont. App. Div.); *St. Luke's Presbyterian Congregation of Salt Springs v. Cameron*, [1929] S.C.J. No. 23, [1929] S.C.R. 452 (S.C.C.); *Ferguson v. MacLean*, [1930] S.C.J. No. 34, [1930] S.C.R. 630 (S.C.C.).

The closest the courts came to addressing the nature of "the church" was in *Hofer v. Interlake Colony of Hutterian Brethren*, where the Supreme Court rejected an action for declaratory judgment brought by excommunicated members of the Lakeside Colony of Hutterian Brethren.[27] The case arose among members of the Hutterian Brethren Church — an Anabaptist church that adheres to strict principles of communal ownership — who belonged to the Interlake Colony. The Colony was set up as an association, but being a "communicant" in the Church was a requirement of membership. When seven members of the Hofer family were expelled from the Church, they sought to recover their share of assets in the Colony. There was some disagreement among the justices on whether the Colony was a commercial undertaking separate from the Church,[28] but the majority accepted the expulsion. The plurality opinion, however, did not pit a communal interest against the interest of a corporate agent but, rather, provided an expansive and deferential interpretation of the Church's authority. In effect, it regarded the Church's authority as decisive not only in regard to the propriety of expulsion from the Hutterian Brethren but also in regard to the relationship between the Church and the communal commercial activities of the Colony. Ultimately the question was about who — the Church or the court — had ultimate authority to define the interests at stake, especially the interest in preserving a religious mandate to communal ownership that permeated all commercial endeavours undertaken by Hutterites. But the opinion was merely a plurality. Other disputes involving Hutterite litigants would emerge a quarter century later, this time in a different constitutional context, but still bearing on the very nature of the religious group.

2. Religious Institutions under the *Constitution Act, 1982*

The advent of *The Canadian Charter of Rights and Freedoms*,[29] part of the *Constitution Act, 1982*, was a radical change in the way in which

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[27] [1970] S.C.J. No. 53, [1970] S.C.R. 958, 13 D.L.R. (3d) 1 (S.C.C.) [hereinafter "*Interlake*"].

[28] Cartwright and Spence believed them to be separate but considered that the expulsion had followed the Colony's procedures; Richie, writing for Martland and Judson, thought the two inseparable, and refused to review the church's decision; Hall hesitatingly agreed but worried about the effect on vulnerable dissidents. Pigeon, for his part, thought the Colony a commercial enterprise and in his lone dissent argued that the expulsion of the members without compensation was contrary to public policy.

[29] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "Charter"].

fundamental rights were protected in Canada, but its application by the courts did little to clarify the legal nature of the church.

The Charter recognized in section 2(a) that "Everyone has the following fundamental freedoms … freedom of conscience and religion" (among other rights recognized in section 2, such as freedom of expression and association). It was never clear whether this right was purely individual or whether it involved a communal or corporate aspect, whether it could be claimed only by natural persons or whether formal associations, such as churches, could claim it too. As Peter Hogg notes, some fundamental rights "would be seriously attenuated if they did not apply to corporations".[30] But some rights, by their very nature, are deemed to apply only to natural persons or individuals. Is freedom of religion one of them? Hogg is ambivalent about it, sharply declaring that "the right to 'freedom of conscience and religion' in section 2(a) does not apply to a corporation, because a corporation cannot hold a religious belief or any other belief", but qualifying in a footnote that "[t]here may be some corporations that are formed for the exercise of religious beliefs, for example, a church organized as a corporation. No doubt, such a corporation could invoke s 2(a)."[31]

The Supreme Court's Charter jurisprudence has not clarified the matter. In the landmark case of *Big M Drug Mart*, which set the tone for later jurisprudence, Dickson J. determined that the question of

> … whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant … if the law impairs freedom of religion it does not matter whether the company can possess religious belief … [Indeed] a law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) … and it matters not whether the [claimant] is … an individual or a corporation.[32]

The issue in *Big M* was whether the *Lord's Day Act*,[33] which restricted the sale of merchandise on Sunday, was constitutional under the Charter.

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[30] P. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2013, release 1), ch. 37, 37.1(b).

[31] *Id*. Lawrence Amselem and I have held elsewhere that there are individual and institutional strains in the Canadian conception of freedom of religion. Muñiz-Fraticelli & David, "Religious Institutionalism", *supra*, note 17. See also Víctor M. Muñiz-Fraticelli, "The distinctiveness of religious liberty" [hereinafter "The distinctiveness of religious liberty"] in R. Provost, ed., *Mapping the Legal Boundaries of Belonging: Religion and Multiculturalism from Israel to Canada* (Oxford: Oxford University Press, 2014), at 99-120.

[32] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, at paras. 40-41 (S.C.C.).

[33] R.S.C. 1970, c. L-13.

But in *Big M* it was the store itself that had been prosecuted under the Act and had itself raised section 2(a) as a defence. In a civil action, if the store was incapable of enjoying freedom of religion (that is, if it was a right reserved for individuals) it would lack standing to bring the suit. But the court sidestepped the question by pointing out that, in a criminal prosecution, a defendant may point to any defect of the law to demand an acquittal. In this case, as the law would have violated the Charter rights of individuals (such as the Seventh Day Adventist owners of Big M Drug Mart), it was invalid and thus inapplicable against the store.

But later cases involving corporate plaintiffs made it more difficult to escape the question of corporate religious freedom, especially when its collective aspect was openly acknowledged. In *R. v. Edwards Books and Art Ltd.*, a case remarkably similar to *Big M*, Dickson J. upheld a provincial Sunday closing law against the protestations of four retailers prosecuted under the Act. The merits of the law are not relevant to this discussion. What is relevant is Dickson's return to the question of corporate claims to religious freedom. On one hand, he notes "that freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects. Legislatures are justified in being conscious of the effects of legislation on religious groups as a whole, as well as on individuals."[34]

While he had "no hesitation in remarking that a business corporation cannot possess religious beliefs", he persisted:

> A more difficult question is whether a corporate entity ought to be deemed in certain circumstances to possess the religious values of specified natural persons. If so, should the religion of the directors or shareholders or even employees be adopted as the appropriate test? What if there is a divergence of religious beliefs within the corporation?[35]

The divergence between the corporation as a discrete agent, whose officers — duly appointed through and acting in accordance with the constitution and by-laws of the organization — articulate its interests and values is implicitly contrasted with a broader conception of the corporate community, as it were, from which disagreement and dissent may emerge. Justice Dickson has difficulty, then, with the role of the court in interpreting and arbitrating such disagreement.

The assumption, after *Big M* and *Edwards Books*, was that, although religious freedom might have a communal or collective aspect, it could not

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[34] *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at para. 140 (S.C.C.).

[35] *Id.*, at para. 148.

be invoked by corporate agents under section 2(a) to protect their religious claims. It could, however, be raised as a defence in criminal trials presumably because individuals would ultimately bear the penalties that followed criminal conviction of a legal person, but the grounds for this assumption were unclear and inconclusive. In another Sunday closing case, *Hy and Zel's Inc. v. Ontario*, Heureux-Dubé J. sharply pointed this out: *Big M* "did not decide that a corporation cannot invoke the rights guaranteed under s. 2(*a*) of the *Charter*" and the statements of Dickson J. to that effect in *Edwards Books* were not a deciding factor in the cases, and thus not binding.[36] All the questions raised by Dickson J. in *Edwards Books* remained unresolved.

The reluctance to recognize religious rights for corporate plaintiffs did not extend to churches themselves, but neither were they treated with thoroughgoing deference. A poignant example is *Lakeside Colony of Hutterian Brethren v. Hofer*, another case of expulsion of members from the Hutterian Brethren Church.[37] The dispute began over the patent rights to a hog feeder and quickly escalated. The authorities of the colony intervened to settle the patent rights, Hofer (no apparent relation to the party in the earlier Hutterite case) refused to abide by their orders, and after several rounds of meetings and appeals, he and two associates were excommunicated, shunned and expelled. While the case arose in a different constitutional context from the prior *Interlake Colony* case — by now the Charter was in effect, and the line of cases following *Big M* decided — the Court followed the majority in *Interlake*. It acknowledged the Church's internal legal authority, accepted its tradition as a source of law, but demanded that it adhere to "the applicable rules and the principles of natural justice",[38] which include "notice, opportunity to make representations and an unbiased tribunal".[39] In consequence, the Court found the notice to expel Hofer to be defective and his expulsion invalid.

Interestingly, McLachlin J. was the sole dissenter in *Lakeside Colony v. Hofer*. She grounded her analysis on a much more nuanced reading of

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[36] *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] S.C.J. No. 113, [1993] 3 S.C.R. 675, at 700-701 (S.C.C.) (Heureux-Dubé J., dissenting).

[37] *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] S.C.J. No. 87, [1992] 3 S.C.R. 165 (S.C.C.) [hereinafter "*Lakeside Colony v. Hofer*"]. See A. Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004) for a full discussion of the history of Hutterite disputes.

[38] *Lakeside Colony v. Hofer*, *supra*, note 37, at 167-68.

[39] *Id.*, at 169-70.

Hutterite customs than the one provided by the majority. She in effect treated the colony as a distinct organization in which the members were well aware of the rules of the Church. This included the Hutterite understanding of the practice of excommunication as a disciplinary but ultimately didactic measure through which the offending member is asked to exclude himself from the community as a form of penance and is thereby ultimately reconciled with the group. It is unclear whether her attitude was one of deference to the formal organization of the Church or of deference to the self-understanding of its members. Her later dissenting opinions in *Alberta v. Hutterite Brethren of Wilson Colony*[40] and majority opinion in *Loyola*[41] would suggest the former.

3. From Religious Community to Religious Corporation

To recapitulate, for several years after the approval of *The Canadian Charter of Rights and Freedoms*, the Canadian Supreme Court avoided the issue of whether the section 2(a) guarantee of freedom of religion contemplated religious organizations. When it did find that the organization was contemplated, it either avoided the ontological question (as in the criminal prosecutions over Sunday retail prohibitions) or made ambiguous comments acknowledging the collective aspect of religion but not expounding on it. More recently, in *Syndicat Northcrest v. Amselem*,[42] the courts seemed to give up on all attempts to consider a collective or organizational aspect to religious freedom, holding instead

> that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.[43]

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[40] [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567, 2009 SCC 37 (S.C.C.).

[41] *Supra*, note 1.

[42] [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.) [hereinafter "*Amselem*"] (holding that Orthodox Jewish condominium owners could build individual *sukkot* on their balconies notwithstanding the condo board by-laws against temporary structures, even if their belief that a separate *sukkah* for each family was religiously required did not conform to expert testimony from religious authorities).

[43] *Id.*, at para. 46.

The discussion on *Amselem* is extensive and I will not summarize it here.[44] It is sufficient to say that *Amselem* demonstrated either suspicion, or at least neglect, of the organized collective aspects of religion and confused even further the question of the legal standing of religious groups and organizations.

The immediate result was a reduction of religious rights to individual claims and a disregard for either a communal conception of religion — in which the members' interest in the religious institutions of the community is given significant weight — or a corporate conception — in which the formal organization of the religious group determines the group's interests.[45] But it also produced an immediate backlash. Again, the catalyst for discussion was a dispute involving the Hutterite Church — *Alberta v. Hutterian Brethren of Wilson Colony*.[46] The province of Alberta had changed its regulations to remove some exceptions to the requirement that all driving permits include a photograph of the licensee. The Hutterite Church, however, prohibits its members from having their photographs taken on the ground that this violates the prohibition of graven images and is idolatrous. But Hutterites (contrary to other Anabaptists, like the Amish) are actively engaged in industry and commerce and depend on motor vehicles for their communal enterprises. To forgo a driver's licence, they contested, would require them to hire non-Hutterite drivers, at a significant cost, in order to continue their religiously mandated mode of life.

The Court agreed that the photograph requirement infringed on the Hutterite's religious freedom. However, McLachlin J., now Chief Justice, considered it a reasonable impairment given the province's interests (including a stated interest in preventing identity theft). When the interest of the individual Hutterite in having a driver's licence was weighed against the provincial interest, the latter won. The restriction allowed individual Hutterites to exercise their faith and "leaves the adherent with a meaningful choice about the religious practice".[47]

Justices Abella and LeBel, by contrast, in separate dissents, considered the infringement to be excessive. Citing *Edwards Books*, Abella stressed

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[44] For an extended discussion, see Muñiz-Fraticelli & David, "Religious Institutionalism", *supra*, note 17.

[45] Louise Tardif observes that "[a] comparison of early post-Charter cases with *Syndicat Northcrest v. Amselem* shows that in early cases, the court imagines religion as embedded in community and uses collective terms to refer to religion; whereas in *Amselem*, the court's view of religion is highly individualistic and, although the communal nature of religion is not totally rejected, collective terms are seldom used." (2012) 4 Ottawa J.R. 20, at 21.

[46] [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.).

[47] *Id*., at para. 95.

that "freedom of religion has 'both individual and collective aspects'"[48] and those collective aspects were seriously undermined when the photograph requirement compromised not only individual Hutterites' ability to drive but their participation in the colony and the church. Thus, the Court's opinion "fails to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community".[49] Justice LeBel added that freedom of religion "incorporates a right to establish and maintain a community of faith that shares a common understanding of the nature of the human person, of the universe, and of their relationships with a Supreme Being in many religions".[50] The proper object of the freedom at stake, then, was not the subjective belief of individual Hutterites but their interest in preserving their community, "a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations".[51]

Notably absent from the Court's discussion was the nature of the community itself. The case was brought by two plaintiffs, Hutterian Brethren of Wilson Colony and Hutterian Brethren Church of Wilson. The trial court and Court of Appeals decisions do not distinguish between the two entities, or between either entity and their individual members.[52] The Supreme Court never broaches the issue of who is truly the aggrieved party. The Hutterians appear to have thought that it was the Church and Colony itself — thought of as a single entity. For the Justices, both in the majority and the dissent, however, the community was merely the object of interest of individual Hutterites (an interest incidental to the Court's opinion, but fundamental to Abella and LeBel JJ.). For the Court, the interest of the members in preserving their self-sufficient religious community was one factor among many to be weighed against the interest of the state. For Abella and LeBel JJ., it was the essence of the claim of religious freedom that was brought before the Court. Religious community was not merely the consequence of religious practice but, rather, constitutive of the religious experience itself, and it was the effect of regulation on the religious community that had to be considered. It was not that individual Hutterites had no individual interest in the preservation of their community; it was that this interest was a joint interest that was

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48 *Id*., at para. 130.

49 *Id*., at para. 167.

50 *Id*., at para. 181.

51 *Id*., at para. 182.

52 *R. v. Hutterian Brethren of Wilson Colony*, [2007] A.J. No. 518, 77 Alta. L.R. (4th) 281, 2007 ABCA 160, fn 1 (Alta. C.A.).

constituted by others having it, and was therefore irreducible to an aggregate of individual concerns to be individually weighed.

Yet this account of religious community would have remained a theoretical curiosity had it not been for *Loyola v. Attorney General*. While Abella and LeBel JJ. were in the minority in *Alberta v. Wilson Colony*, in *Loyola* they gained the upper hand.

The case was brought by Loyola High School, a private Roman Catholic school administered by the Jesuit order and formally organized as a non-profit corporation. In addition to its secular corporate form, the school is also a Catholic school under the provisions of the Code of Canon Law, which makes it subject to the authority of the Roman Catholic Church, a much more complex corporate entity.[53] As part of the school's curriculum, students received instruction on world religions and ethical systems through a program of the school's own design, which was admittedly grounded on a Jesuit and Roman Catholic framework. In 2008, however, the province of Quebec had made mandatory a government-designed curriculum on Ethics and Religious Culture ("ERC") designed "to prepare children for life in a pluralistic society, to educate them in the range of religious traditions that they might encounter, and to teach them about the religious heritage of Quebec".[54] The school argued that its own program has equivalent goals to ERC and that the government curriculum's required neutrality toward religious traditions and its avoidance of doctrinal discussion of religion were incompatible with Loyola's Roman Catholic mission.[55]

The Minister refused to grant an exemption and the school, naturally, sued. This was not the first suit over the ERC curriculum. Immediately after its implementation, the conservative Roman Catholic parents of three children enrolled in a public school sought leave (under a different legislative disposition) to exempt their children from the course on grounds that the curriculum, which they perceived to be relativistic, undermined the Catholic faith that they sought to instil in the children. The Supreme Court did not grant their request. In *S.L. v. Commission scolaire des Chênes* it ruled that, while "[p]arents are free to pass their personal beliefs on to their children if they so wish", it argued, "the early exposure of children to realities that differ from those in their immediate

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[53] See *supra*, note 23.

[54] B. Berger, "Religious Diversity, Education, and the 'Crisis' in State Neutrality" (2013) 29:1 Can. J. of L. and Soc. 103, at 112.

[55] This is discussed in the Quebec Superior Court decision, *Loyola High School v. Courchesne*, [2010] Q.J. No. 5789, [2010] QCCS 2631, at paras. 31-40 (Que. S.C.).

family environment is a fact of life in society [and] [a]lthough such exposure can be a source of friction, it does not in itself constitute an infringement of s 2(*a*) [of the Charter]."[56]

Loyola High School, however, won its case unanimously, although the judges divided precisely on the ontological question of the nature of the right holder. One fundamental difference between the parents' challenge to ERC and the school's was that the parents were seeking to insulate their children from a curricular message transmitted by the public school they attended, a message they could counter at home through religious education or by transferring their children to a Roman Catholic school. Loyola High School was being compelled to "speak" in ways contrary to its mission. Contrary to public schools, a religious school is not a neutral arbiter of opinion. It is founded to preserve and transmit a certain point of view, presumably that of the community of parents, students and ecclesiastical authorities. But it is only those authorities constituted in the corporate person of the school — itself subject to the corporate person of the Jesuit order, itself subject to the corporate person of the Roman Catholic Church — that govern the institution, and they are not (in the Roman Catholic case, at least) identical with or directly accountable to the community as a whole.

Despite the precedent set by *S.L.*, the decision in *Loyola* was not entirely surprising. Earlier in the year, the Supreme Court had decided *Mounted Police Association of Ontario v. Canada (Attorney General)*,[57] which was primarily about freedom of association under section 2(d) of the Charter, and repeatedly brought up parallels between freedom of religion and freedom of association, stressing their historical trajectory and diversity of contexts in which both rights may be applied.[58] In a lengthy discussion, the *RCMP* decision recognized that freedom of religion, as well as other freedoms, "does not exclude collective rights"[59] but rather that "[r]ecognizing group or collective rights complements rather than undercuts individual rights."[60] It went further, recognizing that "while this Court has not dealt with the issue, there is support for the view that 'the autonomous existence of relsigious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of

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[56] [2012] S.C.J. No. 7, [2012] 1 S.C.R. 235, 2012 SCC 7, at para. 40 (S.C.C.).

[57] [2015] S.C.J. No. 1, [2015] 1 S.C.R. 3, 2015 SCC 1 (S.C.C.) (recognizing the right of members of the Royal Canadian Mounted Police to collective bargaining).

[58] *Id*., at para. 48.

[59] *Id*., at para. 64.

[60] *Id*., at para. 65.

the protection' of freedom of religion".[61] *Loyola* reiterates this position, but there remain several vectors of disagreement between the majority and the concurrent opinion in the case, and they go to the heart of the social ontology of churches. These vectors all converge on the nature of the right at stake and the identity of the right holder.

Justice Abella's opinion "recognize[d] that individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practice, such as the transmission of their faith" but she refused (as the Supreme Court had done many times before) to settle the issue of whether the legal person of Loyola High School was the subject of rights in the case.[62] Instead, she held that section 2(a) of the Charter protected the "religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education".[63] The community interest in transmitting the Roman Catholic faith through religious and moral education was strong enough to outweigh the interest of the province in a standardized curriculum of religious instruction, at least when it came to instruction in Roman Catholicism.[64] The elevation of the community interest to constitutional rank was, of course, a vindication of the position that Abella and LeBel JJ. had defended in their dissents in *Alberta v. Hutterian Brethren*. *Loyola* then serves as evidence in favour of Abella and LeBel J.'s. proposition in *Hutterian Brethren* that the shift from an aggregate of individual interests to a single jointly constituted communal interest had tangible constitutional effect by affecting the analysis of the proportionality of government regulation.

Chief Justice McLachlin and Moldaver J. concurred with the majority in granting Loyola the remedy it sought, namely an exemption from the

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[61] *Id*., at para. 64. Surprisingly (at the time) the source of the citation was Abella J.'s *dissent* in *Hutterian Brethren*, and to it was added a reference to what is possibly the most emphatic statement of religious institutionalism to come out of the United States Supreme Court until *Hosanna Tabor v. EEOC*, namely *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 96 S. Ct. 2372 (1976) (deciding that a civil court must defer to ecclesiastical authorities in internal disputes about church governance, even if the court deems the decision arbitrary).

[62] *Loyola*, *supra*, note 1, at para. 33.

[63] *Id.*, at para. 34.

[64] The majority — confusingly, in my view — did not think that education about non-Catholic religion was supported by the same weighty interest. By the time the case reached the Supreme Court, the school had only pressed for an exemption on Catholic instruction, apparently for strategic reasons, but it is hard to see how an avowedly confessional education can be partial when teaching its own belief system but impartial when teaching competing systems.

ERC curriculum.[65] But their argument differed from the Court's in important ways. Where Abella J. did not deem it necessary to decide whether Loyola-*qua*-corporation was a right holder because the interest of Loyola-*qua*-community sufficiently grounded the right to religious freedom, McLachlin C.J.C. and Moldaver J. considered the interest of teachers, parents, or students irrelevant to the determination of the case because the right of Loyola-*qua*-corporation "as a religious organization is entitled to the constitutional protection of freedom of religion"[66] and the right at stake is "the religious freedom of Loyola itself".[67]

A model of corporate agency or associational personality is implicit in the concurrent opinion. The concurrence speaks unequivocally of "Loyola's freedom of religion" and "the religious freedom of Loyola itself".[68] In contrast to Abella J., McLachlin C.J.C. and Moldaver J. are centrally concerned with protecting *agents*, not interests. This is, in fact, consistent with McLachlin J.'s (as she was then) dissent in *Lakeside Colony v. Hofer* and her opinion in *Alberta v. Hutterite Brethren*. In the first case, the colony was acting as an agent with a particular relation to its members that it and they understood in terms of its law and custom. The apparent disagreement within the community was in fact a schism, leaving the corporate agent unchanged despite the exit of a member. In McLachlin's majority opinion in *Alberta v. Hutterite Brethren*, by contrast, the case was framed in terms of a community interest rather than a corporate claim.[69] The only agents who pressed their claim *qua* agents were individual members with an interest in the community.

II. THE SOCIAL ONTOLOGY OF GROUPS

This is not a trivial disagreement and has important implications. Ultimately, the question of the social ontology of religious institutions (to

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[65] They went further, however, arguing — correctly — that there was no reason to allow Loyola to teach Roman Catholicism but not other religious and moral instruction from a confessional perspective, because all such instruction implicated religious doctrine.

[66] *Loyola*, *supra*, note 1, at para. 88.

[67] *Id*., at para. 131.

[68] *Id.* (McLachlin C.J.C. and Moldaver J. concurring).

[69] That's not to say that *Alberta v. Hutterite Brethren* was correctly decided. I share Benjamin Berger's discomfort with the procrustean way in which the Court defined religion, and Richard Moon's observation that government interest was unduly deferred to. Benjamin L. Berger, *Law's Religion*: *Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015), at 75-76; Richard Moon, "Accommodation Without Compromise: Comment on *Alberta v. Hutterian Brethren of Wilson Colony*" in J. Cameron & B. Ryder, eds. (2010) 51 S.C.L.R. (2d) 95.

use Rawls' famous phrase) is political, not metaphysical, even if for some churches it rests on theological premises.

The central point is this: a community is more than an individual but it is not an organization. In the broadest sense, it is what John Searle calls a "social fact".[70] Yet, once imbued with the joint intentions of its members, it goes beyond that broad category and becomes a "plural subject", what Margaret Gilbert has named a group of people in which all members "are jointly committed to doing something as a body — in the broad sense of 'do'".[71] In this sense, a community is irreducible to its individual agents. Although it exists because of the beliefs and attitudes of these individuals, a mere aggregation of people does not produce community; rather, it is their communication to each other of being engaged in a joint enterprise. But we would not attribute agency or intention to the community itself. To say that "a community believes X" is a mere generalization; to say that "the will of the community is Y" already presupposes a decision procedure. This is different in the case of an organization, such as a religious institution.[72] Organizations have agency because they have internal procedures that allow them to communicate a singular will to their members and to third parties. They have authoritative structures through which reasons are considered and decisions made in a way that can be attributed to the institution itself. The more formally constituted an organization, the more decisions are made on the basis of these procedures rather than spontaneous agreement. The mechanism is not mysterious; it is enshrined in the law of corporations and in other areas of law (such as agency, partnership and trust) where one person is required to speak on behalf of another or (in the case of charitable trusts, for instance) for the benefit of a group or a cause. Some of this law is not state-based (as in the case of Roman Catholic, Anglican, or Orthodox canon law), but it takes an analogous form.[73] And, in any case, religious organizations put on the vestments of civil law when interacting with the state and third parties as discrete legal persons.

Many authors have argued that communities can be right holders. Dwight Newman, for instance, has argued that collectivities have moral rights irreducible to those of their members provided that they meet

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[70] Searle, *supra*, note 6.

[71] Margaret Gilbert, *On Social Facts* (Princeton: Princeton University Press, 1992), at 145.

[72] For a thorough treatment of group agency, see Christian List & Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011).

[73] For comparison between Christian denominations, see N. Doe, *Christian Law* (Oxford: Oxford University Press, 2013).

certain conditions.[74] These rights are grounded in the presence of collective interests, of factors contributing to the common good of its members.[75] In cases where participation in these collectivities makes "real contributions to the lives of their members" the collective rights that follow may have a stronger, or at least different, claim to recognition and protection than the individual rights of members taken severally.[76]

Other authors take a more formalist view of collective rights and ascribe rights to the formally constituted organization, which I will refer to as the "corporation" or "corporate person".[77] Peter French's influential and controversial article "The Corporation as a Moral Person" argued that "corporations can be full-fledged moral persons and have whatever privileges, rights and duties as are, in the normal course of affairs, accorded to moral persons".[78] His argument, in brief, is that moral personality is the capacity "to be a party in responsibility relationships" and that intentionality is central to that capacity. If a corporation can form an intention that is not reducible to the intention of the biological agents that comprise it, French argues, then the actions that follow from that intention can be intelligibly redescribed as the actions of the corporate agent and not those of its members. And for this, the only necessary feature is that the group possess an internal decision structure that "delineates stations and levels within the corporate power structure" and at least one rule of recognition — a term French borrows directly from H.L.A. Hart — that "a decision on an act has been made or performed for corporate reasons".[79]

The distinction between these two views of group rights is either explicitly or implicitly grounded on more general arguments about the nature or function of rights themselves.[80] Broadly speaking, there are two

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[74] Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011).

[75] *Id*., at 61.

[76] *Id*., at 79, 104.

[77] I intend this use of the term corporation in a broad sense and not specifically restricted to organizations which are organized under corporate law. An unincorporated organization that nonetheless has internal rules that regulate decision procedures, identify officials and communicate the collective decisions authoritatively would qualify as a "corporate person" in this sense.

[78] Peter A. French, "The Corporation as a Moral Person" (1979) 16(3) Am. Philos. Quarterly 207, at 207.

[79] *Id*., at 212-13.

[80] The following draws on that discussion of the rights of associations in Víctor M. Muñiz-Fraticelli, *The Structure of Pluralism* (Oxford: Oxford University Press, 2014), at 219-21. The interest theory of rights is also the basis of Dwight Newman's defence of group rights, *supra*, note 74, at 10-11, 91-92.

kinds of theories of rights: "will" or "choice" theories, which ground rights on the capacity of agents to exercise rational choice; and "interest" theories, which ground rights on the interests of individuals. Both accounts of rights allow for collective or corporate interests. Interest theorists like Joseph Raz assert that "belief in the existence of rights does not commit one to individualism. States, corporations and groups may be right-holders. Banks have legal and moral rights."[81] However, collective interests are "a mere *façon de parler*" as "the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group".[82] They are collective, to be sure, because "no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty" but they derive from *individual* interest, not from any feature that the group itself has. The theory is in principle indifferent to the form of the group itself, whether it is — to use Hobbes's terms — a regular system with a representative of the whole number, or whether it is an irregular system with no specified authority within.[83]

Will theorists, by contrast, have been more reluctant to embrace collective rights. For many, like Carl Wellman, there remains a lingering suspicion that groups cannot meaningfully be said to be agents in their own right but act only through individual mandataries or representatives.[84] Recent accounts of group agency frame the question in terms congenial to the will theory. Philip Pettit and Christian List have extended the argument of philosophers like French, Searle and Gilbert to claim that there are collective as well as individual subjects, and that collective subjects are capable of being held responsible and of holding others responsible. The particularities of this theory are complex but boil down to this:[85] some groups have decision procedures that allow them to discipline the collective deliberation of their members in ways that make the

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[81] Jospeh Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), at 180.

[82] *Id*., at 208.

[83] Thomas Hobbes, *Leviathan*, Richard Tuck, ed. (Cambridge, Cambridge University Press, 1996), ch. XXII.

[84] Carl Wellman, *Real Rights* (Oxford: Oxford University Press, 1995), at 157-65. I explain the merits of the will theory and the mutual support it gives to the institutional account in s. 10.4 of *The Structure of Pluralism* (Oxford: Oxford University Press, 2014). See also Adina Preda, "Group Rights and Shared Agency" (2012) 9 J. of Moral Phil. 229, and "Group Rights and Shared Interests" *Political Studies* (2012) 61(2) *Political Studies* 250 for a similar discussion.

[85] Christian List & Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011). I discuss Pettit's theory at length in ch. 10 of *The Structure of Pluralism*, *supra*, note 80.

preferences, intentions, and judgments of the group autonomous. These groups can enter into normative discourse with others (third parties or their own members); that is, they can intelligibly give their word and live up to those words.

These two competing accounts of rights — a community-interest account and a corporate-will account — map remarkably well onto the majority and concurring opinions in *Loyola*. They also point to the difficulties that each theory may generate. The community-interest represents the argument of Abella J. (and LeBel J.), dating back to *Alberta v. Hutterian Brethren*, that in cases involving religious groups the collective interests of the religious community must be taken into account, not only the interests of the members separately. The community interest, as Raz explains, is one that is not reducible to an aggregate of individual members' interests. The fact that it is held in common is constitutive of the interest itself. It must therefore be weighed *in toto* against competing claims.

Yet the position of Abella J. runs the risk of misconstruing the nature and role of religious institutions within a community. The institution is not itself the right holder but merely a vehicle through which the interests of the community are conducted. The community-interest conception is the complement of the multiculturalist conception of group-differentiated rights, which attributes rights to an individual because of their membership in a collective.[86] Group-differentiated rights are not properly group rights but rather individual rights held by virtue of being a member of a group (because membership in the group prescribes a certain diet or costume, and this requirement weighs heavily in the conscience of members). Likewise, the rights at stake in the communal-interest conception are not properly group rights either but, rather, individual rights *with regard to* the group (because the welfare of the group is the object of joint interest).

The inarticulation of a proper group right may lead to problems in the governance of the institution, especially at times of disagreement and schism and most especially when these disagreements are brought before state courts. If the interests of the community can be discerned objectively — that is, separately from their authoritative determination by officials of a religious organization — then the courts seem like the only appropriate interpreter and judge. The courts must ask what the true

[86] Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), at 45-48.

interests of the community are, evaluate disagreement among competing factions, assess how a religious institution fosters these interests, and decide between different individual members' (or factions') perceptions of the correctness of the aims and values of the institution and the reasonableness of its management.

But this is not the way that religious organizations work. Religious institutions (like Loyola High School) have decision procedures and appointed officials or representatives (though the forms of representation vary widely). Religious associations usually act through legal officials of some sort, whether these officials are accorded sacramental or only instrumental authority. In nearly all religious groups, these officials derive their authority from their capacity to better represent and guide their members to abide by the religious reasons they believe are obligatory.[87] Officials can take into consideration the interests of the community or its members, including the boundaries that define the community. In a more democratic organization, the officials may be elected by the majority of members or be the members themselves sitting as a committee of the whole; in a hierarchical organization, other methods of selection and representation of interests may operate. The mode of governance is not incidental to the religious claim of either the members or the organization. Rather, it is constitutive of the claim. Therefore, once religious officials render a decision, no further reference to interests needs to be made; no second-guessing by the court is appropriate. To do otherwise is to violate the autonomy of the religious institution, to substitute the court's judgment of the interests at stake over that of the religious officials.

III. FROM SOCIAL ONTOLOGY BACK TO LAW

To sum up, the majority's opinion in *Loyola* is concerned with the weight of religious interests to be balanced against compelling government interests. This approach is arguably more capacious and could conceivably offer some protection to some religious communities that lacked formal institutions, mainly by adding the collective interest in maintaining the community to the individual interest of religious adherents. The concurrence's opinion is narrower but more robust when applied to religious organizations. It does not alter the calculus of interests but seeks instead to discern whether they are genuine. The virtue of the

[87] I develop this argument in "The problem of pluralist authority", *Political Studies* 62.3 (2014): 556-72; and in "The distinctiveness of religious liberty", *supra*, note 31, at 99-120.

concurrence's test is that it defers to the structure of the organization and does not ask a state judge to arbitrate or second-guess the institution's self-assessment of its discrete interest purposes as expressed through its officials.

1. Dangers of the Corporate-Agency Account

It may be argued that this virtue is in fact a vice, or at least a cause for concern, as it may lead to illiberalism. Now, the ontological question is neutral as to the substance of religious doctrine and whether it conforms or not to moral principles that we may hold independently of religious dogma. But it is true that the autonomy offered by the corporate-agent account also protects the ability of churches to erect undemocratic ecclesiastical polities, exclude members and associates in arbitrary ways, and pursue illiberal or discriminatory ends at the expense of some members of the group. Whether this happens in practice, however, is questionable. On matters of sexual morality and gender roles, for instance, some religious groups (*e.g.*, the Roman Catholic Church) possess a hierarchy that is more traditional than the lay membership; in others (*e.g.*, the Church of England) the laity seems at times more conservative, or at least concerned with the accommodation of conservative congregants.[88] In both cases, however, a corporatist conception would answer the question of what the church believed, who are the members of the church, or how the church should use its assets by asking the hierarchy as recognized and constituted by ecclesiastical law.

A slightly different question is whether the corporate-agency conception fosters clericalism — that is, control of the organization by its officials regardless of the interest of the members.[89] On one hand, a conception of "the church" as a discrete corporate agent constituted through authoritative rules is as compatible with a hierarchical church as with a democratic congregation. What matters for this conception is that the interests, ends and purposes of the religious organization are those articulated by whoever the organization's rules identify as the ecclesiastical authority. This authority may be an unelected bishop or a

[88] The most recent example is the vote on the ordination of women bishops in the Church of England, which, although it ultimately passed, originally failed to gain the required support of the required supermajority among representatives of the laity, after securing such majorities among the bishops and priests. See Mark Hill, "A Measure of Credibility?" (2013) 15 Eccles. L.J. 1.

[89] I thank Timothy Lytton for bringing up this point.

congregational assembly. The interests and beliefs of individual members are merely that: interests of individuals, and their aggregation does not add to the interest of the organization as a whole.

Likewise, a conception of the church as a community of individuals must independently inquire into the beliefs and interests of all members of the religious community, not just the hierarchy. It may be the case that the members of the religious community have great interest in the preservation of their ecclesiastical structure, that they share not only substantive beliefs about the object of worship and the rules and principles that should guide their conduct but also about the mode of governance of their institutions. But on the communal conception, we must inquire into these beliefs about modes of governance, determine their centrality to congregants, and balance them against other beliefs. In the absence of a norm of deference to the authoritative rules of the organization, it falls on state courts to discern what the interests of the community are, how these interests fit together, and how to deal with disagreement and dissent among members as to the content and weight of their interests.

2. Extent of Protection of Religious Organizations

Some thorny issues remain. The first is how far the protection of corporate or institutional religious rights extends. This is less a problem for the community-interest account (as expressed by Abella J.) than the corporate-agency account (in McLachlin C.J.C. and Moldaver J.'s concurrence). For the community-interest account, the religious interest is separable from and independent of the legal form that a religious organization takes or the enterprise that it pursues. It is up to the court to tease out the religious interest and weigh it against the state's interest in regulation or against dissenting members' interest in the temporal goods of the organization.

But for the corporate-agency conception, the issue looms large, practically and conceptually. On the one hand, the Canadian courts are well aware of the controversy caused by the United States Supreme Court's opinion in *Hobby Lobby v. EEOC*, which allowed some closely held business corporations to claim protections of religious liberty.[90] The concurrent opinion is careful to limit the scope of religious freedom only to entities "constituted primarily for religious purposes, and … [whose]

[90] *Hobby Lobby*, *supra*, note 2.

operation accords with these religious purposes".[91] Yet this limitation is not easy to enforce. It does not, in principle, rule out all business corporations. Certainly, it applies to all core cases like houses of worship, and probably to most religious schools and charities, whose primary purpose is religious and expressly declared in their trust or charter instruments. Yet one can easily imagine a religious bookstore or a kosher or halal butchery successfully arguing that its constitutive purpose and operation are inherently religious. But even religious charities or churches may engage in activities that confound the boundary between the religious and the secular. Religious hospitals have been one of the main concerns in the United States but may be less so in Canada given the differences in the countries' respective health systems. Professional schools located in religious universities can also present problems, where professional organizations contest the propriety of religious standards of conduct imposed on students or faculty at the school or the effect that these standards may have on the practice of the profession in the broader society.[92] A religious organization may have mixed purposes, and constitutional protection may turn on whether the institution's self-understanding of its mission is accepted by the court.

3. Internal Principles and External Form

But we should return to the core case: the religious organization itself — the church or its equivalent — as well as the corporate or communal structure of religious communities. As mentioned above, religious organizations are structured, in the first instance, according to internal rules and principles of legitimacy that may or may not conform to the rules provided by the state for the ordering of institutions. The nature and structure of a church is not constituted by its secular legal form — whether it is unincorporated or incorporated, whether it is a trust or a

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[91] *Loyola*, *supra*, note 1, at para. 100 (McLachlin C.J.C. and Moldaver J. concurring).

[92] This is, of course, the heart of the controversy involving the proposed Law School at Trinity Western University, currently awaiting hearing at the Supreme Court of Canada. *Trinity Western University v. Law Society of British Columbia*, [2016] B.C.J. No. 2252, 92 B.C.L.R. (5th) 42, 2016 BCCA 423 (B.C.C.A.); *Trinity Western University v. Law Society of Upper Canada*, [2016] O.J. No. 3472, 131 O.R. (3d) 113, 2016 ONCA 518 (Ont. C.A.); *Trinity Western University v. Nova Scotia Barrister's Society*, [2016] N.S.J. No. 292, 376 N.S.R. (2d) 1, 2016 NSCA 59 (N.S.C.A.). The University had previously faced similar litigation regarding its teacher-training program. *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772, 2001 SCC 31 (S.C.C.).

statutory charity, *etc.*[93] This is often the case with hierarchical churches that have a robust ecclesiastical or canonical legal tradition.

The misfit between internal organizational principles and external legal ones is especially relevant to internal disputes in religious groups. It is here that the community-interest model fails, as there may be no general, shared interest that commands universal agreement in the groups. In this case, someone must be charged with identifying the group's will in order to determine what is to be done with its property, how it is to determine its membership, *etc.* Canadian courts have not been consistent in the approach they have used to review internal church disputes. The traditional English standard — to determine which faction in the church was truer to its original religious doctrine — was effectively a community-interest approach (where the interest was doctrinal purity).[94] In recent controversies over the property of certain dissenting parishes in the Anglican Church, Canadian courts have been less reluctant to turn toward ecclesiastical documents to discern the true character of the organization.[95]

A proper understanding of the corporate-agent account, one that treats religious organizations as subjects of religious freedom directly, should seek to protect religion as it is and not as the state would prefer it to be. This means that it should give the greatest latitude to the ways in which these organizations structure themselves internally. In this way, state organizational forms are merely declarative marks, but they only approximate the nature of the group, or translate it, with differing degrees of accuracy, into the language of state law.[96] This applies especially to

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[93] This is a point made a century ago by Frederick Maitland, "Moral Personality and Legal Personality" in H.A.L. Fisher, ed., *Collected Papers*, Vol. III (Cambridge: Cambridge University Press, 1911), at 304.

[94] M.H. Ogilvie, "Church Property Disputes: Some Organizing Principles" (1992) 42 U. of T. L.J. 377. The approach used was that of finding an implied trust consistent with the original purpose of the congregation, understood in terms of continuity of doctrine.

[95] See *Pankerichan v. Djokic*, [2014] O.J. No. 4866, 123 O.R. (3d) 131, 2014 ONCA 709, at para. 62 (Ont. C.A.). ("Canadian courts will not simply defer to the ecclesiastical judgments of church authorities about membership issues without judicially reviewing those decisions to ensure that they conform with the internal law of the religious group."). But in nearly all cases, examination of internal documents has vindicated the hierarchy. See also *Bentley v. Anglican Synod of the Diocese of New Westminster*, [2010] B.C.J. No. 220, 11 B.C.L.R. (5th) 20, 2010 BCCA 506 (B.C.C.A.), leave to appeal S.C.C. refused [2011] S.C.C.A. No. 26 (S.C.C.); and *Incorporated Synod of the Diocese of Huron v. Delicata*, [2013] O.J. No. 3966, 117 O.R. (3d) 1, 2013 ONCA 540 (Ont. C.A.), leave to appeal to S.C.C. refused [2013] S.C.C.A. No. 439 (S.C.C.). A previous case involving the United Church of Canada reached a similar conclusion: *United Church of Canada v. Anderson*, [1991] O.J. No. 234, 2 O.R. (3d) 304 (Ont. Gen. Div.).

[96] Even J.N. Figgis, one of the staunchest defenders of the theory that the state does not create but only recognizes pre-existing associative forms, conceded that "the State may and must require certain marks, such as proofs of registration, permanence, constitution, before it recognizes

constitutive parts of a larger religious organization: religious schools or charities, religious hospitals, monasteries and religious houses, shrines, parishes, *etc.* The relevant question when determining who has authority within the organization, and therefore who represents the agency of the group, is whether the organization is part of "the church" or its equivalent. If a "corporation" is part of the church, the corporate form recognizes or declares its ecclesiastical structure but does not constitute it. If religion in its institutional form is protected, it is not because the state creates this form but rather because an institutional fact exists that is prior to state sanction, and this form demands to be recognized in a legally cognizable way. In the same way, the state protects religious belief in the individualist account, because people have these beliefs independently of their other civic attitudes.

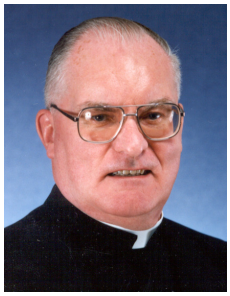
the personality of societies, just as it does, though in a less degree, in the case of individuals; and the complex nature of the body may necessitate a more complex procedure". John Figgis, "Corporate personality and political pluralism" in Leicester Webb, ed., *Legal Personality and Political Pluralism* (Melbourne University Press, 1958), at 56.

Implications of Canon Law

for Catholic Leaders and Organizations

by Francis G. Morrisey, O.M.I

This article will begin by looking at the state of canon law in the Church today. Then it will focus on some of the criteria to be applied when identifying an institution, such as a hospital, or a charitable work, as "Catholic". I will then look at the relationship between the work and the representatives of the Church and consider what is meant by the "sponsorship" of these works. Since there are different models and possibilities, the next part will review, briefly, the evolution of some of the sponsorship models to show how canon law can adapt to changing situations. In a fifth section, we will look at some of the duties of "ministry leaders", using the term in the broadest sense possible. Then, some final thoughts will try to sum up what we will have covered.



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PART I
Canon Law in the Church Today

You will not be surprised, I presume, to see that be basing myself today on the *Code of Canon Law* for the Church and subsequent official documents. In fact, there are two *Codes* – one for the Latin Church, and the other for the Eastern Churches. Both Codes could truly be described as exceptional, especially for their time. They renewed pastoral practice, especially in regard to the Sacraments; they set out challenges and goals for church leadership; they enabled Church authorities to establish structures that would help prevent the arbitrary – the worst form of dictatorship – and take initial steps to ensure that individual

and collective rights would be duly protected against abuse.

By doing so, they also enabled the vision of the Council – that the Church is the People of God – to become part and parcel of daily ecclesiastical life and administration in many parts of the world. Of course, the *Codes* did not replace the doctrinal teachings of the Council which served and continue to serve as the sound basis upon which any type of Church law is to be evaluated and eventually applied.

Although the 1983 *Code* answered an obvious need in the Church at the time, we must nevertheless recognize that the world has evolved at a frenetic pace in the past quarter century and the 1983 legislation will now have to be adjusted somewhat to respond to new situations.

For instance, since the 1983 *Code* was promulgated, and merely as examples:

1. The Iron Curtain fell, and Catholics in many parts of the world were free once again to practice their faith as they so desired.
2. The internet had not yet been created, with the instant communications it established, and the new ways of reaching others. The potential for sound evangelization is almost unlimited, although the fact that some self-designated people proclaim themselves as the sole "orthodox" teachers of the truth on so-called "Catholic" websites, can lead others into error.
3. The scandals of sexual abuse had not yet raised their ugly head – at least publicly – within society and within the Church, and, when they did, it was found that both the Church's law and the civil legislation did not provide adequate or appropriate means of addressing a most urgent situation because they had not been designed for this type of crisis.
4. Public inquiries into financial operations – as we now see in a number of countries – had not yet begun, and, in relation to church finances, the practice of suing the Church before the secular tribunals was relatively unheard of at the time.[1]
5. There has been a growing concern for the protection of rights of individuals and of societies, with new emphasis placed on social justice and the promotion of peace, the protection of the environment, and preserving the integrity of creation.
6. In many parts of the world, the influence of secularism has meant that the religious and spiritual values cherished by so many in the past, no longer hold the same attrac-tion for people, and a number of persons have begun to develop their own form of spirituality – perhaps based on a "cafeteria" approach of taking what they like and leaving the rest aside. People no longer act in such and such a way simply because "authority" says that this is the way to do things. They expect to find authenticity in their political and religious leaders.
7. The world population has changed significantly. There are nearly 3 billion people under 25, and another one and a half billion between 25 and 40. These were all born either after the promulgation of the *Code*, or after Vatican II. Only a little over 2 billion people are over 40. This means that when we are referring to Vatican II and the like, many people have not lived that experience and cannot really relate to it. The Catholic population is slightly over one billion at this time. Using the same proportions, it is likely that some two-thirds of the Catholics in the world would have been born after Vatican II began.[2]

All of these developments, many of them being quite positive, as well as many other movements in society, have changed the way in which people expect Church law to be applied today. We must not forget that because the members of the Church are also profoundly influenced by the world around them, they – rightly or wrongly – expect to find within the Church the same

By doing so, the Code of Canon Law also enabled the vision of the Council – that the Church is the People of God – to become part and parcel of daily ecclesiastical life and administration in many parts of the world. Of course, the Codes did not replace the doctrinal teachings of the Council which served and continue to serve as the sound basis upon which any type of Church law is to be evaluated and eventually applied.

standards of fairness and justice as they want to find in secular society. They do not hesitate to call church leaders to task for their actions and attitudes.[3]

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Furthermore, and not surprisingly, in addition to these changes in society as a whole, there have been numerous internal developments within the Church itself over these past twenty-five years. Some of these could be noted here:

1. The number of lay persons who are now working for the Church on a full-time basis, whether in parishes or in other works of the apostolate, continues to grow exponen-tially – especially in those areas where there is a relative shortage of ordained priests.[4]
2. This leads to a certain number of pastoral decisions that have to be taken regarding the way ministry is carried out in the Church. It also has a great influence on the way priests are expected to interact with lay men and women in their ministry. Likewise, it has serious implications for the various types of parish communities, starting with the so-called base communities, moving to parishes as we have traditionally known them, and then to new forms of clustering and coordinated services.
3. The permanent diaconate is gradually coming into its own in many places with numerous possibilities for new ministries. The "service" dimension (*diakonia*) of the Church is one that deacons can fulfill in exceptional ways.
4. The number of Catholics who belong actively to one or more of the new movements and associations in the Church is astounding.[5] They are now counted in the hundreds of thousands in all parts of the world. This was one of the unexpected outpourings of grace following Vatican II.
5. The results of the R.C.I.A have been such that many parishes have been radically renewed by members who now have a keen sense of parish community and what it should stand for. The hundreds of thousands of people who, over the years, have been baptized as adults, or made their profession of faith in the Church, show that the Church's message is still being heard, and in unexpected places.[6]

   On the other hand, we cannot overlook the fact that certain parishes are languishing for lack of population or finances and have to be closed or radically restructured. In parts of the world, people are leaving their parishes in relatively large numbers to find spiritual consolation elsewhere – particularly those who have moved towards the so-called "evangelical Christianity". Others have simply, at least for now, abandoned any external form of religious practice. This poses quite a challenge for church leaders who, at times, seem to be "a voice crying in the wilderness" (*see* Matthew. 3:3).
6. The blossoming of the Church in Africa and in

certain parts of Asia will inevitably lead us to move away from a law centred rather exclusively on first world traditions and customs.[7]

7. Religious institutes are experiencing a steady decline in numbers, as we see today in many parts of the world. But, perhaps because of this phenomenon, we also note greater collaboration between dioceses and religious institutes in undertaking the works of the apostolate. At times, even the pooling of assets is now a familiar phenomenon, at least in certain parts of the world. At the same time, though, as some of the older religious institutes are dying, there is new birth around the world. It seems that more than 700 new groups that eventually hope to become recognized as some form of consecrated life in North America have been identified and are in various stages of growth.[8] Some of these will last; perhaps others might not be successful; but, at least, we see that the desire for consecrated life is still very strong – although perhaps not always in the forms in which it was traditionally lived in years gone by.

   Some of the newer groups wish to espouse norms that, in law, are presently not legitimate, in the mind of Church leaders, for members of religious institutes. For instance, these groups often want to form a community of men and women living together, they do not want perpetual commitment, they are open to Christians of other denominations, and so forth. At the present time, such groups cannot be recognized as institutes of consecrated life; they can, though, be recognized as public associations of the Christian faithful.

8. Another point that cannot be overlooked is the fact that, each year, throughout the Church, many men and women – bishops, priests, religious, seminarians, catechists, lay missionaries, and workers for social justice – give their lives for the Gospel and suffer violent death. The number of martyrs in the world today shows, time and again, that so many Christians are willing to make the supreme sacrifice to proclaim who Christ is.[9] At the same time as this remarkable form of witness is happening, the Church might nevertheless have to reconsider some of its missionary policies, particularly in regard to dialogue with non-Christian religions.

9. The developments in ecumenical dialogue that we witness today would not have been possible twenty-five years ago.[10] Slow but steady progress is being made, although, of course, there are setbacks along the way. The new Vatican "conversations" with representatives of the Muslin community are certainly an opening that could not have been easily foretold even five years ago.[11]

10. The phenomenon of "World Youth Days" and the on-going involvement of youth in the life of the Church raises a number of fascinating challenges, as to how to keep the interior fires burning in the years ahead.

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These developments, and many like them, have inevitably brought tension to the Church's laws and canonists have struggled to apply legal principles and norms to situations which these laws were not designed to address. They have even brought to light a certain number of deficiencies in ecclesiastical legislation, which, hopefully, will be corrected before too long. Pope John Paul II, in an address given to the Roman Rota on January 22, 1996 had already called for "corrective measures by the legislator or for specific norms for the application of the code."[12] Then, in January 2008, an international conference of canonists was held in Rome under the auspices of the Pontifical Council for Legislative Texts to determine what are some of the legislative issues that would have

to be re-examined today. On that occasion, January 25, 2008, Pope Benedict XVI spoke about the on-going adaptations required in canon law:

> *If canon law is to fulfil this invaluable service it must first of all be a well-structured law. In other words, on the one hand it must be bound to the theological foundation that gives it reasonableness and is an essential title of ecclesial legitimacy; on the other, it must keep up with the changing circumstances of the historical reality of the People of God. Furthermore, it must be formulated clearly, without ambiguity, and must always be in harmony with the rest of the Church's laws.*
>
> *It is therefore necessary to abrogate norms that prove antiquated; to modify those in need of correction; to interpret - in light of the Church's living Magisterium - those that are doubtful, and lastly, to fill possible lacunae legis. As Pope John Paul II said to the Roman Rota: "The very many expressions of that flexibility which has always marked canon law, precisely for pastoral reasons, must be kept in mind and applied" (Address to the Roman Rota, 18 January 1990, n. 4). It is your task in the Pontifical Council for Legislative Texts to ensure that the work of the various bodies in the Church that are required to dictate norms for the faithful always reflects, all together, the unity and communion that are proper to the Church.*[13]

In fulfillment of this, Bishop J.I. Arrieta, Secretary of the Pontifical Council for Legislative Texts, December 4, 2010, announced that, within a few weeks, a draft text of a revised Book VI of the *Code of Canon Law*, on Delicts and Penalties, will be distributed for discussion.[14]

And so, within this continually changing context, let us look at some of the issues we intend to address today.

PART II
The Catholic Identity of Institutions and Charitable Works

A. Introductory note

It must be said right from the beginning that we are dealing with a process, not with a cut and dry situation. As life evolves, so too do the medical techniques and the business practices applied to our everyday situations. We should not be surprised, then, to see that the law of the Church also evolves. As with other areas of church life and practice, we do not pretend to have all the answers; indeed, if we did, there would be no need to study the questions further. Some of the answers that are proposed today might eventually be found to be wrong, or not complete; some might even produce negative effects rather than the hoped-for ones that humanity is desperately seeking.[15] The approval of the drug thalidomide some fifty or so years ago is an excellent example of this: while the immediate effects were considered to be quite beneficial, the long-term ones were disastrous.

For these reasons, it is not surprising to note that the Church has to update continually not only its law, but also its teachings to respond to new and often unforseen situations. The example of the teaching on the death

penalty found in the 1992 edition of the Catechism of the Catholic Church (Art. 2207) and the revised teaching put forward by Pope John Paul II some three years later in the encyclical Evangelium vitae (No. 25) is an excellent example of this type of development.

B. The Catholic identity and mission of any institution

The *Code of Canon Law* does not specifically and directly outline the criteria for catholic identity. So, we must proceed by analogy (Code of Canon Law, canon 19). But, in addition, we must recognize that there are many ways of approaching the issue of catholic identity: we can take

- a purely legal or "institutional" approach, using verifiable criteria and principles to determine what we could call "catholicity"; or we could use a more
- doctrinal approach, building on the examples and criteria derived from the Apostolic Constitution *Ex corde Ecclesiae* and the accompanying Norms, that helped identify Catholic educational institutions.[16] There is also a third possible way,
- by identifying values that we wish to promote and by observing them.

The key point to keep in mind is that there are many ways of being "Catholic", and no one approach can claim to be exclusive of the others. "In my Father's house there are many dwelling places" (John 14, 2).

1. Institutional or legal criteria
Obviously, canonists and other lawyers prefer the legal or "catholicity" approach because it is clear and precise. Some also like the hierarchical dimension found in it because it establishes clear lines of responsibility. However, we must keep in mind that there is more to the life of the Church than simply law and institutions. Law presupposes faith and commitment. Otherwise, it is of little avail.

Approaching the issue indirectly, we note that four canons tell us that no institution, school, undertaking or association may call itself "catholic" without the authorization of the competent ecclesiastical authorities (see canons 216, 300, 803, §3, and 808). But, beyond that, the *Code* does not tell us much. Nevertheless, the canons on catholic schools provide us with many elements that can be used.

I believe that, as a result of an analysis of these norms, there are a number of juridical criteria that could be applied to determine catholicity. I will mention these, without placing them in any particular order:

- Internal Catholic values (such as a Christian inspiration, contribution by research to the understanding of the truth, fidelity to the Christian message as it comes to us through the Church; an institutional commitment to service of the people of God);[17]
- Some reference to Church authorities (particularly to the diocesan bishop);
- Canonically established (set up by Church authorities; having recognized statutes; or being an apostolate of an established religious house);
- Bound by canon law requirements relating to the organization of pastoral care and the administration of property;
- Subject as an institution to visitation by the diocesan bishop.[18]

2. Criteria derived from an institutional commitment
A second approach could also be considered. It arises from principles operative in models of Church which are not "institutional" in their thrust, and where there is less direct involvement of church authorities as such, but where there has been a concerted effort to retain catholicity.

Various possible criteria could be noted were this approach to be adopted. They are not as precise as the former ones, but can be more demanding:

- There is a general apostolic purpose — "to help others". This purpose is based on the personal commitment of

those involved in the work.

- The results are appropriate and proportionate to the activity. Thus, they are cost-effective as regards persons, time, and financial resources.
- The faithful perceive the work as "catholic", that is, as operating under the auspices of a bishop or a catholic group, etc., and consequently as being trustworthy.
- There is a form of "catholicity" permeating the establishment, although such is not legislated or contractual (for instance, a general relation to "Rome", Catholic traditions, religious signs, the name of the institution, and so forth).
- The work corresponds to a need that is perceived as being in harmony with the purposes of the Church.
- Government authorities have granted the work certain exemptions that are usually reserved to religious organizations.

3. Criteria based on values to be promoted

The third way would entail identifying values that are to be promoted by those responsible for the work. Building on publications of the Catholic Health Association of the USA over the past twenty years,[19] we could list seven of them, noting that they are not incompatible with the other criteria listed under the previous approaches. They call for institutional and personal commitment.

- To make certain that we are dealing with a recognized apostolic activity (through the diocesan bishop).
- To be publicly identified with the Catholic Church and guided by its teachings. Responsible stewardship of temporal goods, one of the pillars of the Church's social teachings, requires that we use natural and social resources prudently and in service to all.
- A preferential option for the poor marks the corporate decisions and calls for particular commitment to those who would otherwise be deprived of quality care.
- A holistic approach to the human person underlies all activities. Every person is the subject of human dignity, with intrinsic spiritual worth, at every stage of human development.
- There is respect for the person's needs and right of self-determination. People are inherently social; their dignity is fully realized only in association with others. Our social nature calls for the common good to be served; the self-interest of a few must not compromise the well-being of all.
- There is respect for human life, for suffering and for death, in the context of a fuller life.
- We are offering a service, and not simply a commodity exchanged for profit.

In all of these approaches, there is one common thread: a link with the diocesan bishop. In fact, we could state that if a work is not in communion with the diocesan bishop, there is no way that it can be considered catholic (see canon 394, §1). The bottom line, then, could be presented in the following terms: a work is catholic if the diocesan bishop says it is and is willing to recognize it as such.

The bottom line, then, could be presented in the following terms: a work is catholic if the diocesan bishop says it is and is willing to recognize it as such.

C. The Catholic Identity and Mission of Healthcare Institutions

We could take the above-mentioned criteria and apply them literally to our healthcare institutions. Some would easily pass the "catholicity" test, while others might not. However, there is another approach, again first elaborated some years ago by the CHA,[20] that could be taken in determining the catholic identity of healthcare institutions, and this consists in grouping our data around four critical themes: mission, sponsorship, holistic care, and ethics. These themes, like ingredients in a cake, cannot really be separated one from the other once they have been placed together. Yet, catholicity, like the cake, is more than the sum of the four, although it presupposes them and is based on them.

1. Mission

The mission of the Church is to demonstrate God's love and saving power present in the world. This power, incarnated in the person of Jesus, is clearly seen in the Gospel where we witness Jesus touching, healing, and restoring persons to physical life. The meaning of life becomes expanded to include one's relationship with God and others and hope for life to come.

The mission of a healthcare organization drives the entity to actualize its core values and philosophy. It is also a benchmark to evaluate authenticity and effectiveness. Mission should be the driving force by which decisions are made and by which structure and systems are developed.

In this regard, the criteria mentioned above, relating to apostolic purpose and to communion with the diocesan bishop, can be applied here.

A catholic healthcare institution should be able to determine the values which shape its corporate culture, using ones that are consistent with the Gospel. These must also become evident both in policies and in practice.

2. Sponsorship

Given the changing circumstances affecting healthcare delivery, it is most likely that sponsorship, as we presently know it — operating in the name of and under the authority of a given Church entity, such as a canonical "juridical person" — will change its focus from control to influence. There might even come the day when we will no longer be able to influence certain decisions directly. If such occurs, the sponsorship role might even be reduced to one of advocacy: a voice crying in the wilderness.

Criteria relating to accountability would be applicable under this heading.

Sponsors must be able to articulate the non-negotiables for the Catholic ministry, yet be flexible to choose between total control and having some presence with the power to influence. The process demands a commitment to collaboration with others in order to make the transition to new forms of healthcare delivery.

We will return to this point in the second section of this presentation, so as to enter into more details.

3. Holistic care

Holistic care encompasses the relationship of emotional, intellectual, occupational, physical, and spiritual aspects of personhood through the entire process of healthcare delivery. Simply put, holistic care is sensitivity to the whole person, and not just to a disease or condition that requires medical intervention.

Humans are wonderfully whole in their creation and being. No aspect of the person can ever be considered apart from the totality of personhood.

Criteria relating to quality control would be considered under this heading.

A catholic institution would have to ask itself how it understands holistic care and how this is expressed in the organization's policies, procedures, and practices. Thus, it would have to ask itself also how the spiritual care of persons is integrated into the overall care program? How does this care meet the needs of persons of all denominations?

4. Ethics

Ethics is the discipline that seeks to answer the question: what is

good and right for persons as individuals and as members of the human community? Ethics helps us understand how human beings should relate to self, others, and God in order to be fulfilled as human beings.

For Christians, ethical behaviour means living our lives in accord with Gospel values, so ethics is never added on to or separate from anything else we do. Continuing analysis and reflection are essential to be certain that who we claim to be is consistent with who we are in practice. Catholic identity demands on-going ethical analysis to ensure that the values at the heart of our catholic tradition are expressed in daily operations at all levels.

Criteria referring to doctrinal issues would fit under this category.

We must recognize that there are many types of ethics that affect the catholicity of an institution or system.

For instance, we have social ethics which governs the provision of healthcare services to individual members of the community, thus taking into account the common good. There are also forms of corporate ethics which are expressed in the policies and practices of the institution in regard to social justice. A third ethical area is what could be called clinical ethics whereby respect for the sacredness of life at all stages of development is demonstrated. These ethical issues are concerned with questions that originate in the clinical setting where healthcare is provided. This is a specialized field that includes (but is not limited to) issues related to human genetics and reproduction, treatment decisions at the beginning and end of life, and research involving human subjects.[21]

It is obvious that these four areas — mission, sponsorship, holistic care, ethics — cannot be separated. For, one without the other would lead to an incomplete catholic presence. Of course, it is most difficult to evaluate whether these criteria are operative to a required degree, but that does not mean that they can simply be overlooked.

No matter which criteria are used, the institutions or systems have to address a number of new issues that were not in the forefront a decade or two ago. These new questions pose a serious challenge to the future of catholic healthcare.

PART III
The "Sponsorship" Of Charitable Works in the Catholic Church

A. Certain canonical notions relating to sponsorship

It has generally been held that, for a work to be able to be identified as "Catholic", it must, in one way or another, be related to a Church entity, such as a diocese, a religious institute, one of its provinces, or even one of its established houses (canon 634). While, in general, this statement is obviously true, we must keep in mind that, indeed, there could be exceptional situations in which no formal canonical entity is involved and yet the work is considered by the diocesan bishop to be "Catholic". In spite of this possible and very rare exception, we can nevertheless proceed today under the general presumption that, indeed, there is to be a canonical sponsor in order for a work to be considered as fully within the ambit of the Church's mission.

In general, religious institutes or their component parts, such as provinces, regions, sectors, etc., have been identified among the principal sponsors of apostolic works. At times, though, the work did not have an existence distinct from that of the local community to which it was related, or at least distinct from that of the province or the institute itself. It did not have separate canonical recognition, even though it might

have been incorporated civilly, distinct from the sponsoring institute. On many occasions, it has been very difficult to determine which came first: the work, or the community which operated it. While, generally speaking, this is not of the greatest importance, it takes on significance when it comes to distributing the assets of a work when a religious institute wishes to withdraw from it.

Lately, new canonical entities established specifically for sponsorship purposes have been recognized either by Bishops or by the Holy See. These entities, usually known as "public juridic persons" (but sometimes also called "foundations") assume the sponsorship responsibilities previously carried out by a religious institute (or one of its parts) or by a diocese. In some instances, these new entities also assume all the ownership and property rights previously held by the original institute or diocese. In others, actual ownership is not transferred, but the goods are administered by the new entity. The documents of foundation should determine clearly whether such is indeed the case.

As various theological and historical studies have shown, the term "sponsorship" is relatively new in Church circles.[22] It was originally given wide circulation as part of a threefold approach to health care works: ownership, sponsorship, control. "Ownership" referred to holding title to the property; "sponsorship" usually referred to the body under whose name it operated; and "control" referred to the internal governance.

With time, the distinctions among these three dimensions have come more and more blurred. For instance, we can have sponsorship with or without ownership; ownership with or without control, or with very little control; and degrees of control with various forms of sponsorship.

The term "sponsorship" is not used in the *Code of Canon Law*. In a sense, this is very advantageous because we are not bound by any special parameters. Through the course of time, however, various forms of sponsorship in the Church have been tried and tested. No one form has proven to be the only correct one, with the others being inferior, or even bad. The forms are different, and nothing more. Some of these forms referred, for instance, to a single identity between the work and the sponsoring institute, or to various forms of separate civil incorporation, the use of reserved powers, joint sponsorship with other Church entities, and so forth.

Therefore, it is not possible to quote directly canons that would give us an answer to the questions we are considering on sponsorship. Rather, we have to find the answers in the life of the Church itself and in the responses given to new situations being faced by Church leaders on a daily basis.

It is generally accepted that, today, "sponsorship" entails the use of one's name and the exercise of certain ecclesial and internal responsibilities that arise from this use. It often entails elements of "quality control". To a certain extent, it could be considered somewhat parallel to a franchise. If there is no accountability, then there is a serious risk of fraud and deception. A person's good name – whether that "person" be an individual, a group, or a work – is of primary importance today, and sponsorship responsibilities are exercised in relation to what the name stands for. In our case, we are referring to works undertaken in the name of Christ, on behalf of the Catholic Church (c. 116.1).

Traditionally, sponsorship had emphasized a position of corporate strength and independence through ownership and control via reserved powers. Today, as new relations are established with other providers (who are not necessarily Catholic), a presence is required that relies more on the ability to influence. Questions of ownership are becoming more and more blurred, particularly as Governments, at times, provide or direct various forms of funding to support the works or some of their activities.

Sponsorship in canon law has little if any meaning if it is not related more particularly to the mission and ministry of the Church. The Church's mission is

threefold: to teach, to sanctify, and to serve God's people. Undoubtedly, healthcare fits in among the elements of ecclesial service; education is part of the mission to teach; pastoral and social services would also come under the service dimension.

B. Qualities to be found in a sponsored work

A clear distinction is to be made between "Catholic works" and the "works of Catholics". The former are undertaken "in the name of the Church" (canon 116.1), with all the guarantees of the Church behind them. On the other hand, works of Catholics are those undertakings of Catholics which might have an ecclesial relationship, or might be totally secular in their nature. A number of very "Catholic" activities are, indeed, works of Catholics and not "Catholic works" as such; I am thinking more particularly about the activities of the St. Vincent de Paul Society, or those of the Knights of Columbus, and so forth. Pushing things even more, and at the risk of sounding a bit ridiculous, if a group of Catholics founded an airline, and even named the planes after saints and had them blessed, this does not make the airline "Catholic", even though it could be said to be a work of certain Catholics, but without any type of Church recognition.

The Corporal Works of Mercy

1. to feed the hungry;
2. to give drink to the thirsty;
3. to clothe the naked;
4. to shelter the homeless;
5. to visit and care for the sick;
6. to visit those in prison;
7. to bury the dead.

The words of Jesus (Matthew 25: 35-40) and those recorded in Matthew, Chapter 5, vv. 3-10 ("The Beatitudes") have led to what have been traditionally considered in the Church to be "the corporal works of mercy": (1) to feed the hungry; (2) to give drink to the thirsty; (3) to clothe the naked; (4) to shelter the homeless; (5) to visit and care for the sick; (6) to visit those in prison; and (7) to bury the dead.

For a work to be carried out in the name of the Church, a number of conditions must be met. I intend to refer to seven of them – a perfect biblical number! These are not spelled out, as such, in one place in the *Code*, but are derived from canonical principles interspersed throughout the Church's legislation.

1. First of all, it must have a spiritual purpose (see canon 114). Such a purpose can be either a work of piety, a work of the apostolate, or a work of charity. Canon 676 speaks of lay religious institutes participating in the pastoral mission of the Church through the spiritual and corporal works of mercy. It is not difficult to see how the healthcare or educational ministries fit into a number of these categories of "mercy".
2. A work carried out in the name of the Church must answer a need. Canon 114 even speaks of a "genuinely useful purpose" (when dealing with juridic persons). It could have happened in the past that some Catholic institutions were established, not because there was a real apostolic need, but rather to "fly the flag" because other groups were carrying out a similar mission in the same geographic area. Fortunately, in many places, the time for such undue rivalry and competition has passed. Of course, what was, at one time, a particular need, might not be so today because of changing circumstances.
3. A third condition mentioned in the *Code* is that the undertaking have sufficient means to achieve its

purposes (see canons 114, §3 and 610). We all know that, in many circumstances, some works were simply unable to prosper because of lack of funding. On the other hand, we are all well aware that there are many instances of Foundresses of religious institutes who made do with almost nothing and, through faith, enabled the works to flourish. The necessary means are not limited to financial assets; a spirit of faith and a willingness to work diligently are also part of the necessary means. Likewise, sufficient qualified personnel is a prerequisite.

4. Works carried out in the name of the Church are expected to have a certain perpetuity. We are not involved in fly-by-night operations. It takes a long time to nurture a bud so that it becomes a tree in full bloom. Of course, if the need to which the Church has been responding no longer exists, then the principle of sound administration would call for the closure of the work.
5. Canon 116 refers to tasks or missions that have been "entrusted" to those who are to carry out a work. Those who have been so "entrusted" are to carry out their tasks as good stewards, caring for the work and its assets (see canon 1284, §1). So, the responsible stewardship of the temporal goods entrusted to a work of the Church, and the resulting need for appropriate accountability, are major components of good sponsorship.
6. There is a sixth and most important characteristic that we find mentioned in canon 806. While this canon does not apply directly to healthcare institutions – indeed, there is no mention of these in the *Code* – it applies directly to educational activities in the Church, and, by analogy (in accordance with canon 19) could – and perhaps should – be applied to our various hospitals and related healthcare institutions, as well as to our social services. With appropriate adjustments, we could say then that the canon notes that those in charge of a Catholic work are to ensure, under the supervision of the local Ordinary, that the care given in it, or the works carried out, are in their standards, at least as outstanding as those in other similar institutions in the region. In other words, if the name of the Church is to be attached to a specific undertaking, this work must be one of quality.

   Indeed, if an activity is not of the highest quality, serious questions ought to be asked about whether or not it should continue. There is no place for second-rate activities. This does not mean that activities have to have the latest technological instruments and facilities, but what it does mean is that the apostolate carried out there be of fine quality.
7. In many areas, providing a work of quality calls for special preparation. Canon 227.1 refers indirectly to this. Just as we would not let a physician practice who has not been prepared, duly licenced, and who remains up to date, so too those in charge of mission and related areas must also be duly prepared and remain well-informed. It is difficult to improvise in such situations. Possibly, today, the one area that is going to call for even great quality and preparation is the area of ethics, with its various dimensions. As issues become more and more complex, and the pressure to regard simply the financial implications of decisions rises, it is not always easy to have quality ethical decisions in the workplace. A good ethical decision does not necessarily mean the strictest one possible. Rather, it is one that takes into account all of the factors that are operative in the situation. it is interesting to note that Pope Benedict XVI, in his Encyclical, *Caritas in Veritate*, speaks of "intergenerational

justice" as one of the facts of ethics to be kept in mind today when making decisions (No. 48) – what impact will our decisions have on future generations?[23]

These principles, found here and there throughout the *Code*, can serve as a guideline for those who are carrying out their mission in the name of the Church. This mission is not just a personal activity; rather, it is part of a much larger plan, one that will eventually lead those sharing in it to the fullness of life in faith and in joy.

PART IV
Models of Sponsorship

To understand a number of the present situations, it would be worth our while to go back a bit in history to study the recent evolution in the delivery of healthcare by Catholic religious institutes.

However, we must keep in mind that not all institutions went through the same restructuring process, or in the same order. However, a number of common traits enable us to see better where we might be moving in the future.

Form 1:

The most common form of sponsorship in the past derived from direct ownership of the property and the active presence of many persons identified with the sponsor (for instance, religious sisters or brothers on staff). The name of the sponsoring institute was often found in the name of the sponsored institution.

Form 2:

After the Vatican II period, more emphasis began to be placed in Church circles on the dignity of the baptismal vocation, moving away from an almost exclusive reliance on the vocations of priesthood or religious consecration. More and more lay persons became directly involved in the decision-making processes. At the same time, the number of available religious began to diminish.

Form 3:

With time, and also because of these factors, the duties of sponsorship became somewhat identified with those of a board of directors and the establishment of policy, rather than with actual delivery of various services.

Form 4:

Later, certain works acquired a civil recognition distinct from that of the sponsoring religious institute. This lead to the establishment of separate boards of directors, with membership sometimes overlapping with the sponsoring institute.

Form 5:

Then, there came about a further separation as a two-tiered structure was put in place: a distinction was made between the "members" of the corporation, and the board of directors. In such instances, the sponsorship responsibilities were generally identified with the "members", rather than with the "board", although, by no means was this universal.

Form 6:

Relations between the "members" and the "board" were directed by the use of reserved powers. Although the *Code of Canon Law* makes little reference to what are now known as "reserved powers", when reserved powers were first being considered as an acceptable mode of operation, there were

some fourteen or so powers that were considered to be essential, since institutes did not wish to let go of their institutions too easily. Among such powers we found:

- To establish or change the mission and philosophy of the corporation
- To amend the corporate charter
- To amend the bylaws
- To appoint the board of directors (trustees) of the corporation or of intermediate boards and to remove them from office
- To appoint the chief executive officer (CEO) and to him/her from office
- To lease corporate real estate
- To sell corporate real estate
- To encumber corporate real estate (by, for instance, contracting debts)
- To merge, dissolve the corporation, distribute corporate assets
- To establish subsidiary corporations
- To approve capital budgets
- To approve operating budgets
- To require a certified audit
- To appoint the certified public accountant

Form 7:
Again, with time, the number of essential reserved powers was diminished, as sponsors become more comfortable with the idea of having others directly involved, and these powers (identified as three "p"s), now focused on:

- "paper" - - mission and docu-ments (corporate documents and by-laws, mission statements)
- "persons" (CEO and Board)
- "property" (alienation, mortgages, bond issues).

Form 8:
Then, to facilitate coordination and to reduce expenses, systems began to be established, grouping several works or institutions. This resulted in a further refinement of reserved powers, with some being operative at a lower level, rather than at the level of membership.

Form 9:
More recently, a number of provinces or even institutes have come together to sponsor their works jointly. At times, the reserved powers were exercised separately for institutions originally owned by one institute, as distinct from another sponsor; then later, many of them were delegated jointly on a permanent basis to the new board governing the joint sponsors, with only the property issues being reserved to the original sponsors.

Form 10:
As institutes and dioceses came together to operate institutions and works jointly, it became appropriate to establish new diocesan church corporations – known as "juridic persons" to assume sponsorship of the joint works. The works took on a life of their own, distinct from that of the original sponsoring institutes.

Form 11:
Some diocesan bishops became somewhat uncomfortable with inter-diocesan systems, especially when decisions were being made outside their own diocese (especially relating to moral and ethical issues), but affecting their territory. There developed a need for cohesion with a system, but how to address the challenge? Because of this overlapping, it sometimes became necessary to have a higher authority grant canonical recognition. Thus, the more recent involvement of the Holy See in granting new types of recognition.

Form 12:
At the same time as the last few developments were taking place, another set of factors began to make themselves felt. For instance, partnerships were no longer exclusively with Catholic providers.

Form 13:
As Catholics began to partner more and more with groups that were not Catholic, the issues revolving around moral theology and ethics began to take on more importance. Beforehand, these were simply taken for granted. Today, a positive commitment has to be made towards a number of values. While, in the case of hospitals and healthcare activities, it was relatively easy to enter agreements to cease all abortion activities, when such partnerships were considered,

such has not been the case with sterilizations and other means of contraception. Yet, as practices are now becoming more and more harmonized from diocese to diocese, new moral issues are arising which have not yet been fully addressed, such as cloning, gene experimentation, end of life issues, and so forth. These too will have to considered delicately, yet clearly.

Form 14:
In addition to establishing alliances with providers who were not Catholic, there has also been the pressure in recent times of entering into agreements with providers who were operating on an investor-owned or a "for profit" basis, thus risking a change in the nature of the work from that of an "apostolate" to a "business".

It is obvious that not every undertaking moved through all these steps. Nor is it necessary to do so. Rather, it is important to be aware of the elements involved and to take the necessary precautions to preserve Catholic identity.

PART V
The Special Canonical Duties of Those Responsible for Sponsored Healthcare Works

The duties of those responsible for Catholic sponsored healthcare ministries can, for reasons of convenience, be considered under a number of particular headings. There is no particular order in these topics.

We should also keep in mind that, depending on the type of agreement entered into by various parties, what are responsibilities of the "members" in one case are not so in another, where some of these responsibilities are either shared with the " board of directors", or entrusted totally to it.

A. In relation to the governing canonical "statutes"

1. From a canonical perspective, the primary duty of those in charge is to assure that the institutions under their supervision operate in accordance with the teaching, discipline and laws of the Roman Catholic Church. This is to be done, however, taking into account the mission, vision and values of the system they represent.
2. This implies six elements, three of which are somewhat on a philosophical or spiritual line, while the other three are on a more practical one:
   • mission,
   • vision and
   • values of the system
   • teaching,
   • discipline and
   • laws of the Catholic Church

   In order to carry out these duties, the "members" usually exercise certain powers which relate directly to the philosophy and mission of the system or the institution. Sometimes, however, these powers are shared with the board, depending on the way in which the organization has been structured.
3. It can even happen that both members and the board are also exercising a sponsorship role; in the case of the members, this, obviously, does not imply operations. Rather, the responsibilities of the members, as canonical stewards, will be situated more at the level of ideas than of operations, which are the responsibility of the various officers of the system.
4. Of course, if the board is also functioning on the secular level (which is most often the case), then the obligations that arise from the applicable civil legislation and from the corporate documents have also to be observed.

5. But, from the canonical perspective, in order to exercise the responsibilities relating to mission, vision and values, those in charge will have to keep abreast of the teaching, discipline and laws of the Roman Catholic Church and apply these to the best of their ability.[24] For this, they can usually count on the assistance of the Mission Integration department of the system, by whatever name it is known. Nevertheless, they have ultimate responsibility for the decisions taken and will most likely have to arrange periodically for some form of on-going formation in these three areas, possibly using the expertise already found among themselves.

B. In relation to temporal goods

1. As was the case with the canonical documents and the mission of the system, so too is it with matters relating to temporal goods. The same persons could exercise both canonical and civil responsibilities, or be functioning exclusively on one level. I will focus here on the canonical obligations in this area.
2. The goods owned by a public juridic person (such as a religious institute, or one of the PJPs currently operating in various countries) are ecclesiastical goods. Thus, it will be important to determine precisely, in each case, whether the ownership of institutions or works is absolute, or whether we are dealing simply with goods that have been entrusted to the system for administrative purposes.
3. Since the presumption would be that we are dealing with ecclesiastical goods, when a work is accepted for sponsorship, a clear statement should be made as to the eventual canonical "ownership" of these goods. For instance, some goods (as in the case of a community hospital) are sometimes simply entrusted to the system, without transferring ownership rights and responsibilities.
4. If these goods are not ecclesiastical goods, then the norms governing administration and alienation do not apply in the same way as they do for ecclesiastical goods.

C. In relation to the diocesan bishop

1. Since the members and the board accept responsibility for an apostolic activity, we must recall that all apostolic works are under the direction of the diocesan bishop (see canon 394, §1). The way this responsibility is implemented will vary from diocese to diocese.
2. Whether the establishment of these forms of relationship is the prerogative of the canonical sponsors (i.e., the "members"), or of the board, will depend on the way the system operates. We can presume that, no matter which approach is taken, the board would be part of the process.
3. In particular, the diocesan bishop should be involved in matters relating to chaplaincy services ("care of souls" and the "liturgy"), and to the work itself (see canon 394, and, by analogy, canon 678).
4. Also, it is the diocesan bishop who applies in his diocese the *Health Care Ethics Guide*, or, in the USA, the Ethical and Religious Directives. We have to keep in mind that just because a given policy exists in one diocese where a system is exercising sponsorship, this does not necessarily mean that it applies in all the dioceses where it carries out its mission. It can thus follow that a diocesan bishop could remove "Catholic" identity from a hospital because he judges that its activities are not in conformity with Church teaching and practice.[25]
5. As a public juridic person assumes the sponsorship of more and more works, it will have to develop good protocols for dealing with the bishops of the dioceses

where they carry out this mission.

6. Possibly, it might also be necessary to establish some type of mediation procedures, since it must be remembered that in some areas, Church authorities or their representatives won't look upon lay people as the "official" representatives of the Church which they often are, especially in the case of a public juridic person established specifically for the delivery of healthcare. It takes time to change mentalities.
7. It would be essential to keep the bishops of the dioceses where there are works sponsored by the system informed of the progress of the work, of difficulties encountered, and of challenges for the future. In a period of revision and restructuring, this is an excellent time to establish good strong relations with the bishops or their healthcare delegates.

PART VI
The Future Viability of Our Healthcare Ministy

1. It is obvious that the Church's healthcare ministry in North America is facing many challenges, both from without and even from within. These challenges can arise from financial pressures, from competition, from ethical positions, and so on.
2. Those involved in sponsorship must be aware of these pressures, and not simply wake up some morning to find themselves face to face with something that could have been avoided.
3. In particular, and without hardening the point too much, I am concerned with maintaining the Catholic identity of our institutions, not just in name, but also in mission and philosophy.
4. We cannot expect the leaders to do tasks for which they are not suitably prepared, nor for which training is not made available.
5. In addition to the general duties mentioned above, a sound application of the Church's canon law would call for those in charge of Catholic works to:
   - remain aware of developments in moral and ethical teachings;
   - exercise responsible stewardship over the temporal goods entrusted to their care;
   - make certain that we are indeed dealing with a recognized apostolate (which calls for communion with the diocesan bishop);
   - make certain that new members and trustees are suitably informed of situations;
   - establish good rapport between their civil responsibilities and their canonical duties, particularly when these appear to be in conflict;
   - be particularly careful when considering proposed new mergers, amalgamations, joint ventures, closing down, and so forth.
6. Naturally, when a board brings together persons who represent different elements in a "system" or an "integrated relationship", the responsibilities will be distributed according to the constituency represented by

We cannot expect the leaders to do tasks for which they are not suitably prepared, nor for which training is not made available.

the board members. Thus, for instance, if a system comprises both Catholic and secular institutions, clear distinctions will have to be made as to the parts of the operation to which canon law applies.

But, if persons accept to be part of a board of directors or to assume specific leadership roles within the system or one of its institutions, it can be expected that they will espouse the values of the system as a whole, as well as the principles on which the system has been built.

PART VII
Accountability

1. Canonical stewards and those who assist them are bound to some form of accountability (cc. 1284, §2, 8°; 1287; 636, §2; 637).
2. The internal norms of an institution or system will provide how those in charge are to render an account of their activities. Such is usually provided for on the civil level. There is nothing preventing the canonical administrators from adopting the same procedures to cover canon law obligations.

   In his first letter to the Corinthians, St. Paul reminds his readers that they are to be regarded as Christ's subordinates and as stewards of the secrets of God. Stewards are expected, he says, to show themselves trustworthy (I Cor. 4:2). The call to be trustworthy is fundamental to any type of stewardship, spiritual or temporal. We can, therefore, ask ourselves what is an attitude of "trustworthy stewardship" as it affects the administration of temporal goods belonging to the Church or to one of its juridic persons or recognized entities.
3. There is a form of accountability to the diocesan bishop, not so much for the temporal goods, as far the mission of the institution or system. He has the right to determine whether a work undertaken in his diocese is, indeed, in conformity with Church teaching and practice. The diocesan bishop would have a say when it comes to the alienation of ecclesiastical property, since he has to give a "nihil obstat" if the value of the property being alienated exceeds the maximum amount allowed at the time.

Accountability to the Holy See (the "Vatican") can be exercised in certain ways. For instance, in cases of alienation of property, the permission of the Holy See is required if the transaction exceeds the maximum amount allowed. In other instances, when we are dealing with a pontifical sponsoring PJP, there is an annual report to be presented.

The focus of this report would be:

- the mission
- the persons involved
- new undertakings
- financial situation
- relations with diocesan bishops

PART VIII

Paths for the Future

1. **Recognizing the importance of mission over business.** Because of the numerous pressures placed on boards to make ends meet financially, it often happens that the "mission" is the first area to suffer. Mission effectiveness and pastoral care depart-ments are often cut, because the boards do not place much value in their services.

2. **Answering real needs.** Although the Church has been actively involved for years in the delivery of healthcare, it might be necessary to examine carefully how its resources in personnel, time and finances are being used. Are they being put to the best possible advantage?

3. **A commitment to Catholic teachings.** If the basic philosophy of the board is simply to try and "get around" Catholic teachings, it is not of much use to put so much energy into what we are doing. It might be preferable in such instances for the Church not to be involved and to leave such tasks to others. Of course, this is not what we are doing here, but there is always a danger lurking in the background.

4. **Integrated relationships.** Although Catholic undertakings are committed to maintain Catholic identity and values, this does not mean that they must exclude other forms of relationships. The overview of the development of sponsorship forms shows this clearly. No two relationships are alike, and therefore one size does not fit all. We must build relationships, not legislate for them. The same applies to "catholicity" – we must live it, not legislate it!

   When people are insecure, they have a tendency to legislate. Our ministry should be based on concern for the people we serve, not primarily on retaining what we had in the past.

5. **What do we insist upon.** If Catholics are involved in an undertaking, then we should not be surprised that they are going to insist on certain values that they wish to have promoted. These, in turn, will lead to better service of the community, because they offer consistency, and help make the vision a reality.

Today, in Catholic institutions, there is strong emphasis placed on:

- the value of human life in all its forms and at all stages;
- no discrimination based on sex, race, religion, state of health, and so forth;
- the responsible use of resources (persons, finances, time);
- concern for the whole person (including the spiritual), and not just for a physical part of the person;
- recognizing the place of suffering and even death in the plan of human existence;
- a focus on wellness, rather than on healing; thus, preventative care;
- a dimension of charity towards those who do not have the necessary financial means.

Conclusion

Obviously, we are living in challenging times. We should not be afraid to recognize that we do not always have the answers.

What counts most is that those who have devoted their time and energy to the furthering of healthcare ministry be given the opportunity to update themselves and to know what are the underlying expectations attached to their position.

Therefore, it is essential that both members and board focus on:

- mission (what are we about?)
- persons involved (how are they chosen, selected or named; how are they formed for their duties?)
- accountability, since they are not operating in their own name
- the ethics involved (corporate ethics, medical and social ethics, etc.)

NOTES

1. See, for instance, Catholic World News, July 25, 2008, "English ex-pastor faces prison term for theft" (30 months prison term). See also, J. POKORSKY, "Avoiding the Next Tsunami", in CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND, Newsletter, No. 157, March, 2009, pp. 36-46. See also the recent Motu proprio of Pope BENEDICT XVI, "La Sede Apostolica", December 30, 2010, for the prevention and countering of illegal activities in the area of monetary and financial dealings.
2. Statistics taken U.S. Census Bureau, International Programs Center, 2008. See also C.A. JOYCE, ed., *World Almanac and Book of Facts,* 2008. Catholics are now listed as numbering 1,135,729,000, out of a total world population of 6,712,576,865.
3. Lay groups such as "Voice of the Faithful" are illustrative of this change in thought.
4. For instance, see D. LECKEY, "From Baptismal Font to Ministry: The Surprising Story of Laity Stirring the Church", in Origins, 38(2008-2009), pp. 141-147. She mentions six ways the laity are stirring the Church: (1) the hunger and thirst for an authentic spirituality; (2) a renewed understanding of marriage and family life; (3) the changing role of women in both church and society; (4) co-creation with God in work life; (5) the formation of Christian communities; (6) the laity's willingness to share responsibility for the mission of the Church.
5. The Vatican website for the Pontifical Council for the Laity, lists 122 approved or recognized lay movements of pontifical right (as of May 25, 2009).
6. The Official Catholic Directory 2010 lists 43,279 adult baptisms for 2009, and 75,724 received into full communion with the Church in the U.S.A. alone (p. 2106). The 2011 *Catholic Directory of England and Wales*, lists 5,147 receptions into the Church (p. 888). The Canadian *Annuaire - Directory 2011*, does not provide statistics of adult baptisms or professions of faith for Canada (pp. 92-93)
7. See www.ActiveParishioner.com, June 3, 2008: "Worldwide, the number of diocesan priests went up by about 2%, with significant increases in Asia and Africa and a decrease in Europe. The number of non-ordained religious decreased sharply in Europe by 12% and increased sharply in Asia by 21% and in Africa by 8%. The number of seminarians worldwide increased by 4% with most of the growth in Africa and Asia, while Europe accounted for a decrease of 16%."
8. See M. WEISENBECK, "Emerging Expressions of Consecrated Life in the United States: Pastoral and Canonical Implications", in CLSA, Proceedings, 58(1996), pp. 368-390, at p. 368. CARA Research, in a 126-page directory, titled "Emerging Communities of Consecrated Life in the United States, 2006," (March,2006) refers to 165 of these institutes that are more firmly established. See also R. VAN LIER, *Comme des arbres qui marchent. Vie consacrée et charismes des fondateurs*, Montreal, Novalis, 2007, 167p.
9. See Agenzia Fides website: "Martyrology" per year.
10. For instance, in regard to the Roman Catholic-Luthern dialogue, January 25, 2011, Pope Benedict XVI said, "Despite the theological differences that continue to exist on questions that in part are fundamental, a *togetherness* has grown between us, which becomes increasingly the basis of a communion lived in faith and in spirituality between Lutherans and Catholics,"
11. See VATICAN INFORMATION SERVICE, March 5, 2008, "Seminar of Catholic-Muslim forum to be held in November." Since then, some ten separate meetings have been held. However, unfortunately, Al-Azhar has recently suspended the dialogue with the Holy See; see *Clerical Whispers*, January 23, 2011.

12. In this regard, a number of such corrective measures were promulgated in the Instruction *Dignitas connubii*, January 25, 2005 on the processing of marriage nullity cases. Likewise, the procedures to be observed in diocesan inquiries for the eventual beatification and canonization of saints were revised (May 17, 2007) and made public on February 18, 2008 (*Sanctorum Mater*).

13. Text taken from the Vatican website – www.vatican.va.

14. See J.I. ARRIETA, "Cardinal Ratzinger's Influence on the Revision of the Penal Law System", in *Origins*, 40(2010-2011), pp. 494-498.

15. For instance, see the Address of Pope BENEDICT XVI, to the Congregation for the Doctrine of the Faith, January 15, 2010: "Christian faith also makes its truthful contribution in the field of ethics and philosophy, not supplying prefabricated solutions to real problems such as biomedical research and experimentation, but presenting moral standpoints within which human reason can seek and fine appropriate solutions."
(Taken from www.vatican.va).

16. See J.H. PROVOST, "The Canonical Aspects of Catholic Identity in the Light of *Ex Corde Ecclesiae*, in *Studia canonica*, 25(1991), pp. 155-191.

17. See JOHN PAUL II, Apostolic Constitution, *Ex Corde Ecclesiae*, August 15, 1990, No. 13.

18. See J.H. PROVOST, loc. cit., p. 167. See also F.G. MORRISEY, "What Makes an Institution Catholic?", in *The Jurist*, 47(1987), pp. 531-544.

19. See, for instance, CHA, *The Dynamics of Catholic Identity in Healthcare. A Working Document*, St. Louis, CHA, 1987viii-52p; *A Perspective on How to Approach Catholic Identity in Changing Times. A Working Process Document*, St. Louis, CHA, ND, 19p; The Search for Identity: Canonical Sponsorship of Catholic Healthcare, St. Louis, CHA, 1993, xi-88p, and similar publications.

20. This section is mostly based (even at times literally) on the CHA document: *A Perspective on How to Approach Catholic Identity in Changing Times*. Also, see, CHA, *One Vine, Different Branches: Sponsorship and Governance in Catholic Ministries*, St. Louis, MO, 2007 (A collection of resources).

21. See BENEDICT XVI, January 15, 2010: among the issues being considered today in relation to biomedical processes and ethics, the Pope notes: in vitro fertilization, new forms of contraception, freezing embryos, cloning, the creation of human-animal hybrid embryos, genetic screening, gene therapy.

22. See, for instance, R. SMITH, et al., *Sponsorship in the United States Context. Theory and Praxis*, Alexandria, VA, Canon Law Society of America, 2006, vii-141p.

23. See BENEDICT XVI, Encyclical Letter, *Caritas in Veritate*, June 29, 2009, in Origins, 39(2009-2010), pp. 130-159, at p. 148.

24. For instance, the recent revision to the ERDs relating to Section 5 on "Issues in Care for the Seriously Sick and Dying", as approved by the USCCB, November 17, 2009; see *Origins*, 39(2009-2010), pp. 434-435

25. See, for instance, Bishop T.J. OLMSTEAD, "Phoenix Hospital No Longer Considered Catholic", in *Origins*, 40(2010-2011), pp. 505-507. See also, ibid., pp. 507-509, 537-551.

Presented by
Francis G. Morrisey, O.M.I
at Villa Madonna Retreat House
Rothesay, NB
on February 17, 2011
as part of the
Catholic Leadership Program
for Catholic health care
professionals.

CASE STUDY – A CATHOLIC HOSPITAL

1. St. Patrick's Hospital, sponsored by the Sisters of St. Patrick, is situated in the downtown core of a large city. It is a major Catholic hospital.
2. This downtown core has recently become identified as being part of a large gay and lesbian district in the city.
3. Not too far from St. Patrick's Hospital, there is a clinic, catering more especially to the gay and lesbian community, which offers quite a number of reproductive and related procedures (such as abortion counselling, vasectomies, tubal ligations, counselling for a gay lifestyle, dispensing condoms, etc).
4. In the Provincial Government directed restructuring process, the clinic has been ordered to become managed and directed by St. Patrick's Hospital, and to continue to offer the procedures it gives to the local community. St. Patrick's has, for years, offered care to AIDS-HIV patients, and has no problem continuing this service.
5. However, the Government requires that a certain number of St. Patrick's board members constitute the new board for the clinic.
6. The diocesan bishop wishes to be able to keep St. Patrick's a Catholic hospital, but has no intention on being lenient on moral issues.
7. What can the Sisters of St. Patrick (or their representatives) accept if they wish to keep St. Patrick's Catholic, not only in name, but also in fact:
    - could the constitute the board of the clinic?
    - could they offer management contracts?
    - could they put employees of the clinic on their payroll?
    - can they offer laboratory services?
    - can they offer cafeteria services?
    - could they allow the clinic to continue to offer certain procedures?
    - could they appoint those openly promoting a gay lifestyle to the board of St. Patrick's Hospital, so that they can be part of the board of the clinic?
    - what could the diocesan Bishop approve, or tolerate?
8. Are there other points that should be considered, or might it be preferable for St. Patrick's simply to cease being a Catholic hospital because of the Government pressure?

CASE II – A CATHOLIC SCHOOL

1. In a large metropolitan area, there are a number of Catholic schools. However, a significant number of parents are not satisfied with the content of the Catholic education their children are receiving in the schools operated by the Catholic School Board.
2. The parents have come together to open two new private schools, in two parts of the city.
3. However, because they think that the diocesan Bishop is too lax in his approach to "Catholic" matters, they do not want the schools to be identified as Catholic schools. Rather, they want them to be simply private schools.
4. The curriculum offers intensive courses on Catholicism, religion, and so forth. There is no essential problem with the doctrinal content of the curriculum, except that perhaps it might be a bit too "conservative" in the eyes of a number of other Catholics. Two religious priests have been recruited from outside the diocese to serve a full-time "chaplains" to the students. However because the priests have not asked for official recognition by the diocese, the diocesan authorities have not given them any appointment or authorization to function, either as priests, or as chaplains.
5. The diocesan Bishop insists that children who do not go to Catholic schools are to undergo a special preparation program for reception of the sacraments; this is to be offered in the parishes.
6. The parents involved in the two private schools consider that this is not necessary and want to parish priests to recognize their programs, even though the schools do not have "Catholic" identity. Or, at least, they want the "chaplains'" word to suffice that the children have been adequately prepared.
7. There is no doubt that the schools are a "work of Catholics". But are they also "Catholic" schools?
8. What is missing in this entire set-up? How could the schools achieve "Catholic" identity? Should the diocesan Bishop simply tolerate their presence and grant tacit approval to their programs and to the two priests? What would you suggest?

SCC Court File No:37273

JUDICIAL COMMITTEE OF THE HIGHWOOD CONGREGATION OF JEHOVAH'S WITNESSES (VAUGHN LEE - CHAIRMAN AND ELDERS JAMES SCOTT LANG AND JOE GURNEY) AND HIGHWOOD CONGREGATION OF JEHOVAH'S WITNESSES	and	**RANDY WALL**
Appellants		Respondent

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

BOOK OF AUTHORITIES OF THE INTERVENERS, THE EVANGELICAL FELLOWSHIP OF CANADA AND THE CATHOLIC CIVIL RIGHTS LEAGUE

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