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**THE CANONICAL STATUS OF DIOCESAN AND PAROCHIAL SCHOOLS IN NEW
ZEALAND, WITH PARTICULAR REFERENCE TO THE DIOCESE OF AUCKLAND,
IN THE LIGHT OF THE PRIVATE SCHOOLS CONDITIONAL INTEGRATION ACT
1975**

by

Bernard Francis WATERS

**A dissertation submitted to the Faculty of Canon Law,
Saint Paul University, Ottawa, Canada, in partial
fulfilment of the requirements for the degree of
Doctor of Canon Law**

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ABBREVIATIONS

vii

<i>AAS</i>	<i>Acta Apostolicae Sedis</i>
ACDA	Archives of the Catholic Diocese of Auckland
AJHR	Appendices to the Journals of the House of Representatives
BRO	Bishop Denis George Browne file (1983-1994)
CECNZ	Catholic Education Council of New Zealand
CIC/17	Code of Canon Law 1917
CIC/83	Code of Canon Law 1983
<i>CLD</i>	<i>Canon Law Digest</i>
CLSA	Canon Law Society of America
CLSGBI	Canon Law Society of Great Britain and Ireland
DEL	Bishop Reginald John Delargy file (1970-1974)
ERO	Education Review Office
LIS	Archbishop James Michael Liston file Coadjutor (1920-1929) Bishop of Auckland (1929-1970)
LUC	Bishop John Edmund Luck file (1882-1896)
MAC	Bishop John Mackey file (1974-1983)
NCRS	National Centre for Religious Studies
NZCBC	New Zealand Catholic Bishops' Conference
NZCEO	New Zealand Catholic Education Office
NZCER	New Zealand Council for Educational Research
NZEI	The New Zealand Educational Institute. Inaugurated in January 1883, its object was "to promote the interests of education within the Colony of New Zealand."
NZCP	New Zealand Council of Proprietors
NZPD	New Zealand Parliamentary Debates (Hansard)
POM	Bishop Jean Baptiste François Pompallier file Vicar Apostolic of Western Oceania (1836-1848) Apostolic Administrator (1848-1860) Bishop of Auckland (1860-1869)

ABBREVIATIONS

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PPTA	Post Primary Teachers' Association
PTA	Parent-Teacher Association
PTFA	Parent-Teacher-Friends Association
PSCIA 1975	An Act to make provision for the conditional and voluntary integration of private schools into the State system of education in New Zealand on a basis which will preserve the special character of the education provided by them. 10 October 1975. Its short title is the Private Schools Conditional Integration Act 1975.
STA	School Trustees Association.

INTRODUCTION

When the first Roman catholic missionaries arrived in New Zealand in 1838, they established schools for both the indigenous Maori and the European settlers. These early mission schools provided general education as well as being a means for teaching the catholic faith. Following colonisation in 1840, the educational endeavours of the missionaries and lay people received some financial assistance (as did the other Churches) from the government of the day.

In 1852, the *Constitution Act* divided the country into six provinces. Despite education from this time becoming a provincial responsibility, the educational initiatives of the provinces were uneven. In Auckland province, for example, the cost of the land wars left the province particularly disadvantaged in its educational quest. During this period and following the *Abolition of the Provinces Act* in 1875, the country began to look to a national system of education.

Because the Churches had been involved in education since the arrival of their various missionaries, much of the debate surrounding the future of education in New Zealand was of an intensely sectarian nature. When the Act finally did emerge – the *Education Act, 1877* – it made education at primary level free, compulsory, and secular. Consequently, those schools wishing to retain religious teachings were ineligible for any form of government assistance. The response of Roman catholics was to eschew the state school system and consolidate their energies in establishing a school system of their own that allowed them to teach religion, but which in most other aspects, paralleled the state system. Such schools became “Registered Private Schools”.

Underpinning this initiative of educational independence was the conviction that the catholic school was both a necessary vehicle for preserving the faith and an intrinsic component of the parish. Catholics, therefore, established their schools at parochial and

diocesan levels, relying on religious for staffing, such schools being supported by the giving of the faithful. The bishops persistently sought state financial assistance, but without success. Following World War II, a baby boom put pressure on the church to accommodate more pupils in a system that was already in need of urgent financial assistance owing to the crippling costs of property, the erection and maintenance of buildings, and salaries for increasing numbers of lay teachers. From the fifties, catholics made several appeals to parliament for aid. While the government eventually responded by way of grants, they were not enough to sustain the ailing system.

Finally, in 1975, parliament passed an Act “to make provision for the conditional and voluntary integration of private schools into the state system of education in New Zealand on a basis that will preserve and safeguard the special character of the education provided by them.” Its short title is the *Private Schools Conditional Integration Act 1975*. For catholic schools, the “proprietor” referred to in the Act is the diocesan bishop or the superior of a religious institute. Thus a catholic school becomes integrated when the proprietor and the Minister of Education for the Crown enter a formal agreement known as the integration agreement. Advantages that catholics receive by way of integration include teachers’ salaries paid to state standards, and buildings and grounds maintained at state cost (once they have been brought up to state code). Capital works, however, remain the responsibility of the proprietor.

Canonically, however, there is no recognition under the Act of the parish as a juridical person since the parish is not civilly incorporated. The civil law acknowledges neither the parish priest, nor his right to administer the juridical person of the parish, nor that the catholic school in canon law belongs to the parish that built it. On the contrary, in New Zealand civil law the Roman Catholic Church in New Zealand acts through the diocesan bishop as corporation sole. For the integration agreement, the diocesan bishop as corporation sole is the proprietor in law. As proprietor, the bishop owns the integrated catholic school and the

land on which it is situated.

As we have noted, the Act does not recognize the rights of the parish priest as administrator of the juridical person of the parish. Instead he acts for the proprietor in the administration of the integrated school as the proprietor's appointee. In the Act a significant place had to be found for the parish priest. The provision that each school should have a chaplain achieved this. For primary schools the parish priest has this status. In canon law the parish priest has both these positions by virtue of his office.

In this study we will consider the impact of the *PSCIA 1975* on the canon law of the Church in regard to catholic schools owned and managed by the Church. First we will consider the impact of the Act on the catholic school as an expression of the apostolate of the parish or diocese as a juridical person. Flowing from this, we will explore also the consequences of the transference of administrative control from bishops and parish priests to boards, which the Act calls the "controlling authority" (and from 1989, "boards of trustees"). While the Act appears to give the proprietor sweeping rights regarding the preservation of "education with a special character" – the catholic ethos – we will examine whether these rights are as extensive as those that he may have in canon law. Furthermore, we will explore whether under the Act there may be loss of effective canonical control which may be tantamount to canonical alienation. Second, we will address whether by integration the temporal goods that comprise the parochial or diocesan school have been canonically alienated (c. 1533 CIC/17). As all catholic schools were integrated prior to the promulgation of the 1983 Code of Canon Law, the canonical status of the schools and school buildings must be determined according to the *ius vigens* – the 1917 Code of Canon Law.

In approaching the question of determining the canonical status of catholic schools following their integration, and in keeping with canon law as a subalternated discipline, we shall use a multi-disciplinary approach in our methodology. Drawing primarily on writings

from church history, secular history, and some sociology, we will consider the major influences that impinged upon the Church in New Zealand, leading it to the various decisions that have shaped its past, taking it to the present. We include necessarily the influence of canon law itself, which prior to the 1917 Code of Canon Law came by way of the various plenary and provincial councils together with the diocesan synods. Incorporating studies from these disciplines we hope to present a composite analysis of the subject of the thesis.

Our research reveals that there are several studies in other disciplines that address attendant issues concerning catholic schools in New Zealand.¹ The same research, however, indicates that this study is the first major work attempted in the discipline of canon law vis-à-vis the status of catholic schools in New Zealand. While other canonical studies outside New Zealand address the same general concerns,² we consider that the history and legislation involving the integration of catholic schools in New Zealand make this study significantly different.

In chapter one we shall provide a summary history of the catholic Church in New Zealand, beginning with the arrival of the first missionaries and concluding with the two Acts of Parliament that impinged on the life of catholic schools which opted to integrate: the *PSCIA 1975* and the *Education Act 1989*.

In chapter two we shall discuss the canonical aspect of several subjects related to the

¹ See, for example, E. A. ATKINS, *The Effects of Integration of New Zealand's Roman Catholic Schools*, MA thesis, Palmerston North, Massey University, 1984; M.J. MCMENAMIN, *The Special Character of the Catholic School: Theory and Practice*, MA thesis, Auckland, NZ, University of Auckland, 1985.

² See B. DUNN, *Catholic Schools in Newfoundland: An Investigation into Their Nature According to the Code of Canon Law*, DCL diss., Ottawa, Saint Paul University, 1991; L. BORDONARO, *Separate Schools in Ontario, Canada: Their Canonical Status and Relationship to the Church According to the 1983 Code of Canon Law*, Romae, Pontificia Studiorum Universitas a S. Thoma Aq. in Urbe, 1989.

life of the catholic school – the parish and parish priest, the parish as a juridical person, administration of the juridical person, ownership of temporal goods by the juridical person, the juridical nature of the diocesan and parochial schools themselves, and the diocesan bishop as a corporation sole.

Having clarified these canonical entities, in chapter three we will analyse the impact of the Act on the canon law of the Church insofar as it allows us to determine the canonical status of catholic schools.

Finally, in chapter four we shall consider the teachings of the Second Vatican Council and subsequent Church teachings in the New Zealand context as they apply to the mission of the school. While each chapter has its own conclusion these will be brought together in a general conclusion at the end of the study.

CHAPTER ONE

A HISTORY OF CATHOLIC EDUCATION IN NEW ZEALAND

“To be ignorant of what occurred before you were born is to remain always a child. For what is the worth of human life, unless it is woven into the life of our ancestors by the records of history.” Cicero.¹

1.1 – THE PRE-MISSIONARY PERIOD²

New Zealand, also known as Aotearoa New Zealand, lies in the southwest Pacific

¹ M.T. CICERO (106-43 BC), *Orator*, 34: 120, 46 BC., English translation by H.M. HUBBELL, Cambridge, MA, Harvard University Press, 1993, pp. 394-395.

² E.R. SIMMONS, *A Brief History of the Catholic Church in New Zealand*, Auckland, Catholic Publications Centre, 1978, p. 6: “The story of these people, the Catholic Church in New Zealand, falls easily into six different periods, which are clearly defined but of very unequal length: 1. THE PRE-MISSIONARY PERIOD, the time before the arrival of Bishop Pompallier and his missionaries. 2. THE NEW ZEALAND MISSION, from 1838 to 1850, when the whole of New Zealand was one of the missions entrusted to Bishop Pompallier and the Society of Mary. 3. THE COLONIAL PERIOD, from 1850 to 1870, when New Zealand was divided into two dioceses, Auckland to the north and Wellington in the south, and when the Church was partly a Maori mission and partly a European colonial Church. 4. THE PERIOD OF DEVELOPMENT, from 1870 until 1900, during which the dioceses of Dunedin and Christchurch were formed, the first synods were held and the Catholic Church gradually found its place in the life of New Zealand as a whole. 5. THE PERIOD OF CONSOLIDATION, from 1900 to 1955, during which the fairly limited objectives which had emerged towards the end of the nineteenth century were pursued single-mindedly and with considerable success. 6. THE PERIOD OF CHALLENGE, from 1955 onwards, in which both external events and internal pressures combined to force major changes in the life of the Church.” In treating the history of catholic education, we follow the same divisions. For a more complete analysis of the first period which we treat summarily, see the same author's, *Pompallier, Prince of Bishops*, Chap. 1, “Land of the Maori”, Auckland, Catholic Publications Centre, 1984, pp. 7-16; J.C. BEAGLEHOLE, et al., (eds), *New Zealand's Heritage: The Making of a Nation*, Auckland, Paul Hamlyn Limited, 1971; J.C. BEAGLEHOLE, *The Exploration of the Pacific*, London, Adam and Charles Black, 1996; R. DUFF, *The Maa-Hunter Period of Maori Culture*, Wellington, R.E. Owen Government Printer, 1956; J. METGE, *The Maoris of New Zealand*, London, Routledge and Kegan Paul, 1967; W.H. OLIVER and B.R. WILLIAMS (eds), *The Oxford History of New Zealand*, Auckland, Oxford University Press, 1991; A.H. and A.W. REED (eds), *Captain Cook in New Zealand*, Wellington, A.H. and A.W. Reed, 1964.

between parallels 34 and 48 degrees south.³ Two hundred and seventy thousand, five hundred and thirty-four (270,534) square kilometres in size,⁴ it comprises two main islands (the North Island and the South Island), Stewart Island, and other small outlying islands. (See Appendix 1, Map 1.) Before the coming of the Europeans, successive waves of Polynesian people called The Maori⁵ populated the country from the 10th century AD. This people, as indicated by similarities in speech and culture, most likely came from Eastern Polynesia (Tahiti, the Marquesas) and the Southern Cook group, approximately sixteen hundred miles north-east of New Zealand.

In 1642, a navigator of the Dutch East India Company, Captain Abel Janszoon Tasman sighted the Southern Alps on the west coast of the South Island near Hokitika, calling it *Staten Landt*. (See Appendix 1, Map 2.)⁶ Within a decade, the name that Tasman

³ Opinions differ as to the meaning of Aotearoa: "Usually translated as **Land of the Long White Cloud**, originally the North Island of New Zealand, later New Zealand as a whole, especially as the homeland of the Maori; [...], a symbolic name coined in the 1980s, to represent the Maori and Pakeha components of New Zealand society and culture. [Maori: probably 'land of the long twilight' differentiating the length of the New Zealand twilight from that of tropical islands]" (E. and H. ORSMAN, *The New Zealand Dictionary*, Auckland, New House Publishers, 1994, p. 5).

⁴ Writers compare New Zealand with the State of Colorado (269,619 square kilometres), Japan (377,835 square kilometres), and the United Kingdom (244,110 square kilometres). Statistics from *Encyclopaedia Britannica, Micropaedia*, 15th ed., Chicago, Encyclopaedia Britannica Inc., 1998, vol. 8, p. 649; vol. 3, p. 467; vol. 6, p. 496; vol. 12, p. 141.

⁵ "The use of the term Maori (lit. normal, ordinary or proper) to distinguish the Polynesian inhabitants of New Zealand from the intrusive European is even more clearly a late development and certainly post European" (DUFF, *The Moa-Hunter Period of Maori Culture*, p. 12). On p. 12, footnote 5, Duff comments: "Williams (1921) notes no literary use before 1850 of the term Maori in its present sense. Scholefield (1945) puts its use back to 1840, in the translation of the Treaty of Waitangi. McNab, quoted by Shrimpton and Mulgan, without references being cited, states that the earliest use was in 1818." See H.W. WILLIAMS, *A Dictionary of the Maori Language*, 5th ed., Government Printer, Wellington, 1917 (reprint 1921). G.H. SCHOLEFIELD, *The Press*, Christchurch, 18 March, 1945. A.W. SHRIMPTON and A.E. MULGAN, *Maori and Pakeha*, Auckland, Whitcombe and Tombs, 1921, p. 19.

⁶ The Dutch navigator Le Maire, sighting land east of Tierra del Fuego in 1616, thinking it was part of the great South-land, called it "Staten Land". Tasman, believing the coastline he discovered could also be the South-land, named it similarly. See A. SALMOND, *Two Worlds. First Meeting*

gave the country appeared on Dutch maps as Zeelandia Nova or Nieuw Zeeland.⁷

The next recorded European visitor was Captain James Cook who, sailing under British naval orders, circumnavigated the country in 1769. Although he landed on each island and claimed formal possession of it in the name of King George III, the country was not colonised until seventy years later. Cook returned to New Zealand two more times, in 1773 and 1777.

About this time, other explorers from Britain, France, and Spain came to the country. The 1790s saw the arrival of sealers and deep-sea whalers. China, England, and the United States imported seal skins for the making of felt hats. American ships from the New England ports of Boston, Nantucket, New Bedford, and Salem, along with British ships, established several whaling stations, creating a vigorous trade in whale oil and whale bone. The industry declined towards the end of the 1830s as returns diminished and herds came close to extinction following over-exploitation. Besides deep-sea whaling, bay-whaling began in New Zealand waters in the late 1820s, but by the 1850s most of the stations had closed due to a decline in the whales, a downturn in the economy, and the use of vegetable oil in place of whale oil.

Another industry bringing commerce to New Zealand was flax, called by the Maori,

between Maori and Europeans 1642-1772, Auckland, Penguin Books, 1991, Chapter 1, p. 437, footnote 1,

⁷ Melchidech Therenot showed Zeelandia Nova on his map of the southern lands in 1663. See P. DUNMORE (ed.), *The Dunmore Book of New Zealand Records*, Palmerston North, The Dunmore Press, 1977, p. 23.

While Tasman is credited with being the first European to set eyes on New Zealand, Ross Wiseman in a recent study suggests he may not have been the first: "The purpose of this book is to prove that he [Abel Tasman] was not the first. It was in fact the Spanish who discovered New Zealand exactly sixty-six years before Tasman – in December 1576 [...]" (R. WISEMAN, *The Spanish Discovery of New Zealand in 1576*, Auckland, Discovery Press, 1996, p. 1). See also BEAGLEHOLE, *New Zealand's Heritage*, p. 25.

harakeke. From the 1820s, trade developed with New South Wales for this commodity, reaching a peak at the beginning of the nineteenth century. It had another value, however; it would become the principal source of barter with traders who could supply muskets to the Maori: a ton of flax for one or two muskets. Timber, used especially for ships' spars, also became an important export item. By this time less lawful elements augmented the population: runaway sailors, escaped convicts⁸ from the penal communities of New South Wales, and other adventurers. Into this environment came the missionaries.

1.2 – THE NEW ZEALAND MISSION 1838-1850

On 10 January 1836, Gregory XVI established the Vicariate Apostolic of Western Oceania,⁹ entrusting it to the newly-formed Society of Mary, or Marists (who received papal approbation on 29 April), and Bishop Jean Baptiste François Pompallier. Pompallier arrived in the Hokianga Harbour on 10 January 1838, accompanied by a priest, Catherin Servant, and a lay catechist, Brother Michel Colombon. He celebrated the first mass in the home of Thomas Poynton and his wife Mary at Totara Point three days later. Poynton, an Irish timber merchant, gave the missionaries land for their first house and introduced them to the Maori. Anglican missions were already established in the Bay of Islands, under Samuel Marsden since 1814. Shortly afterwards, in 1822, Wesleyan Methodists arrived establishing their first mission

⁸ An estimate given in the House of Commons in 1838 put the number of absconded convicts at two hundred out of a British subject population of less than two thousand. See J. MACKEY, *The Making of a State Education System. The Passing of the New Zealand Education Act 1877*, London, Geoffrey Chapman, 1967, p. 10 quoting A.J. HARROP, "The Companies and British Sovereignty", in *The Cambridge History of the British Empire*, VIII, Pt. II, New Zealand, p. 69.

⁹ See Appendix 1, Map 4. At this time the area south of the equator was referred to as the South Sea Islands. A Belgian cartographer, Philippe Vandermaelen, was the author of an *Atlas* titled *Atlas universel de géographie physique, politique, statistique et minéralogique*. His use of the word "Oceania" prompted the *Congregation de Propaganda Fide* eventually to use this same generic term for Australia and all the islands in the Pacific. See R.M. WILTGEN, *The Founding of the Roman Catholic Church in Oceania 1825-1850*, Canberra, Australian National University Press, Australia, 1979, p. 46.

at Whangaroa. (See Appendix 1, Map 3.) Pompallier, realising that the Bay of Islands was more central than the Hokianga, established a second mission at Kororareka, the seat of government, in July 1839.¹⁰

Initially, Pompallier received a hostile reception from many protestants.¹¹ An agreement between the Wesleyans and the Church Missionary Society decided their respective territories for evangelisation. However, no such agreement was part of catholic thinking:

The efforts of the Church Mission and the Wesleyans to provide books were redoubled with the arrival of the Roman Catholics in 1838. The Catholics refused to accept any system of geographical zoning because of their conviction, and made clear by their actions, if not their statements, that heresy was as bad if not worse than heathenism. Combined with Bishop Pompallier's insistence on their having a thorough knowledge of the Maori language, this made them, in spite of their lack of resources, the cause of considerable apprehension to the two earlier established missions.¹²

Not surprisingly, one of Pompallier's early requests to Jean-Claude Colin, his superior, included a printing press, to counter the proliferation of anti-catholic literature.¹³ With its

¹⁰ Today Kororareka is called Russell. Many people presume that this is the same Russell which, briefly, was New Zealand's first capital. However, old Russell was situated at Okaito, a headland further up the Harbour (See Appendix 1, Map 3). A decree of Governor Fitzroy in 1844 determined that Kororareka should be "included within the township of 'Russell' and [...] officially designated by the said name of 'Russell'." So Okaito remained Russell and Kororareka became Russell, a situation still confusing to many. Russell was named in honour of Lord John Russell, then Secretary of State for the Colonies and later British Prime Minister.

¹¹ For example, the Wesleyan Methodist, Nathaniel Turner, caused a dispute between the catholic missionaries and the Maori by suggesting that they were a threat to the freedom of the Maori, by reference to Napoleon's exploits in Europe. See L. KEYS, *The Life and Times of Bishop Pompallier*, Christchurch, Pegasus Press, 1957, p. 94.

¹² J.M. BARRINGTON and T.H. BEAGLEHOLE, *Maori Schools in a Changing Society*, Christchurch, Whitcoulls Limited, 1974, p. 28.

¹³ "A major antidote to Catholicism was printed religious matter. 'The press,' said Woon, 'will be a mighty engine in exposing the errors of their system' [Letter of Woon to W.M.S., November 24, 1838, *Wesleyan Missionary Notices*, new series, no. 9 (September 1839), p. 141.] This form of

arrival, he rebutted the accusations against the catholic Church with a pamphlet *Luminous Doctrine of the Catholic Church*.¹⁴

1.2.3 – The Treaty of Waitangi

Despite efforts to distance itself from being involved in the governance of New Zealand, the British government in 1832 appointed James Busby from New South Wales as British Resident under the governor of New South Wales. His appointment came in response to an increased tribal warfare,¹⁵ tensions between the new European arrivals and the Maori, the uncontrolled selling and purchasing of land, and the general lack of law and order. Along with the French, American interests were regarded with some misgiving. Busby himself described the situation as “a permanent anarchy” resulting in depopulation “going on, till district after district has become void of its inhabitants....”.¹⁶ However, Busby arrived in the Bay of Islands without any legal means of exerting his power; he had no authority over the military or police force, was unable to supervise the liquor laws, and was powerless to bring justice against criminals. This earned him the contempt of settlers and Maori alike who called

proselytising had a remarkable boom during the 1840s, when large numbers of Maoris had become able to read and eagerly sought anything in print” (H.M. WRIGHT, *New Zealand, 1769-1840. Early Years of Western Contact*, Cambridge, MA, Harvard University Press, 1959, pp. 52-53).

¹⁴ *Ko ngo tahi pono nui o te hahi Katorika Romana*. The pamphlet dated 1842 was published in 1843. The same year an English translation was published in Sydney.

¹⁵ Between 1815-1830 a series of inter-tribal wars broke out. Such were the primary means by which a warrior achieved *mana* = status, standing, spiritual power, authority, prestige. By 1831, seventy-five per cent of the export trade from New South Wales to New Zealand comprised guns and ammunition. The consequence of such armed warfare was devastating with possibly one fifth of the Maori population killed. For a more complete description of the effect of the weapons trade on the Maori, see A.G. BUTCHERS, *Young New Zealand*, Dunedin, Coulls Somerville Wilkie Ltd., 1929, pp. 20-29.

¹⁶ W.H. OLIVER, *The Story of New Zealand*, London, Faber and Faber, 1960, p. 41. The reference may be found in *Irish University Press Series of British Parliamentary Papers, Colonies, New Zealand*, Shannon, 1970, III, pp. 60-66.

him a “Man-o’-War Without Guns”.¹⁷ The situation remained chaotic until the arrival of Captain William Hobson of the British Navy in January 1840, who restored some stability. Nevertheless, Busby could exercise his influence in other areas. In October 1837 he assembled thirty-four Maori chiefs of the northern region at Waitangi (See Appendix 1, Map 3.) in response to their request that the British king be their protector and parent. The chiefs, in a Declaration of Independence, constituted themselves the “United Tribes of New Zealand”. Later, seventeen other chiefs’ names were added, thus paving the way for the treaty that would follow.¹⁸

On 6 February 1840, Hobson on behalf of the Crown signed the Treaty of Waitangi. W.H. Oliver describes it:

This Treaty of Waitangi purported to be a legal instrument by which the chiefs – such of them as signed – ceded sovereignty over New Zealand to the Queen. It was, in fact, a moral agreement by which certain chiefs expressed their willingness to be ruled (distantly, they hoped and believed) by the Queen, and by which the representative of The Crown agreed to accord them her protection.¹⁹

In return for relinquishing their sovereignty to the Queen of the United Kingdom of Great Britain and Ireland, one of the three versions of the treaty guaranteed to respect the Maori’s “full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess [...]”²⁰ and gave the Maori the rights and privileges of British subjects. Variousy regarded as the Magna

¹⁷ *New Zealand Encyclopedia*, (G. MCLAUCHLAN, Ed.-in-Chief), Auckland, David Bateman, 1984, p. 78.

¹⁸ For a comprehensive treatment of the treaty see C. ORANGE, *The Treaty of Waitangi*, Wellington, Allen & Unwin New Zealand Limited, Port Nicholson Press, 1988.

¹⁹ OLIVER, *Story of New Zealand*, p. 49.

²⁰ Translation from *Facsimiles of the Declaration of Independence and the Treaty of Waitangi*, Wellington, R.E. Owen Government Printer, 1960.

Carta of New Zealand, the founding document of the nation, a nuisance, irrelevant, a fraud, a declaration of good intent, confusing, no more than a statement of British policy, the treaty more recently has been described as “hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution.”²¹ Orange, in her extensive commentary,²² writes in the Introduction:

[...] there is as much division over the treaty now as there was in the 1840s when Governor Robert Fitzroy wrote that “some persons still affect to deride it; some say it was a deception; and some would unhesitatingly set it aside; while others esteem it highly as a well considered and judicious work of the utmost importance.”

She concludes, “The gap between Maori and European expectations of the treaty remains unbridged.”²³

In their approach to the treaty, the catholic missionaries showed an independence that would mark future ventures, including education. The celibate clergy had no interest in acquiring tracts of land for themselves or their families; besides which, they did not have the means for significant purchases. This gave Pompallier and his companions a certain neutrality. His standing was enhanced when both the daughter and the niece of Rewa, one of the paramount chiefs of the influential Ngapuhi tribe in the north, were healed following prayer. Consequently Rewa sought advice from Pompallier when Hobson began negotiations. Hobson and the protestant missionaries blamed Rewa's denunciation of the treaty on Pompallier.²⁴

²¹ ORANGE, *The Treaty*, p. 483, footnote 61, quoting R. ROSS, *The Treaty of Waitangi, Its Origins and Significance*, Wellington, Victoria University Extension, 1971, Publication 7, p. 30.

²² ORANGE, *The Treaty*, p. 1.

²³ *Ibid.*, p. 5.

²⁴ “Suspensions of Pompallier were partially correct. Writing about this event some years later, he admitted that ‘Catholic chiefs’ (mainly from the Kororareka district), and ‘above all’ Rewa, had consulted him over the treaty. [...] As a Frenchman and a Catholic, Pompallier was undoubtedly able to adopt a more neutral position than could the Englishmen committed to Crown success in treaty

The prejudice continued; in 1844 when hostilities broke out in the north, Governor Robert Fitzroy declared that part of the blame must rest with the catholic missionaries. Later, when the wars of 1860-72 broke out, Mackey records the anti-catholic and anti-French sentiment of one Rev. Richard Taylor against the subversive catholic missionaries:

Who are now trying to work upon your fears, and to make you view Englishmen as your enemies. Who are they who tell you that they could do great things for you if the Queen's *Mana* were out of New Zealand? Who are they who are trying to make you believe, if you would consent to give up your instructors and turn to them, in a body, that the Emperor of the French would assist you with men, and guns, and powder.²⁵

Governor George Grey later investigated and found the accusations without basis.²⁶ As John Mackey observes, however, "groundless or not the emotion of distrust was there and contributed to some difficulties that arose in regard to education, as the inspection of schools in Auckland was later to show."²⁷

negotiations. He could, therefore, have more open, honest discussion with the Catholic chiefs concerning the transfer of Maori authority. While not opposing the treaty, he was certainly not promoting it, as were most of the English missionaries. His early departure from the Waitangi meeting of February, before any chiefs had signed the treaty, was probably sufficient to suggest the Bishop's public dissociation from the business in hand. Even allowing for Maori exaggeration and national or sectarian jealousy, there was some justification for suspecting the French bishop. It is not surprising that the Kororareka chiefs, with Pompallier as their adviser, had demonstrated a more accurate grasp of the nature and effect of the treaty than most" (ORANGE, *The Treaty*, p. 57).

²⁵ MACKEY, *The Making of a State Education System*, p. 42, quoting R. TAYLOR, *The Mother Church*, Pamphlet Collection, Auckland Central Public Library, p. 8.

²⁶ Included in the report was a postscript by Thos. Beckham, police magistrate in the Bay of Islands, who testified, among other things that, "[...] I have always found the bishop and his subordinate clergy anxious to allay irritation, promote a good feeling and afford every information in all matters connected with the natives; [...]." He concludes, "[...] I am happy to state that upon a strict investigation it appeared that there were no grounds whatever for the charge." See WILTGEN, *The Founding of the Roman Catholic Church*, p. 398; KEYS, *Bishop Pompallier*, pp. 243-245.

²⁷ MACKEY, *The Making of a State Education System*, p. 42.

In September 1840, the capital moved from Russell in the Bay of Islands to Auckland.

Mackey explains the transfer:

It [Auckland] grew about the nucleus of the Crown colony officials when Hobson decided to establish this site on the sheltered banks of the Waitemata harbour as the seat of government. About 80 per cent of the Maori population lived in the north and mid sections of North Island.²⁸ Hobson was a conscientious evangelical with a deep sympathy for the missionaries' point of view regarding the welfare of the natives and was fully in accord with the Colonial Office's policy that the Maoris should be protected from exploitation by European colonizers. Since Auckland sat squarely in the midst of this concentration of Maori population it was a natural choice for the seat of government. The choice was deeply resented by southern settlers who considered themselves and their interests slighted by this preference for Maori welfare.²⁹

From being a dependency of New South Wales, the country was constituted as a separate colony on 3 May 1841. That year also, Pompallier founded a mission in the new capital under the patronage of St Patrick and St Joseph. On 29 January 1843, the church, which doubled as a school during the week, was opened. Boys and girls were taught separately by Patrick and Catherine Hennessey. Within a year, Auckland's priest, Jean Baptiste Petit-Jean, and Patrick Hennessey applied to the government for land on which they could build a school since the church was too small. By July 1845 the roll stood at 155 (which doubled within two years), 55 of whom were protestants. The pupils were given religious

²⁸ Estimates of the Maori populace vary. For discussions of the size of the Maori population, see: 1) *Information Relative to New Zealand, Compiled for the Use of Colonists*, by John Ward, Secretary to the New-Zealand Company, 2nd ed., London, John W. Parker, West Strand, 1839, p. 60; 2) D.I. POOL, *The Maori Population of New Zealand 1769-1971*, Auckland, Auckland University Press, 1977, p. 24; 3) OLIVER, *Oxford History*, pp. 49-50, p. 479, footnote 20; 4) MACKEY, *The Making of a State Education System*, p. 8, p. 21; 5) BUTCHERS, *Young New Zealand*, p. 29, comments: "No figures are available prior to 1842 as the conditions under which earlier estimates were made were such as to rob them of even the most superficial statistical value." He quotes census figures for Maori in all New Zealand: 1857-58 – 56,049. According to the census figures the low point was in 1896 – 39,854.

²⁹ MACKEY, *The Making of a State Education System*, p. 20; OLIVER, *The Story of New Zealand*, p. 52.

instruction outside school hours. "The teachers were paid £50 a year each and £10 a year was spent on books. There was an annual grant of £60 from the Government, the rest of the money being found by the bishop and from voluntary contributions from parents."³⁰

To protect Auckland³¹ from Maori incursions, Governor Grey asked for more troops from the British government. Their response was to suggest fencible settlements, and from 1847 the Royal New Zealand Fencibles established barracks at Onehunga, Howick, Panmure, and Otahuhu, forming a defensive chain across the south of the Auckland isthmus. (See Appendix 1, Map 5.) As over half of the garrison were Irish catholics, this also increased the catholic population. Antoine Marie Garin, pastor of Howick from 1847 to 1850, established schools in each of the above settlements.³² In all four villages, the government gave land for the church, presbytery, school, and glebe – about five to six acres in each settlement. Again, the catholic population provided for the shortfall. This cursory history does not allow a detailed analysis of each and every school in the diocese. Suffice to say, that the giving of land by the government for catholic schools in Auckland in the above examples would not become the usual pattern. Instead, catholics would become responsible for the total outlay of the

³⁰ E.R. SIMMONS, *In cruce salus. A History of the Diocese of Auckland 1848-1980*, Auckland, Catholic Publications Centre, 1982, p. 33. A parallel account occurs in SIMMONS. *Pompallier*, pp. 98-99.

³¹ Called by the Maori, *Te Tamaki-makau-rau* (*Tamaki* – a thing which is the object of interminable contest or strife, *makau* – a young person sought after as a spouse, *rau* – a hundred or numerous.) Hence the name of this appropriately-named and much contested tribal area, the scene of centuries of tribal conflict for its possession – hence "The land contested by hundreds." See G. GRAHAM, (D.R. SIMMONS, ed.), *Maori Place Names of Auckland: Their Meaning and History*, Auckland, Auckland Institute and Museum, 1980, p. 5. Hobson named the new centre after the Earl of Auckland, George Eden, former First Lord of the Admiralty under whom Hobson served when he first visited New Zealand in HMS *Rattlesnake* in 1837.

³² Howick parish at this time included the settlements of Panmure and Otahuhu. Roll figures vary for the time. SIMMONS, *In cruce salus*, lists the figures in 1849 as Howick, 137; Panmure, 62; Onehunga, 44; and 22 at Otahuhu, p. 35. Ian and Alan Cumming list the rolls two years later at the end of 1851 as Howick, 104; Panmure, 49; Onehunga 53; and Otahuhu 42, p. 35, – a drop overall. I. and A. CUMMING, *History of State Education in New Zealand, 1840-1975*, Wellington, Pitman Publishing New Zealand Limited, 1978, p. 13.

schools, land, and the buildings.

1.2.4 – Auckland Diocese

In the Marist camp, however, all was not well. Tension increased between Pompallier and the Marists. Servant criticised Pompallier to Colin, listing among his grievances that Pompallier alone would give gifts to the Maori, that Pompallier's preoccupation with New Zealand meant that the rest of the Vicariate Apostolic was neglected, and that Pompallier read the Marists' outgoing mail. Justified complaints of poor financial administration abounded and these would dog Pompallier for his life in New Zealand. There were complaints, too, of poor pastoral practice – of short catechesis followed by baptism. In short, the Marists were caught in the tension between loyalty to their bishop on the one hand and loyalty to their superior, Colin, on the other. Pompallier for his part believed that he was receiving loyalty from neither. From 1842 Colin sent no more Marists. As a consequence, on 8 August 1842, the territory formerly assigned to Pompallier and the Marists became divided yet again by the erection of the Vicariate Apostolic of Central Oceania.³³ On 4 January 1846, Archbishop John Bede Polding, consecrated Philippe Viard, in St Mary's Cathedral, Sydney, as coadjutor to Pompallier. Leaving Viard administrator of the vicariate, Pompallier sailed for Rome on 16 April 1846. He took with him a history of the mission of Western Oceania, an account of the progress and difficulties of the mission, and future plans. Colin meanwhile had tried to get Pompallier to resign. In the end, the Congregation *de Propaganda Fide* resolved the conflict between Pompallier and the Marists to some extent by proposing to Pius IX the division of New Zealand into two dioceses – Auckland and Port Nicholson (later called Wellington). (See Appendix 1, Map 6.) Pius IX approved and confirmed the resolution of the Congregation on 4 June 1848. On 20 June the Diocese of Auckland was erected in the brief *De animarum salute*, and the brief *Ad firmandum magis* appointed Pompallier apostolic

³³ The new Vicariate comprised Wallis, Futuna, Tonga, Samoa, Fiji, New Caledonia, and the New Hebrides. On 12 January 1845, however, Tonga was returned to Pompallier's jurisdiction.

administrator.

While Pompallier was overseas, a Royal Charter in 1846 divided New Zealand into three provinces. While each province was governed by a governor and a Legislative Council, the Colony of New Zealand retained its Governor-in-Chief. During this time, despite the best efforts of the Churches, education remained at best piecemeal. Ian and Alan Cumming sum it up:

In the several settlements a system of *laissez-faire* had left the provision of education to some extent to those few parents who were both interested and financially able to care about the schooling of their young. On the whole the schools were small yet they were as efficient as very limited means allowed. A school room was always difficult to obtain whether in the townships or in the scattered settlements. [...] Books and basic equipment were scarce because of expense; [...].³⁴

To alleviate the situation described above, Governor George Grey on 7 October 1847, enacted *An Ordinance for Promoting the Education of Youth in the Colony of New Zealand*.³⁵ The Ordinance enabled the governor with his Executive Council to spend an amount which, “in any one year shall not exceed one-twentieth part of the estimated annual income of the Colony or Province as the case may be [...] .” Grants were to be made to:

The Bishop of New Zealand. The Bishop or other head of the Roman Catholic Church in the Colony of New Zealand. The Superintendent of the Wesleyan Mission. The Head or Minister of any other Religious Body who shall have engaged in the education of youth in the Colony of New Zealand.

³⁴ CUMMING, *History of State Education*, pp. 15-16.

³⁵ *An Ordinance for Appointing a Board of Trustees for the Management of Property to be set apart for the Education and Advancement of the Native Race, 1844*, was the first educational legislation. *An Ordinance for Promoting the Education of Youth in the Colony of New Zealand*, in *The Ordinances of the Legislative Council of New Zealand and of the Legislative Council of the Province of New Munster, from 4 Victoriae to 16 Victoriae inclusive 1841-1853*, Wellington, by Anthony George Didsbury, Government Printer, 1871, pp. 292-293.

While teachers were to be appointed by the religious superior, each school was subject to a yearly visit by an inspector appointed by the governor. Grey's intention was that the document initially would be directed to Maori and half-caste children. Later it would be extended to European children. It encouraged the belief that the best way to civilise the Maori was by taking the children out of their environment and by placing them in boarding schools away from the influence of the tribe.³⁶

St Mary's on the North Shore was the first catholic school begun with aid under the 1847 Ordinance. It opened in 1849, R.H. Huntley being its master.³⁷ In 1850 Grey endowed it with 376 acres in the hope that it would become self-supporting. A school for Maori girls began when Pompallier temporarily gave his house at Ponsonby to the Sisters of Mercy. It became St Anne's convent and boarding school for girls. The mission of Whangaroa in the north provided teachers and catechists between May 1847 and the end of 1849.

The Ordinance, meanwhile, was not without its critics. While Auckland's *Southern Cross* declared that European parents would not send their children to the same schools as natives, the *Nelson Examiner* saw it as acquiescence to the missionaries: "We have not failed to observe [...] the Governor's promise to the Bishop to be the best friend of the missionaries if they do his bidding."³⁸ Alfred Domett, lawyer, politician, literator, and Colonial Secretary for New Munster (one of the three new provinces), argued that a system of non-denominational schools, as proposed by the Council of New Munster, financed by local education taxes

³⁶ For a more complete discussion of this topic, see E. COXON, et al., *The Politics of Learning and Teaching in Aotearoa-New Zealand*, Palmerston North, The Dunmore Press, 1994, pp. 50-60.

³⁷ "There are few teachers even to-day who could not learn something from a knowledge of the admirable teaching and disciplinary methods of Huntley." Huntley, an English civil engineer, was later in charge of a catholic school in Hill Street, Wellington (1851). In 1864, he was appointed surveyor to the government, and under his direction the grounds of Government House were first laid out. See BUTCHERS, *Young New Zealand*, pp. 134-135.

³⁸ As quoted in CUMMING, *State Education*, p. 17.

and staffed by teachers trained in Britain, should be allowed as an alternative. Following criticism from Aucklanders, Grey extended the Ordinance beyond the original three Churches. He justified the Ordinance on two grounds: first, because of a similar practice in Britain and, second, upon the local situation which was that the denominations were the only ones who demonstrated that they were prepared to support the education of the Maori. Mackey notes that the spirit of animosity towards Catholics was strong at this time in certain sections of the community such that Grey received petitions against Roman Catholics' receiving financial assistance. However, he rejected these on the grounds of non-sectarian discrimination and equal treatment for the Churches concerned.³⁹

Since the Ordinance gave financial assistance to denominational schools, it made the teaching of religious doctrine mandatory in those schools that accepted funding. This provided an opportunity for those who were opposed to the denominational principle to promote viable alternatives. Mackey sums up the influence of the Ordinance thus:

The 1847 Education Ordinance did something to assist Maori education for the next twenty years. The general deterioration, however, of Maori and European relations over land, [...] stultified whatever chances the scheme had of developing and contributing significantly to education generally in New Zealand. The Ordinance was rarely applied to assisting the education of European children, which during the whole of the Crown colony period depended almost solely upon private enterprise. Nevertheless in the history of education in New Zealand, the Ordinance is of importance because it allowed certain attitudes in the community to find expression.⁴⁰

Thus began an enduring debate on the best system of education.⁴¹

³⁹ MACKEY, *The Making of a State Education System*, pp. 38-43.

⁴⁰ *Ibid.*, p. 42.

⁴¹ With few modifications, the Ordinance remained the legislation for Maori education until the passing of the *Native Schools Act, 1867*. Under this Act the government established separate, secular village day schools known as "Native Schools". For a detailed appreciation of this history, see BEAGLEHOLE, *Maori Schools*; J. SIMON, "European-Style Schooling for Maori: the First Century",

1.3 – THE COLONIAL PERIOD 1850-1870

While in Europe, Pompallier visited St Leo's Convent of the Sisters of Mercy in Carlow, Ireland, seeking sisters for the New Zealand mission. When he arrived in Auckland on 9 April 1850 (having been away from New Zealand for four years), Pompallier, along with clergy and seminarians, brought eight Sisters of Mercy with him. The sisters wasted little time establishing themselves as teachers.

Two weeks later on 21 April, Viard left for Wellington taking with him a party of twenty-four: the Marist priests and brothers, the newly formed Marist sisters, and lay helpers. Auckland diocese retained three priests along with four Marists to help Pompallier for a year – it would be seventy years before the Marists would set foot in Auckland again.⁴² Earlier, Viard and Pompallier agreed that the 39th parallel of latitude would be the boundary between the dioceses of Auckland and Port Nicholson.⁴³

In education, meanwhile, under the Ordinance, the government was careful to select inspectors who would not only see that the government's money was not squandered but who had some connection with the religious life of the community. When Colonel Andrew Hamilton Russell submitted his report that same year, he criticised the allocation of funds

in University of Auckland course notes, 14.100, 1995, *Schooling, Education and Society*, Auckland, Research Unit for Maori Education, Education Department, University of Auckland, 1991.

⁴² “An event of notable historical interest in the Church in New Zealand is the return of the Marist Fathers to the Diocese of Auckland, the scene of their first missionary labours in the Dominion [...]” (April 1924, ACDA, “Mt Albert”).

⁴³ The brief *De animarum salute* says Auckland diocese would comprise “ [...] all that part of the North Island or Teihanamawi from the islands called the Three Kings, which are near the 34th degree of latitude, in the north, to the bay of Terenake in the south, through the 41st degree of latitude exclusively, bounded in the east and west by the sea, the Kermadec islands situated to the northward being included” (ACDA, POM 1-1/5). Translation in SIMMONS, *In cruce salus*, p. 7. Simmons then notes: “Since the 41st degree of latitude is around the location of Paekakariki and Carterton, it is an obvious mistake for the 39th, which was in fact agreed upon by Pompallier and Bishop Viard [...] .”

under Grey's scheme. For example, twenty-seven pupils at St Anne's and St Mary's absorbed £1,167, amounting to £43 per head, compared with the Anglican school of St Stephen where the average per head was £6 2s. He wrote:

[...] whilst those schools which together muster but 27 pupils, pay £415 for teaching them [...] and as the same disparity exists as regards food, clothing, buildings, medical attention etc., it follows that a strong inducement is held out by the present mode of distributing the funds appropriated to Native education to diminish the number of pupils, and so limit the usefulness of the institutions which it is intended to increase.⁴⁴

In 1852, representative government was achieved by legislation enacted by the British Parliament. Thus the *Constitution Act* of 30 June 1852, promulgated as law in New Zealand on 17 January 1853 by Sir George Grey, provided for a general legislature. The Act divided the country into six provinces: Auckland, New Plymouth, Wellington, Nelson, Canterbury, and Otago. (See Appendix 1, Map 7.) Each province was administered by its own Superintendent and Provincial Council, education being one of its responsibilities. Eve Coxon and associates, referring to Colin McGeorge and Ivan Snook,⁴⁵ observe that since the Churches did not have sufficient resources to continue running the schools, these provincial councils gradually assumed responsibility for education within their own area.⁴⁶

In Auckland, the Provincial Council opted to further education by giving aid to voluntary efforts. The Province's *Education Act* of 1857⁴⁷ enabled the Superintendent to establish a Board of Education, which Board reported to the Superintendent those schools

⁴⁴ See BARRINGTON, *Maori Schools*, p. 72; AJHR, 1858, E-1, p. 61.

⁴⁵ C. MCGEORGE and I. SNOOK, *Church, State, and New Zealand Education*, Wellington, Price Milburn, 1981, p. 7.

⁴⁶ COXON, *The Politics of Learning*, p. 40.

⁴⁷ *Education Act, 1857*, "A Bill to Promote Education in the Province of Auckland", *Acts and Proceedings of the Auckland Provincial Council. Session 4-6*, Auckland, Williamson & Wilson for the Provincial Government, 1855, Auckland Public Library Collection.

that qualified for assistance under the Act. Financial assistance came in the form of half the teachers' salaries. School managers became responsible for the other half of the teachers' salaries, along with land, buildings, and equipment. The Act was hotly debated before and after its enactment by the Provincial Council. The main contentions concerned the use of public monies for denominational schools, the relationship of the state to formal religions, and the manner of raising finance. While Clause 6 of the Act required the inspection of schools at least once a year, Roman Catholics objected to anyone of another religion having access to their schools. In the end, a shortfall in the allocated sum led to a repeal of the Act and the formulation of new legislation, the *Common Schools Act, 1869*.⁴⁸

In May 1862, under the *Native Schools Act* of 1858, Henry Taylor was appointed first full-time inspector of schools. Prior to Taylor's appointment, Henry Carleton in April that same year, severely criticised St Mary's on the North Shore. He reported that the master did not know how many pupils he had since the roll was "locked up in the priest's box", nor was there any attempt to keep any record. Pompallier responded by replacing the teacher. When Carleton subsequently inspected the school there were some improvements; these, however, were short-lived: "the whole a 'perfect farce', and the sooner it is put a stop to the better." He was also highly critical of other Catholic schools which he considered "did their best to turn aside his strictures." Pompallier believed that the misunderstandings could be resolved if a Catholic inspector was appointed, and he, moreover, could suggest the right man.⁴⁹ Barrington writes:

After some correspondence, Grey, [...] wrote to Pompallier that the explanations given "exonerate the superiors of the schools from any charge

⁴⁸ *Common Schools Act, 1869, Province of Auckland New Zealand, Journals of the Auckland Provincial Council, Session 22-26, 1867-1870, Auckland, W.C. Wilson, Printer to the Provincial Government, 1867. Auckland Public Library Collection.*

⁴⁹ See BARRINGTON, *Maori Schools*, p. 79; AJHR, 1862, E-4, pp. 14-15, 23; AJHR 1863, E-9, p. 9; E-9A, pp. 1-9; AJHR, 1868, A-6, p. 6.

of misleading the Inspector of Schools"; to which the bishop replied with what looks like wilful misinterpretation, thanking Grey for "declaring the justification of my Native Colleges in the neighbourhood of Auckland about objections made to their efficacy."⁵⁰

In light of the above, it comes as no surprise that when a select Committee heard submissions prior to passing the *Common Schools Act, 1869*, the Rev. James McDonald, vicar-general of the diocese of Auckland, "stated that the only conditions acceptable to the Catholics were 'to have the appointment of teachers, the selection of books, the inspection of the schools and their entire management.'"⁵¹ Mackey comments that "This sweeping assertion appears now uncompromising and undiplomatic, but the attitude of the Committee was decidedly hostile, and, on the evidence, completely immune to the possibility of any conciliatory compromise."⁵² Mackey's analysis is worth quoting since his observations of the committee would also mark the attitude of the catholic authorities in the years to come and in the debates leading to the *Education Act of 1877*: the intransigence of their own spokesmen would, to a large extent, determine the future direction of catholic and state education.

The *Common Schools Act, 1869* established a board which in turn administered education in the province by setting up districts under the authority of a committee. This committee had the power to control expenditure and to set a school rate to meet the running costs of the province's public schools. Significantly, the Act installed secular instruction in the schools, prohibiting Bible-reading and religious instruction inside or outside school hours. This Act was replaced by another in 1872 which gave the board authority to levy an annual rate abrogating the need for fees. The Act also contained a clause that made education compulsory for half of the school year at the request of the majority of resident householders in any school district:

⁵⁰ BARRINGTON, *Maori Schools*, p. 79; AJHR, 1863, E-9A, pp. 8-9.

⁵¹ MACKEY, *The Making of a State Education System*, p. 103.

⁵² Ibid.

[...] the parent or guardian of every child of the age of not less than seven or more than twelve years shall in case such child resides within a distance of two miles to be measured by the nearest public road from a public school established under the provisions of this Act send such a child to school for at least one-half period in each year during which the School is usually open.⁵³

An amendment in 1874 (*Education Act, 1872 Amendment Act, 1874*) empowered the board to raise the per capita rate from five shillings on children between seven and twelve years under the 1872 legislation to ten shillings on children between six and fourteen years of age. Further, a levy “not exceeding ten shillings in any one year” was placed on every male person over twenty-one “who shall not be liable to pay the household rate”. It quickly became known as the bachelor’s tax. The above is noteworthy since it contains the essence of what public education would become in New Zealand: it would be free, it would be secular, it would be compulsory, it would be under the control of central government with district administration. That education would be compulsory and secular was startling in its novelty.

For all that, the systems of schooling were not uniform among the provinces. A comparison of educational policies and their implementation among the six provinces showed considerable inequalities. Coxon cites Auckland province where there was little funding from provincial taxes since most of the money had been used in the Land Wars against the Maori:

The schools were run almost entirely by the churches until 1869, when an Act was passed to provide secular schooling for all children. (It was unable to take immediate effect however, because of financial difficulties.) There was general agreement during this period until 1872 that education in Auckland was in a lamentable state.⁵⁴

⁵³ Province of Auckland, *Education Act, 1872, Session XXVII, No. 1*, Auckland Public Library Collection.

⁵⁴ COXON, *The Politics of Learning*, pp. 42-43. See also MACKEY, *The Making of A State Education System*, p. 105. From 1860 to 1870 Maori wars were fought intermittently through the province (with incursions into the suburbs of Auckland itself) and land sales were in a state of stagnation. Hence the Province was nearly bankrupt.

Further, a survey taken in 1869 showed that significant numbers of children, even in well-off areas, were still not receiving any schooling.⁵⁵ Since attendance at school was not compulsory, no more than half of those aged between five and fifteen went to school. Mackey notes that during the provincial period opinions on educational matters became more widespread and more diverse. After twenty-four years, the provincial period came to an end with the *Abolition of Provinces Act* of October 1875, taking effect from 1 November 1876.⁵⁶ Since the legal provisions for maintaining education fell into desuetude and to tide the country over, Parliament passed the *Education Boards Act, 1876*. Education now becomes a national responsibility.

Meanwhile, Pompallier had been to Rome again. Leaving on 17 June 1859, he returned on 30 December 1860 having secured for himself and Viard the office of diocesan bishop. In the following years, the financial situation in Auckland diocese worsened, much of it due to decreased government funding and the building up of the catholic school system. Meanwhile, Maori wars raged from Taranaki up to the Waikato and across to the East Coast. (See Appendix 1, Map 8.) On 23 March 1869, Pompallier offered his resignation which Rome accepted.⁵⁷

Just before the close of the decade, the united provinces of Otago, Southland, Stewart Island, and adjacent islands, became separated from the Diocese of Wellington in a brief of 26 November 1869. A brief of 3 December the same year translated an Irishman, Patrick

⁵⁵ See J.D.S. MCKENZIE, "The First Legislation on National Education", in *New Zealand Journal of Educational Studies*, 4 (1969), pp. 24-40.

⁵⁶ "The main causes of the abolition of the provinces were said at the time to be financial. 'Their doom', said Vogel, 'was only a question of time when it became obvious that they could not raise their own revenues: that they had to look to the General Government to supply deficiencies: and that they could not borrow without the colony being liable' " (W.P. MARSHALL, *The Provincial System in New Zealand 1852-1876*, Christchurch, Whitcombe and Tombs, 1964, pp. 271-272).

⁵⁷ Pompallier returned to France, becoming a canon of the Cathedral of St Denis in Paris. He died on 21 December 1871.

Moran, from vicar apostolic of the Eastern Province of the Cape of Good Hope to the new Bishopric of Dunedin. One year and two weeks later, the second bishop of Auckland, Thomas William Croke, also an Irishman, arrived in Auckland on 17 December 1870. After three years Croke resigned and was translated to the Archdiocese of Cashel.

1.4 – THE PERIOD OF DEVELOPMENT 1870-1900

Without a shadow of a doubt, the single most absorbing issue for the catholic Church in New Zealand in the late sixties, seventies, and beyond was catholic education. For decades, the issues surrounding national education were debated. Now they came to a head in the final years of the seventies, leading to a bill to provide national education – which culminated in the *Education Act, 1877*. Whereas the inequalities that arose during the provincial period were all too apparent, some argued that a national system would prevent such unequal treatment in the future since access to education would be the same for those from both poor and rich backgrounds. One of the principal reasons, then, for supporting universal education was the provision for equal opportunity in education for all children. Coxon outlines the progression from equal access leading to the notion of compulsory education:

These ideas about “equality” in 1877 had been shaped by perceptions of what had been promoting inequalities beforehand. Some children, for a number of reasons, had been given the opportunity to go to school while others had not. Hence access to schooling was seen as the solution. To facilitate this, the 1877 Act contained a clause to make schooling *compulsory*. This idea had not been supported by all communities. Nevertheless, as McKenzie [...] observes, the claim that “in the interest of equality of enjoyment of individual right, parental discretion should be foregone and attendance at school be enforced upon all children of legislatively defined school age” became one of the moral imperatives underpinning the Act.⁵⁸

⁵⁸ COXON, *The Politics of Learning*, pp. 43-44. See also D. MCKENZIE, “The Changing Concept of Equality in New Zealand”, in *New Zealand Journal of Educational Studies*, 10 (1975), pp. 93-94.

Under the new Act, the Department of Education would control schooling, while regional interests would be served by the establishment of education boards. At the local level, school concerns were addressed by the school committees. While the balance of administrative power among the three tiers was not ideal (school committees, for example, were many and scattered, and communications left much to be desired; hence they were unable to develop a unified approach to education policy) the new Act was, nevertheless, a vast improvement over the provincial education legislation. The average attendance in school determined government funding which came by way of grants from the consolidated fund through the Department of Education to the education boards and the school committees. Consequently, the scheme did away with school fees: no child, therefore, would be denied an education because he or she was unable to pay the fees.

When Moran arrived in New Zealand, fresh from the First Vatican Council, he immediately became embroiled in the debates leading to the *Education Act, 1877*. His campaign was, in a sense, fought single handedly, not only on behalf of the Church authorities, but on behalf of the whole catholic Church in the country. With the death of Viard on 2 June 1872, Wellington remained without a bishop for nineteen months until 10 February 1874, when Francis Redwood was appointed. The Auckland See, following Pompallier's resignation, was vacant for two years from 1868 until Croke's arrival in December 1870. The diocese was again vacant from 1874 until 1879 after Croke returned to Europe. As bishop of Auckland, Croke was far less interested in actively campaigning the schools issues than his Dunedin confrère, appearing quite content to leave the debate to Moran.⁵⁹ Croke, on his departure, left the diocese in the competent care of his vicar-general, Henry Fynes, making him administrator from January 1874. He held the position until the arrival of Archbishop Walter Bisscop Steins, in December 1879. Moran, however, was apostolic administrator of

⁵⁹ Simmons bluntly says of Croke that, "His main disadvantage was that he was not really interested in Auckland or New Zealand and quite clearly regarded this diocese as a stepping stone to an Irish diocese" (SIMMONS, *In cruce salus*, p. 106).

Auckland. During a meeting in Panmure on 18 November 1872, Fynes remarked that he opposed any form of schooling that did not allow of religious instruction being given. He noted that his own school at Howick had been conducted by a protestant teacher and that they got on very well.⁶⁰ Such a position would scarcely have endeared him to Moran whose opinions were far less temperate and ecumenical.

As for Moran, there was no doubt where he stood on the issue of catholic education and his expectation that the government would support independent catholic schools. An entry in his diary sums up his attitude to the issue: "I am an advocate for religious education. I am opposed to the mixed or secular system, and I am opposed to the system that exists in this province [Dunedin]. I demand for the Catholic body help from the State to educate children in their own way."⁶¹

On 3 May 1873, Moran founded a catholic weekly, the *New Zealand Tablet*. Later, a leader stated that the paper:

was launched for the express purpose, first and before all things else, to fight the battle of Catholic education, and to agitate for justice on this question at the hands of the Legislature. From this object it has never swerved, and to its attainment it has devoted much labour and undying loyalty.⁶²

1.4.1 – The *Education Act, 1877*

The minister of justice, Charles Christopher Bowen, Member for Kaiapoi, introduced

⁶⁰ *New Zealand Herald*, 23 November 1872, p. 2, col. 6-7, as quoted by SIMMONS, *In cruce salus*, pp. 118-119.

⁶¹ 24 March 1871, SIMMONS, *A Brief History*, p. 64.

⁶² *New Zealand Tablet*. 31 November 1891, p. 17. The paper remains a primary source of material relating to the education issue. The publication ceased at Easter, 1996.

the Education Bill on 24 July 1877.⁶³ After its second and third readings, amendments, and debates, the Governor gave his assent and “An Act to make provision for the further education of the people of New Zealand” came into effect on 1 January 1878. That education in New Zealand from now on would be free, secular, and compulsory, became a catch cry.

One of the bulwarks of the *Education Act, 1877* was that education was “free”: “No fees shall be payable at any public school [...] .” However, this was an illusion. As Cumming observes, “It was free only in so far as weekly fees were abolished; the Act made all taxpayers responsible for all children. Instead of being free, education became costlier than ever.”⁶⁴ The second bulwark of the Act provided for compulsory education.⁶⁵ Exemptions could be granted for sickness or the state of the roads. Children attending “some private school [...] not supported by grants from the Board” were also exempt.⁶⁶ Into this category fell catholic

⁶³ Introducing the Bill, Bowen said: “It has been found that, whenever an attempt has been made to divide among the different religious bodies the money raised for educational purposes, the funds have been frittered away; [...] . For my part, I am at a loss to understand how any person, who has a strong feeling as to the necessity for doctrinal teaching, can desire that the greater proportion of State funds devoted to education should be handed over to denominations which he thinks are disseminating damnable errors, – how he can desire that such an expenditure of public money shall be made to secure for his own Church a small percentage of the public grant. [...] I repeat that the only way to be absolutely fair is to forbid the teachers to give their pupils any instruction whatsoever. But, while we exclude religious teaching from our schools, I do not think there is any necessity for excluding any allusion to a Higher Power” (NZPD, 1877, vol. 24, p. 36).

⁶⁴ CUMMING, *State Education*, p. 103; MACKEY, *The Making of a State Education System*. pp. 180-181.

⁶⁵ “89. [...] , the parent or guardian of every child not less than seven or more than thirteen years of age shall, in case such child lives within the distance of two miles measured according to the nearest road from a public school within a school district, send such child to school for at least one half of the period in each year during which the school is usually open” (*Education Act, 1877*, p. 127).

⁶⁶ The compulsory clause was not without its critics. Arthur Gordon Butchers, citing correspondence ten years later and following, shows the difficulty of enforcing the compulsory attendance clauses: *New Zealand Schoolmaster*, June 1886: “The system is said to be compulsory. Herein our Education Act falls short of the English Act. We have what are called compulsory clauses, but they are practically unworkable. The mode of enforcing attendance is so clumsy, that contumacious parents need only employ a fourth rate solicitor, and the Act can be driven through with a coach

pupils; they attended "Registered Private Schools."

But the most debated issue and the cause of heated argument was the so-called "secular clause": "The school shall be kept open five days in each week for at least four hours in each day, two of which shall be consecutive and the teaching shall be entirely of a secular character." It seemed a long way from Grey's dream twenty years earlier of a national education system in which all schools would be conducted on "the principle of a religious education." The Churches were involved in education since the arrival of the missionaries. Now, sixty years later, debate revolved around the role of the Churches in education, whether or not there should be any religious instruction in schools and which Churches should be supported.⁶⁷ In the end parliament eschewed any form of sectarianism opting instead for secular education.

Mackey writes, "The majority of members probably thought that in the impasse, where neither Protestant nor Catholic could be persuaded to unite in a uniform school system, it was more equitable to accept a system which satisfied neither."⁶⁸ In this he echoes the conscientious secularist, Robert Stout, who in the Parliamentary debate of August 1877 said that Bowen "must see there can be no such thing as a compromise between those who ask

and four" (A.G. BUTCHERS, *An Historical Survey of Educational Progress Amongst the Europeans and the Maoris since 1878*, Dunedin, Coulls Somerville Wilkie Ltd., 1930, pp. 46-48).

⁶⁷ An analysis of the debates and divisions leading to the passing of the Act discerns three separate groups. These groups almost certainly represent the opinions of the country at large: 1) secularists opposed to both religious instruction in state schools and aid to denominational schools; 2) those who supported the catholic case for state aid but were opposed to religious instruction in schools; 3) those who wanted religious instruction in state schools but were opposed to aid for catholic schools. See R. SHUKER, *The One Best System. A Revisionist History of State Schooling in New Zealand*, Palmerston North, The Dunmore Press, 1987, pp. 243-244. See also R.P. DAVIS, *Irish Issues in New Zealand Politics 1868-1922*, Dunedin, University of Otago Press, 1974; MCGEORGE, *Church, State, and New Zealand Education*, p. 8; COXON, *The Politics of Learning*, pp. 44-45.

⁶⁸ MACKEY, *The Making of a State Education System*, p. 278.

for secular instruction and those who ask for what are called denominational schools.”⁶⁹

More recently, Mary Petersen, writing on the secular clause, observes that in 1877 there was no definition provided and so it came to be variously interpreted: for some, secular teaching meant there could be no bible readings or religious observances in school. Others thought the Act clearly provided for voluntary religious teaching in the school outside the prescribed teaching hours. Others again considered that the Act was simply the logical conclusion to settling New Zealand “by a people who determined to create a new society based on anti-establishment secularism.” She cites Colin McGeorge and Ivan Snook, saying that the first edition of the Bill makes it clear “that the secular clause in the Act merely meant the deletion of opening (religious) exercises; it did not mean the replacement of one general form of education by another.” She concludes that the efforts to change the law were aimed at making Bible readings and school worship possible during school hours.⁷⁰

Without underplaying the sectarian forces involved in the debates leading to the Act and the lack of compromise in the catholic position, other factors were at play. In summary:

The reasons why the choice of the secular principle was an acceptable compromise were rooted in the social conditions of the community and in the nascent state of educational theory. The community was essentially a frontier one with a deeply felt need for promoting its sense of communal and national unity. In this phase of its development, the community was more akin to the new societies then taking shape in other colonies and looked, as they did, to

⁶⁹ NZPD, vol. 25, 1877, p. 229.

⁷⁰ M. PETERSEN, “Responsibility for State School Religious Education: The Churches Education Commission 1973-1992”, in *Godly Schools? Some Approaches to Christian Education in New Zealand*, (ed. B. GILLING), Hamilton, University of Waikato and Colcom Press, 1993, pp. 82-83. See also I. BREWARD, *Godless Schools*, Christchurch, Presbyterian Bookroom, 1967, p. 9; E.O. BLAMIRE, *A Christian Core for New Zealand Education*, Auckland, Whitcombe and Tombs Ltd., 1960, p. 16; R. ARNOLD, “A ‘New’ Educational History for NZ?”, Address given to Wellington Institute for Educational Research, 5 September 1973, NZCER, p. 11; MCGEORGE, *Church, State, and New Zealand Education*, p. 9.

the United States of America rather than to England for indications towards the solutions of the problems that faced frontier societies. Educational theory conceived of the function of the common school as an instrument for imparting merely the elements of literacy. Lower middle class usefulness was the purpose of the common school and so restricted an activity seemed to offer no offence to the religious conscience of anyone.⁷¹

Such a reductionist or minimalist view of education would never be acceptable to Catholics, and in the years ahead it would provide the principal argument for sustaining an independent schooling system. Catholics would argue first that the choice of a Catholic school was a matter of conscience and that education concerns the whole person. Secondly, they were entitled in justice to financial assistance from the state.

Following the Act came the elections of school committees in 1878. The *New Zealand Tablet's* position was clear:

Catholics knowing this Act has been passed in direct hostility to them – that its chief object is to destroy if possible, all Catholic schools and Catholic education, and that the responsibility of administering it should be allowed to rest with its advocates, have determined to abstain from taking any part whatever in the election of School Committees.⁷²

The way of the future was clear for Catholics:

From the holding of public meetings, the Catholics will now proceed to systematic and minute organisation of wide-spread and unceasing agitation. This agitation will be carried on in every way consistent with law; by petitions to both Houses of Parliament, by the press, by public meetings, by registration, and by undying opposition at elections to every candidate who has refused justice to Catholic schools. The Catholic body will never rest content under the injustice that excludes their schools from participation in the taxes which they pay for education, and under the tyranny that compels them to pay for free education for the children of other people, to their own great injury

⁷¹ MACKEY, *The Making of a State Education System*, pp. 283-284.

⁷² *New Zealand Tablet*, 16 November 1877, p. 11.

and degradation.⁷³

To continue as religious schools, catholic schools became “Registered Private Schools” under the Act. Thus any hope of financial assistance for catholic schools disappeared with the passing of the Act. The government remained unmoved “Notwithstanding the presentation of several private members’ bills in the House and nearly 300 petitions seeking state aid for private schooling endeavours in the period 1878-1891, [...]”⁷⁴ Catholics had little choice but to strengthen what they had begun over the preceding decades and establish a parallel system of their own, parallel in that while “Catholic education was conducted in a religious atmosphere [...] most of its content was governed by the requirements of the state syllabus.”⁷⁵ Hence the catholic system, not having the wherewithal to be totally independent, recognised state exams for which catholic pupils sat, while catholic schools were subject to inspection in all subjects except religious instruction.⁷⁶ Bishop William Henry Cleary of Auckland would say of the catholic system in 1921 that catholic schools were

⁷³ *New Zealand Tablet*. 21 September 1877, p. 11.

⁷⁴ G. LEE, “The 1975 Private Schools Conditional Integration Act: Issues and Controversies”, in *Godly Schools. Some Approaches to Christian Education in New Zealand*, Hamilton, University of Waikato and Colcom Press, 1993, p. 40, quoting I.A. McLAREN, ‘Education’, in *Thirteen Facets: Essays to Celebrate the Silver Jubilee of Queen Elizabeth the Second 1952-1977*, (I. WARDS, ed.), Wellington, Government Printer, 1978, p. 218. In 1887, a Bill intituled “An Act to provide for Roman Catholic Schools” was introduced into Parliament. It asked that catholic schools be deemed public schools under the Act and that each school “ [...] receive a capitation allowance equal to two-thirds of the allowance granted to public schools [...] .” The Bill was not passed. ACDA, POM/Luck era.

⁷⁵ C. VAN DER KROGT, “ Good Catholics and Good Citizens”, in *Godly Schools? Some Approaches to Christian Education in New Zealand*, (ed. B. GILLING), Hamilton, University of Waikato and Colcom Press, 1993, p. 17.

⁷⁶ In the years following the passing of the 1877 Act (see Minutes of Conference of the Archbishop and Bishops of New Zealand held in Auckland, August 1894 [ACDA, LUC 1-4/2]; Circular to Clergy 1895, [ACDA, LUC 1-4/3]), the bishops petitioned the Minister of Education and the House of Representatives to have catholic schools inspected and examined by state inspectors. Eventually, on 22 February 1900, the Education Board authorised inspection. The decision did not go unnoticed, and for a time the local press carried letters both in favour of, and against, the concession. ACDA, LUC 27-2, pp. 57-59.

not really “private” since “in them the State curriculum of secular instruction is fully taught, under State inspection, by teachers holding State certificates. They are thus doing State work under State conditions. As such they are, in a very real sense, State schools.”⁷⁷

Moran’s platform on the education issue, the *New Zealand Tablet*, in the years following the passing of the *Education Act, 1877*, gave the government little respite. From 31 August 1883 to 25 June 1897, the following appeared at the beginning of each leader:

PROGRESS AND JUSTICE IN THE NINETEENTH CENTURY.

The Catholics of New Zealand provide, at their sole expense, an excellent education for their own children. Yet such is the sense of justice and policy in the New Zealand Legislature that it compels these Catholics, after having manfully provided for their own children, to contribute largely towards the free and godless education of other people’s children!!! This is tyranny, oppression, and plunder.⁷⁸

What of Moran’s influence? Mackey writes, “This appointment of the first Irish bishop to a large Irish catholic community is of some importance to the education question.” He

⁷⁷ *Month*, 15 July 1921, p. 15. If pupils from catholic schools were to seek employment in the State Services, State School Inspectors needed to inspect applicants for the Proficiency Certificate. Later, the catholic schools themselves were inspected. Cleary’s argument that private schools were really state schools would be repeated two decades later: “I thereupon pointed out that without any State Aid whatsoever, the private school system, let it not be forgotten, was subject to a very real degree of State control and interference. For example, State inspection of the private schools, State set standards of efficiency, State set syllabuses sometimes containing features with which we could not agree, State set examinations which tend unconsciously to determine school outlook and procedure, State set requirements for registration, State set demands re standards of laboratory and gymnasium equipment” (Rev. N.H. GASCOIGNE, Report on Meeting of Heads of Registered Private Schools, St Margaret’s College, Wellington, 24 August, 1948. ACDA, LIS 2-10/6).

⁷⁸ *New Zealand Tablet*, 31 August 1883, p. 15: “[...] internal evidence only seems to suggest that he [Moran] may have written the ‘Leaders’ on educational matters during the period he was Bishop of Dunedin. This is suggested by the tone of the ‘leaders’, the large number dealing with the education question, [...] Bishop Moran died on May 22, 1895, and it is noticeable that the tone and style of the ‘Leaders’ on education were modified, the number of ‘leaders’ on the question dropped considerably and on June 25, 1897 the above quoted standing leader was published for the last time” (A. GREY, *The State Aid to Private Schools Issue in New Zealand – A History from 1877-1956*, MA thesis, Wellington, Victoria University College, 1958, pp. 48-49).

but it changed the temper in which that decision was made.”⁷⁹ Simmons concurs:

Although Moran had led the fight against secular education and in favour of a denominational school system, it can be fairly said that his campaign and bitterness that arose between his opponents and himself was one of the factors which brought about a secular education system. There were many supporters of a national system who favoured the restoration of aid to denominational schools including the Catholic schools, but despaired of achieving agreement between the different denominations on the matter. So they cut the Gordian knot by embracing the secularist cause.⁸⁰

To many non-catholics the stand taken by Moran, with which many catholics agreed, was at best contradictory, and at worst, prejudiced, plainly and simply. For Moran, secular schools without any religious teaching were bad enough, but schools with protestant teachings were intolerable. The paradox was that on the one hand catholics wanted state schools to be devoid of any religious teaching but on the other wanted catholic schools supported by the state in which the catholic faith was taught.

1.4.2 – The First Plenary Council of Australasia, 1885

On 24 May 1884, the prefect of the Congregation *de Propaganda Fide*, Giovanni Cardinal Simeoni, informed the bishops of Australia and New Zealand that Pope Leo XIII wished them to meet in a plenary council within two years. Accordingly, the First Plenary Council of Australasia was convoked by the archbishop of Sydney, Patrick Francis Moran, in Sydney, on 14 November 1885. From New Zealand, Auckland diocese was represented by

⁷⁹ MACKEY, *The Making of a State Education System*, p. 123.

⁸⁰ SIMMONS, *A Brief History*, p. 66. BEAGLEHOLE, *New Zealand's Heritage*, (p. 1288): “Bishop Patrick Moran” – “As a final judgment it must be admitted that Moran caused much needless unpleasantness and did little to integrate Catholicism into New Zealand society, possibly to the disadvantage of both Catholics and the wider community. Yet, through his material achievements and the cohesive sense of purpose with which he imbued them, he had at least helped ensure that Catholics could adapt to New Zealand from a position of strength.”

in Sydney, on 14 November 1885. From New Zealand, Auckland diocese was represented by Bishop John Edmund Luck,⁸¹ and Rev. John Adalbert Sullivan; Wellington by Bishop Francis Redwood, and Dunedin by Bishop Patrick Moran. Since the Council comprised the two provinces of Sydney and Melbourne, along with the bishops of New Zealand, it was called Australasian rather than Australian.

Of the legislation sent to Rome for approval, the chapter on primary education comprised fifteen decrees while the chapter on intermediate education comprised three decrees.⁸² The 1885 *schema* on education was drafted by Bishop Moran at the request of Cardinal Moran.⁸³ There had already been two provincial councils in Australia, one in Sydney in October 1844 and the other in Melbourne in April 1869.⁸⁴ In 1844 the First Provincial Council of Australia contained a single paragraph on catholic education, exhorting “every missionary to set up schools in his district”. Among other things he was to visit these schools often, giving “counsel to the teachers and advice to the pupils by instructing them seriously.” He was reminded that the duty of watching over the character of those who govern the

⁸¹ Steins died in Sydney en route to Europe on 7 September 1881. Luck arrived in Auckland 15 November 1882 and was bishop for fifteen years until his death.

⁸² *Acta et decreta, concilii plenarii Australasiae, habiti apud Sydney, AD 1885* (= AUSTRALASIA I), Sydney, F. Cunninghame & Co., Steam Machine Printers, 1887. All subsequent translations of the Australasian decrees from the plenary, provincial, or diocesan synods unless otherwise noted, are mine.

⁸³ I.B. WATERS, *Australian Conciliar Legislation Prior to the 1917 Code of Canon Law and a Comparative Study with Similar Legislation in Great Britain, Ireland, and North America*, JCD diss., Ottawa, Saint Paul University, 1990, p. 141. Sydney Archdiocesan Archives, Moran Papers, vol. 197. Moran drew on the education decrees of the Plenary Synod of the Bishops of Ireland held in Maynooth in 1875. The First Plenary Council of Australasia decrees 231-233 are identical to Maynooth 1875 decrees 278-281, while the Australasian decrees 246-247 on intermediate schools are similar to the Maynooth 1875 decrees 317 and 319. See *Acta et decreta synodi plenariae episcoporum Hiberniae habitae apud Maynutiam, an. 1875*, Dublini, Typis Browne et Nolan, 1877.

⁸⁴ See *Acta et decreta conciliorum primi et secundi provincialium Australiensium, et synodorum primae, secundae, tertiae, quartae, quintae, et sextae, diocesanarum Melbournensium*, Melbourne, Printed at the “Advocate” Office, 1891.

schools falls chiefly on the priest. By the time of the Second Provincial Council of Australia in 1869, however, the debates on education that were occurring in Australia were also taking place simultaneously in New Zealand. In the council, the bishops responded by placing:

the clergy under a strict obligation to provide a truly Catholic and Christian education for all Catholic youth, in view of the system of public education being promoted by many, which would only encourage heresy and breed indifferentism. The motivating principles were enunciated in the pastoral letter to the laity issued at the same time, as the bishops spoke of their own role as they perceived it: "No system of education can be accepted, which does not recognise the guardianship of the bishops over the education of Catholic children; and to the security of such guardianship are essential the ownership of their schools, and control over teaching, by the power of appointing and dismissing teachers."⁸⁵

With this position the New Zealand bishops concurred. Included in the seven decrees *De educatione* was a statement of disapproval of any educational system that impeded the Church's duty to teach on faith and morals (decree 1); the requirement that catholic children be taken out of mixed schools – these were schools over which the Church had no authority, (decree 2); and an admonition to erect catholic schools (decree 3) along with the right to expect "a just proportion of the public revenues" to sustain them (decree 6). The section on education concluded with propositions 45, 47, and 48 of the *Syllabus errorum* of Pius IX in 1864.⁸⁶ The practical conclusion of the education decrees was that catholic children would

⁸⁵ WATERS, *Australian Conciliar Legislation*, p. 139. See also J.B. POLDING, *The Eye of Faith: The Pastoral Letters of John Bede Polding* (G. HAINES, M.G. FORSTER and F. BROPHY [eds]), Kilmore, Vic., Lowden, 1981, p. 385.

⁸⁶ The "Syllabus of Errors" comprised eighty condemned propositions which were attached to the encyclical, *Quanta cura*, of Pius IX, 8 December 1864. The propositions were a précis of earlier papal letters or allocutions.

45. The entire government of public schools in which the youth of a Christian state is educated [...] may and ought to appertain to the civil power, and belong to it insofar that no other authority whatsoever shall be recognised as having any right to interfere in the discipline of the schools, the arrangement of the studies, the conferring of degrees, in the approval of the teachers. (*In Consistoriali*, 1 November 1850. *Quibus luctuosissimus*, 5 September 1851.)

47. The best theory of civil society requires that popular schools open to children of every class

be removed from government schools which in conscience were unacceptable.

Two factors had a bearing on the education decrees. First, one must acknowledge the influence of the Irish bishops who comprised a significant proportion of the council. In 1863 the Irish Episcopal Meeting in Dublin condemned the Irish Education System in which religion was tacked on to secular education. Second, fully state-controlled and purely secular schools usurped the authority of the Church. Pius IX formally condemned this position in the *Syllabus*.⁸⁷ Patrick O'Farrell sums it up:

of people, and, generally all public institutes intended for instruction in letters and philosophical sciences and for carrying on the education of youth, should be freed from all ecclesiastical authority, control and interference, and should be fully subjected to the civil and political power at the pleasure of the rulers, and according to the standard of the prevalent opinions of the age. (Letter to the Archbishop of Freiburg, *Quum non sine*, 14 July 1864.)

48. Catholics may approve of the system of educating youth unconnected with the Catholic faith and the power of the Church, and which regards the knowledge of merely natural things, and only, or at least primarily, the ends of earthly social life. (Letter to the Archbishop of Freiburg, *Quum non sine*, 14 July 1864.) See PIUS IX, *Syllabus errorum*, 8 December 1864, in A. FREEMANTLE, *The Papal Encyclicals in their Historical Context*, Toronto, New American Library of Canada, 1963, pp. 148-149.

⁸⁷ One author argues that the position of the Irish bishops became the position of Pius IX in the *Syllabus*: "The history of Irish Catholic education in New Zealand effectively begins in August 1850 in the dreary provincial Irish town of Thurles. There Archbishop Cullen convened a full synod of the Irish bishops to deal with several matters, the most pressing of which was 'mixed education'. This was the term for education wherein Catholic and Protestant children were schooled together and where control of the schools was not entirely in the hands of the local parish priest or, in the case of the secondary schools [...], of a religious order or the ordinary of the diocese or the bench of bishops. [...] not surprisingly, the bishops condemned mixed education and set out guidelines to reduce the occurrence of this danger to the faith. The decrees of the Synod of Thurles were the formal declaration of war against the Irish government and against the forces of liberalism and Protestantism and a truce would be declared only when the church had obtained full control over a school system that was financed by state funds, but not controlled by the state. The fundamental position of the Irish bishops (which was, in essence, the position of Paul Cullen, endorsed by his colleagues) was assimilated into the *Syllabus of Errors* promulgated by the Pope in 1864. This condemned mixed education and state control of schooling, and was the Papacy's writing large a viewpoint that was being most radically advanced in Ireland" (D.H. AKENSON, *Half the World from Home: Perspectives on the Irish in New Zealand 1860-1950*, Wellington, Victoria University Press, 1990, pp. 167-168). See also D.H. AKENSON, *The Irish Education Experiment: The National System of Education in the Nineteenth Century*, Toronto, University of Toronto Press, 1970, pp. 254-257.

Education, crucial to man's supernatural destiny, was integral to the church's earthly mission: it could not surrender to the state or anyone else its authority in that sphere, which was to impart religious instruction and ensure that parents discharged properly their serious responsibility to educate their children in the faith. This task ought to be carried out in harmony with the state, but the state had no right whatever to control or impair parental rights of conscience or the authority of the church. In particular, the state had no right to compel parents to violate their consciences by sending their children to schools where an alien religion, or no religion at all was taught.⁸⁸

Again, this would be a recurring argument for the catholics of New Zealand for the next seventy years as they appealed again and again for financial assistance from the government. So while none of the text of the former Australian provincial councils was used by Bishop Moran for the 1885 *schema*, the principles of the two earlier councils were embodied in the new decrees. And there were additions: "Parents and guardians of children also have the responsibility derived from natural law, to teach by themselves [...] or through others the truths of religion" (decree 235). Should catholic parents neglect religious education, or choose public schools without sufficient reason when a catholic school exists, then "It has been shown by catholic moral teaching that it is not possible to absolve them in the Sacrament of penance" (decree 238). Catholic schooling was so important that there was to be a school in every mission supported by the mission and if necessary, the erection of a school should precede the building of the church: "This Provincial Synod regards as absolutely necessary that the primary or elementary school be maintained in a mission where a priest lives and that the funds required for this end come from ordinary proceeds, if not supplied from another source. This Synod considers these schools so necessary that it does not hesitate to urge both bishops and pastors to see that in every new sacred mission a school building is not neglected so that a school is immediately erected which could be used as a chapel" (decree 240). Again, the three propositions from the *Syllabus* were included.⁸⁹

⁸⁸ P. O'FARRELL, *The Catholic Church and Community in Australia, A History, 1788-1967*, Melbourne, Thomas Nelson (Australia) Limited, 1977, p. 161.

⁸⁹ As with the Second Provincial Council of Australia in 1869, the presence of Irishmen was

Propaganda Fide gave the *recognitio* to these decrees, amending decree 234 by including a quotation from Pius IX's letter, *Gravissimos inter* of 11 December 1862, to the archbishop of Munich and Freising, asserting the Church's right and duty to teach the revealed truths.⁹⁰

In the early 1860s, Bishop Polding in his pastoral letters emphasised the complementary role of the home and school. In practice the council acknowledged that the home often fell below this ideal: too many parents, because of their own inabilities or indifference could not undertake their responsibilities.⁹¹ Hence the Fathers' insistence on attendance at a catholic school reinforced by sanctions.

On 14-16 August 1888, Auckland celebrated the Second Diocesan Synod. The synod promulgated and confirmed the decrees of the First Plenary Council of Australasia held in 1885 and added some of its own.⁹² Two years later on 5 December 1890, Auckland Diocese

significant: "Twelve of the council fathers were Irish; of the others, Bishops Salvado (Port Victoria) and Griver (Perth) were Spanish, Torregiani (Armidale) and Cani (Rockhampton) Italian, Redwood (Wellington) and Luck (Auckland) English" (WATERS, *Australian Conciliar Legislation*, p. 69). As mentioned above regarding education, more significantly the major source of legislation was derived from the 1875 Council of Maynooth.

⁹⁰ WATERS, *Australian Conciliar Legislation*, p. 142.

⁹¹ "If it is said that the poor children for whom our primary schools are intended may learn the specialities of their religion at home in their families, or from visits of their priests at the school, deny it at once, positively and wholly. In the first place, Catholics have no separable specialities in their religion; it is one living whole, and each part is in vital and mutual connection with the whole. Next, those who really know the homes from which the children come in many instances, know also that it is a mockery to expect in them religious training such as Catholics account training. Thirdly, no one who looks at the number of our clergy, at the number of the schools, at the distances by which they are separated, can believe the man to be serious who proposes that they should do what is to be done. Besides, there is the previous obstacle, that an intermittent training is not what we want. The whole school day in its various occupations must have one character, tend to one end" (Pastoral Letter of Archbishop and Bishops of the Province assembled in the Second Provincial Council of Australia, held at St Patrick's Cathedral, Melbourne, 1869, Melbourne, Clauson, Massina, and Co., 1869.

⁹² The First Diocesan Synod was held from 1-3 May 1884. Decree six of Part II exhorted priests that "Where schools are not to be found, let them put their heart to it, so that, as far as possible, this serious need is satisfied as quickly as possible [...]" (*Synodus dioeceseos Aucopolitanae prima*,

held its Third Diocesan Synod. Of the six decrees, the fourth referred to education:

Since first and foremost among the most serious dangers to which the Catholic religion is exposed in these times, is that which arises from non-catholic education, we again advise the clergy that, whether convenient or not, the faithful learn of their duties in this matter and to keep from the sacraments such people who show themselves unworthy because of excessive or obstinate carelessness in this duty.⁹³

Cardinal Moran, as apostolic delegate, presided over the Second Plenary Council of Australia in Sydney on 15 November 1895.⁹⁴ The decrees of The First Plenary Council in 1885 remained intact but again, new decrees were added. Whereas the Council of 1885 said that parents who sent their children to non-catholic schools could be refused absolution, the Second Plenary Council decreed that they were not to be refused the sacraments publicly *inconsulto ordinario*: "Take heed that parents who fail in this manner cannot be denied the Sacraments without direct consultation with the ordinary" (decree 300). Catholic schools could not be closed or abandoned "without the permission of the bishop" (decree 303). The three propositions of the *Syllabus* were once again included, along with a lengthy decree (313) quoting from decrees 200-202 of the Third Plenary Council of Baltimore (1884): priests "should love our schools as the pupils of their eyes. They should often visit and inspect every single one of these schools at least once a week and be vigilant concerning the morals of our children by instilling in them by suitable means a zeal for the faith."

habita a die 1 usque ad 3 maji, 1884, ACDA, LUC 1-3/1). The Second Synod of the Auckland Diocese said that parents should often be advised about the serious obligation they are under of conforming themselves to the decrees of the Plenary Council concerning the catholic education of catholic offspring (decree 20). Decree 23 established inspection of catholic schools by a diocesan inspector, his expenses to be paid according to the norm fixed by the acts of the synod. See *Synodus dioeceseos Aucopolitanae secunda, habita a die 14 usque ad 16 augusti, 1888. ACDA, LUC 1-3/2*.

⁹³ *Synodus dioecesana Aucopolitana tertia, habita die 5 decembris, 1890. ACDA, LUC 1-3/3*.

⁹⁴ *Acta et decreta concilii plenarii Australiensis II, habiti apud Sydney, AD 1895, a Sancta Sede recognita, Sydney, F. Cunninghame & Co., Steam Machine Printers, 1898*.

The laity was called upon to see the parish school as an essential element of the parish without which the very future of the parish would be jeopardised. Nor does the existence of the catholic school depend upon the whim of the pastor. On the contrary, after the parish church, the laity was to hold the school in great honour. Part of the Baltimore decree warrants quoting in full since it provides the basis for understanding the close relationship of the school to the parish:

As far as lay people are concerned, we urge and order that their minds be educated by the Bishop and by priests so that they may see that the parochial school is, as it were, an essential element of the parish without which the very existence of the parish would be in danger in the future. Therefore, lay people are to be instructed in a clear and solid manner. They are to be taught that in no way is the need for schools a minor need where the priest is shown to have superabundant zeal or where once in a while he may choose according to his liking, although honest, to labour for; it is rather a heavy responsibility and duty imposed on the priest by the Church which is to be conscientiously carried out yet not without the help of the lay people. With full zeal and prudence let that erroneous opinion be rooted out from the minds of lay people that the care of the schools belongs merely to a part of the parish which is just at present being used for the benefit of our children. With clear arguments, however, that are based on a most profound truth, let it be shown hence that the fruits and blessings which stem from faith and morals that are preserved in our parochial schools largely affect the good of the whole community. With all these things in mind, let there be no doubt that lay people who belong to a parish are to hold no other place after the parish church of greater concern and honour, than the parish school. For the parish school is the custodian of faith and morals among young people that will become for all in the future the seed plot of joy and consolation (decree 202).

The same decree exhorted lay people, whether parents or “other members of the parish” to provide suitable and generous sustenance for their schools.⁹⁵

At the Third Plenary Council of Baltimore, the American bishops decreed: “1. That

⁹⁵ *Acta et decreta concilii plenarii Baltimorensis tertii, AD 1884, praeside Illmo. Ac. Revmo. Jacobo Gibbons (= BALTIMORE III), Baltimorae, Typis Joannis Murphy et Sociorum, 1886.*

adjoining each church, where such does not yet exist, within two years from the promulgation of this Council, a school shall be erected and perpetually maintained, unless the Bishop on account of serious (*gravior*) difficulties, judge a delay be granted.” In contrast, the Australian bishops, fully aware of the American decree, decided the opposite: the school was to be built before the church.⁹⁶

The plenary council thus codified a decision already taken by the Australian Catholic community. By 1885 schools had become what they were to remain, a major focus of parish life, episcopal concern, and lay activity. Indeed from this time on the parochial school may be considered the single most distinctive feature of Australian Catholicism.⁹⁷

The description of this situation applied equally in New Zealand.

1.4.3 – The First Provincial Council of Wellington, 1899

The New Zealand bishops were not summoned to the 1895 council; instead the Congregation *de Propaganda Fide* advised the bishops that New Zealand was considered to be quite distinct from Australia. Archbishop Francis Redwood convoked the First Provincial Council of Wellington on 21 January 1899.⁹⁸ Representing Auckland was Bishop George

⁹⁶ Two authors make the same observation: R. FOGARTY, *Education in Australia 1806-1950*, Carlton, Victoria, Melbourne University Press, 1959, p. 310: “In this the Australian bishops deliberately reversed the precedent created by their brother bishops in America. There, it is true, the primary parochial school was given a high priority, but it was definitely *post ecclesiam parochialem* and not *ante*.” E. CAMPION, *Australian Catholics*, Ringwood, Victoria, Penguin Books Australia Limited, 1987, pp. 55-56: “The Americans decided that wherever a parish was established, the first thing to build was a church, followed by a school. The Australian bishops, fully cognisant of the American decision, decided to reverse this priority. They determined that the first building in a new parish should be its school.”

⁹⁷ CAMPION, *Australian Catholics*, p. 56.

⁹⁸ *Acta et decreta concilii provincialis primi Wellingtonensis, habiti in ecclesia Sancti Josephi Wellingtone in Nova Zelandia, die 21 januarii et sequentibus usque ad diem 29 januarii anno 1899* (= WELLINGTON I), Dunedin, NZ, The NZ Tablet Printing & Publishing Co., 1899.

Michael Lenihan.⁹⁹ Three days later, the bishops voted that the decrees of the First Plenary Council of Australasia would remain in force for New Zealand. With few amendments the 1895 decrees were adopted verbatim, including the decrees on education.¹⁰⁰

Having eschewed the state system, catholic energies now concentrated on building up the system begun before the *Education Act, 1877*. Pastorally, compulsory attendance of catholic pupils at catholic schools left parents with little choice. The severest of sanctions was invoked: refusal of parents to send children to a catholic school was a grievous sin, and for the best of reasons. The law was clear and constantly emphasised by bishops and priests. A Conference of the New Zealand Catholic Bishops in 1894 in Auckland resolved:

That in view of the deplorable fact that a large proportion of the Catholic children attending non-Catholic Schools in this colony, practically lose their faith, the Bishops of New Zealand again inculcate the grave duty incumbent on Catholic parents of sending their children to the Catholic Schools, and warns them that the sending of their children to non-Catholic schools generally constitutes a grievous sin which debars them from the reception of the Sacraments as long as they persevere in such dereliction of parental duty.¹⁰¹

Against this background, catholic education entered into the twentieth century.

⁹⁹ Luck died on 23 January 1896. On 15 November the same year Lenihan was consecrated bishop.

¹⁰⁰ "The Roman corrections were few and minor. On 9 April 1900 approval of the cardinals was given, followed by papal ratification on 29 April 1900 (cf. *Concilium Wellingtonense*) [WATERS, *Australian Conciliar Legislation*, p. 89].

¹⁰¹ ACDA, LUC 1-4/2. Also *New Zealand Tablet*, 19 August 1894, pp. 16-17. BLAMIRE, p. 46, *A Christian Core*, sums up a non-catholic appreciation of the sanction, accusing "[...] the R.C. Hierarchy of denying to parents what the Hierarchy itself describes as a God-given right of parents to choose what type of education their children shall receive. By their Church law R.C. parents must send their children to a Roman Catholic school on pain of not being permitted to attend the sacraments. Permission in exceptional cases can only be granted by the bishop."

1.5 – THE PERIOD OF CONSOLIDATION 1900-1955

When Bishop Lenihan died on 22 February 1910, he was replaced by Henry William Cleary who had been editor of the *New Zealand Tablet* for the previous twelve years.¹⁰² One of many concerns that occupied Cleary's time was the issue of the Bible-in-Schools movement. In 1904, the catholic bishops of New Zealand rejected the proposals of the other Churches to introduce "Scriptural or other religious lessons or exercises in public schools as part and parcel of the programme of education."¹⁰³ Among the arguments put forward by the bishops was that "Under the sanction of the State, it would introduce into public schools the well-known Protestant principle of interpretation of the Scriptures by the exercise of private judgment." They also argued that since "The religious education of youth is a fundamental duty of parents and of the Christian ministry," therefore, on that ground the clergy cannot abdicate in favour of the state. Again, the bishops used the traditional argument from conscience:

The State can neither claim nor exercise any authority in matters of conscience. It has neither right nor competency to set up as a teacher of religion, nor to usurp the spiritual duties of any of its subjects. The reading and explanation of the Scriptures cannot be regarded as merely a proposed new feature in the course of language or literature in our public schools. They are exercises of religion.¹⁰⁴

Cleary, drawing on the teachings of the past, strongly opposed the principle since it seemed to him that state schools would become protestant schools. Following his death in

¹⁰² Baptised William Henry Cleary, *The Dictionary of New Zealand Biography*, vol. 3, Auckland, Auckland University Press, 1996, p. 101.

¹⁰³ The Catholic Bishops of New Zealand, *The Education Question in New Zealand, Two Pronouncements by the Catholic Bishops*, "Manifesto on the Bible-in-schools scheme", 20 April, 1904, Dunedin, *New Zealand Tablet Company*, 1904, pp. 4-5.

¹⁰⁴ *Ibid.*, p. 5.

1929, however, the position of the catholic bishops towards the scheme softened somewhat. Since Cleary's health was not strong, Rome appointed James Michael Liston, rector of the national seminary at Mosgiel, as coadjutor to Cleary in May, 1920.

As many New Zealand catholics were of Irish descent, sectarian differences and protestant hostility over the preceding decades led to what William Hosking Oliver calls "a strategy of institutional separatism". Ernest Simmons describes the twenties as a time when "The Catholic community was turned in on itself, looking to its own affairs, not participating very much in the general work of the community at large." Similarly, Anthony Spencer describes the catholic attitude as a "psychological divide, created by obduracy on both sides" which "separated the Catholic Irish from the rest of the nation. For almost seventy years after Bishop Moran's death, the bishops and the politicians alike were prisoners of the tradition established in the formative period."¹⁰⁵ And this remained the impetus for the building of more catholic schools – the period 1920-1929 saw the founding of thirteen new schools without including the expansion of existing school facilities. The faithful raised funds by fairs, raffles, bring-and-buy stalls, dances, and the like.

In 1930, A.G. Butchers, writing on the catholic system, says:

The financial and personal sacrifices entailed in this huge undertaking, which has been extended to provide free secondary as well as elementary schooling,

¹⁰⁵ See OLIVER, *Oxford History*, p. 266. SIMMONS, *A Brief History*, pp. 100-101. Here Simmons goes on to describe the consequence of this xenophobia: "Eventually this was to lead to the setting up of a sort of parallel society, with Catholic libraries, Catholic dances, Catholic football clubs, Catholic tennis clubs, Catholic separate bodies of every sort." A.C. SPENCER, *Report Commissioned by the NZ Catholic Education Council. Interim Report, Belfast, 27 June 1971*, p. 20. Anthony Spencer, educationalist, statistician, sociologist, and senior research lecturer in the sociology of education at Cavendish Square College arrived in New Zealand at the end of June 1967. The report was never published. A draft copy is in ACDA, DEL 66.

On the Irish issue see: DAVIS, *Irish Issues*. R.M. SWEETMAN, *New Zealand Catholicism, War, Politics and the Irish issue 1912-1922*, PhD thesis, Cambridge, University of Cambridge, 1990. R.M. SWEETMAN, *Bishop in the Dock. The Sedition Trial of James Liston*, Auckland, Auckland University Press, 1997.

are scarcely realised by the general public. Comprising only 14 per cent. of the population they are now educating in their own schools 12 per cent. of the school population of the Dominion, while at the same time contributing through taxation their proper share of educating the other 88 per cent. In this work they have never faltered.¹⁰⁶

This argument from distributive justice was one that Catholics and their protagonists were all too familiar with from 1877; in the years ahead it would continue to be a source of heated debate.

When Cleary died in 1929, James Michael Liston as coadjutor automatically succeeded him as bishop of Auckland on 9 December 1929. (He resigned on 7 April 1970, 41 years after taking office.) The period of the thirties saw the great depression and ended with the Second World War. Despite this, the ten years saw another five new primary schools built. In education, Simmons sums up the decade:

In spite of the hard times, the Church continued to make surprising progress during this decade, even in a material way. Somehow new churches, convents and institutions went on being founded and built and priests and nuns were found to staff them. The tremendous confidence of the bishops in the future was matched only by the generosity of the Catholic people.¹⁰⁷

In hindsight, despite the optimism of the bishops, there were already indications that

¹⁰⁶ BUTCHERS, *An Historical Survey*, p. 439. Butchers observes that the annual cost of educating a child in the State system is £11 14s. 2d. Multiplying that figure by the Catholic school roll, which in 1926 was nationally at 21,397, he argues that the saving to the State was £250,523. "Or looking at the matter from another point of view, the annual cost of State primary education per head of population was £1 16s. 4d. Multiplied by the Catholic population of New Zealand (181,922 in 1926), this gives a sum of £330,483 which is the amount contributed by the Catholic element in the population towards the maintenance of the State schools – over and above the cost to themselves of their own system. If, however, we included all branches of State education of which the annual cost is given at £2 15s. 3d per head of population, the Catholic contribution exceeds half a million pounds (£502,559) per annum" (p. 441).

¹⁰⁷ E.R. SIMMONS, "The Church in New Zealand 1924 to 1973", in *The Australasian Catholic Record*, 50 (1973), p. 325.

in education catholics would have serious difficulties regarding teachers in the future. In the mid-1930s, of 420 religious working in the diocese, 227 or 54% were New Zealanders while 193 or 46% came from overseas. In just over one hundred years since Pompallier's arrival, the education system was still relying heavily upon a disparate number of vocations from overseas. It was the consequence of the catholic community going it alone following the 1877 *Education Act*. Simmons interprets the decision shortly after the 1877 Act thus:

Schools were growing into large institutions. [...] The Catholic school system in particular needed a great deal of money and attention, since it had to be provided wholly out of the resources of the Catholic community. The obvious way to meet this need was to make use of as many religious teachers as possible.¹⁰⁸

In short, only religious teachers could sustain an economically viable catholic education system.¹⁰⁹ But there was another side to Luck's policy: "In Luck's case the economic argument was scarcely needed: as an ex-teacher himself he was completely convinced that religious teachers were much better than lay teachers and that the schools staffed by them would be more effective in teaching both religion and citizenship." Hence the reluctance to

¹⁰⁸ SIMMONS, *A Brief History*, p. 75.

¹⁰⁹ "Bishop Luck [...] and other Catholics of his time, took it for granted that there was nothing wrong in making the nuns carry the burden of the Catholic school system. But as the system grew, paralleling the State system, the funds available proved insufficient. The sisters, given a mere pittance for their support, had to give music lessons outside school hours to make ends meet. The life of a nun was one of unceasing activity from five in the morning until nine at night. [...] The nuns became the drudges of the New Zealand Church and the fact that they were cheerful and uncomplaining did not alter the fact of their servitude" (SIMMONS, *In cruce salus*, p. 204).

"[...] the bulk of the work of Catholic primary education, both for boys and girls, falls on the shoulders of the various Sisterhoods. These supply the teachers for 'parish' schools which are now to be found beside almost every Catholic church in New Zealand. It is more than all else the self-sacrifice of these devoted women that has enabled the Catholic Church to make its successful stand for religious education. This is all the more noteworthy because the demands made upon the people for constant funds for the erection of churches and school buildings leave all too little for the support of the Sisters themselves, with the result that in almost every parish they are required to eke out their scanty means by teaching music and other special lessons in addition to the ordinary work of the schools" (BUTCHERS, *An Historical Survey*, pp. 441-442).

employ lay teachers until there was no choice. "It is not surprising, therefore, to find that Luck introduced a number of orders."¹¹⁰

In the years following the Second World War the need for financial assistance became an even more urgent issue as catholic schools tried to cope with the burgeoning post-war population.¹¹¹ The issue was not reserved for catholics alone. The state-sector did not anticipate the population expansion after the War either, or, if it did, did little (if any) planning for it. Ian Cumming writes that "The 1950s were sprinkled with schemes to overcome the shortage of teachers [...] . In forty-six weeks, clerical workers, factory hands, radio technicians, farmers, nurses, shop assistants, salesmen, plumbers and others, aged from twenty-one to forty-six years, were equipped as teachers."¹¹² Building programmes could not keep up with the demands for accommodation. The catholic system was placed under even more financial pressure as it struggled to survive: buildings were inadequate and staffing was not at strength.¹¹³ Yet innovations continued: 1950 saw the opening of Loreto Hall, a catholic

¹¹⁰ SIMMONS, *A Brief History*, p. 75. Simmons observes that from this time the religious began to be seen as the ideal teacher, lay teachers being no more than a poor substitute for the real thing. As late as 1960 the bishop of Auckland was still seeking religious to teach in schools, asking Bishop Joyce of Christchurch on his impending visit to Ireland and Rome that when he met the religious superiors to represent to them the educational needs of the diocese and that "our hopes for Catholic life rest largely on our Catholic schools, staffed by Religious sisters. The diocese would be responsible for their travel expenses, [...] support, and if Mother General wished it, for their Convent home." Letters of Bishop Liston to Bishop Joyce, 12 April 1960. ACDA, LIS 58-3. A PTFA remit of 1965 saw the injection of clerical teachers as an (interim) solution. ACDA, LIS 190-1/.

¹¹¹ For example, in 1953 there were 3260 infant baptisms in the Auckland diocese. 6324 boys were recorded in catholic primary schools and 6348 girls. Four years later in 1957, 5082 infant baptisms were recorded while 7401 boys were recorded in the same primary schools with 7332 girls. Infant baptisms peaked in 1967 at 5454. By 1970 there were 7991 boys at primary schools and 8457 girls. Figures taken from Returns for *S.C. Propaganda Fide*. ACDA, LIS 20-5.

¹¹² CUMMING, *State Education*, p. 315.

¹¹³ While the reports of Mr. M.T. O'Connor, inspector of catholic schools for Auckland Diocese in the fifties and sixties, are full of praise for the teaching staff, the reports consistently highlight the difficulties under which the staff and pupils laboured: "After a period of several years of excessively large classes, and in spite of the earnest and unceasing efforts of the teachers it is not surprising that

teachers' training college.¹¹⁴ While private schools were given increasing aid starting from 1877 with advice from inspectors and departmental officers, free rail tickets to the nearest private primary school (1889), free conveyance to state school manual training classes (1928), free *School Journals* (1936), free milk and apples when available (1944), etc.,¹¹⁵ financial assistance was really needed in the crippling costs of property, the maintenance and erection of buildings, the purchase of furniture and equipment, teachers' salaries, and general operating expenses.

1.6 – THE PERIOD OF CHALLENGE 1955 –

To this end, a massive campaign was launched throughout the country supported by the catholic bishops of New Zealand culminating in the presentation of a petition to parliament on 19 September 1956, on behalf of the hierarchy and laity of New Zealand. Spearheaded by Walter Stewart Otto of the Holy Name Society, the petition – under the catchcry “Hear the Case” – distributed brochures and other advertising material outlining the arguments seeking public support for state aid.¹¹⁶ The 1956 submission drew on the now

some aspects of class work fall short of a satisfactory standard during 1959.” “No praise is too high for the manner in which the Head Teacher has directed the activities of this school in the face of overwhelming difficulties for several years. [...] Her most serious problems have been inadequate accommodation, and shortage of staff, and in consequence over-large classes.” “There are, however, many individual weaknesses, especially among the ‘slow learners’. [...] The departmental report last year noted: ‘It will be necessary to remedy the situation in the infant room where numbers this year [1956] have been definitely excessive’ (71 pupils).” ACDA, LIS 183.

¹¹⁴ Loreto Hall, founded by Bishop Liston in 1950, was the only Catholic Teachers' College in New Zealand. Completely maintained by the Auckland diocese until 1976 when Loreto Hall students became eligible for student teachers' allowances, the college came as a response to the teacher education needs of female religious. In 1961 the college accepted lay women as students, and by the early seventies both lay and religious men attended courses. In twenty years from its inception Loreto Hall averaged an annual intake of 42 students. The college closed in 1984.

¹¹⁵ For a full discussion of this topic see M. WILSON, *The State Aid to Private Schools Issue in New Zealand: 1963-74*, MA thesis, Auckland, Auckland University, 1975.

¹¹⁶ The petition presented variants of arguments that had already been outlined in a Memo to

familiar arguments of double taxation, conscience rights, and distributive justice. Those who equally vigorously opposed state aid presented counter submissions; in all, the Education Committee of the House of Representatives heard thirty-three opposing submissions. The Parliamentary Abstract of the Report of the Education Committee of the House of Representatives, issued by the clerk of the House of Representatives on 24 October 1956 was short and to the point: "The committee has carefully considered the Petition and reviewed the evidence and has no recommendation to make."¹¹⁷

Down, but not out, Catholics then reappraised their approach to the state aid issue. Ian McLaren puts it:

[...] the Catholic educational interest groups withdrew to prepare for the next round. They now looked critically at their own existing educational arrangements, especially at the sweeping powers parish priests had over their schools, and admitted that there was need for reform. Worthwhile reforms would be too costly for the Catholic Church and parishioners to undertake without state assistance, so once again the Catholic pressure groups were forced to attack.¹¹⁸

Boards of Governors on the Question of State Aid for Private Schools in April 1949. (A copy of this memo has hand written on the front page in Bishop Liston's handwriting: "Prepared by Rev. Dr Gascoigne: revised by Abp McK [Peter McKeefry, Archbishop of Wellington from 1954 until his death in 1973] + Bp Liston. April 3/5. 1949 Sent out to Board 8/1949." ACDA, LIS 184). The basis of the claim for state aid was the natural law itself. The rights of both parents and the state in regard to the natural law were presented with a question as to what degree is the natural law recognised in regard to parents' rights in New Zealand. There followed a summary appreciation of how natural law was recognised in other parts of the British Empire (England, Scotland, Northern Ireland, Canada, South Africa), and the memo ended with a rhetorical question as to whether state aid implied state control of schools. In answer, Scotland and Quebec were held up as examples where a hundred per cent state funding did not threaten the independence of the schools. The expenses of publicity were shared among the dioceses. (In a circular letter dated 29 July 1956, the Bishop of Auckland asked the clergy and lay people " [...] to share with me Auckland diocese's quota of £2,500." ACDA, LIS 191-.)

¹¹⁷ ACDA, LIS 191.

¹¹⁸ I. McLAREN, *Education in a Small Democracy. New Zealand*, London, Routledge and Kegan Paul, 1974, p. 61.

In Auckland diocese a new force began to emerge, the Parent-Teacher-Friend Association. From the earliest establishment of catholic schools many parishes had a PTA or equivalent – a group of parishioners who had as their special concern the support of the parish priest in his role of administering the school. The activities of these committees, however, were very often parochial with little if any interest in what was occurring outside the local school. Under the leadership of R.W. (Bob) Hubbard, the PTFAs became a cohesive force in seeking state aid. The strategy was simple: negotiations between Catholic PTFAs and the politicians. To achieve this, the PTFAs needed to be unified. On 1 June 1960, Thomas Weal, secretary to the Auckland Catholic PTFA wrote to Bishop Liston advising him of the results of a meeting to federate Catholic PTFAs: “The meeting was splendidly attended by approximately one hundred and sixty delegates representing parishes of the Diocese near and far. A motion was passed, ‘That the Federation be formed,’ [...] .” The bishop was asked to appoint a chaplain and the letter concluded advising the bishop of the appointment of four of the members to the Executive of the Auckland Federation.¹¹⁹ By October 1960 the federation could write to the Labour prime minister, the Rt Hon. Walter Nash, telling him that it represented “some forty-three Parent Teacher Friend Associations throughout the Auckland Diocese (which diocese covers approximately half the North Island), and therefore is an organisation representative of some thousands of electors.” Nearly four years later (April 1964) the minutes of the federation would record that there were now some sixty affiliated PTAs.

That same year Bishop John Kavanagh of Dunedin established a national body, the Catholic Education Council for New Zealand. Supported by the bishops of the country (and under the chairmanship of Kavanagh), it represented all bodies that had a concern for catholic

¹¹⁹ “Mr R. Hubbard, Vice-President; Mr Weal as Publicity Officer and Messrs M. Hunt and W. Bond as Committee Members; Messrs Hubbard and Hunt also go as delegates to the State Schools’ National Council, while Mr Hubbard was made convenor of the Special Sub-Committee appointed to bring down recommendations for the Commission” (Letter of T.K. Weal to Archbishop James M. Liston, 1/6/60, Diocesan Federation of Catholic Parent-Teacher-Friends Associations).

education: PTFAs, teachers, Congregations of Religious, the Holy Name Society, the Catholic Women's League, etc. Initially, this unwieldy body comprised some one hundred and seventy representatives. Later, a vastly trimmed council would become the primary vehicle representing catholic interests in the call for state aid. Hubbard, chairman of the Auckland Catholic PTFA was co-opted to the Executive of the Catholic Education Council. (Later he would become chairman of the Interdenominational Committee for Independent Schools [ICIS], the major player in petitioning the government for financial assistance.)¹²⁰

1.6.1 – The Education Commission, 1960

While catholics were rearranging their strategy, the political climate was also in ferment. "There was, however, enough pressure to make the politicians use an old political ploy; they set up a commission."¹²¹ On 15 February 1960, the Hon. Philip Skogland, a former careers adviser and commercial teacher, and now minister of education in the Labour government, set up a Commission of Education. Its chairman was Sir George Currie, former vice-chancellor of the University of New Zealand for ten years from 1951. Twenty-eight months and 886 pages of report and an interim report later (June 1962), it addressed a very wide range of educational issues.¹²² On Religious Teaching in State Schools (Chapter 16),

¹²⁰ ICIS represents the Catholic Education Council for New Zealand, Church of England Schools' Governing Bodies Assoc., Presbyterian Board of Education, most Seventh Day Adventist Schools, and undenominational schools.

¹²¹ J. MULHERON, *State Aid, Integration and New Zealand's Public Schools*, Wellington, Paerangi Books, 1987, p. 9. In 1978, Mr Bob Whyte as chairman, and Mr Jack Mulheron as secretary, established an organisation called the Committee for the Defence of Secular Education, later called the Society for the Protection of Public Education. Among other things, the committee opposed "[...] the philosophy, provisions and operation of the Integration Act" (See MCGEORGE, *Church, State, and New Zealand Education*, pp. 52-53; SHUKER, *The One Best System?*, pp. 255-256).

¹²² *Report of the Commission on Education in New Zealand*, Wellington, R.E. Owen, Government Printer, 1962. The commission was constituted to "[...] consider the publicly controlled system of primary, post primary, and technical education in relation to the present and future needs of the country", *Report of the Commission*, p. 1. In addition, the minister asked the commission to

quoting the submission of the Wellington Institute for Educational Research,¹²³ the commission agreed, "That this policy of neutrality was intentionally adopted in 1877 [...] is beyond doubt." Further, the commission considered that subsequently it was beyond dispute that this policy had been deliberately followed. Since "A strong plea was made by the churches that 'secular' should be defined as including general religious teaching of a non-sectarian nature" the commission discussed the issue at length and recommended that "The term secular be not interpreted to exclude reference to religion and religious history in the primary and secondary syllabuses of social studies [...]." ¹²⁴

In Chapter 17, "State Aid to Private Schools", the commission made the point that while it was charged by the government to recommend a policy with regard to state assistance to private schools, "The consideration of this matter necessarily involves attention to questions of policy lying outside the normal preoccupations of educators. Indeed the Commission feels constrained to state from the beginning that the ultimate resolution of this problem [...] is to be found rather within the realm of politics and of community attitude than of pure logic or educational theory."¹²⁵ The commission noted that while other organisations have seen fit to establish their own schools outside the state system, "They differ from Catholic schools in that these churches do not hold that their adherents may not in conscience

consider the question of aid by the state to private schools. For a comprehensive treatment of the commission see D.J. SCOTT, *The Currie Commission and Report on Education in New Zealand 1960-1962*, PhD thesis, Auckland, The University of Auckland, 1966.

¹²³ "In New Zealand there is a separation of Church and State. Accordingly there is no State church and so far as religion is concerned the State is neutral. This policy of neutrality has meant that the State has, since it entered the field of education, deliberately refrained from teaching religion and also from supporting religious teaching by grants from public finance. That this policy of neutrality was intentionally adopted in 1877 (the date of the Education Act) is beyond doubt" (*Report of the Commission*, p. 676).

¹²⁴ *Ibid.*, pp. 681, 697.

¹²⁵ *Ibid.*, p. 698.

avail themselves of the education available in State schools [...]”¹²⁶ Addressing the catholic case for state aid, the commission responded to the Catholic Education Council for New Zealand’s argument citing Article 26 of the United Nations Declaration of Human Rights (to which New Zealand is a signatory) that “Parents have a prior right to choose the kind of education that shall be given to their children.” In response, the commission concluded “that no case for State aid can legitimately be based on this declaration.”¹²⁷ The commission believed that state aid to denominational schools would be divisive, and therefore, it could not support the notion. Discussing the catholic argument of the parent’s “inalienable rights” and “distributive justice”, the commission said that it could not “construct a general State policy upon a doctrine that is not universally held by the churches”; moreover, distributive justice has “very little to do with the strictly educational purposes of this Commission.” It then went on to say that distributive justice was not “recognised in political theory as a principle on which the Commission might base a recommendation”, stating again that the issue was “basically a matter for political decision.”¹²⁸ From the evidence the commission recommended “That no changes be made in the present policy relating to the granting of aid to private schools.”¹²⁹

Under Appendix V, the commission summarised “the lengthy and detailed submissions made to it by the Catholic Education Council of New Zealand.”¹³⁰ In the end the commission

¹²⁶ Ibid., p. 701.

¹²⁷ The commission interpreted the Declaration to mean that no government would promulgate any law that will place a *legal* impediment in the way of a parent’s discharging his responsibility. So long as there was no legal infringement, the intention of the Declaration was met. *Report of the Commission*, p. 706.

¹²⁸ Ibid., pp. 707, 708.

¹²⁹ Ibid., p. 716.

¹³⁰ The commission quoted in full relevant sections of the Catholic Education Council of New Zealand’s submissions. It noted that “The Catholic parent’s choice of a Catholic school for his child is not a whim or caprice.” Rather, “it proceeds from deep convictions. It is for him a matter of

opted for the *status quo* on the issue of state aid. In the words of David Scott:

On controversial issues such as state aid to private schools and the secularity of schools [...] In the event they allowed the conflict to continue by taking the non-interference route – the non decision. The divisive issue of funding for private education, (equality, equity and fairness) was never hammered out during the commission's public hearings.¹³¹

Observers noted the good will of the members of the commission toward the catholic presenters. Noel Gascoigne, of Wellington, wrote to the bishop of Auckland that “not one unpleasant note was struck in the 3½ hours.” John Mackey, who would become the ninth bishop of Auckland, wrote also to Bishop Liston that “as the session proceeded the atmosphere here became even more cordial. By the end of it the rapport between the members and ourselves was of the friendliest character.”¹³² The sixties indeed saw some significant breakdown of the sectarian divide. Observers give several reasons for this shift: the rise of ecumenism, the rising costs of education, and the unwillingness of modern societies to accept

conscience.” It addressed again the issue of distributive justice and the Catholic Education Council's submission on “double taxation” (the added financial burden that catholics bear in supporting two systems of education). The commission argued that “If ‘distributive justice’ meant that those who did not use a service which was provided by the State and financed from public money were in equity entitled to recompense from the public exchequer, its inherent defect as a principle of government would become apparent as soon as any attempt was made to apply it to any item of public expenditure.” The commission continued: “What would be returned, for example to the very large number of people who have no children at school, or who are bachelors or spinsters? It would seem impossible to sustain distributive justice as a general principle in the face of such considerations” (*Report of the Commission*, Appendix V, pp. 835, 839-840). Finally, under Appendix W the commission reviewed state aid in countries overseas including among others, Holland, France, England and Wales, Scotland, Australia, and Canada.

¹³¹ SCOTT, *The Currie Commission*, p. 234.

¹³² Letter of Rev. Noel Gascoigne to Bishop Liston, 14 July 1960; letter of Rev. John Mackey to Bishop Liston, 18 July 1960. ACDA, LIS 190-1/. Prior to becoming bishop of Auckland in 1974 until his retirement in 1983, Mackey held several diocesan appointments in education: diocesan inspector of religious instruction, secretary to the education committee, secretary to the education fund, and director of catholic schools.

inequalities in educational opportunity.¹³³

In 1963, ICIS made a deputation to the prime minister (Rt Hon. Walter Nash), asking, among other things, for an education benefit. The government responded in 1964 by making an annual per capita grant of £200,000 for running expenses (chalk, light, heat, water, telephone, furniture, and equipment, etc.) and assistance in travel expenses from 1 February 1964. This grant for incidental expenses based on the "incidentals" grant to state schools became known as Grant A.¹³⁴

But in the Auckland diocese, as throughout New Zealand, the catholic school system was on the verge of collapse. Financially the system was strapped. Teachers' salaries were not keeping pace with inflation. In 1963, some religious sisters' salaries were as low as £50 per

¹³³ See J.J. SMALL, "Religion and the Schools in New Zealand 1877-1963", in *Comparative Education Review*, vol. 9 (1965), pp. 53-62. "The governing bodies of many of these non-Catholic schools, stretched to the limit of their financial resources, abandoned their former aloof attitude to state aid and in 1962 made common cause with Catholic educational interests in the Interdenominational Committee of Independent Schools" (MCLAREN, *Education in a Small Democracy*, p. 62). "But then something happened outside New Zealand which changed things sufficiently to enable Catholics and Protestants to talk together more easily. The talk quickly led to Catholic and Protestant private schools joining forces to approach the Government for state aid. The event was, of course, the Ecumenical Council called by Pope John 23. [...] The joint approach was immediately successful" (MULHERON, *State Aid*, p. 10-11). "From the 1960s, the case for state aid was strengthened by an attitudinal change discerned by the Commission on Education: the dissolving of interdenominational rivalry between Catholic and Protestant schooling interests. These denominations had begun to appreciate the difficulties the other faced" (G. LEE, "The 1975 Private Schools Conditional Integration Act: Issues and Controversies", p. 43). "In the ten years prior to 1973 the arguments advanced by those seeking State aid for private schools proved reasonably effective and considerable assistance was provided during this period. Several factors contributed to this. The most important was the ecumenical movement, especially since the Second Vatican Council, which made it possible for the various churches to work in closer cooperation and make a concerted approach to Government regarding financial assistance for their schools" (WILSON, *The State Aid to Private Schools Issue*, p. 29).

¹³⁴ For the year ending 31 March 1974, a year prior to the Integration Act of 1975, this grant was estimated to be £265,000 for primary schools. See J. O'NEILL, "Catholic Education in New Zealand", in *The Australasian Catholic Record*, 66 (1989), p. 174; SHUKER, *The One Best System*, p. 254; WILSON, *The State Aid to Private Schools Issue*, pp. 52.

annum while others received £200. Archbishop Peter McKeefry, who was bishop of Wellington from 1954, placed a request before his brother bishops from the assistant general of a brothers' teaching order for "an additional sum of £100 per Brother [...]" since "it is not possible to exist and provide for our training centres on £300 per Brother per year."¹³⁵ The PTFAs were also well aware of the financial situation. Their minutes record remit discussions that: "The pledge system is the most efficient and proper system of raising money for education. [...] A pledge system should be established in each parish, which would allow at least 60% for Catholic education."; "That in the opinion of the parent-parishioners of this Federation the principle of a general levy is supported to meet school needs throughout the diocese."¹³⁶

The effect of diminishing religious teachers and the consequent need to employ lay teachers was also taking its toll on the system.¹³⁷ Lay teachers were steadily increasing: compared with 342 religious teachers and 44 lay teachers over 83 primary schools in the diocese in 1960, by 1969 there were, over 85 primary schools, 343 religious teachers while the lay teachers had risen to 130, an increase of nearly 200% in nine years. The inequalities in salary scale also show that the viability of catholic education still depended on the smallness

¹³⁵ Letter of Archbishop Peter McKeefry to Bishops Liston, Kavanagh, and Ashby (bishop of Christchurch), 13 April 1965. ACDA, LIS 58-3.

¹³⁶ Auckland Diocesan Federation of Catholic PTA Associations, Remit discussion, 4 July 1964, ACDA, LIS 58-3/; Resolutions of General meeting of the Auckland Diocesan Federation of PTAs, 16 October 1966, ACDA, LIS 190-1/. One of the more desperate resolutions of the Federation, dating from 1965, was: "**THAT** the Council strongly recommends the use of clerical assistants and/or other non-teaching aides in our more seriously understaffed schools." ACDA, LIS 190-1/.

¹³⁷ Rev. John Mackey of the Auckland Catholic Education Centre, in presenting a statistical account of primary schools at the beginning of 1968 to Bishop Liston wrote: "Our present shortage of teachers, 24, as recorded, is actually inaccurate. A new staffing schedule [...] makes our situation worse than indicated." From the same letter: "130 [lay teachers] are now being paid. This is another disturbing factor namely that religious orders now seem unable to replace their sick or incapacitated teachers. They all presume that the office will make up for their own staffing deficiencies." Letter of Rev. John Mackey to Bishop Liston, 21 May 1968. ACDA, LIS 190-2/.

of the religious' stipend: in 1969 religious sisters received an allowance of \$300 while their lay counterparts received \$2,200. (The country changed to decimal currency on 10 July 1967.) In May of the same year the primary salary costs for 343 religious came to \$99,300, while 130 lay staff cost \$265,776.

Meanwhile, classes were bulging. A report of G.P. (Peter) Kelly of the same year to Archbishop Liston said:

Although few classes exceed 45 in roll, one is left with an impression of full class rooms and extended teachers. Numbers between 36 and 44, grouped in parallel classes, are accepted as a norm. Consequently there is an exacting demand on personal energy, teaching efficiency and general professional competence.¹³⁸

Private schools continued to press the government for assistance. J. Mulheron observes that "The NZ Labour Party [...] had within its ranks those who attributed lack of political success at the polls to its failure to give state aid to, mainly Catholic private schools."¹³⁹ In 1969 the Labour Party Manifesto acknowledged the savings to the taxpayer by virtue of independent schools. The manifesto also encouraged any independent schools to integrate into the state system, while preserving teachers' existing salaries and conditions. Further, the Labour Party promised that "Within six months, a conference of all parties concerned, political as well as education, will be called to determine a fair and just solution to this problem." It also stated that parliament would be asked to amend the Education Act accordingly.¹⁴⁰ Labour, however, was defeated at the polls, 45:39 seats.

In 1969 the government approved a grant for incidental expenses based on the

¹³⁸ Auckland Diocesan Education Office, Report for 1969, G.P. Kelly, director of catholic schools for Archbishop Liston, 16 February 1970. ACDA, LIS 190-2/.

¹³⁹ MULHERON, *State Aid*, p. 11.

¹⁴⁰ Labour Party Manifesto 1969.

“incidentals” grant to state schools (Grant B). Out of this grant came assistance towards maintenance and non-teaching salaries (caretakers, ground staff, etc.). Loans were offered through the State Advances Corporation, not exceeding one million dollars, for approved building developments. Colin McGeorge and Ivan Snook observe that while by modern standards these were minor grants [...] nevertheless they mark a change of tempo and of principle since while earlier concessions could be justified as “services to the pupil”, these new grants were clearly aid to the school – they relieved the financial burden of the school rather than that of the parent.¹⁴¹

In February 1970, the Interdenominational Committee of Independent Schools presented submissions to government. It pointed out that, despite grants already given, parents met the whole of the capital cost of an independent primary school and approximately 93% of its running costs. The committee asked that in 1970 the per capita funding be increased to approximately \$23 per child in primary school increasing to 50% of the average daily cost per child in a state school over 5 years. (The committee estimated that savings to the state because of independent schools amounted to approximately \$11 million per year with capital savings [land and buildings] in the vicinity of \$200 million.) While acknowledging that parents choosing to send their children to independent schools are prepared to make some sacrifice, the committee believed the burden on such parents was inequitable, and unless there was relief forthcoming, it could see no solution but to “throw a large number of children on to the State System.” The committee in an appendix denied that independent schools were “privilege schools” or that they were “divisive”. Finally the committee denied the claim that if further assistance was granted by the government, greater control of the independent schools would follow.¹⁴² In December the same year Brian Talboys, minister of education,

¹⁴¹ MCGEORGE, *Church, State, and New Zealand Education*, p. 46.

¹⁴² THE INTERDENOMINATIONAL COMMITTEE OF INDEPENDENT SCHOOLS, *Submissions to Government in Relation to Government Assistance to Independent Schools*, February 1970, pp. 4-7, 15-20.

announced an increase in assistance to private schools. A joint cabinet-caucus committee agreed to pay 20% of the cost of salaries to teachers rising to 35% over seven years with abatements when staffing ratios and salaries exceeded state levels. In total the grant (known as Grant C) was worth \$2.5 million.¹⁴³

1.6.2 – The State Aid Conference, 1973

Following the polls in 1972, the country returned a Labour government. Faithful to its election promise it convened a State Aid Conference in May 1973. It became apparent to the steering committee set up by the conference that discussions revolved about two principal issues: “the possible integration of private schools into the State system” and issues “concerning the forms of State aid which, under Government policy, would remain for schools which did not wish to integrate.”¹⁴⁴ The steering committee established two working parties to discuss the issues, and the Report from the Conference Steering Committee was presented to the Hon. Phillip A. Amos, minister of education, on 8 November 1974. Under Appendix F of the report, the Working Party on Issues other than Integration summed up its report:

21 The working party believes that, after full and cordial discussions, in which genuine attempts were made by all members to find solutions to the issues confronting them, the stage has been reached where no significant progress on the question of additional financial assistance for abated schools is likely to eventuate from further meetings.

22 The working party regrets that it has been unable to fully implement its terms of reference but feels, on the other hand, that some definite progress has

¹⁴³ See CUMMING, *State Education*, pp. 334; MCLAREN, *Education in a Small Democracy*, p. 64; MCGEORGE, *Church, State, and New Zealand Education*, p. 46; WILSON, *The State Aid to Private Schools Issue*, p. 142.

¹⁴⁴ STATE AID CONFERENCE, *Report from the Steering Committee*, 8 November 1974, to the Hon. P.A. Amos, Minister of Education, p. 4.

been made.¹⁴⁵

The Report of the Working Party on Integration, however, was another story: the steering committee said that "It is a monumental achievement for this working party."¹⁴⁶ Following two meetings on 6 and 30 July 1973 the working committee proposed to the minister that two subsidiary groups be established "to examine separate aspects of the integration issue".¹⁴⁷ From 18 June 1973 to 1 November 1974, the working party (which changed its title from "working committee" on 7 March 1974 since it examined the actual proposals for integration) produced a document (Appendix D of the Report to the Minister) which it described as "not a polished document" but:

18 [...] a form of words which has been arrived at over the entire period of discussion by patient examination, forceful advocacy on all the issues contained in it and constructive consideration of opposing points of view [...] this document is presented for submission to the resumed conference in the sincere belief that it provides an acceptable formula for the integration into the State system of private schools which wish to integrate.¹⁴⁸

¹⁴⁵ *Report to the Steering Committee from the Working Party on Issues other than Integration*, 27 May 1974, Appendix F, p. 28. Later, the working party's chairman, A.N.V. (Ned) Dobbs, would say of it: "The state aid working party, despite the undoubted competence of its members, found it impossible to reach any substantial agreement on the many vexed questions within its field. It had several meetings, tried hard to break through, wrote a report and went out of existence" (*Listener*, 28 February 1981, p. 11).

¹⁴⁶ *Report From the Steering Committee*, p. 4.

¹⁴⁷ One group discussed: "In relation to the possibility of incorporating the Catholic primary schools into the State system of education and within the general principles set down by the working committee in its report to the steering committee, to study and report on – a) the recruitment, training and certification of teachers; b) the appointment and promotion of teachers; c) the protection of existing staff; d) any other matters which seem appropriate." Under the same general principle the second group studied and reported on: "a) the provisions which should be made for the performance of those functions which in the State system are carried out by education boards and school committees; b) any change that should be made in the criteria for school transport." See, *Report to the Steering Committee from the Working Party on Integration*, 1 November 1974, Appendix D, pp. 15-16.

¹⁴⁸ *Ibid.*, p. 17.

Over the time of its meetings, members of the working party met with Bishop Kavanagh and advised him of progress. At vital stages the bishop called meetings with the executive of the Catholic Education Council to discuss progress and future directions. Reports were confined to this select group since its responsibility was to report to the minister. Similarly, any public statements were also the responsibility of the minister.

1.6.3 – The *Private Schools Conditional Integration Act 1975*

Since the *Education Act 1964* had been amended frequently by parliament, the working committee recommended that any scheme of integration should be dealt with as far as possible by a separate act. So it was that the *Private Schools Conditional Integration Act 1975* was enacted on 10 October 1975. The long title to the Act reads: “An Act to make provision for the conditional and voluntary integration of private schools into the State system of education in New Zealand on a basis which will preserve and safeguard the special character of the education provided by them.”

Following the passing of the Act, the bishops and their representatives gave the impression that integration would be optional, voluntary, a free choice.¹⁴⁹ Such statements,

¹⁴⁹ For example, the Catholic Education Council for New Zealand published successive pamphlets, giving information as a series of questions and answers: “1. Q. Now the Act has been passed do we have to integrate? A. No. The Act is ‘conditional’ and ‘voluntary’. Integration is voluntary. The principles of the Act will now be spelt out in detail in the Regulations. After that is completed, a separate Integration Agreement for each school which chooses to integrate will be drawn up between the proprietor [Note: the proprietor of a Catholic school under the Act is the diocesan bishop or a religious institute.] and the Government. Unless the proprietor is satisfied with the conditions of the Agreement, he will use his freedom not to integrate” (*Private Schools Conditional Integration Act 1975*, issued by the Catholic Education Council for New Zealand, under the Chairmanship of His Lordship Bishop J.P. Kavanagh). ACDA, MAC 38-3/.

Q. 9. “If integration is unsuccessful, is there any alternative? A. Yes. Both National and Labour have guaranteed the alternative of 50 percent State Aid and the Act details the manner of the translation of a school back from the integrated to the private status” (*Integration – Questions People Ask, The Private Schools Conditional Integration Act, 1975; The Private Schools Conditional Integration Amendment Act, 1977*, issued by the Catholic Education Council for New Zealand, under

however, begged the question and were no more than a smoke-screen to give a semblance of the notion that the bishops were able to exercise choice. The reality was that with government assistance too little, too late, and not keeping pace with inflation, the fall-out of religious and their replacement by properly-paid lay teachers, the bishops, if they wished to retain a viable catholic school system, had no choice but to integrate. "Veritas", writing in *The New Zealand Tablet*, commented at the beginning of 1975:

Let's face the fact that integration is being forced on private schools. If it were not for the steadily rising costs, a diminishing flow of religious vocations and a dramatic change in the demands of education, I have no doubt that those private schools at present engaged in the negotiations would not be sitting around the table.¹⁵⁰

In the end the bishops presented the catholics of New Zealand with a *fait accompli*: "it is our view that, [...] the Catholic community should accept the Act and the assistance it offers. In respect of the diocesan schools that is what the Bishops propose to do."¹⁵¹

Within a few months the bishops gave the government notice of intent to conditionally integrate their schools with the state system.¹⁵² Integration took the form of a four-phase

the Chairmanship of His Lordship, Bishop J.P. Kavanagh, Tablet Printing Co. Ltd.).

Again, in a statement by the N.Z. Catholic Bishops' Conference on Integration, the bishops said: "The decision whether to integrate will be a free one on the part of the Proprietor of the school, who in the case of parochial schools will be the Bishop of each diocese, and in the case of other Catholic Schools will be the controlling body of each school" (Statement by the N.Z. Catholic Bishops' Conference on Integration, Preliminary Suggestions by Mr D.P. Neazor, p. 4. ACDA, MAC 39-3/4).

¹⁵⁰ *New Zealand Tablet*, 8 January 1975, p. 3.

¹⁵¹ Statement by N.Z. Bishops' Conference on Integration, Preliminary Suggestions by Mr D.P. Neazor, undated, p. 7. ACDA, MAC 39-3/4.

¹⁵² The decision to integrate was weighed against what came to be called "the catholic six principles", which originated in Auckland diocese and were accepted by the bishops and the New Zealand Education Council. They became the criteria against which the final formula for integration was judged: 1) The right to teach, develop, and implement the catholic programme in christian faith and living; and to follow those catholic religious customs that are normal in a catholic school. 2) The

process. Initially, representatives of the Catholic Education Office (the office entrusted with the task of seeing to integration), the Department of Education, the bishop, and the school community (including the parish priest), met at the school to discuss the implications of integration and any practical difficulties. A second visit entailed a more detailed examination of the property and buildings. The third visit included representatives of the Ministry of Works to ascertain whether the schools met the state building code, fire requirements, etc. Since few did, it was in this area that the greatest financial cost to catholics would occur. John O'Neill describes it:

When all the sums were done it was found that most schools had accumulated considerable debts over the years of famine while waiting for the years of plenty. In addition the works schedules showed that most schools had been badly maintained and many were not structurally as sound as State schools were expected to be [...] It soon became clear that integration was going to cost the church some \$100 million. However further analysis shows that these costs arose, not from integration itself. Integration merely showed up the accumulated debts, the long deferred maintenance and the building deficiencies which would have had to be put right some time.¹⁵³

While some interest-bearing loans were used to finance the huge undertaking of deferred maintenance, the cost was met mainly by suspensory loans (interest free, 25 year term, paid

and living; and to follow those catholic religious customs that are normal in a catholic school. 2) The right to administer staff appointments and arrange for staff composition in a manner that recognizes the catholic character of the school. 3) The right to enrol children of catholic parents in the first place, and in the second place to enrol the children of other parents seeking a christian environment for the education of their children. 4) The right to extend existing schools and build new ones to meet the demands of legitimate expansion and proven need, including schools with special purposes: e.g., catering for children with special educational, physical or emotional problems. 5) The right to own land, schools, ancillary educational buildings, and facilities which make up the catholic system. 6) The right of the catholic community to make a tangible financial contribution towards the cost of maintaining its schools. See *New Zealand Tablet*, 22 January 1975, p. 2; also Statement by N.Z. Bishops' Conference on Integration, p. 3.

¹⁵³ O'NEILL, "Catholic Education in New Zealand", p. 179. Since 1987 Rev. John O'Neill has been executive director of New Zealand catholic education. His involvement in integration dates from 1973 when he was appointed as a member of the Working Committee on Integration.

off at 1/25 p.a. by way of attendance dues¹⁵⁴) through the government's Housing Corporation. The final visit involved meeting the teachers so that they understood what would happen to them under integration. Issues such as registration, etc., were addressed by the team.

Negotiations for each school wishing to integrate culminated in the integration agreement, a formal agreement between the minister of education acting on behalf of the Crown, and the proprietor, establishing a partnership. Thus the originally-established private school became part of the state system but subject to the special provisions of the new Act.

The bishops originally wished that all catholic schools would be integrated at once; however, since the government was unable to finance the integration of so many schools (270 plus), a phasing-in programme began. In Auckland diocese the first primary schools were integrated in September 1980, and by the end of March 1983 all primary schools were integrated. Auckland diocese's load for integration became significantly reduced with the division of the diocese and the erection of the Hamilton diocese on 7 July 1980. (See Appendix 1, Map 9.)

1.6.4 – The Curriculum Review and Tomorrow's Schools

While catholic schools were adjusting to their new status, reforms in education were occupying the Department of Education. In November 1984, the minister of education, the

¹⁵⁴ Under the Act, tuition fees were abolished. However, proprietors were entitled to levy attendance dues to service the loans needed to bring the school up to code. In 1979, representatives of the bishop of Auckland and provincials of orders teaching in catholic schools formed a Board of Proprietors, under the chairmanship of the bishop, which had among its purposes "(a) to unite Catholic Schools of the diocese into one system for the purpose of integration; (b) to provide uniform primary and uniform secondary attendance dues over the system, to equalize burdens and opportunities for Catholic parents; (c) to use the on-going reduction of capital debt from attendance dues, and the on-going taking up of debt to be serviced by the constant dues to expand the system in the future and to offer Catholic education to more children [...]" (Board of Proprietors of Auckland Diocese, 30 May 1979). ACDA, MAC 41-4. See *infra*, chapter four, p. 258, footnote 132.

Hon. Russell Marshall, announced the establishment of a committee to review the curriculum for schools. (The last review was in 1942.) Following widespread consultation of parents, teachers, and students, the findings were published as *The Curriculum Review Report of the Committee to Review the Curriculum for Schools 1987*. Then on 21 July 1987, the Rt Hon. David Lange, prime minister and minister of education, established a “Taskforce to Review Education Administration”. Reporting directly to the ministers of education, finance, and State Services, under the chairmanship of Brian Picot, the taskforce considered “more than 700 submissions” and met and talked “with many people and organisations”.¹⁵⁵ Included in its terms of reference was an “endeavour to ensure that systems and structures proposed are flexible and responsive to changes in the educational needs of the community and the objectives of the Government.”¹⁵⁶ In its executive summary, the taskforce observed that “The running of learning institutions should be a partnership between the teaching staff (the professionals) and the community. The mechanism for creating such a partnership will be a board of trustees.”¹⁵⁷ Among other recommendations, the taskforce proposed an independent review and audit agency which would report directly to the minister of education. It would review and audit “the performance of every institution in terms of its charter, and for providing independent comment on the quality of policy advice and on how well policies are

¹⁵⁵ NEW ZEALAND TASKFORCE TO REVIEW EDUCATION ADMINISTRATION, *Administering for Excellence: Effective Administration in Education*, Wellington, NZ, The Taskforce, 1988, p. vii.

¹⁵⁶ *Administering for Excellence*, p. ix.

¹⁵⁷ *Ibid.* Later, the document enunciated the specific responsibilities of the board of trustees: “5.2.1 Each institution will have a board of trustees responsible for the broad policy objectives and the efficient running of the school. The board will be expected to be responsive to community educational needs and set programmes and courses to meet them, within national objectives. The role of the board of trustees will differ in some detail between the three sectors – early childhood, compulsory schooling (primary and secondary), and tertiary. However, the broad responsibilities are the same – for the institution’s charter, for staffing, for allocation of funds, and for building maintenance” (p. 45).

In regard to property, the taskforce noted that in the case of integrated schools, the existing legal contract needed to be taken into account in deciding who is responsible for maintenance and capital works. *Administering for Excellence*, p. 48, 5.2.17.

being implemented at the national level.” The rationale was accountability – that “Those who exercise power and responsibility on behalf of others must expect to have their performance monitored and to be held accountable for what they have achieved.”¹⁵⁸

In response to the report of the taskforce the government produced a discussion paper *Tomorrow's Schools*.¹⁵⁹ Following substantially the recommendations of *Administering for Excellence*, the generally-favourable public response to the paper enabled the government to introduce a Bill to effect the changes. The taskforce considered 1 October 1989 as the date for change since “the work of learning institutions must not be disrupted in any way”, and it would “allow sufficient time for the planning, the legislative changes, and the training that will be required.”¹⁶⁰ So that elections for boards of trustees could take place prior to this date, “An Act to provide for the establishment of boards of trustees for State primary, secondary, composite and correspondence schools and for certain other units” whose short title may be cited as the *School Trustees Act 1989* was enacted on 10 March 1989. The substantial Act to effect the changes was the *Education Act 1989*. Now the overall governance of the school would effectively rest in the hands of the board of trustees – a long way from the days when the parish priest administered the parish school with a handful of loyal supporters to help him, and the religious administered the diocesan secondary schools.

Conclusion

In this chapter we presented a summary overview of the history of the catholic Church in New Zealand, with an emphasis on catholic education. The first missionaries, beginning with Bishop Pompallier in 1838, saw the school as an essential vehicle in the process of

¹⁵⁸ Ibid., p. 60, 6.4.1-2.

¹⁵⁹ DEPARTMENT OF EDUCATION, *Tomorrow's Schools. The Reform of Education Administration in New Zealand*, August, 1988.

¹⁶⁰ *Administering for Excellence*, p. 83, 8.2.7, 8.2.10.

evangelisation. Initially, some financial assistance to the Churches involved in education, including the catholic Church, came by way of the colonial authorities.

Between the division of the country into six provinces in 1852 and the abolition of this legislation in 1875, education became a provincial responsibility. Over this time various debates on education led the government to establish in 1877 a national education system that eschewed sectarian differences, opting for a secular education system. The response of the catholic Church was to divert its energies into developing a parallel education system that included the teaching of the faith – becoming a “private school” system – which relied heavily upon a supply of religious teachers (many of whom were not New Zealanders), and the financial generosity of the laity.

The bishops, by way of the plenary, and provincial councils and diocesan synods vigorously encouraged the faithful to send their children to catholic schools, using ecclesiastical sanctions to reinforce attendance at such schools. In 1917, the Code of Canon Law arrived in the life of the Church. It did little more than reflect the legislation under which the Australasian Church had operated since its inception.

Beginning in the fifties, the catholic school system began to experience, among other things, increasing financial strain and the effects of overcrowded classrooms. Through this time the catholic community continued to make several appeals to the government for financial assistance. Eventually, the government responded by way of various grants; these, however, were insufficient to sustain the system. With catholic schools literally on the brink of collapsing, the Labour government in 1972 convened a State Aid Conference. The conference recommended the feasibility of integrating private schools into the state system by way of a separate act. Thus catholic schools, choosing to integrate with the state system under the *PSCIA 1975*, had their survival ensured.

In 1988, a task force established by the Labour government to review the administration of education, recommended that education should be a partnership between the teaching staff and the community. The mechanism enabling this provision to be effected came by way of the *Education Act 1989* in which boards of trustees were established. From a canonical perspective, we discussed that catholic schools, whether diocesan or parochial, were, from the beginning, administered or governed by either the diocesan bishop or parish priest respectively. Following their integration and the passing of the *Education Act 1989*, however, this function passed statutorily to boards of trustees.

CHAPTER TWO

THE CANONICAL STATUS OF PARISH AND DIOCESAN SCHOOLS IN AUCKLAND

“Law is a form of order, and good law must necessarily mean good order” (Aristotle).¹

Introduction

While canonical writings frequently make reference to the word “status”, in keeping with Javolenus’ dictum that “all definitions are perilous”,² one becomes hard pressed to find a definition of status in canon law. *A New English Dictionary on Historical Principles* notes that the meaning of status is derived from the Latin, *stare*, to stand. Hence it defines status under “Law” as “the legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations.”³ *Black’s Law Dictionary* has a similar definition; it defines status, among other things, as “standing, state or condition; the legal relation of an individual to the rest of the community. The rights, duties, capacities and incapacities which determine a person to a given class.”⁴ Using these definitions as a basis, this chapter will explore certain legal entities in canon law – their history and present condition, their relationship to one another, rights and

¹ ARISTOTLE, *Politics*, Bk VII, Chap. 4, sec. 5, English translation by H. RACKHAM, Cambridge, MA, Harvard University Press, 1990, p. 555.

² “*Omnis definitio in iure civili periculosa est*” (OCTAVIUS PRISCUS JAVOLENUS [b. c. 60 A.D.], D. 50, 17, 202).

³ *A New English Dictionary on Historical Principles; Founded Mainly on the Materials Collected by the Philological Society*, J.A.H. MURRAY, et al. (eds), Oxford, Clarendon Press, 1888-1933, pp. 866-867.

⁴ H.C. BLACK, *Black’s Law Dictionary*, 6th edition, St Paul, MN, West Publishing Co., 1990, p. 1410.

responsibilities which they entertain, and their legal standing.

In chapter one we outlined the establishment of catholic schools, their rudimentary beginnings, and the passing of the *Education Act, 1877* which led to the establishment of the catholic school system. The undertaking of keeping catholic schools financially viable depended on the sacrificial giving of the laity. Eventually, the system outgrowing the generosity of the faithful, reached the point of economic collapse. In this impasse, the Church had no alternative but to apply to successive governments for economic aid. In the end, the solution was to integrate the catholic schools into the state system by an Act of Parliament in 1975. By March 1983 all the primary schools in the Auckland diocese were integrated. Since this latter development took place under the prescription of the 1917 Code of Canon Law, the contents of this chapter will concentrate primarily on the *ius vigens*, the 1917 Code – the law applying at the time.

Again, as we have shown in chapter one, the nineteenth century saw the establishment of catholic schools in New Zealand. The *ius vigens*, the ecclesiastical law of the time that regulated the life of the Church, and, therefore, catholic schools prior to the promulgation of the 1917 Code of Canon Law, derived from the plenary councils producing “what were *de facto* local codes of canon law that regulated Catholic life and determined ecclesiastical policy.”⁵ Diocesan synods drew on this legislation, adding particular legislation of their own.

Among the many issues that preoccupied the fledgling Church in Australia and New Zealand in the last quarter of the nineteenth century were the establishment of parishes; whether parishes once they were established, were parishes properly so-called according to the common law of the Church; and the appointment to a parish of its own pastor “as in other

⁵ WATERS, *Australian Conciliar Legislation*, p. 1.

other Catholic countries”.⁶ In short, what precisely was the status of a pastor and the people who lived within determined boundaries and who supported the pastor by their voluntary offerings? The colonial Church was equally concerned with the necessity of maintaining catholic schools. Finally, the Church sought recognition in the law of the land such that the Church could effectively carry out its mission.

As outlined earlier,⁷ the bishops of both Australia and New Zealand in the First Plenary Council of Australasia, believing that catholic schooling was critical to the faith-formation of children, decreed that the construction of school buildings should precede the building of parish churches. At the parish level, the responsibility for the establishment of a catholic school rested with the priest of the place, while parents were exhorted (under threat of refusal of absolution if they chose otherwise “without a sufficient reason”) to send their children to a catholic school where such was established. As land was needed by the Church for catholic schools and since the catholic bishops representing the Church were unable to own land, parliament passed an Act (*The Roman Catholic Lands Act, 1876*) which constituted the catholic bishop of a diocese as a corporation sole. The Act enabled a diocesan bishop to purchase, own, and sell land on behalf of the Church.

The 1917 Code of Canon Law contained many of the juridic norms which occupied the Fathers of the plenary councils: parish priests, parishes, catholic schools, and the administration of temporal goods. Since these canonical legal entities are interconnected and impinge directly on the diocesan and parish catholic schools, each of them will be treated in this chapter: the parish and the parish priest, the notion of the juridical person, the administrator of the juridical person, the catholic school, and the civil law recognition of

⁶ *Concilii plenarii Baltimorensis II. In ecclesia metropolitana Baltimorensi a die VII. ad diem XIII. octobris AD 1866, habiti et a Sede Apostolica recogniti acta et decreta, editio altera mendis expurgata* (= BALTIMORE II), Baltimore, Excudebat Joannes Murphy, 1880, decree 123; AUSTRALASIA I, decree 35; WELLINGTON I, decree 34.

⁷ *Supra*, chapter one, pp. 40, 44.

these, where applicable, in the corporation sole.

One of Mackey's observations in his history on the founding of a state-education system is the impact of the United States. With the War of Independence, the transportation of convicts to America ceased. England sought an alternative penal colony in Australia, and this indirectly affected New Zealand. The penal colony in Botany Bay in New South Wales became a source of trade in timber and flax for New Zealand. Later, whaling fleets brought contact with the United States (along with France, England, and Russia). Although the early New Zealand settlers were predominantly British, Mackey in his Foreword observes, "Nevertheless, it would be a mistake to consider that New Zealand was a slavish model of a British pattern." In support of his premiss, he states that:

A recent scholar, Leslie Lipson, who has written on the development of politics in New Zealand, [...] wrote of the British tradition and of its modification by time and circumstance in the colony: "It permeates the political machinery, the legal system, and the social customs of the people. In some form or other it can be felt pervading every sphere of activity. But, as already stated, New Zealand democracy is not just a slavish imitation of the British model. The need for adjusting to a new environment has modified the inherited tradition. It will be noticed, moreover, that where New Zealand has struck out on its own, it has arrived at results more analogous to those of other English-speaking democracies than of Britain. The United States, Canada, Australia – these are the countries in which some parallel features can be observed. In certain cases New Zealand has deliberately followed an American or an Australian rather than a British precedent. In others, she has independently arrived at results similar to those of America and Australia by adopting much the same solutions under parallel circumstances." The truth of this statement is exemplified by New Zealand's educational history. The root and inspiration are essentially British, yet its form is closer to American and Australian patterns than to British. Yet despite its parent-root or its similarities to other forms it is an indigenous growth.⁸

This statement also points to the influence of the United States on the canonical legislation

⁸ MACKEY, *The Making of a State Education System*, p. 15. Also see L. LIPSON, *The Politics of Equality*, Chicago, The University of Chicago Press, 1948, p. 10.

of Australia and New Zealand. The influence of the Irish bishops in the Australasian councils has been noted already,⁹ but the conciliar Fathers also drew on the legislation of the American Church, particularly in regard to parishes and education. It was a natural consequence to a parallel situation. A comparison of the First Plenary Council of Australasia and the Second Plenary Council of Australia (1885, 1895) with the First, Second, and Third Plenary Councils of Baltimore (1852, 1866, 1884) shows the closeness of the Australasian church to the American situation.¹⁰ And so akin was the Church in New Zealand to the Church in Australia that the First Provincial Council of Wellington in 1899 adopted the decrees of the Second Plenary Council of Australia with only minor modifications.

2.1 – THE PARISH AND THE PARISH PRIEST

As noted already, New Zealand shared a frontier expansion with both Australia and America. Originally the whole country was part of a vicariate apostolic. To facilitate pastoral care, missions or districts were entrusted to the early missionary priests. These catholic missions were aligned with settlements which were more or less developed as the case might be. Eventually, the vicariate apostolic became divided into dioceses.

The Church in the United States was somewhat further advanced at this stage. The Fathers of the Second Council of Baltimore in 1866, well aware of the advantage of establishing parishes in line with the common law of the Church, decided to introduce gradually parishes into each diocese:

⁹ See *supra*, chapter one, pp. 37-42.

¹⁰ WATERS, *Australian Conciliar Legislation*, p. 114, records that when Archbishop Polding learned that Bishop Quinn of Brisbane was “instituting parish priests” he pointed out that it was not done in America or England. Later, “At Propaganda, the consultor Father Steinhuber, after noting the debate and casting vote [on irremovable parish priests during the First Plenary Council of Australasia], wondered whether it was yet opportune to erect parishes, and recommended that Australia have what was legislated for the United States of America [...]”, p. 117.

As formerly and very appropriately, in the words of the Council of Trent, dioceses and parishes were distinct, and to each flock special pastors (*pastores*) as well as inferior rectors were assigned, so that each one should have charge of his particular congregation,¹¹ it would therefore be very desirable, that in accordance with this custom of the entire Church there should be parish priests in the proper sense of the term (*parochi proprie dicti*) in these States, as in other Catholic countries. Yet our circumstances are such as will not at the present conjuncture admit of this. It is, however, the sincere desire of the Fathers of this Plenary Council, that gradually and as far as circumstances will permit, our discipline should in this respect conform to that of the entire Church (decree 123).¹²

They decreed that in every diocese each church should have assigned to it a certain and well-defined district, equivalent to a parish, and that the rector in charge should have parochial or quasi-parochial rights:

We wish [...], therefore, that throughout all these provinces, especially in the larger cities, where there are several churches, determinate districts on the model of parishes with accurately defined limits, be assigned to each church; and that to its rector parochial or quasi-parochial rights be given (decree 124).¹³

Rectors, however, did not have the right of irremovability. Rather they were removable at the

¹¹ "And because by an excellent law dioceses and parishes have been made separate, and to each flock have been assigned their own shepherds and to less important churches their rectors, who each have responsibility for their own sheep, so that ecclesiastical order may not be confused, or one and the same church belong in the same way to two dioceses, not without serious inconvenience to those who may be its subjects; therefore benefices of one diocese, whether they are parish churches, perpetual vicariates, simple benefices, prestimonies or prestimonial portions, are not to be joined permanently to a benefice or monastery or college or place, even pious, belonging to another diocese, even on the plea of increasing divine worship or the number of the beneficiaries, or for any other reason: hereby is explained the decree of this holy council about unions of this kind" (COUNCIL OF TRENT, Session 14, c. 9, in N.P. TANNER, *Decrees of the Ecumenical Councils*, London, Sheed and Ward, University Press, 1990, vol. 2, p. 717).

¹² Translation in S. SMITH, *Notes on the Second Plenary Council of Baltimore*, New York, P. O'Shea Publisher, 1874, p. 104.

¹³ *Ibid.*, p. 108.

will of the bishop but not without grave reasons:

While employing the terms parochial rights, parish priests [*parochi*], parish [*paroechiae*], we by no means intend that to the rector of any church the right of immovableness [*inamovibilitatis*] should be given. We admonish bishops, however, not to use their privilege of removing priests [*sacerdotem*]) except for grave reasons (decree 125).¹⁴

By 1884, however, the Third Plenary Council of Baltimore decreed that in every diocese there should be permanent or irremovable pastors as was the custom in England (decree 33).¹⁵

In Sydney, in 1885, the First Plenary Council also addressed the issue of parish priests or *parochi*. Of the council's two hundred and eighty-seven decrees, nine of them (decrees 35-43) applied to parish priests. Prior to this time all priests were missionaries and the bishop could transfer them at his pleasure. Initial legislation proposed that if possible, one fifth of the districts of each diocese would have a permanent parish priest, and as an absolute minimum, each diocese was to have three. Following the American bishops, the Fathers agreed that parish priests should be appointed in Australasia as in the catholic countries of Europe; however, since many dioceses were poorly-staffed, bishops were unable to confer this title on every priest in charge of a district. So that there might be some alignment with the universal law of the Church, the council decided that the principal mission in each diocese would have an irremovable rector.¹⁶

¹⁴ Ibid., pp. 108-109.

¹⁵ BALTIMORE III, p. 21. The reference to England contains a footnote "Vide Excerpta e Conc. Prov. Westmonast. I., in *Appendice*, p. 230."

¹⁶ "Without a doubt it is to be most surely hoped that Priests be established who will watch over the salvation of the faithful, and will rule individual areas; that they properly be named as parish priests in the Churches of our own province, just as in the catholic regions. The circumstances of the rest of these regions are scarcely such that they are unable to be arranged correctly with the ordering of this kind, nor do they allow that all priests are honoured immediately with such a title and privilege as rectors of individual districts. So that at least in part the clergy of the dioceses of Australia [sic]

In August 1888, Auckland diocese held its second synod. The synod obliged each of the clergy to have the acts and decrees of the First Plenary Council of Australasia “as the norm of his own account of action” (decree 1.1). Acting on the decrees concerning irremovable pastors, the synod made the parish priests of six of the principal parishes, irremovable pastors.¹⁷ The parishes were Newton (St Benedict’s, 1880), Onehunga (Assumption, 1850), Otahuhu (SS. Joseph and Joachim, 1861), Panmure (St Patrick, 1847), Parnell (St John the Baptist, 1861), and Thames (St Francis of Assisi, 1868). (See Appendix 1, Maps 2 and 5.)

Decree 35 of the First Plenary Council of Australasia was repeated verbatim in the Second and Third Plenary Councils of Australia (1895, 1905), and brought into New Zealand legislation in the First Provincial Council of Wellington in 1899, with appropriate modifications for the local scene. Until the promulgation of the 1917 Code of Canon Law, New Zealand (as Australia and the United States) sustained two categories of pastors: a small group of irremovable rectors and a larger group of removable rectors. In both cases their

might conform to the norm and custom of the universal Church, we wish that in each Diocese certain special missions be chosen by the authority of the bishop which will enjoy the privilege that their Parish Rectors will be immovable” (decree 35).

“As to the number of parish districts that will enjoy this privilege, we wish that, if possible, in each Diocese at least one among five Ecclesiastical districts would have an immovable parish rector. We consider it useful that in whatever diocese at least three immovable parish rectors be established” (decree 36).

In comparison, a year earlier the Third Plenary Council of Baltimore determined that one-tenth of the pastors of a diocese should be irremovable pastors: “*For now*, let immovable missionary rectors be established in individual dioceses in such number that among all the missionary rectors of the diocese each tenth part be immovable, [...] Let this proportion (one in ten) not unadvisedly be exceeded within the first twenty-one years after the council is published” (decree 35).

¹⁷ “Freely embracing those things which can be a help to advance the good of our beloved clergy, we publish and decree those things which were sanctioned by the Fathers of the Council of Sydney concerning the establishment of immovable rectors. We advise individuals therefore to read carefully and follow what has been established concerning this matter. Nominations which we have decided to make in this matter will be found among the Acts of the Synod” (decree 7). ACDA, LUC 1-3/2.

jurisdiction was regulated by the bishop whose vicars they were.¹⁸

With the promulgation of the 1917 Code, the distinction between irremovable and removable rectors¹⁹ was sustained. Irremovable rectors continued just as the law found them (c. 454 CIC/17).²⁰ But with the coming into force of the 1917 Code the status of rectors/pastors changed. Accordingly, the jurisdiction of pastors was ordinary and acquired

¹⁸ To clarify any confusion, the First Plenary Council of Australasia in decree 43, stated: "To deal with every occasion of disagreement, we declare [...] that the Rector, except for the right of immovability, does not get any other right unless it is clearly declared in this Plenary Council or in Provincial or Diocesan Synods." The decree was quoted verbatim by the New Zealand bishops in the First Provincial Council of Wellington as n. 42.

¹⁹ Some English translations of the 1917 Code translate *rectores* as "pastors", rather than the familiar "rectors" used in some translations of the councils and synods. See, for example, ABBO-HANNAN, BOUSCAREN, WOYWOD, following.

²⁰ All references to the 1917 and 1983 Codes of Canon Law are styled c. for canon and cc. for canons, followed by the canon number(s) and CIC/17 or CIC/83. The English translation of the 1917 Code, unless otherwise noted, is taken from J.A. ABBO and J.D. HANNAN, *The Sacred Canons, A Concise Presentation on the Current Disciplinary Norms of the Church*, St Louis, MO, B. Herder Book Co., 1957. The English translation of the 1983 Code is taken from *The Code of Canon Law in English Translation*, prepared by THE CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND, in association with THE CANON LAW SOCIETY OF AUSTRALIA AND NEW ZEALAND and THE CANADIAN CANON LAW SOCIETY, London, Collins; Ottawa, Canadian Conference of Catholic Bishops, 1997.

Canon 454 – §1. "They who are placed in charge of parishes as their pastors should be given stability of tenure, though this does not prevent their removal in accordance with the norms of law."

§2. "Pastors do not all enjoy the same degree of stability; those who enjoy it in greater measure are possessed of irremovable tenure; those who enjoy it in less measure are possessed of removable tenure."

§3. "Parishes of irremovable tenure cannot, without the consent of the Holy See, be changed into parishes of removable tenure, but the latter may be changed, after consultation with the cathedral chapter (board of diocesan consultors), by the bishop, but not by the vicar capitular (administrator), into parishes of irremovable tenure. Parishes newly erected shall be of irremovable tenure, unless the bishop, after consultation with the cathedral chapter (board of diocesan consultors), decides on the basis of his prudent appraisal of the local and personal factors involved that it is advisable to erect it as a parish of removable tenure."

§4. "Quasi parishes, i.e., the subdivision of vicariates apostolic or prefectures apostolic, are all removable tenure [...]."

by virtue of the office of pastor itself. No longer was jurisdiction delegated from the bishop.²¹

Not only did the new Code affect the status of parish priests, but it also affected the status of parishes. Again, the Church in the United States had an influence on the Church in Australasia. John J. Nevin, recalling the history of the diocese and parish in the United States, writes:

It is evident, then, that at this time there were no canonical parishes in the United States, and this condition of things continued even after 1908, when the American church was transferred from the jurisdiction of the Propaganda to the government of common law. When the New Code came into force, a great change was effected in the status of parishes and pastors in the United States. Forthwith, the territorial division of dioceses became canonical parishes, and the rectors began to hold these parishes *in titulum*, i.e., as their own and not merely as delegates of the bishop.²²

Nevertheless, after the promulgation of the Code, despite what John Abbo and Jerome Hannan would call “the clear and precise dispositions of canon 216 §1,”²³ the canon caused some confusion in the American Church. On the one hand, doubts arose as to the nature of parishes, and on the other, there were disputes concerning the rights and duties of the rectors. Nevin describes the effect on the Australasian Church as follows:

Yet there was reason to doubt if, in this matter, the Code had the same full

²¹ Canon 451 CIC/17. See J.J. NEVIN, “Canonical Status and Proper Mode of Designating Priests in Charge of Missions”, in *The Australasian Catholic Record*, 3 (1926), p. 157.

²² *Ibid.*, p. 156. In the reference to “Forthwith”, Nevin refers the reader to *AAS*, 11 (1919), p. 346.

²³ ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 275.

Canon 216 – §1. “The territory of each diocese shall be divided into distinct territorial parts; and to each part there shall be assigned its own church with a definite group of the faithful, and a particular rector must be placed over it as its proper pastor for the requisite care of souls.”

§3. “The portions of a diocese mentioned in §1 form *parishes*; the portions of a vicariate apostolic or a prefecture apostolic, if a rector of their own has been assigned them, are called *quasi-parishes*.”

effect on our parochial districts and their rectors as in the United States. The Church of America had passed from the jurisdiction of the Propaganda to that of common law; we were still under the Propaganda. They had ceased to be regarded as a missionary country; we, though having a constituted hierarchy, were, to some extent at least, still a missionary country. Hence our conditions were somewhat abnormal. We were not a purely missionary country, and yet our organisation was not complete since *aliquid inchoatum adhuc praeseferebat*, as the decree of Propaganda of December, 1920, expressed it.²⁴ Hence, if doubts arose, as they did, in America after the publication of the Code regarding the canonical status of parishes and pastors in that country, it was only natural that they should arise here too. The Propaganda realized that the situation called for a solution and issued a special decree on the point on December 8, 1920.²⁵ In this decree it was decided that, in countries which, though under the jurisdiction of the Propaganda, have regularly constituted hierarchy, the divisions of dioceses, which have fixed boundaries or which in future will be thus erected in accordance with Can. 216, are to be called *parishes*, but what is specially legislated in the Code for quasi-parishes also refers to them.²⁶

Despite the decree, debate continued in the United States as to the nature of parishes. In the end, the Apostolic Delegate, Giovanni Bonzano, in a letter dated 20 March 1921, addressed

²⁴ *AAS*, 13 (1921), pp. 17-18; *Periodica*, 10 (1922), p. 303. The decree of the Sacred Congregation of Propaganda, 9 December 1920, reads:

“The Ordinaries of certain territories, which, although they have a hierarchical organization, are yet under the jurisdiction of this Sacred Congregation because they are in some respects still in a primitive condition, have proposed certain questions regarding the juridical status of their missions.

Accordingly, to remove the doubts and provide a safe general norm of action, the Sacred Congregation provides:

1. As the dioceses subject to this Sacred Congregation are to be considered as missions, some parts of the territory may be permitted to remain undivided, that is without any designation of parish limits.

2. But those parts of the territory which have already been assigned definite boundaries, or which will hereafter be assigned such boundaries in accordance with c. 216, are to be called parishes; they shall, however, be subject to the peculiar provisions that have been made for quasi-parishes. [...]” (*CLD*, vol. 1, p. 149).

²⁵ Nevin records the date of the decree as 8 December 1920 while both *AAS* and *CLD*, vol. 1 record it as 9 December 1920.

²⁶ NEVIN, “Canonical Status and Proper Mode of Designating Priests in Charge of Missions”, pp. 157-158.

again the confusion regarding the nature of parishes. The delegate submitted to the Pontifical Commission for the Authentic Interpretation of the Canons of the Code the following question:

For the erection of a parish which has not the character of a benefice: (1) is it necessary that the Ordinary should issue a formal decree declaring explicitly that he erects a certain district into a parish; or, (2) is it sufficient that, having divided a certain territory into several districts, the respective limits of which are definitely indicated, he assigns to each district a rector to take charge of the people and the church thereto pertaining, according to c. 216, 1° and 3°?²⁷

The response of the president of the commission, Cardinal Pietro Gasparri, was:

“*Negative ad primam partem*”; i.e., that a special decree of the ordinary is not necessary for the erection of a parish; and, “*Affirmative ad secundam partem*,” i.e., that it is sufficient *quoad hoc*, for the erection of a parish, that the Ordinary define the territorial limits, and assign a rector to the people and the church within said limits.²⁸

Gasparri also addressed the issue of the parish as an ecclesiastical benefice. He determined that a parish is always an ecclesiastical benefice according to c. 1411, 5° CIC/17, whether it has the proper endowment, resources or revenue as c. 1410, or, even if it is lacking these, it be erected according to the provisions of c. 1415, 3°.²⁹

²⁷ *CLD*, vol. 1, p. 150.

²⁸ *Ibid.*

²⁹ Canon 1411 – 5°: “[Ecclesiastical benefices are] *curata* or *non curata*, as they have or have not annexed the care of souls.”

Canon 1410 – “The endowment of a benefice is constituted either by the property owned by the juridical person itself; by regular, pledged payments made by some family or moral person; by regular, voluntary offerings of the faithful which belong to the administrator of the benefice; by so-called stole fees as determined by the diocesan schedule or legitimate custom; or by choir allotments, exclusive of a third part of them if the entire income of the benefice consists of them.”

Canon 1415 – §3. “But in the case in which an adequate endowment cannot be set up, [the ordinary] is not forbidden to establish parishes or quasi-parishes, if he shall prudently foresee that what is needed will not be wanting from other sources.”

The delegate asked a second question whether a special decree of the Ordinary was necessary to constitute as canonical parishes, those which prior to the new Code were established according to the second part of the previous question. The response was that no decree was necessary and that such parishes became canonical parishes *ipso facto* on the promulgation of the new Code.³⁰

From this, the delegate concluded:

It is evident from this official answer that all parishes of the United States having the three necessary qualifications, viz., (1) a resident pastor; (2) endowment (resources or revenue according to the provisions of canons 1410 or 1415, §3); and (3) boundaries, are not only parishes in the strict canonical sense, but are also ecclesiastical benefices. Hence, pastors in the United States are real canonical pastors (*parochi*) having all the duties and obligations pertaining to such an office [...].³¹

Nevertheless the issue of whether a decree of erection was necessary for constituting a parish continued to be raised.³² In answer to this question, the Sacred Congregation of the Council responded that: “a decree of erection, though it is the usual way of constituting a parish, does not seem necessary to its valid erection. Neither the former law nor the Code makes this requirement *ad validitatem*; and acts are not presumed invalid unless their invalidity is clearly proved (cc. 11, 1680, §1).”³³

³⁰ *CLD*, vol. 1, pp. 150-151.

³¹ *Ibid.*, p. 151.

³² The question posed by a Canadian bishop was whether the rectors of parishes constituted *de facto*, i.e., without any decree of canonical erection were obliged to say the mass *pro populo*. See *CLD*, vol. 1, p. 152.

³³ SACRA CONGREGATIO CONCILII, *Resolutio, Principis Alberten. et Saskatoonen*, 5 March 1932, in *AAS*, 25 (1933), p. 437; also in *Apollinaris*, 6 (1933), pp. 421-422; English translation in *CLD*, vol. 1, p. 152.

For Australia and New Zealand, the American decision by no means closed the discussion and for some forty years following, the question of whether a parish was a benefice continued to be debated. George C. Gallen noted that the basis of the dispute rested on the fact “that a new and wider concept of ecclesiastical benefice has been introduced by the Code”.³⁴ Nevin, in 1930, had summed up the difficulty thus:

The idea of a pastor holding a canonical Benefice in a Missionary country – and Australia, while it remains under the jurisdiction of the Sacred Congregation of Propaganda,³⁵ must be regarded as such – is so new and contrary to our preconceived notions of a Benefice, that one’s first impressions are totally against it. Such an idea was entirely outside the concept of the old canonists who compiled their tomes *De Beneficiis Ecclesiasticis*.³⁶

By the time of the Fourth Plenary Council of Australia and New Zealand in 1937, the conciliar Fathers declared that parishes *in regionibus nostris* are true parishes (*sunt verae paroeciae*) (decree 178).³⁷ Since decree 223 determines that “the parish priest has the right

³⁴ G.C. GALLEN, “Are Parishes in Australia also Benefices – Are Parishes always Benefices – Consequences of Parishes in Australia being Benefices – Is Australia still under the Sacred Congregation of Propaganda Fide”, in *The Australasian Catholic Record*, 36 (1959), p. 57.

³⁵ Under Paul VI, the Apostolic Constitution, *Regimini Ecclesiae universae* of 15 August 1967 (AAS 59 [1967]), pp. 885-928), named Propaganda the Congregation for the Evangelisation of Peoples. Australia remained subject to this congregation until 1976. See PAUL VI, Apostolic letter, *Australiam*, 22 March 1976, in AAS, 69 (1977), p. 29. English translation in *CLD*, vol. 8, p. 180: Apostolic letter “changing status of all the ecclesiastical territories of, from status and law of a missionary territory to status and law of common law, thus removing it from the jurisdiction of S.C. Gent. Evang. to the various competent departments of the Apostolic See.” New Zealand continues to enjoy the competence of the above-mentioned Congregation.

³⁶ NEVIN, “Are Parishes in Australia Benefices? Are Parish Priests bound to give their Superfluous Revenue to Charitable Purposes”, in *The Australasian Catholic Record*, 7 (1930), p. 172.

³⁷ *Concilium plenum IV, Australiae et Novae Zelandiae, habitum apud Sydney a die 4^a ad diem 12^{am} mensis septembris anno Domini 1937, praeside Excell.mo Domine Joanne Panico, a Sancta Sede recognitum, editio officialis*, Manly, NSW, Manly Daily Pty., 1937: “Territorial divisions of a diocese with their own church and fixed population, even in our own regions, are true parishes and the rector who is appointed to each division is indeed the parish priest of the same division

to remuneration which legitimate custom or taxation affords him”, and decree 667 says that “With the exception of the offering collected by order and approval of the bishop for a definite purpose, all others comprise the income of the parish”, Gallen argues that these considerations “impel the conclusion that by the legitimate authority for the entire territory of Australia [and New Zealand], the voluntary offerings of the faithful have been constituted the endowment of parishes in the same territory, and that the pastor has a right to these offerings.”³⁸

The debate over whether parishes were benefices, or whether they were true parishes, or whether their pastors were canonical parish priests, highlighted another feature of the life of the Church in Australia and in New Zealand, namely, that parishes relied principally on the financial giving of the faithful: the voluntary offerings of the laity were the primary source of income for the parish and the diocese. Closer to home, while the issue of benefices continued to be debated publicly by clerics until 1959, as mentioned already, the reality was that in the Auckland diocese, as in the rest of New Zealand, parish priests administered parishes according to the provision of the common law. In conclusion, the history of parishes and parish priests as outlined previously demonstrates that according to the *ius vigens*, the decrees of the councils, and the Code of Canon Law, parishes in dioceses in New Zealand have the status of true parishes and their pastors have the status of true parish priests, according to the provisions of the law.

2.2 – THE PARISH AS A MORAL OR JURIDICAL PERSON

Canonical commentators have treated extensively the notion of the moral or juridical

with all the rights and obligations of parish priests unless it is already decided otherwise” (decree 178).

³⁸ GALLEN, “Are Parishes in Australia also Benefices”, p. 51.

person.³⁹ However, since this juridical concept is important, especially in its application to the parish and parish school, diocese, and diocesan school, and for the sake of later discussion, an overview is presented here. Canon 99 CIC/17 states that in the Catholic Church, besides physical persons, there are also moral persons which are instituted by the public authority of the Church.

Augustine Mendonça describes the rationale of the juridical [moral] person as follows: “Their *raison d'être* is rooted in the need to effectively pursue and actualize collective interests and goals which are beyond the sphere of individual persons.”⁴⁰ Similarly, Abbo and Hannan write:

[...] in every human society there are certain aims which only indirectly affect physical persons or exceed the limited capacity of the latter as to resources or as to duration but which provide a necessary or highly useful contribution to the attainment or the preservation of the society's interests. To promote these

³⁹ See, for example, W. BERTRAMS, “De origine personae moralis in Ecclesia”, *Periodica* 36 (1947), pp. 169-184; F.M. CAPPELLO, *Summa iuris canonici*, Romae, Aedes Universitatis Gregoriana, 1945, pp. 172-178, nn. 207-209; P. GILLET, *La personnalité juridique en droit ecclésiastique spécialement chez les Décretistes et les Décretalistes et dans le Code de droit canonique*, Louvain, Catholic University of Louvain, 1927; G. MICHELS, *Principia generalia de personis in Ecclesia*, 2nd ed., Parisiis, Desclée, 1955, pp. 343-564; WERNZ-VIDAL, *Ius canonicum, tomus II, de personis*, Romae, Universitatis Gregoriana, 1943, pp. 24-36, nn. 25-34; S. BUENO SALINAS, *La noción de persona jurídica en el derecho canónico: su evolución desde Inocento IV hasta el C.I.C. de 1983*, *Collectània Santa Pacià*, no. 33, Barcelona, Herder and Herder, 1985. In English, B.F. BROWN, *The Canonical Juristic Personality with Special Reference to Its Status in the United States of America*, Canon Law Studies no. 39, Washington, DC, The Catholic University of America, 1927; T.J. KILCULLEN, *The Collegiate Moral Person as Party Litigant: A Historical Synopsis and Commentary*, Canon Law Studies no. 251, Washington, DC, The Catholic University of America Press, 1947, esp. Chap. II: “The Collegiate Moral Person in Roman Law”; A. GAUTHIER, “Juridical Persons in the Code of Canon Law”, in *Studia canonica*, 25 (1991), pp. 77-92; A. GAUTHIER, *Roman Law and Its Contribution to the Development of Canon Law*, Ottawa, Saint Paul University, 1996, pp. 49-52; J. RISK, book review of S. PANIZO ORALLO, *Persona jurídica y ficción. estudio de la obra de Sinibaldo de Fieschi*, Pamplona, Ediciones Universidad de Navarra, 1975, in *The Jurist*, 38 (1978), pp. 229-234.

⁴⁰ A. MENDONÇA, *Persons in General and Juridic Acts*, (Class Notes for the Private use of the Students), Ottawa, Faculty of Canon Law, Saint Paul University, 1997-1998, p. 69.

aims, the law recognizes determined juridic entities (institutions, corporate bodies) as capable of having rights and obligations.⁴¹

2.2.1 – Prior to the 1917 Code of Canon Law

“The roots of this juridical doctrine are found in Roman law.” Thus observes Albert Gauthier.⁴² While the Romans did not have the understanding of moral or juridical persons as found in modern law, nevertheless ancient jurists recognised an entity such as a colony, a municipality, a *collegium*, *universitas*, *corpus*, and *sodalitium*⁴³ as the subject of both rights and obligations. Around 1139, Gratian’s *Decretum* made its appearance.⁴⁴ Again, this

⁴¹ ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 143.

⁴² GAUTHIER, *Roman Law*, p. 65; also see GAUTHIER, “Juridical Persons in the Code of Canon Law”, p. 79.

⁴³ “A *collegium* is the legal union of two or more persons of like status: a *corpus* is the union of several colleges: a *universitas* is a local community” (O. VON GIERKE, *Natural Law and the Theory of Society, 1500 to 1800*, Cambridge [Eng.], University Press, 1934, pp. 64-65). Manuel Rodriguez writes: “It appears that the technical idea of corporation is *universitas personarum*. Nowhere indeed is there to be found any statement or definition concerning the precise nature of a corporation.” He defines *societas* as “an organized body of persons with a fixed number of members, each partner having a disposable share of the common property; when a partner died or withdrew, the partnership was inevitably dissolved. By contrast, the *collegium* was an organized body of persons with a variable number of members, no member having a fixed and disposable share of the common property; thus, when a member died or withdrew, the ‘corporation’ was not dissolved” (M. RODRIGUEZ, *The Laws of the State of New Mexico Affecting Church Property*, Canon Law Studies no. 406, Washington, DC, The Catholic University of America, 1959, pp. 61-62). See also BROWN, *The Canonical Juristic Personality*, p. 13: “It appears that the strictly technical expression for the idea of corporation is *universitas personarum*.” On *societas* and *collegium*, see esp. pp. 13-14. William Burdick writes: “It was for the purpose of designating the ownership of public property that the term *universitas* which we translate ‘corporation’ came into use. The phrase *res universitatis*, or university property, called by us corporate property, meant originally property that was owned by the municipality, the use being public. Consequently the original notion of a corporation in Roman Law was what we would call a municipal, or a public corporation, and not a private corporation” (W.L. BURDICK, *The Principles of Roman Law and their Relation to Modern Law*, Rochester, NY, Lawyers Co-operative Publishers, 1938, p. 282).

⁴⁴ Little is known about the life of this Camaldolese monk who was born in Chuisi and who lived in the monastery of SS. Felix and Nabor. The earliest manuscripts of the *Decretum* appeared as the *Concordia discordantium canonum*, a compilation from different sources of ecclesiastical

collection used neither of the modern terms “juridic person” or “moral person”. But while neither Gratian nor the decretalists developed a technical concept of juridic personality, nevertheless, as Bruce Miller observes, canon law in the *Decretum* evidenced some basic elements of juridic personality even though a coherent theory was not proposed.⁴⁵ In evidence, he notes that monasteries and particular Churches as legal entities were founded on a minimum number of physical persons and that these entities owned property distinct from that of their members. While the Church or monastery could possess, control, and dispose of property, alienation required the consent of others: a bishop needed the consent of a chapter (except in urgent necessity); a monastery needed the consent of the abbot, chapter, and bishop, and a parish church needed the consent of the priest. Further, the *Decretum* frequently uses terms connected with juridical capacity: *bona ecclesiarum*, *res ecclesiarum*, and their equivalents.⁴⁶

Further elucidation of the notion occurred a century later under Sinibaldo Fieschi, who became Pope Innocent IV in 1243. Trained in Roman and canon law, he studied and taught at the University of Bologna, later becoming a curial auditor. During his pontificate he addressed practical issues of law in his *Commentaria super libros quinque decretalium*. Distinguishing between a *societas* and a *collegium* or *corpus*, Innocent IV determined that the latter comprised an aggregate of persons constituted tacitly or expressly by a superior authority. Thus it could exercise certain rights and perform juridical acts which were outside the capabilities of the *societas*.⁴⁷ Among other topics he discussed was the minimum number

constitutions, canons of the councils, decretals, texts from the early Church Fathers, etc. See “Gratian, Decretum of (Concordia Discordantium Canonum)”, in *New Catholic Encyclopedia*, vol. VI, New York, McGraw-Hill Book Company, 1967, pp. 706-709.

⁴⁵ D.B. MILLER, *The Concept of Juridic Personality Antecedent to the 1917 Code of Canon Law*, unpublished JCL diss., Washington, DC, The Catholic University of America, 1986, pp. 21, 23.

⁴⁶ *Ibid.*, pp. 21, 23, 24-25.

⁴⁷ INNOCENT IV, *Commentaria apparatus in V libros Decretalium*, Frankfurt, Minerva, 1968, c. 3, X, I, 31; GILLET, *La personnalité juridique*, p. 111; MILLER, *The Concept of the Juridic*

of persons required for the erection of a *collegium*, tacit or express approval of the same by a superior authority, that corporate bodies were incapable of *dolus* but liable in an action, and that a juridical personality is presumed to have a perpetual existence.⁴⁸

Innocent IV further clarified the distinction between the *collegia realia* and the *collegia personalia*. In the first category came *civitates, burgi, ecclesiae*; in the second came *collegia professionum, negotiationum, officiorum, religionum, and scholarium*. Acknowledging that there were grounds in law for the division, Innocent IV nevertheless argued the distinction by analogy with real and personal servitudes in Roman Law.⁴⁹ Fritz Schulz sums it up:

The difference between them lies in the manner in which the right is vested in the holder of the servitude.

1. The personal servitude is vested in an individual person [...].
2. The real or praedial servitude must always be attached to the ownership of a thing [...].⁵⁰

This contrast would become the basis of the juridical distinction between *universitas personarum* and *universitas rerum*. In similar vein, some authors attribute to Innocent IV the

Personality, pp. 34-35.

⁴⁸ On erection: *Commentaria*, c. 1, X, 1, 6; GILLET, *La personnalité juridique*, p. 109; MILLER, *The Concept of Juridic Personality*, pp. 33-34. Constitution by authority: *Commentaria*, c. 3, X, 1, 31; GILLET *La personnalité juridique*, p. 111; MILLER, *The Concept of the Juridic Personality*, pp. 34-35. On *dolus*: *Commentaria*, c. 52, X, V, 39; RODRIGUEZ, *Laws of New Mexico*, pp. 81-83; MILLER, *The Concept of the Juridic Personality*, p. 36. On perpetuity: *Commentaria*, c. 4, X, II, 12; MILLER, *The Concept of the Juridic Personality*, p. 38.

⁴⁹ “*Quod autem praedicta collegia appellantur personalia vel realia, non habetur in iure, sed per simile dicitur numerum servitutum realium & personalium [...]*.” (*Commentaria*, c. 14, X, V, 31).

⁵⁰ F. SCHULZ, *Classical Roman Law*, Oxford, Clarendon Press, 1951, p. 382. See also MILLER, *The Concept of Juridic Personality*, pp. 35-36; RODRIGUEZ, *Laws of New Mexico*, p. 70; GILLET, *La personnalité juridique*, pp. 108-109.

insights leading to the modern theory of corporations.⁵¹ Concisely, Innocent IV's contribution was a more precise understanding of the notion of the juridical personality.

Authors agree that the development of the notion "moral person" (*persona moralis composita*) relies heavily on the influence of Samuel von Pufendorf, publicist and jurist, best known for his influence on the philosophy of law.⁵² According to Gauthier, (who quotes no

⁵¹ Innocent IV wrote: "[...] *quia cum collegium in causa universitatis fingatur una persona, dignum est, quod per unum iurent, licet per se iurare possint, si velint.*" (c. 57, X, II, 20), which Gauthier translates as "Since a corporation, when considered as a whole, is considered by the mind as being one person" (GAUTHIER, *Roman Law*, p. 51). Commenting on the *universitas* as a *persona*, Sir Frederick Pollock and Frederic Maitland write: "Pope Innocent IV. (Sinibaldus Fliscus), has been called the father of the modern theory of corporations" (F. POLLOCK and F.W. MAITLAND, *The History of English Law before the Time of Edward I*, Cambridge [Eng.], University Press, 1923, vol. 1, p. 494). "When the relations of corporations to their members and to society came to be subjected to the test of philosophy, it was the scholastic philosophy, the philosophy of the monastic and cathedral schools, that was first applied. It was the speculative canonist, and the scholastic philosopher that invented the mystical 'personal' elements in the conception of the corporation [...]. Innocent IV. earned the title of 'the father of the modern learning of corporations' by giving formal sanction to the results of their quibbling analyses. If the source of the conception of a corporation as an artificial person is to be found, it must be sought among the speculations of the canonists and scholastics of the thirteenth century [...]" (DAVIS, *Corporations*, p. 238).

⁵² Gauthier, suggesting that Pufendorf may have been the first author to use the term "moral person", quotes Riccardo Orestano: "and yet another German, Samuel Pufendorf, will go so far as to elaborate a unified concept of *moral person*, with the aim of uniting, as a single general notion, *sole persons*, that is to say, individuals in relation to their 'moral status' (understood as the position they might occupy in a society), and *composite persons*, which is to say the various forms of groupings that might exist in the concrete reality, thus to be considered as 'moral entities' " (R. ORESTANO, *Il problema delle persone giuridiche in diritto romano*, Torino, G. Giaichelli, 1991, pp. 14-15), quoted by GAUTHIER, "Juridical Persons in the Code of Canon Law", p. 80; this parallels GAUTHIER, *Roman Law*, p. 52. Otto von Gierke, commenting on Pufendorf's position writes: "He [Pufendorf] distinguished the conception of legal personality, to which he gave the name of *persona moralis*, from the conception of natural personality. He held that the legal world was a world not of physical, but of mental factors – or rather, in view of the fact that it was the moral aspect of these mental factors which was really in question, it was a world of moral factors, or *entia moralia*" (GIERKE, *Natural Law and the Theory of Society*, pp. 118-119). MILLER, *The Concept of Juridic Personality*, p. 56, asserts that it was Pufendorf who "first distinguished between the natural personality and the legal personality which he called *persona moralis*." What Pufendorf wrote was: "Entia moralia, quae ad analogiam substantiarum concipiuntur, dicuntur *personae* morales quae sunt homines singuli, aut per vinculum morale in unum systema connexi, considerati cum statu suo aut munere, in quo in vita communi versantur" I, §XII, (S.F. VON PUFENDORF, *De jure naturae et gentium*, Frankfurt, Minerva Press,

sources) the first-time use of the expression “juridical person” has been attributed to a German jurist, A. Heise.⁵³

2.2.2 – Moral Person and Juridical Person in the 1917 Code of Canon Law

As mentioned, the CIC/17 introduces moral persons by declaring in c. 99 that, besides physical persons, there are also in the Church moral persons constituted by public authority.

Miller, writing on the *fontes* of the 1917 Code maintains:

The 1917 code introduced the institute of moral or juridic persons [...] . Although many of the themes of this legislation were long familiar, the institute itself was completely new to canon law. It was derived primarily from civil law sources which flourished as commercial companies developed while canonical theorizing was languishing.

The *fontes* cited by Petro Cardinal Gasparri do not list any document from canon law as a precedent for the institute of moral or juridic persons. There were none.⁵⁴

Brendan Brown, sixty years earlier, wrote similarly:

The law relative to canonical legal personality so precisely and compactly formulated in the New Code was abstracted, however, from a Source authority which is vague and couched in a language nowise resembling the terminology employed in the Code, although the thought now concisely

1967, p. 12).

⁵³ GAUTHIER, *Roman Law*, p. 52.

⁵⁴ MILLER, *The Concept of Juridic Personality*, p. 58. Miller restates this opinion in his review of S. BUENO SALINAS, *La noción de persona jurídica en el derecho canónico*, Barcelona, Herder and Herder, 1985, in *The Jurist*, 46 (1986), p. 674: “An enquiry into the unpublished proceedings of the commission under Gasparri’s leadership revealed it was entirely influenced by the jurists of the nineteenth and early twentieth centuries, specifically K.F. Savigny’s *persona ficta* and Otto Gierke’s *Genossenschaftstheorie*, especially as these were understood by Francesco Ruffini.”

expressed reflects substantially the viewpoint of the canonists before the Code. Thus, the early Sources may be searched in vain in an effort to find the words *persona moralis*, yet there existed in the old law the equivalent of the idea which this expression conveys.⁵⁵

Gauthier believed that the concept of the juridical person as a subject of rights and obligations in contradistinction to physical persons arrived in the 1917 Code “due in great part to the internal logic inseparable from the very project of a code that had the ambition of presenting the rules of canon law in a unified and systematic way. [...] The preference given to the expression *persona moralis* has been explained by the secular and curial sources used.”⁵⁶ Brown says that, “it is seen that a fundamental conception of the legal personality in Roman and pre-Code [law] has been ‘canonized’ by the new Code.”⁵⁷

The arrival of the term in the 1917 Code was not without its difficulties. Brown, commenting on c. 99 CIC/17, notes that the Code contains no definition of a moral person. P. Rayanna agrees and states that the Code sometimes uses the words *persona moralis* and *persona iuridica* as synonymous “and sometimes it seems to distinguish between them.”⁵⁸ In the end he concludes “that in the terminology of the Code, there are moral persons which are not at the same time juridical persons. The juridical personality derives only from Church authority.”⁵⁹

⁵⁵ BROWN, *The Canonical Juristic Personality*, p. 76.

⁵⁶ GAUTHIER, “Juridical Persons in the Code of Canon Law”, p. 80.

⁵⁷ BROWN, *The Canonical Juristic Personality*, p. 89.

⁵⁸ *Ibid.*, p. 88. For an extended treatment of the difficulty, see P. RAYANNA, “Moral or Juridical Person?”, in *The Jurist*, 18 (1958), pp. 459-467.

⁵⁹ RAYANNA, “Moral or Juridical Person?”, p. 467. His proposed distinctions would become the changed terminology of the 1983 Code. See *Communicationes* 9 (1977), pp. 240-241; GAUTHIER, “Juridical Persons in the Code of Canon Law”, pp. 81-82; MENDONÇA, *Persons in General*, p. 71. MILLER, *The Concept of Juridic Personality*, p. 56, comments that while the term *persona moralis* remains, the original meaning of the adjective “moral” has passed into oblivion in civil law. For the *coetus studiorum* discussion on the meaning of the word, see GAUTHIER, “Juridical Persons in the

Despite the Code's not providing a definition of a juridical person, commentators essentially agree on what comprises a juridical person. For instance, Gommar Michiels writes: "A moral person, distinct from all physical persons in the church (material cause: c. 99), is one which has a religious or charitable purpose (final cause: c. 100, §1), is constituted by public authority (efficient cause: c. 99), and is a subject capable of having rights and obligations (formal cause: c. 88, correlated with c. 87)."⁶⁰ Felix M. Cappello, has a similar definition: "The moral person is a *juridic being* entirely distinct from a physical person, indeed capable of rights and duties, of which the subject is not the physical or natural person, but the very being to which person the juridical personality coincides. From this comes the name: *juridic being, juridic person, moral person* insofar as distinguished from the physical [*person*]."⁶¹

Code of Canon Law", pp. 81-82. RAYANNA, "Moral or Juridical Person?", p. 465 maintains "[...] that when the Code speaks of moral persons in canons 99-103 it really means to speak of juridical persons. In fact when it comes to apply this doctrine to associations (canon 687) and institutions (canon 1489) set up by the faithful, it rightly calls them juridical persons. But of moral persons in the natural law it nowhere gives a description or definition. Yet in some canons – 684, 708, and 1489 – the existence of a moral person apart from a juridical one is presupposed and on this presupposition only can these canons be properly understood." We follow the terminology of R. T. KENNEDY, "McGrath, Maida, Michiels: Introduction to a Study of the Canonical and Civil-Law Status of Church-Related Institutions in the United States", in *The Jurist*, 50 (1990), p. 352, footnote 6: "The 1917 Code of Canon Law [...] generally referred to juridic persons as 'moral persons' [...] The 1983 code restricts the term 'moral person' to the Catholic Church and the Apostolic See (cf. c. 113, §1), and uses the term 'juridic person' in all other instances. To avoid confusion in the minds of contemporary readers, the terminology of the present code will be used throughout this except in passages quoted or paraphrased from the writings of authors who wrote under the 1917 Code."

⁶⁰ MICHELIS, *Principia generalia*, p. 347.

⁶¹ CAPPELLO, *Summa iuris canonici*, pp. 172-173. Abbo-Hannan similarly define a juridical or moral person "as a juridic entity constituted by an act of a competent authority, existing independently of other persons and endowed with the capacity of acquiring and exercising rights as well as of contracting obligations, by the means and to the extent determined by the competent authority." They refer the reader to Maroto no. 458, and Beste on c. 99. See ABBO-HANNAN, *The Sacred Canons*, vol. 1, pp. 143-144; U.C. BESTE, *Introductio in Codicem, quam in usum et utilitatem scholae et cleri ad promptam expeditamque canonum interpretationem paravit et edidit*, 5th ed., Neapoli, M. D'Auria, 1961, pp. 155-157; F. MAROTO, *Institutiones iuris canonici ad normam novi Codicis*, Romae, Apud Commentarium pro Religiosis, 1919-1921, pp. 149-152.

Adam Maida, emphasising the distinction between the juridical person and physical persons, says that a non-collegiate moral person necessarily employs people to administer the goods and resources which comprise the moral persons. Furthermore, "As in the case of every juridic personality, the property and the identity of the moral person are distinct from the property and the identity of the people who administer the affairs of the non-collegiate moral person." Using the parish as an example, he concludes: "Thus a parish, which is an example of a non-collegiate moral person, is made up of territory, buildings and other tangible assets. The pastor as an administrator or the people as members of a parish do not constitute the juridic personality of a parish."⁶² So it is that goods belonging to the parish do not belong to the parishioners but to the juridical person of the parish. The parishioners are not responsible for the debts of the juridical person; the juridical person itself is. Should someone sue a parish, the juridical person responds and not the parishioners. All these considerations flow from the fact that the parish as a juridical person is a subject of rights and obligations.

Having discussed the juridical person, does the 1917 Code perceive the parish to be a juridical person? Raoul Naz categorically affirms that it is a juridical person. He argues:

In order to be endowed, the parish has to be a subject of rights, therefore, to be recognised as a moral person. And it is. Admittedly, the Code does not expressly say so. But it treats the parish as a subject of rights, which implies its personality, when in c. 1209, §1 it speaks of parish cemeteries and cemeteries belonging to other moral persons. [...] Without doubt the Code intended that the parish itself should be erected as a moral person.⁶³

Lincoln Bouscaren and associates agree. They distinguish between the law itself conferring

⁶² A.J. MAIDA, *Ownership, Control, and Sponsorship of Catholic Institutions: A Practical Guide*, Harrisburg, PA, Pennsylvania Catholic Conference, 1975, p. 11.

⁶³ R. NAZ, "Paroisse", in *Dictionnaire de droit canonique*, vol. 6, Paris, Letouzy & Ané, 1946, p. 1239. He further advances that: "In cc. 630, §4 and 1182, §1 and 2, the Code clearly distinguishes between the goods of the parish and the goods of the church." Finally he argues that c. 2156, §1 speaks of goods that relate to the parish while in c. 1356 the parish is counted among those benefices which are required to contribute to the diocesan seminary.

moral personality *directly* (by express provision) or *indirectly or equivalently* (by inference):

Indirectly [...] , moral personality is declared by the law itself when the law confers on a certain class of institutions rights which belong only to full moral persons, particularly the right to acquire property. [...] Parishes and dioceses duly constituted (according to cc. 216, §1 and 248, §2 respectively) are moral persons by law.⁶⁴

Further, drawing on the definition of a benefice as found in c. 1409 as “a juridical entity (moral person) permanently established or created by a competent ecclesiastical authority, consisting of a sacred office and the right to receive the revenues attached to the office by endowment”, they conclude that parishes in the United States are both offices and benefices.⁶⁵

2.3 – THE ADMINISTRATOR OF THE PARISH AS JURIDICAL PERSON

The juridical person exists to enable the Church as diocese, parish, etc., to pursue its

⁶⁴ T.L. BOUSCAREN, A.C. ELLIS, and F.N. KORTH, *Canon Law. A Text and Commentary*, 4th rev. ed., Milwaukee, The Bruce Publishing Company, 1966, p. 90.

⁶⁵ BOUSCAREN, *Canon Law*, p. 125. In support of their argument they draw on the letter of the Apostolic Delegate, US, 10 November 1922, and the response of the S.C. Conc., 5 March 1932, cited earlier. See *supra*, p. 82, footnote 24; p. 84, footnote 33. Since the situation in the US paralleled that of New Zealand, one may apply the argument validly to New Zealand; however, an alternative opinion is provided by William Onclin (among others). Since the 1917 Code distinguished between collegial and non-collegial moral persons, Onclin discusses how a true college might be identified. If a college is understood to be a group of equals then parishes (and dioceses) could not be collegial moral persons. See W. ONCLIN, “De personalitate morali vel canonica”, in *Acta conventus internationalis canonistarum Romae diebus 20-25 mai 1968 celebrati*, Typis polyglottis Vaticanis, 1970, pp. 121-157. GAUTHIER, “Juridical Persons in the Code of Canon Law”, p. 86, commenting on the position says: “Their reasons were not without foundation, since parishes and dioceses are not governed as *collegia* [...] .” To overcome the difficulty, Onclin, who later would become the *relator* of the *coetus* on physical and juridical persons in the 1983 Code of Canon Law, proposed that moral persons should be distinguished into aggregates of persons and aggregates of things. Aggregates of persons would either be collegial, if comprised of a college of equals, or non-collegial if the association of persons did not comprise a college. Canon 115, §2 of the CIC/83 reflects this proposal.

mission in the world.⁶⁶ Necessarily, this mission requires the use of the things of the world – temporalities, or goods. Ownership of these goods presupposes that the Church has rights: the right to acquire goods, and once having obtained them, to exercise the right of retention and use of them as it sees fit. This right, understood since the very inception of the Church, is summed up in c. 1495 CIC/17:

§1. The Catholic Church and the Apostolic See have an inherent right, without restriction and independent of the civil authority to acquire, own, and administer temporal property in the prosecution of the ends for which they were established.

§2. Moreover, in accordance with the norm of the sacred canons, the right of acquiring, owning, and administering property belongs also to individual churches and to other moral persons which have been established as juridical persons by ecclesiastical authority.

The physical person(s) who transact(s) on behalf of the juridical person (or in canonical language exercises juridical acts) is the administrator. As affirmed in c. 1495 CIC/17, the Church sees administration also as a right, along with the acquisition and retention of goods. Lawrence L. McReavy in defining the term, advances that “ ‘administration’ in its proper sense, comprises all acts by which property is conserved and developed, and its yield duly

⁶⁶ Stanislaus Woywod, clarifying the use of the term *Church* in the 1917 Code, notes that according to c. 1498, “*Church* signifies not only the Universal Church or the Apostolic See, but also every legal person in the Church, unless the contrary is apparent from the context of the law or from the nature of the matter under discussion. [...] In the canons on church property the Code employs the term ‘church’ to denote any of the many legal persons, parishes, institutions, societies and organizations, which have by act of the competent ecclesiastical authority been constituted legal persons in the Church” (S. WOYWOD, “Temporal Goods of the Church”, in *Homiletic and Pastoral Review*, 29 [1929], pp. 978-979). See also BOUSCAREN, *Canon Law*, p. 803: “The term ‘church,’ therefore, does not include any ecclesiastical associations which are *merely approved* by the Church such as pious and charitable societies; [...] These organizations may be incorporated by the civil law and entitled to hold and administer their own property, but such property is in no sense *church property* within the meaning of the canons of this chapter.”

gathered and applied.”⁶⁷ The various terms used by writers to describe the possessions of the Church – temporal goods, Church property, etc. – are called by the legislator *bona ecclesiastica*.⁶⁸ For the sake of consistency, the term *bona ecclesiastica* will be called in this study either temporal goods or ecclesiastical goods.

Canon 1523 CIC/17, drawing on an image from Roman Law, states that the administrators of ecclesiastical property are required to fulfil their responsibility with the diligence of a good family head (*paterfamilias*).⁶⁹ In regard to the administration of the parish, McReavy writes:

She [the Church] consigns the immediate administration of the parish to the man on the spot, delegating to him a degree of discretionary power which not infrequently works out to her advantage, but at the same time she guards against the possibility of graver errors and excesses by an effective system of checks which guides rather than hampers him.⁷⁰

⁶⁷ L.L. MCREAVY, “The Administrator of Parochial Property”, in *The Clergy Review*, 29 (1948), p. 2.

⁶⁸ Canon 1497 – §1. “Temporal property, both movable and immovable corporeal property and incorporeal property, which belongs either to the universal Church and the apostolic See or to some other moral person in the Church is ecclesiastical property.”

⁶⁹ Canon 1523 further outlines prescriptions to safeguard both the administrator and the temporal goods:

1° “Be on guard that the property entrusted to their care shall not be destroyed or damaged;”

2° “Observe the requirements of both canon law and secular law, as well as those specified by the founder or the donor or imposed by legitimate authority;”

3° “Collect promptly and in full all income and profits, safeguard them, and distribute them in accordance with the intentions of the founder or with established laws or norms;”

4° “Invest for the benefit of the church itself the money of the church which is left over and above the expenses and which can be thus profitably employed;”

5° “Keep well posted books of receipts and expenditure;”

6° “Put in order and file in the archives or in a suitable and adequate safe belonging to the church all documents and deeds on which the rights of the church are based; and, where it can readily be done, deposit authentic copies of them in the archive or safe of the curia.”

⁷⁰ MCREAVY, “The Administrator of Parochial Property”, p. 1.

The person responsible is the parish priest. Writing on the parish priest as an immediate administrator, McReavy says that the temporal property of any given secular parish may be considered under three categories:

Some of it (*bona beneficalia*) is meant to provide the parish priest with a decent living; some of it (*bona ecclesiae*) is meant to cover the repairs, furnishing and adornment of the church, and the maintenance of divine worship; and, finally, some of it (*bona paroeciae*) is intended to meet the costs of parochial activities, such as schools, clubs, etc.⁷¹

Irrespective of whether these three funds are administered together or separately, they are vested in the parish as a juridical person and are temporal goods according to c. 1497 CIC/17. McReavy continues: “the parish priest is designated by the Code of Canon Law as the administrator of all three: of the *bona beneficalia* by canon 1476, of the *bona ecclesiae* by canon 1182, §1, and of the *bona paroeciae* – ‘nisi aliud ferat ius peculiare aut legitima consuetudo’ – by canon 1182, §2.”⁷²

In the Auckland diocese the parish priest administered the funds which came by way of two collections during Sunday mass – the first, taken up at “the offertory” provided for his keep; the second, taken up after communion, contributed to the diocesan tax and to the

⁷¹ Ibid., p. 2.

⁷² Ibid. Naz asserts that, “The parish, like every moral person needs to be represented in the execution of juridic acts. According to canon law, this is done through the parish priest (c. 1476, §1)”, in NAZ, “Paroisse”, p. 1240.

Canon 1476 – §1. “The incumbent, as the administrator of the benefice, shall, in accordance with the law, take care of the property belonging to the benefice.”

Canon 1182 – §1. “Without prejudice to the norms of canons 1519-28, the administration of funds destined for the repair and the embellishment of a church and for the support of divine worship in it, unless the contrary is demanded by some special claim or by legitimate custom, belongs to the bishop and the chapter in the case of a cathedral church, [...], to the rectors of other churches.”

§2. “Even offerings made in favor of a parish or a mission or of a church located within the boundaries of a parish or a mission are administered by the pastor or the missionary, unless the church in question has its own administration distinct from the administration of the parish or the mission and unless a particular law or a local custom rules otherwise.”

general running of the parish. Diocesan collections were taken up as and when the law required. Parish administration included the collection of school fees, and to 1970, the payment of the Sisters' stipend. Besides the administration of these funds, the parish priest spent a significant amount of time on the maintenance of the school. Simmons, writing of the demographic changes at the turn of the century says that when the population around an outstation grew large enough, a new parish comprising a presbytery, a hall, a parish school, and a convent would be formed: "This church-hall-school complex was the heart of the parish and the centre of its life."⁷³ Not alone that, but canonically, the parish priest claimed it as his exclusive administrative domain; and whether he chose to share his administration with lay members of his parish was, apparently, his prerogative: some priests did; others did not.⁷⁴

As to the administration of the school, while the Sister head teacher was responsible for the internal running of the school and maintaining the demands of the syllabus which, excluding catechism classes, paralleled the state system, the parish priest understood that the law of the Church made him responsible for just about everything else. The First Synod of the Auckland Diocese in 1884 exhorted priests "that where schools are not to be found, let them put their heart to it that, as far as possible, this serious need is satisfied as quickly as possible" (Part II, decree 6). In 1899, the First Provincial Council of Wellington spelled out precisely the dependent relationship of the school on the pastor:⁷⁵ every new mission where a priest lived was to have a school (decree 280). Moreover, a pastor was not free to close an existing

⁷³ SIMMONS, *In cruce salus*, p. 203. See also the author's, *A Brief History*, p. 75.

⁷⁴ James Munday comments on the position: "Hence it is to be noted that, inasmuch as a pastor is, *ipso iure*, the administrator of the parish entrusted to him, canon 1521 does not require the local ordinary to appoint church committee-men to assist him in the administration" (J.E. MUNDAY, *Ecclesiastical Property in Australia and New Zealand: An Historical Synopsis and Comparative Study of the General Law of the Church, Canons 1495-1551, and the Decrees of the Fourth Plenary Council of Australia, Decrees 653-685*, Canon Law Studies no. 387, Washington, DC, The Catholic University of America, 1957, p. 81).

⁷⁵ The obligations placed on the pastor by the First Plenary Council of Wellington concerning schools were, in the main, identical to the First Plenary Council of Australasia.

school (decree 281), and decree 290 exhorted priests to “love our school as the pupils of their eyes” and to inspect them at least once a week.

While the bishops and priests educated the laity “so that they may see that the parochial school is as it were the essential part of the parish, without which the very existence of the parish in the future would be in danger” (decree 290), nevertheless the laity’s contribution (besides their children) was, in the main, confined to pecuniary support. According to decree 280, unless other resources were available, monies required for the establishment of a school were to come from the ordinary giving of the laity. Decree 290 further reminded the laity that they were to “be always ready to cover the incurring expenses of the school” and parents were to “offer promptly and freely a small monthly contribution from their abundance to cover each child and his needs”. Other catholics meantime were “to offer their wealth and influence”. The synod recommended a parish society “to cover the costs of free schools”, a contradiction lost, no doubt, on the synodal Fathers. (Decree 282 commended the priests and laity who maintained schools and collected monetary offerings.)

Just as the proceeds of the regular Sunday collection established the school buildings, so this collection provided for their upkeep and expansion. Furthermore, since the parish priest administered the voluntary giving of the laity, a large part of which went towards running the school,⁷⁶ the parish priest included the maintenance and development of the school buildings, along with the presbytery and church, as part and parcel of usual parochial administration. In those parishes where the Sisters did not own their convent, again, upkeep was provided through the administration of the parish priest. And while drawing on the assistance of the laity, the initiative remained primarily that of the parish priest. The 1917 Code simply reinforced the powers that the parish priest had under the various councils and

⁷⁶ “Father (later Bishop) John Mackey, in the Auckland Herald of 6 October 1969, stated that between fifty and sixty per cent of parish income was going into education at this time” (O’NEILL, “Catholic Education in New Zealand”, p. 171).

synods to administer the parish plant, since it comprised ecclesiastical goods, including the school.

Between the 4th and 12th of September 1937, the bishops of Australia and New Zealand assembled for the Fourth Plenary Council of Australia and New Zealand, presided over by the apostolic delegate, Archbishop Giovanni Panico. The council produced thirty-three decrees on *bonis ecclesiasticis*, many of them restatements of canons of the Code. Decree 656 stated: “Administrators of ecclesiastical goods, whether parish priests or others are to administer the goods committed to themselves with the same care which a good *paterfamilias* ought to administer his goods.”⁷⁷ Decree 657 included schools among churches, houses, and other ecclesiastical buildings (if any) that “are to be protected against loss and rendered secure through ascribing them to someone in the securities societies”.

2.3.1 – Ownership of the Temporal Goods by the Juridical Person

While the CIC/17 does not stipulate specific goals of the juridical person, nevertheless commentators observe that basic to the notion of juridical personality is the right to ownership

⁷⁷ Once again the legislators use the image of the Roman *paterfamilias*. How successful this simile is, is challenged by the Roman understanding of the *paterfamilias*. Gauthier declares that “The central figure in the Roman family was the *paterfamilias*, that is a Roman citizen, male, and not himself under the paternal power (*patria potestas*) of someone else [...]” (GAUTHIER, *Roman Law*, p. 31) – scarcely the position of the parish priest as administrator. While empowered to administer property, a series of canons remind the administrator that his power is constrained by “the limits of ordinary administration”. Any administrative act performed outside these limits without the appropriate written approval from the ordinary renders the act not only unlawful but invalid (c. 1527 – §1). Further, the parish administrator is accountable to the bishop and if he fails in the proper administration of temporal goods, the bishop can remove him (cc. 2147-2161 CIC/17). Woywod says that the legal person who holds the title to Church property and goods, is not free to use and dispose of the goods at will, as the owner of private property can do, since canon law regulates the use and administration of temporal goods. See S. WOYWOD, *A Practical Commentary on the Code of Canon Law*, vol. II, New York, Joseph F. Wagner, 1948, p. 202. None of these was the position of the Roman *paterfamilias* who “is sovereign on his land. There, no one has the right to interfere with his activity” (GAUTHIER, *Roman Law*, p. 57).

of such property that the Church needs to pursue its legitimate goals.⁷⁸ As Maida notes:

Ownership of Property is attributed by the Canons to the following entities: dioceses, vicariates apostolic, and prefectures apostolic, (c. 628, 1°), parishes (cc. 216, §1, §3; 1208, §1), churches (c. 485; 1182, §1; 1183, §1), public oratories (cc. 1188, §2, 1°; 1191; 1298, §1), pious places (c. 1298, §1), seminaries (cc. 1475, §2; 1355; 1356), and ecclesiastical benefices (c. 1410). The capacity of owning property is attributed to the following collegiate bodies: chapters, cathedral or collegiate (cc. 391, §1; 395, §3), the diocesan curia (c. 363, §2; 1572, §2), the Roman Curia (c. 427).⁷⁹

Once the juridical person has acquired temporal goods then, according to c. 1499, §2, the ownership of such goods belongs to that legal person which acquired these same goods legitimately. As discussed earlier, ownership of ecclesiastical goods is vested in the individual legal ecclesiastical person. Woywod remarks that it is an ownership of a particular type which in effect approaches trusteeship.⁸⁰ Moreover, the administrator has an obligation in justice to fulfil exactly the donor's intentions (c. 1514 CIC/17).⁸¹

⁷⁸ "The ability to manage its possessions and to keep them distinct from the good[s] of its members is a fundamental attribute of juridic personality" (MILLER, *The Concept of Juridic Personality*, p. 23); "Full moral or juridical personality [...] includes among other rights especially the right to acquire and own property; and this is consequently a *fair general criterion* of the existence or non existence of full moral personality" (BOUSCAREN, *Canon Law*, pp. 89-90); "The *purpose* or end provides the collegiate (the body of physical persons) and the non-collegiate (the aggregation of goods) moral persons with the specific reason for the union of persons or the coalition of goods" (ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 144). "It is through moral persons that all ecclesiastical property is administered and the works of religion and charity made possible in this mundane world" (MAIDA, *Ownership*, p. 18).

⁷⁹ MAIDA, *Ownership*, p. 15.

⁸⁰ See WOYWOD, *A Practical Commentary*, p. 202.

⁸¹ Canon 1514 – "The wishes of the faithful contributing or leaving a portion of their wealth to pious causes, whether during their lifetime or in contemplation of death, must be most exactly carried out (*diligentissime impleantur*) even in regard to the method of administration and the distribution of the property." See also cc. 1500-1501, 1515-1517, 1523, 2°, 3°.

Along with these obligations, the administrator must not put ecclesiastical goods at risk or cause them to be lost to the Church, or alienated, except according to law: "In the strict sense alienation means any act by which the direct ownership of property is transferred to another, as in the case of a

To conclude, since the founding of the Church in the Auckland diocese, the plenary councils, diocesan synods, and the common law of the Church enunciated in the 1917 Code of Canon Law, obliged bishops, priests, and laity to establish and support parochial catholic schools. Over generations, the voluntary sacrificial giving of the laity built, maintained, and expanded these schools. In short, the buildings comprising the school are ecclesiastical goods (along with the church, presbytery, and hall) belonging to the juridical person of the parish and administered according to the canons relating to temporal goods, as of right by the parish priest.

2.4 – THE JURIDICAL PERSONALITY OF THE PARISH SCHOOL

It seems clear from the foregoing discussion that the division of a diocese into territorially-distinct parts which have a proper rector as pastor, along with a definite group of the faithful, has at once the status of a parish and the status of a juridical person from the law itself (*a iure*).⁸² A priest, appointed according to the provisions of the law (c. 451 CIC/17) has the canonical status of a rector or pastor, or in New Zealand parlance, a parish

gift, a sale, or an exchange. In a wider sense it includes any lawful act by which the use or usufruct of property, or some claim upon it, is given to another, though the naked ownership is retained. Under this head would come rentals, leases, mortgages, and the like" (BOUSCAREN, *Canon Law*, pp. 832-833). "Canonically, then, alienation may be defined as any act or contract whereby church property is exposed to danger of loss, or its legal possession is reduced to a worse condition. It is that act by which property, real rights, or possessions of any ecclesiastical moral person are gratuitously or onerously transferred, set aside, lessened, or burdened" (J.F. CLEARY, *Canonical Limitations on the Alienation of Church Property: An Historical Synopsis and Commentary*, Canon Law Studies no. 100, Washington, DC, The Catholic University of America, 1936, p. 2). In order to avoid loss of ecclesiastical property or the forfeiture of rights of administration, the canons outline procedures that administrators must follow. See cc. 1530-1533 CIC/17.

⁸² For opinions of commentators on the constitutive elements of parishes see, N.P. CONNELLY, *The Canonical Erection of Parishes*, Canon Law Studies no. 114, Washington, DC, The Catholic University of America, 1938; T.M. MUNDY, *The Union of Parishes: An Historical Synopsis and Commentary*, Canon Law Studies no. 204, Washington, DC, The Catholic University of America, 1945; and especially A.B. MICKELLS, *The Constitutive Elements of Parishes: A Historical Synopsis and a Commentary*, Canon Law Studies no. 296, Washington, DC, The Catholic University of America, 1950.

priest. But what of the parish school – wherein lies its status?

For over one hundred and forty years, the faithful of the diocese responded to the persistent demands of bishops and priests to educate their children by way of the catholic school. So important was the catholic school that the bishops decreed that it should be built even before the church. Successive generations of parents and others committed to catholic education served on PTFAs and school committees. Answering to appeals from the clergy, the laity contributed to the establishment of a catholic primary school in all but a few parishes.⁸³ Finally, religious teachers, without whom the system would not have survived, sustained the organisation by teaching for a pittance. Eventually, more and more lay teachers became involved in the system, their salaries by this time subsidised by government funding. This entity, the catholic school, while relying on the parish, has a life of its own; it depends upon the parish in some respects, but in others is distinct from it.

As we have discussed, various councils and synods decreed the establishment of catholic primary schools. In response, parishes built schools from monies given by the laity for this purpose. Since c. 1499, §2 CIC/17 affirms that the ownership of property belongs to the juridical person that has legitimately acquired it, we have proposed that these schools are considered rightly to be ecclesiastical goods belonging to the juridical person of the parish. Furthermore, until integration the administration of the school, with the exception of the internal management (which was the purview of the head teacher), belonged as of right to the parish priest. A committee may or may not have helped him administer the school. The question that arises now, is whether such a school has a juridical personality of its own, distinct from that of the parish?

In law and in the minds of clergy and laity alike a catholic primary school in New

⁸³ For example, in 1965, of 86 parishes in the Auckland diocese just 13 (15%) did not have a school.

Zealand existed as part of the life, one of the apostolates of the parish; its buildings were parish plant. In ecclesiastical law the insight of juridical personality arrives with the 1917 Code. According to c.100 CIC/17, besides the Catholic Church and the Apostolic See which have the nature of a moral person by divine ordinance, there are other subordinate, moral persons who derive their personality either from a provision of the law itself (*a iure*) or by a special concession of the competent ecclesiastical superior granted by a formal decree (*ab homine*). Canon 99 declares that churches, seminaries, benefices, etc. have juridical personality by the law itself. The specific act, or intervention of the competent ecclesiastical superior is called canonical erection. For parochial or diocesan schools in New Zealand and the Auckland diocese, the competent ecclesiastical superior is the diocesan bishop. Distinct from approval (which is an act recognising the entity as ecclesiastical but not conferring upon it juridical personality), or praise, or permission, Bernard Flanagan defines canonical erection in a strict sense as “the concession of moral personality, that is, an act of competent ecclesiastical authority or a prescript of law by which an association or institute is acknowledged as a moral person in the Church.”⁸⁴

In discussing juridical personality that arises from the law itself, Rayanna considers that juridical personality arises independently of the decree of erection. He continues:

It is true that such entities, too, are erected by means of a decree of the competent ecclesiastical authority, as for example, religious houses, parishes, etc. Yet the decree of erection in this case does not confer moral personality on the entities so established. Prior to their establishment the Code itself has

⁸⁴ B.J. FLANAGAN, *The Canonical Erection of Religious Houses: An Historical Synopsis and Commentary*, Canon Law Studies no. 179, Washington, DC, The Catholic University of America, 1943, pp. 32-33. “Erection is an act of lawful ecclesiastical authority by which an association is formally constituted as a moral person with all the rights of an ecclesiastical moral person, such as perpetuity (c. 102), the right to acquire, own, administer ecclesiastical property (cc. 1495, §2, 1497, §1), to sue and be sued in ecclesiastical courts (c. 1469)” (BOUSCAREN, *Canon Law*, p. 358).

invested them with moral or juridical personality (canon 100).⁸⁵

Canon 687 CIC/17 determines that “associations of the faithful acquire juridical personality only when they have obtained from the legitimate ecclesiastical superior a formal decree of erection.” Rayanna insists:

A formal decree of erection by a competent ecclesiastical authority is thus absolutely necessary to make an association already existing or one which is being brought into existence now a juridical person according to Canon Law. It is thus the ecclesiastical law which gives this body a moral personality in the Church. Hence it is rightly called a juridical personality.⁸⁶

Concerning the establishment of moral personality by means of a formal decree of a competent ecclesiastical superior, not all canonists agree about the form of the decree. While some insist that a formal decree of erection should be in writing,⁸⁷ others are inclined to the position that the establishment itself of an educational institute or similar is sufficient to confer upon it juridical personality.⁸⁸ We are inclined to the position held by Robert Kennedy:

⁸⁵ RAYANNA, “Moral or Juridic Person?”, p. 463. See also BROWN, *The Canonical Juristic Personality*, p. 94. Brown says that c. 100 indicates that moral persons may be erected “*a iure* i.e. automatically, as it were, by compliance with specified conditions.” Maida considers that, “The law itself may confer the juridical personality on a legal entity whenever the legal entity is brought into existence, [...]” Specifically, “In creating a parish the Bishop in the very act of creating the parish, in the decree of erection, is indirectly conferring moral personality which is directly conferred by the law itself” (MAIDA, *Ownership*, pp. 14, 17-18).

⁸⁶ RAYANNA, “Moral or Juridic Person?”, p. 463.

⁸⁷ “The decree should be formal, stating that this moral personality is for this particular end, specifying its character, etc. It is to be in writing” (BROWN, *The Canonical Juristic Personality*, p. 94); “The formal decree of erection should be in writing; this is probably not a requisite to validity” (BOUSCAREN, *Canon Law*, p. 361); Rayanna agrees with these opinions but contests Bouscaren’s second statement: “A formal decree of erection cannot be had except in writing. Since such a decree is needed for the validity of the existence of an association, it is not at all intelligible why certain authors consider this decree ‘probably not a requisite to validity’ ” (RAYANNA, “Moral or Juridic Person?”, p. 463).

⁸⁸ Maida writes: “what is the exact nature of this formal decree? It is obviously clear that a specific written document entitled ‘A formal Decree of Erection’ need not be employed. No special

To assert that establishment of an educational or charitable institution “of itself and apart from any further action of the competent ecclesiastical authority”⁸⁹ conferred juridic personality on the institution would appear, on the surface at least, to negate the twofold method of constituting juridic persons provided in the 1917 Code, and reduce the creation of all juridic persons to the single act of establishment by competent ecclesiastical authority. There would be no difference between *a iure* conferral of juridic personality and *ab homine* conferral. Once properly established, any entity would, by the mere fact of establishment acquire juridic personality; no “special concession” would ever be necessary for the conferral of canonical status.⁹⁰

In the light of this discussion, since a parish school is not an ecclesiastical entity receiving juridical personality by the law itself, then to be recognised as a juridical person distinct from the parish it must, of necessity, receive its juridical personality by way of a special concession of a competent superior according to the provision of c. 100. Besides which, c. 1489, §1. CIC/17 determines that hospitals, orphanages, and other similar institutions (one may add schools) dedicated to works of religion or charity, whether spiritual or temporal, can be erected by a local ordinary and by his decree constituted juridical persons in the Church. To create a juridical person in the Church, the competent ecclesiastical superior must perform some determined action – a juridical act. Logically, the physical persons

seal, particular legal words or acts, or peculiar legal documents need to be produced. It seems sufficient that a writing or formal pronouncement, which clearly indicates the mind and will of a competent ecclesiastical authority to establish an ecclesiastical entity, suffices. Whether one holds the theory that the conferral of moral personality is distinct from the creation of an ecclesiastical entity, or whether he holds that the very decree which establishes an ecclesiastical entity of itself, without any other formal action or decree, grants moral personality to the entity in question, there is no need for a specific and separate formal decree indicating that a moral personality is being created.” Drawing on Michiels, he concludes that “non-collegiate ecclesiastical institutes no less than associations of the faithful, are constituted as moral personalities in the Church by the very fact they are formally established by ecclesiastical authority” (MAIDA, *Ownership*, pp. 16-17, 37). For an exposition of this position, see KENNEDY, “McGrath, Maida, Michiels”, esp. pp. 377-399. Against this position Kennedy quotes Berutti, Brown, Cappello, Chelodi, Ciprotti, Coronata, Forchielli, Jone, Regatillo, Sipos, Tocanel, Vromant, and Wernz-Vidal (*ibid.*, pp. 390-391).

⁸⁹ MAIDA, *Ownership*, quoting MICHIELS, pp. 405-412.

⁹⁰ KENNEDY, “McGrath, Maida, Michiels”, pp. 379.

affected (in the case of a school, those who are involved in the life of the school) must know this. In brief, there will be some manifestation, record, or similar, of the concession or intervention by the ecclesiastical superior (the diocesan bishop) giving a parish or diocesan school a juridical personality of its own. In the Auckland diocese no such verification exists. Both Bishops Cleary and Liston were totally committed to the pursuit of catholic education, and both were fastidious in their committing to writing the slightest minutiae in the administration of the diocese. Yet there is no evidence at all that either, following the promulgation of the 1917 Code, altered the status of parish schools by some kind of intervention or special concession which would grant them juridical personality distinct from that of the parish.

Furthermore, the very history of the parish schools supports this contention. As described in chapter one, pages 65-66, the parish priest of necessity was involved in the discussion leading to integration since he represented the interests of the parish and the parish school. No other personality claimed this position or was given this responsibility by the bishop. Even after integration, the parish and no other body was expected to make up for the shortfall in attendance dues, an audacious claim if the school had a juridical personality other than that of the parish.⁹¹

⁹¹ As it is, whether a bishop can make a parish liable for the debts or the default of any of its parishioners remains open to debate. In *Integration – Questions People Ask*, we read: “Q. Will parishes still be asked to contribute to Catholic education? A. Yes. Catholic education should be a cost on the whole Catholic community and not merely on the parents of the children in the schools” CATHOLIC EDUCATION COUNCIL OF NEW ZEALAND, *Integration – Questions People Ask, The Private Schools Conditional Integration Act, 1975. The Private Schools Conditional Integration Amendment Act, 1977*, issued by the Catholic Education Council for New Zealand under the Chairmanship of His Lordship, Bishop J.P. Kavanagh, undated, Tablet Printing Co. Ltd. Later the bishop of the diocese would write: “It is correct that for our Catholic primary schools, the parish of residence is expected to make up the shortfall in attendance dues, in the event of students from the parish not being paid for by their families. This practice has been in effect for several years and is an effort to share the burden as much as possible. It is one thing for a school to provide hospitality and teaching for students outside the parish. That hospitality should not be expected to extend to meeting the shortfall in attendance dues” (Letter of Bishop Denis Browne to the parish priest of St X Parish, March 1994). A search of the files of the Catholic Integrated Schools Board failed to find the original memo. Attendance dues

Lacking any evidence to the contrary, the conclusion can only be that parish schools are an expression of the life, the mission, the apostolate of the parish. Since the theory of canon law does not allow the granting of juridical personality by way of acquaintance, connection, implication, liaison, custom, or some sort of canonical osmosis, parish schools in the Auckland diocese can only be a part of the juridical personality of the parish.⁹² Canonically, then, we consider that the parochial school is simply a dimension, an expression of the apostolate of the parish – no more, and no less.

2.4.1 – Diocesan Schools

We determined in the preceding discussion that the primary schools of the Auckland diocese are truly an apostolate of the parish, their buildings are parish plant. They are, therefore, ecclesiastical goods administered by the parish priest. Briefly, the same argument applies *mutatis mutandis* to the six secondary colleges commonly understood by the faithful to be diocesan schools. Again, as there is no evidence to suggest that they have a juridical personality of their own, they can only have the personality of the diocese that founded

were paid by parents of children attending integrated schools and were the only fees a school could charge under the Integration Act to service the suspensory loans.

⁹² Some writers in examining the relationship of such entities as schools, hospitals, etc. to the already existing ecclesiastical person describe it in various ways. Jerald Doyle, writing of hospitals “found, without proper identity of their own, attached to an already existing ecclesiastical moral person,” says that “the hospital participates in the personality and nature of the institute to which it is attached” (J.A. DOYLE, *Civil Incorporation of Ecclesiastical Institutions: A Canonical Perspective*, JCD diss., Ottawa, Saint Paul University, 1989, pp. 203-204); Maida, writing on health-care and educational institutions, describes it thus: “Without equivocation, there can be no doubt that, canonically, these institutions are part and parcel of the moral persons known as the Diocese or Religious Order which brought them into existence in the beginning” (MAIDA, *Ownership*, p. 37); others use such terms as “shares in” or “is part of” to describe the relationship: “A hospital can be set up as an ecclesiastical moral person, that is, an independent religious house; or it might merely be a part of, attached to, some other ecclesiastical moral person or independent religious house” (F.N. KORTH, *Canon Law for Hospitals: Administration of Temporal Goods*, St Louis, MO, Catholic Hospital Association of the United States and Canada, 1963, p. 4).

them.⁹³ The resident bishop administers the diocese (c. 334 CIC/17) which includes the secondary colleges. The buildings comprising these schools belong to the juridical person of the diocese and are subject to the provisions of the Code concerning ecclesiastical goods as outlined earlier. In short, such schools have the status of a diocesan apostolate, their buildings are part of the ecclesiastical goods of the diocese.

2.4.2 – The Juridical Person in the 1983 Code of Canon Law

The 1983 Code in distinguishing between a moral person and a juridical person,⁹⁴ then affirms that juridical persons are either aggregates of persons or aggregates of things (c. 115, §1). Aggregates of persons are either collegial, if decisions are determined by the joint voting of the members, or non-collegial if the decision making is confined to only certain or one of the members. Consequently, some of the entities which in the Code of 1917 were non-collegial juridical persons having their basis on things, became under the 1983 Code, non-collegiate juridical persons based on natural persons – the diocese and parish being two examples. Furthermore, specific canons in the 1983 Code enunciate more precisely who administers the juridical persons of the diocese and parish.⁹⁵ In general, however, the

⁹³ As mentioned already, c. 99 CIC/17 states that Churches are moral persons. “Churches” in this context means dioceses. See BOUSCAREN, *Canon Law*, p. 90.

⁹⁴ Canon 113 – “The catholic Church and the Apostolic See have the status of a moral person by divine disposition.” [Curiously, the inherent logic of this principle is not applied in any canon to include the college of bishops which, according to c. 330 CIC/83, is “by the decree of the Lord”. See L. CHIAPPETTA, *Il codice di diritto canonico: commento giuridico-pastorale*, Naples, Edizioni Dehoniane, 1988, p. 139; F.X. URRUTIA, *Les Normes Générales. Commentaire des canons 1-203*, Collection Le Nouveau Droit Ecclésial, Paris, Editions Tardy, 1994, p. 188, n. 612; G. SHEEHY, et al. (eds), *The Canon Law. Letter & Spirit*, prepared by THE CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND in association with THE CANADIAN CANON LAW SOCIETY, Collegeville, MN, The Liturgical Press, 1995, p. 64; MENDONÇA, *Persons in General*, p. 72, n. 4].

⁹⁵ Canon 393 – “In all juridical transactions of the diocese, the diocesan Bishop acts in the person of the diocese.”

Canon 532 – “In all juridical matters, the parish priest acts in the person of the parish, in accordance with the law. He is to ensure that the parish goods are administered in accordance with

discussion on the administration and alienation of temporal goods applies equally in the 1983 Code: a comparison of the two Codes shows substantial agreement in their treatment of ecclesiastical goods.

2.5 – THE BISHOP OF AUCKLAND AS A CORPORATION SOLE

2.5.1 – *The Religious Charitable and Educational Trusts' Act, 1856*

The *Religious Charitable and Educational Trusts' Act* of 6 August 1856 was the earliest civil legislative vehicle whereby a catholic bishop could manage and hold a title to property. The Bill under clause 3 outlined the reason for its enactment:

And whereas certain Grants from the Crown of Land in the Colony of New Zealand have been made and issued, and certain conveyances and assurances of land in the said Colony have been signed and executed, granting, conveying, and assuring, the several allotments or parcels of Land in the said grants, conveyances, and assurances particularly described, to the office bearers of different Religious Denominations and their successors. And whereas doubts have arisen as to the estate which in Law has been granted, conveyed, or assured by the said grants, conveyances, and assurances respectively, and it is expedient that the said doubts should be set at rest [...].⁹⁶

Parliament saw the solution as the establishment of a trust in which the trustees representing various denominations could hold land:

Whenever any such grant, conveyance, or other assurance shall have been made and issued, or signed and executed, other than to or in favour of a Corporation, sole or aggregate, the same shall be deemed and taken to have granted, conveyed, and assured from the days of the date thereof respectively

cann. 1281-1288.”

⁹⁶ References to the Act are taken from *New Zealand, Votes and Proceedings, House of Representatives, Session IV 1856*, vol. 1, Auckland, Williamson and Wilson for the New Zealand Government, 1856, pp. 61-64.

granted, conveyed, and assured from the days of the date thereof respectively unto the person or persons designated in such a grant, conveyance, or assurance, his or their heirs and assigns the fee simple⁹⁷ in the allotments of Land therein respectively described and purported to be granted, conveyed, and assured subject nevertheless to the trusts if any in the said grants, conveyances, and assurances respectively set forth concerning the same.

Under clause 5 the Act specifically mentions the Roman Catholic Bishop of Auckland as an “Office Bearer”. In 1876 the Bill was extended to include the catholic bishops of Dunedin (Moran) and Wellington (Redwood).

2.5.2 – *The Roman Catholic Lands Act, 1876*

A few months later parliament heard “An Act to facilitate the Vesting and Transfer of Lands belonging to the Roman Catholic Church in New Zealand”. The sectarian prejudice that by now marked any catholic initiatives would guarantee the Bill a rocky passage through its readings. Dr M.S. Grace, in moving the second reading of the Bill in the Legislative Council (27 September 1876), repetitively said “its object was to establish the Catholic Bishop of any diocese in New Zealand into a corporation sole, the object being to enable him

⁹⁷ Munday describes the fee simple as meaning that the bishop or the pastor held and administered Church property in his own name and by an absolute and full legal title: “The forced adoption of the method whereby a church held property in fee simple was fortunately only rarely the practice and has now fallen into desuetude. [...] Even though this form was resorted to only when safer and more convenient means were prohibited by state laws, nevertheless the experience of more than half a century proved that it was not a feasible method, but rather a highly dangerous one. Property held in fee simple was subject to taxation, death duties and inheritance taxes. In the event of bankruptcy the entire church property of a diocese could be assigned to creditors. Furthermore, the bishop himself was liable for all debts of the various parishes. In addition, during the interim between the death of a bishop and the appointment of his successor the resultant confusion could very easily jeopardize the property holdings of the diocese. It could happen, too, that the deceased bishop’s last will and testament would be disputed, with the consequent passage of consecrated and blessed objects as well as valuable land and buildings into alien hands. Hence it is not to be wondered at that in 1840 the Sacred Congregation for the Propagation of the Faith drew up regulations and suggestions for the safeguarding of ecclesiastical goods in fee simple” (MUNDAY, *Ecclesiastical Property in Australia and New Zealand*, pp. 29-30).

to deal with lands in his possession for trust purposes of that Church [...]”⁹⁸ Again, “The object of the Bill was to make the bishops in succession corporation sole, and to enable any Bishop, during the time he was administering the diocese, to deal with property which he held in the interests of the diocese [...]”⁹⁹ The reason for the Bill was that owing to the absence of legislation, the bishop of any of the dioceses could only give a lease on land for the term of his own life. This lacuna disadvantaged the Church in dealing with the property it had accumulated.

The second and third clause of the Bill asserted that the lands belonging to the Roman Catholic Church within the colony should be vested in the Bishop so long as he should be in communion with the Holy See of Rome. The third clause also said that “those lands should be withdrawn if the bishop for the time of any diocese should cease to be in communion with the Holy See of Rome”.¹⁰⁰ The Hon. G.M. Waterhouse, Member for Wellington, objected to the Bill since to him, “it was quite evident that the effect of this change would be to place the papal authorities in Rome – who were referred to, he supposed by ‘the Holy See of Rome’ – virtually in possession of the whole of the temporalities of the Roman Catholic body in this colony.” Waterhouse further argued that the proposed Bill would give the Holy See an advantage that other foreign powers did not have: it would “practically withdraw all control over the temporalities of the Roman Catholic Church from the jurisdiction of the existing Courts of law,” and, secondly, “The effect of this Bill would be of course to vest in one who

⁹⁸ NZPD, vol. XXII, 4 September-3 October 1876, pp. 520-521. “Corporations sole were originally ecclesiastical for the most part [...] An archbishop, a bishop, a prebendary or canon, a dean, an archdeacon, a rector (or parson), a vicar, and a vicar choral are each a corporation sole” (*Halsbury’s Laws of England*, Publishing Editor (Paul H. Niekirk), 4th Edition Reissue, vol. 9, Lord Hailsham of St Maryelbone, Lord High Chancellor of Great Britain 1970-74 and 1979-87, London, Butterworth & Co. (Publishers) Ltd., 1991, p. 720, 1207). Given the influence of the English legal system, the corporation sole was the logical legal vehicle familiar to both the bishops and the parliamentarians.

⁹⁹ NZPD, vol. XXII, 4 September-3 October 1876, p. 521.

¹⁰⁰ *Ibid.*

was in the eyes of the law, and justly so, an alien, the power of holding property as a trustee, while the same power was not extended to aliens generally.”¹⁰¹ He concluded his argument by proposing that the reference to communion with the Holy See should be struck out and the Bill should not be passed in its present shape.

These arguments were repeated in one way or another by the other seven members who spoke to the Bill. Members Mantel, Menzies, and Bonar questioned the competency of a court of law deciding the legality of what constituted communion with the See of Rome. They agreed with the objections of the first Member who spoke against the Bill and proposed that the clause referring to the See of Rome be struck out. In the words of the Hon. J.A. Bonar, Member for Westland, “the Courts or the legislature should not be called upon to enter into the internal settlement of religious questions”. The Hon. R. Hart, Member for Wellington, “thought the principle which had been laid down in the Council in reference to Bills of this kind had been to exclude as far as possible from the courts of law [...] questions affecting the internal discipline of any Church.”

In response, Grace outlined the deficiencies for the catholic bishops of *The Religious Charitable and Educational Trust’s Act, 1856*:

[...] it was, unfortunately, a fact that, as a rule, Catholics had not materially interested themselves as trustees up to the present time. There was a large amount of property held in the North Island practically by the Bishop of the diocese for the time being, and it descended from each bishop to his successor, and the parishioners had absolutely no legal control whatever over the property.¹⁰²

Later in his speech, referring to a specific parcel of land by way of example, Grace proceeded to explain the deficiencies of trusteeship under the present Act. First, “a certain amount of

¹⁰¹ Ibid.

¹⁰² NZPD, vol. XXII, 4 September-3 October 1876, p. 624.

public money had already been invested by the Bishops and the lands had been acquired in their own names. [...] The people subscribed a part of the money, and the title was conveyed to the bishop in person.” A second difficulty was that practically, there were no trustees. Rather than seeing this as a responsibility of the diocesan bishop, Grace attributed this to “some degree from the indifference of the laity and in some degree from the absence of organization amongst the laity.” He then gives the bishop’s¹⁰³ motives in bringing down the Bill:

The reason the Bishop now came down with this Bill was because he wished to be in a position to give leases in his own name, yet as a corporation sole, without, as it were, even in thought violating the spirit of his trust; because, practically, though the Bishop was absolutely the owner of this property, he knew perfectly well that he had no real moral hold upon it. He was quite aware that, though in some cases, according to law, he could will away the property to-morrow, still *in foro conscientiae* he could not do it. The Bishop wished to continue to administer *ex officio*, as it were, and put himself in a position by which he could hand down the whole of his property, and make his deeds binding on his successors in the interests of the trust.¹⁰⁴

When put to the vote, the Council defeated the second reading of the Bill: 18:6.

The Hon. Dr Grace, when moving the second reading of the Bill, “had to inform honourable members that he found no difficulty whatever in altering the Bill to meet the views expressed by honourable members when it was previously under discussion. When the Bill came before them again, he thought it would be found to be wholly unobjectionable.”¹⁰⁵ When Grace introduced the modified Bill he told the Members that, along with a diminished preamble, the Bill “proposed to strike out all those words which had reference to the See of Rome.” Furthermore, the Bill would contain a couple of clauses “enacting that the limit of

¹⁰³ Grace says that the originator of the Bill was Bishop Redwood; see *ibid.*, p. 525.

¹⁰⁴ NZPD, vol. XXII, 4 September-3 October 1876, p. 524.

¹⁰⁵ *Ibid.*, p. 599.

each diocese should be registered in the District Lands Registry Office, and that a person should be nominated by the Bishops of those dioceses, whose certificate should be evidence at law as to the exact limits of the boundaries.”¹⁰⁶ Following adjournment of the debate and the proposed amendments printed in the Order Paper, “An Act to facilitate the Vesting and transfer of Lands belonging to the Roman Catholic Church in New Zealand” became law on 14 October 1876. The short title of the Act is *The Roman Catholic Lands Act, 1876*.

Under section 2 the brief of the paragraph stated that the “Bishop shall hold lands acquired for the use of the Church as a corporation sole.”¹⁰⁷ Section 3 established that in the case of the vacancy of the bishopric the administrator of the diocese has the same powers. The remaining sections, 4-6, gave the bishop power to lease lands for forty-two years, decreed that diocesan boundaries be registered, and allowed the bishops to appoint a Registrar of Diocesan Boundaries.

2.5.3 – The Influence of the Plenary Councils on the Administration and Ownership of Ecclesiastical Goods

Having noted earlier the influence of the American Church on education in Australia and New Zealand, the influence of that same Church on legislation applying to temporal goods was, in contrast, non-existent. In interpreting this feature, Munday writes:

In Australia [and without contradiction one may add New Zealand] the question of ecclesiastical property has lacked, for the most part, the

¹⁰⁶ Ibid., pp. 639-640.

¹⁰⁷ “2. Whenever any lands tenements or hereditaments within any diocese for the time being of the Roman Catholic Church in New Zealand shall heretofore have been or shall hereafter be granted to or otherwise acquired by the Bishop for the time being of such diocese, upon any trusts for the purposes or benefit of the said Church, the Bishop for the time being of the diocese, whether original or afterwards established, within which any lands shall be situated, shall hold the same lands tenements and hereditaments to him and his successors for ever in perpetual succession as a corporation sole, but subject nevertheless to the trusts and purposes for which such lands tenements or hereditaments may have been granted or acquired.”

perplexities and problems encountered in Europe and America. Perhaps this is the reason why so little space and so few decrees have been devoted to temporal goods in the first three Plenary Councils. Again, unlike other countries, Australia is so young, that, in many ways, the endemic conflicts in evidence between the Church and the State elsewhere in the eighteenth and nineteenth centuries have been avoided.

Munday then touches on a critical difference between the Church in the United States and the Church in Australia and New Zealand regarding temporal goods: "Nevertheless, the Church in Australia had its problems, not the least of which was the lack of temporalities and material means efficiently and thoroughly to begin and to pursue its work for the salvation of souls."¹⁰⁸

As with the education decrees, the influence on ecclesiastical goods came from Irish sources. Twelve years after New Zealand civil law established the diocesan bishop as a corporation sole, the First Plenary Council of Australasia under *De bonis ecclesiasticis*, incorporated eight decrees from the Irish Plenary Councils.¹⁰⁹ To protect ecclesiastical goods, the Australasian council decreed:

To prevent ecclesiastical goods from falling into the hands of others, the bishop will take care that title deeds and instruments shall be drawn up in the name of at least three guardians nominated by the ordinary of the place. Among these will be the bishop of the diocese and at least two priests prudent and skilled in matters of this kind. These will meet once a year to watch over the security of the property. If any one of these had been removed for any cause, the bishop must appoint another in his place (decree 271).

¹⁰⁸ MUNDAY, *Ecclesiastical Property in Australia and New Zealand*, p. vii. Ian Waters concurs and simply describes the difference as "In contrast to the Australian legislation, which seems to have been a minor matter in council agendas, was that of the United States where the administration of temporal goods had always been a grave concern" (WATERS, *Australian Conciliar Legislation*, p. 196).

¹⁰⁹ The decrees of the Plenary Council of Ireland in 1875 held in Maynooth were the same as the Plenary Council of Ireland in 1850 held in at Thurles. See *Decreta synodi plenariae episcoporum Hiberniae apud Thurles habitae, anno 1850, Dublinii*, Apud Jacobum Duffy, 1851, pp. 50-52; *Acta et decreta synodi plenariae episcoporum Hiberniae habitae apud Maynutiam, an. 1875, Dublini*, Typis Browne et Nolan, 1877, pp. 126-127.

Successive plenary councils (1895, decree 341; 1905, decree 368) repeated the decree verbatim. As Waters comments: "whatever may have happened in the pioneer days with property being held in fee simple, the only canonically legal method after 1885 was a trust composed of the bishop and several others."¹¹⁰ Since the New Zealand bishops had already opted for the corporation sole, the First Provincial Council of Wellington (1899) did not require ecclesiastical goods to be vested in a trust. Instead, it legislated that title deeds and instruments be drawn up according to civil law (decree 319). The legislation of the Fourth Plenary Council of Australia, held in Wellington, New Zealand in 1934, incorporated some canons of the new 1917 Code; but by and large the legislation repeated previous councils. There were, however, additions: the council forbade priests to hold ecclesiastical property or money in their own name:

It is unlawful for any priest, without the written permission of the ordinary, to hold in his own name and in his own right the church, school, presbytery, parish or cemetery funds or any ecclesiastical goods whatsoever towards which the faithful have contributed in any way, but must transfer them as soon as possible to the ordinary or to a society or corporation sanctioned by him (decree 673).

Likewise we strictly forbid a pastor or any priest to deposit money belonging to the church in his own name, or to have the bank book in the name of his private person, but he must place it in the name of the trustees, of whom mention is made in decree 655 (decree 674).¹¹¹

¹¹⁰ WATERS, *Australian Conciliar Legislation*, p. 194. On 29 July 1911, the S.C. Conc. addressing the ordinaries of the United States, stated its preference for the *Parish Corporation* as a method of holding and administering Church property. The congregation stated: "Only in those places where the civil law does not recognize *Parish Corporations*, and until such recognition is obtained, the method commonly called *Corporation sole* is allowed, but with the understanding that in the administration of ecclesiastical property the Bishop is to act with the advice, and in more important matters with the consent, of those who have an interest in the premises and of the diocesan consultors, this being a conscientious obligation for the Bishop in person." Finally, the Congregation dismissed fee simple: "The method called *in fee simple* is to be entirely abandoned" (*CLD*, vol. 2, p. 445; BOUSCAREN, *Canon Law*, p. 806).

¹¹¹ Translation from MUNDAY, *Ecclesiastical Property in Australia and New Zealand*, pp. 31-32.

2.5.4 – The Corporation Aggregate and Corporation Sole¹¹²

As with other parts of this thesis, this section presents no more than a working summary. Halsbury's Laws of England defines a corporation as:

a body of persons (in the case of a corporation aggregate) or an office (in the case of a corporation sole) which is recognised by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder for the time being of the office in question.¹¹³

Corporations may be divided into two main classes, the corporation aggregate and the corporation sole. Halsbury describes the corporation aggregate as:

a collection of individuals united into one body under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence.¹¹⁴

By contrast, the same author, in a catch-all description, defines the corporation sole as:

a body politic having perpetual succession, constituted in a single person, who, in right of some office or function, has a capacity to take, purchase, hold

¹¹² "John P. Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and their Relation to the Authority of the State*, 2 vols, (1905, reprinted 1971), remains one of the best historical accounts of the corporate form in the medieval and mercantile periods" (*Encyclopaedia Britannica, Micropaedia*, 15th ed., Chicago, Encyclopaedia Britannica Inc., 1998, vol. 15, p. 376). See also POLLOCK, Chap. 12, *Corporations and Churches*, pp. 486-511.

¹¹³ *Halsbury's Laws of England*, p. 716, 1201.

¹¹⁴ *Ibid.*, p. 718, 1204.

and demise (and in some particular instances, under qualifications and restrictions introduced by statute, power to alienate) real property, and now, it would seem, also to take and hold personal property, to him and his successors in such office for ever, the succession being perpetual, but not always uninterruptedly continuous; that is, there may be and often are, periods in the duration of a corporation sole, occurring irregularly, in which there is a vacancy, or no one in existence in whom the corporation resides and is visibly represented.¹¹⁵

A footnote observes that a corporation sole now appears to be capable of taking personality in succession. The common law rule was to the contrary.¹¹⁶ In the New Zealand legislation creating the diocesan bishop a corporation sole, the office is successive and perpetual. The legislation provides for continuity by the provision that in the vacancy of the office of bishop, the diocesan administrator possesses in law “all the rights, powers, and privileges of the Bishop.”¹¹⁷

As mentioned earlier concerning the distinction between the juridical person and physical person(s) through whom the juridical person acts, Halsbury makes the same observation regarding corporations:

The nature of a corporation may be shown by contrasting it, as a legal conception, with the individuals [...] in which it resides. In law the individual corporators, or members, of which it is composed are something wholly different from the corporation itself; for a corporation is a legal person just as much as an individual.¹¹⁸

These considerations give rise to what may be considered as the characteristics of

¹¹⁵ *Halsbury's Laws of England*, p. 719, 1206.

¹¹⁶ *Ibid.*

¹¹⁷ See *infra*, the *Roman Catholic Bishops Empowering Act 1997*, Section 24, p. 11. We note that these are civil rights, the administrator not having the power to perform certain ecclesiastical functions unique to the office of bishop. See c. 435, §1 CIC/17; c. 427, §1 CIC/83.

¹¹⁸ *Halsbury's Laws of England*, p. 721, 1209.

corporations. Following Halsbury, they may be listed as follows: creation by parliament or by the Crown, continuity, having a corporate entity distinct from the individuals in which it resides, and possessing a name.¹¹⁹

Maida, in comparing the juridical person in canon law with a civil law corporation, says that:

In their respective legal systems, they are more or less equivalent. The moral person in Canon Law and a corporation in civil law are both created by the state, both have a legal personality distinct from the members which comprise them, both enjoy as legal personalities certain rights, duties and obligations, both can sue or be sued, both are bound by the very law of their creation. [...] the moral person obtains its existence either by operation of law or by a decree which issues from a proper ecclesiastical authority. The civil law corporation is not unlike the moral person in this respect.¹²⁰

Discussing how Church property is held, Munday, reflecting William Doheny, says of the corporation aggregate that under this system:

the property is vested in a body corporate formed from a group of members of the society or church. The incorporators hold the property under their control, but their possession is the possession of the artificial person, whose agents they are. They manage and administer the property, but this right is an authority and not an estate or title. In many respects their direction and discretion are similar to that vested in the board of directors in any other

¹¹⁹ *Ibid.*, pp. 720-733. DAVIS, *Corporations*, in Chap. II, "The Nature of Corporations", lists the features of a corporation as: 1. Associate Activity; 2. Creation by the State; 3. Voluntary Inception – Compulsory Endurance; 4. Autonomy, Self-Sufficiency, Self-Renovation; 5. Compulsory Unity; 6. Private Interest Motive; 7. Functions Public and Appropriate for Associate Activity, pp. 13-34. See also MILLER, *The Concept of Juridic Personality*, pp. 5-11.

¹²⁰ MAIDA, *Ownership*, p. 23. On creation by the state, Miller writes: "When 'state' is used, one may for purposes of canon law understand 'ecclesiastical legislator,' *mutatis mutandis*" (MILLER, *The Concept of Juridic Personality*, p. 5). But note Alesandro's warning, *infra*, p. 116.

corporation.¹²¹

Maintaining that this is the method preferred by the Sacred Congregation of the Council by virtue of their 1911 opinion,¹²² Munday declares that “It is also the system envisaged in all four Plenary Councils of Australia.” In evidence he cites decree 655 of the Fourth Plenary Council.¹²³ Be that as it may, the particular legislation made no difference to New Zealand ecclesiastical law which, eschewing the corporation aggregate, continued to act civilly through the corporation sole. Commenting on the Sacred Congregation of the Council’s preference for holding property as corporation aggregate in their 1911 opinion, Doheny remarks that the advantages of such a system, when protected and recognised by law, are many: “The rights of the clergy and the power of the bishop are in no wise jeopardized and at the same time the laity are represented.”¹²⁴

As mentioned, the civil vehicle for protecting the property of the Church in Auckland diocese, along with the other dioceses of New Zealand, was the corporation sole. Through the corporation sole, the diocesan bishop not only safeguards the property which the diocese has in its own right, but it also protects the property of the parishes within the diocese. New Zealand parishes have no recognition in civil law and have no civil protection other than that of the corporation sole. Unfortunately, as some commentators warn, the corporation sole tends to align itself with the interests and goals of the diocese, forgetting that it also has a responsibility to represent equally well the interests of the parishes. A bishop may succumb to the temptation to use the power that he has as a corporation sole to disregard or override

¹²¹ MUNDAY, *Ecclesiastical Property in Australia and New Zealand*, p. 33. See also W. DOHENY, *Church Property: Modes of Acquisition*, Canon Law Studies no. 41, Washington, DC, The Catholic University of America, 1926, p. 39.

¹²² See *supra*, p. 119, footnote 110.

¹²³ See *supra*, p. 118, decree 271.

¹²⁴ DOHENY, *The Tenure of Parochial Property in the United States*, p. 40.

the provisions of the Code of Canon Law, which should be his first consideration, and not his last, in pursuing diocesan objectives over those of all or any given parish. So it is that Francis J. Weber, commenting on the 1911 decision of the Sacred Congregation of the Council, declares:

This “permissive attitude” of the Church to Corporations Sole was not altered by the *Codex Iuris Canonici* in 1918. Nonetheless, the Holy See plainly regards parish corporations as “preferable” to any other mode of holding property and prelates are still advised to “take steps to introduce this method [...] in their dioceses, if the civil law allows it.”¹²⁵

Continuing, Weber highlights specific difficulties of the corporation sole:

From a canonical point of view, Corporation Sole is frowned upon because it legally reserves the right to own property to the Ordinary, a prerogative which the Code grants to parishes as moral persons. In addition, there has traditionally been a hesitance to localize as much authority in a single person as is the case when one prelate retains full title to all parochial and chancery property in its jurisdiction.¹²⁶

Robert L. Kealy, writing 20 years later, in discussing modes of diocesan incorporation, acknowledges that the corporation sole was a great advance over fee simple. But, “The major drawback to the corporation sole model was the objection that it gave too much authority to the diocesan bishop. In the corporation sole model, the extent of the bishop’s power is broader than it is in Church law.” Agreeing with the prior commentators, Kealy interprets the decree of 1911 as the Congregation’s recommending the corporation aggregate over the corporation sole, since “the Congregation was concerned about the possibility or perception that bishops might overstep their canonical authority because of the broader, unlimited grant

¹²⁵ F.J. WEBER, “Corporation Sole in California”, in *The Jurist* 25 (1965), p. 332.

¹²⁶ *Ibid.*

of authority given to them in the civil corporation.”¹²⁷

In discussing the historical relationship of ecclesiastical and civil law, John A. Alesandro warns that:

one might easily yield to the temptation to equate civil and canonical concepts. Similarities, however, often conceal significant differences. The Code’s concept of a *juridic person* [...] reflects both its own canonical heritage and modern civil law theory; and yet, though analogous an *ecclesiastical juridic person* cannot in actuality, simply be equated with a *civil corporation*. It would also be a mistake to identify the notion of *ownership* in some civil systems with the canonical concept of *dominium*.¹²⁸

Noting the comments of these authors just cited, the confusion between the canonical system and the civil system and a preference by the bishop of civil ownership by the corporation sole over canonical ownership by the parish may readily be seen in a glossy brochure *Catholic Schools, Our Heritage*, produced by the bishop of Auckland in 1992. The author asserts: “In the Auckland diocese there are 40 Catholic primary schools and 15 secondary colleges. All Catholic primary schools are owned by the diocese. Seven of the secondary colleges are also owned by the diocese and the other 8 are owned by the Religious Orders [...] .” Here, the bishop sees ownership of the primary schools aligned with the

¹²⁷ R.L. KEALY, “Methods of Diocesan Incorporation”, *CLSA Proceedings*, 48 (1986), pp. 168-169.

¹²⁸ J.A. ALESANDRO, “General Introduction” in J.A. CORIDEN, T.J. GREEN, and D.E. HEINTSCHEL (eds), *The Code of Canon Law; A Text and Commentary*, commissioned by THE CANON LAW SOCIETY OF AMERICA, New York/Mahwah, Paulist Press, 1985, p. 11. In like manner, Maida writes: “It would be mistake to consider these legal entities [dioceses and parishes] as the civil law identity of the public juridic person that is the diocese or parish. They are not the civil law equivalent of the public juridic person. At best, they are the civil law incorporation or entrustment of one function of the public juridic person, namely the property-holding function. The public juridic person, as such, has no civil law equivalent and no civil law identity. Its only existence is juridical in the canon law. It is a religious concept and not a civil one” (A. MAIDA and N. CAFARDI, *Church Property, Church Finances, and Church Related Corporations: A Canon Law Handbook*, St Louis, MO, The Catholic Health Association of the United States, 1984, p. 131).

corporation sole. Even if valid in civil law, the bishop fails to acknowledge that canonically the primary schools belong to the parishes. While this example may seem insignificant, it nevertheless epitomises the difficulties outlined hitherto which have occurred in the past in more significant ways and which will no doubt continue in the future.

It was as a Conference of Bishops that the bishops of New Zealand negotiated with the government a workable deal that enabled the catholic school system to survive. The appeal for financial assistance on behalf of the 300-plus parishes in the country was the aim and goal of the bishops who represented each parish and diocesan school. The impetus for financial assistance came from the catholic Church at large as distinct from individual parishes. Practically, each parish negotiating its own proposal with the government was never a consideration. The Church learned from the debates leading to the *Education Act* of 1877 and in the decades that followed, that strength lies in a united front, and a unified approach carries much more weight than a piecemeal presentation. But it was as corporations sole that the bishops committed the catholics of New Zealand to the *PSCIA 1975*, by signing the integration agreement for each diocesan and parish school; and it was as corporations sole that the bishops took out suspensory loans in excess of \$150 million. Yet, as William H. Woestman forcefully reminds the reader:

Even if temporal goods are held before the civil law by a diocesan corporation or by a corporation sole, it is still the pastor who is administrator of the parish property and legally represents the parish within the Church, whether they be physical or juridic persons. In those places where the parish property is held civilly by the diocesan corporation or a corporation sole, there can be a danger of forgetting that parish property does not belong to the diocese, but to the parish, and that it is the parish priest's right and obligation to administer the property. Anyone not respecting the pastor's or the parish's rights acts contrary to canon law and justice.¹²⁹

¹²⁹ W.H. WOESTMAN, *Parishes, Pastors, and Parochial Vicars*, cc. 515-552, (Class Notes for the Private Use of the Students) Ottawa, Faculty of Canon Law, Saint Paul University, 1995-96, pp. 5-6.

Again, just how successful the bishops of New Zealand were in implementing the canonical principles given here, and how faithful the bishops were to the ideals proposed, will be treated more fully in chapter three.

2.5.6 – Some Recent Developments: The *Roman Catholic Bishops Empowering Act 1997*

In the one hundred and twenty years since the passing of *The Roman Catholic Lands Act, 1876*, parliament incorporated many legislative amendments to extend the powers of the diocesan bishops. Consequently, the legislation over that time had become cumbersome and complex. Furthermore, legal interpretations and opinions sought by the bishops over the years led to a realisation that the original legislation, along with its amendments, was inadequate to cope with the needs of the Church in today's world. In short, the legislation of the diocesan bishop as a corporation sole needed a legislative overhaul and update. To this end, the bishops in 1990, in consultation with their civil law advisers, began discussing the administration of temporal goods and the administration of trusts. The outcome is a private Act promoted by the catholic bishops of the six dioceses in New Zealand: the *Roman Catholic Bishops Empowering Act 1997*.

The original draft of the Bill raised the issue of the place of canon law in the proposed legislation. In a letter to the drafter of the Bill, Michael Shanahan, legal adviser to Cardinal Thomas Williams representing the six diocesan bishops, reaffirmed the bishops' position:

he [Cardinal Williams] reaffirms that the intention of the Roman Catholic Bishops Empowering Bill is to restate in contemporary legislative form of the powers and the duties of the Bishops as Corporation sole at Civil Law. The Bishops are bound by Canon Law and are subject to the restraints imposed there. It is not appropriate to address matters of Canon Law or introduce

them in the legislation.¹³⁰

The reason for this position was that the inclusion of canon law would expose the bishops in the exercise of a power having to meet a second compliance and for that to be tested before the courts in New Zealand. To prevent the canonical concepts behind the Act being subject to interpretation by the civil courts, the bishops eschewed canonical references completely. The Act contains no specific references to canons, nor does the Act contain definitions of the canonical concepts underpinning the Act.¹³¹

Over the hundred years that the bishops have been corporations sole, a point of dispute was whether the bishops were corporations sole in respect of land only. The new Act clarifies the position, enabling each diocesan bishop to have all the rights and powers of a natural person. Diocesan and parish properties remain vested in the bishop of the diocese as corporation sole according to the existing legislation. So it is that the *Roman Catholic Bishops Empowering Act 1997*, drafted in contemporary language, simplifies the compound legislation of the last one hundred and twenty years and allows for the provisions of canon law which, in New Zealand, is no way inimical to civil law.

The Act contains a new provision and that is the power a bishop has to vary trusts.¹³² The legislation in this section follows similar powers given to other Churches in New Zealand.

¹³⁰ Letter of F.M. Shanahan of Russell, McVeigh, McKenzie, Bartleet, & Co., Barristers, Solicitors & Notaries Public, to R.G.F. Barker, Legislative Consultant, 21 September 1993.

¹³¹ See Minutes of the New Zealand Canon Law Commission, 28 November 1996.

¹³² The speech notes for the Hon. Member who would introduce the Bill contain an explanatory reference to vary trusts attached to trust property where it becomes impossible to carry out the purpose of the trust, or the trust property is inadequate, or the objects have been carried out: "For example, money [may] have been left to a Diocese to upkeep a Church that may no longer be of use and the trust property may be better applied having regard to the changed circumstances that exist in the Diocese" (*Roman Catholic Bishops Empowering Bill* ["Bill"], Speech Notes for the Honourable Richard Prebble, CBE, MP for Wellington Central, p. 5).

This provision replaces the usual recourse to the High Court – a process which is often time-consuming and expensive. The canonical provisions of the 1983 Code for the varying of a trust require the diocesan bishop's consulting with the diocesan finance council and those concerned, and for a parish, the bishop must consult with the parish priest and parish finance council. Since parliament would not accept consultation alone the civil legislation requires consent: ultimately, the bishop may approve of a scheme only if the various diocesan or parish organisations give their consent. Civilly, the attorney-general must be notified of the scheme and retains the right of objection should he find that the scheme is not charitable. In that event also the diocesan bishop is unable to approve the scheme.

The new Act became law on 28 October 1997.¹³³ Given that the time was ripe to address the effectiveness of the present legislation enabling the diocesan bishop to administer the temporal goods of the diocese, one has to wonder why the bishops did not consider other legal options which might more properly reflect the current ecclesiology of the Church. While the corporation sole may have been the only acceptable means of holding property available to the bishops in the 1870s, alternative civil options now exist. Instead, the bishops knowing that Rome prefers the corporation aggregate over the corporation sole, remain content to maintain the corporation sole.¹³⁴ Seemingly, the bishops and their advisers did not consider other options such as a trust corporation (as in all the dioceses of Australia except the archdiocese of Perth, which is corporation sole). Furthermore, the bishops gave no consideration to the possibility of civilly recognising the parish's right to own independently of the corporation sole. In line with previous opinions discussed earlier, Chester Bartlett writes:

¹³³ *Roman Catholic Bishops Empowering Act*, 28 October 1997, Wellington, NZ, Published under the authority of the New Zealand Government, 1997.

¹³⁴ It becomes the more curious to read in the Canon Law Commission of New Zealand Minutes of 28 November 1996, p. 3, that, "The term 'corporation sole' as applied to a Roman Catholic Bishop was considered the best vehicle in the civil law which canonists would find compatible with prescriptions of canon law."

the council [Plenary of Baltimore III] ostensibly had in mind a corporation, which while not identical in theory with the ecclesiastical moral person, practically functions in the manner prescribed by the sacred canons. That this is the corporation aggregate is clear from the decree of the Sacred Congregation of the Council, July 29, 1911.¹³⁵

More recently, James Coriden, writing on the rights of parishes, makes the point that parishes have the right to acquire, retain, administer, and dispose of their own goods and property (cc. 1255-1256 CIC/83) in keeping with norms of the Code and of the particular Church (c. 1276, §2 CIC/83) and that they do so on their own authority. Dominion over the goods belongs to the parish community which is why the parish financial council is mandatory (cc. 537; 1280 CIC/83). He argues that the question of parish versus diocesan ownership is confused because of laws which allow the bishop to hold the property of all parishes as a corporation sole. He continues: "This corporate structure ill befits the nature of the particular Church as a community of communities, it militates against the principle of subsidiarity,¹³⁶ and

¹³⁵ C.J. BARTLETT, *The Tenure of Parochial Property in the United States of America*, Canon Law Studies no. 31, Washington, DC, The Catholic University of America, 1926, p. 82. He cautions, "Nevertheless, it must not be supposed that every form of corporation aggregate fulfills the required conditions."

¹³⁶ Pius XI formulated the principle of subsidiarity as follows: "Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to a community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy or absorb them" (PIUS XI, *Encyclical Letter on the Reconstruction of the Social Order, Quadragesimo anno*, 15 May 1931, in *AAS*, 23 [1931], p. 203; English translation in *The Papal Encyclicals 1740-1981* (= *PE*), [by] C. CARLEN, Wilmington, NC, Consortium Books, McGrath Publishers, 1981, vol. 3, p. 428, n. 79. JOHN XXIII referred to subsidiarity in the social encyclical *Mater et magistra*, 15 May 1961, in *AAS*, 53 (1961), p. 414; English translation in *PE*, vol. 5, p. 65, n. 53. The Second Vatican Council also made reference to subsidiarity: SECOND VATICAN COUNCIL, *Pastoral Constitution on the Church in the Modern World, Gaudium et spes*, 7 December 1965, in *AAS*, 58 (1966), n. 86 (c); English translation in A. FLANNERY (gen. ed.), *Vatican Council II. The Conciliar and Post Conciliar Documents* (= FLANNERY), Grand Rapids, MI, William B. Eerdmans Publishing Co., 1992, p. 995; *Declaration on Christian Education, Gravissimum educationis* (= *GE*), 28 October 1965, *AAS*, 58 (1966), nn. 3, 6; English translation in Flannery, pp. 729, 731. JOHN PAUL II reaffirmed the principle in his encyclical *Centesimus annus*, 1 May 1991, in *AAS*, 83 (1991), p. 854, n. 48; English translation in *Origins*, vol. 21, no. 1 (May 16, 1991), p. 19, n. 48. By no means

is difficult to reconcile with the canons on temporal goods.”¹³⁷ For all that, the civil vehicle for the holding and administration of temporal goods in New Zealand remains the corporation sole under the *Roman Catholic Bishops Empowering Act 1997*.

2.6 – CATHOLIC SCHOOLS IN THE 1917 CODE OF CANON LAW

Given the history of the catholic Church in New Zealand and its commitment to independent catholic schooling dating from the turbulent 1870s, the canons of the then new Code contained little, if anything, that was unfamiliar to anyone involved in catholic schools.¹³⁸ The canons *on De scholis* may be found in Book III, *De rebus*, under Title XXII. Of the twelve canons under “Schools”, three pertain to universities, faculties, and degrees (cc. 1376-1378), c. 1380 relates to higher studies for the clergy, and c. 1383 reaffirms that rectors should not habitually hear the confessions of their students (c. 891). Gasparri’s *fontes* draw on a multiplicity of documents that underpin the seven canons that refer to catholic schools: sources from the Council of Trent, a small selection of documents from popes over the sixteenth and seventeenth centuries, and issuances from various sacred congregations;

exhaustive, this list serves merely to demonstrate the significance of the principle in the teaching of the Church. For an extended treatment of subsidiarity, see R.M. HARRINGTON, *The Applicability of the Principle of Subsidiarity according to the Code of Canon Law*, JCD diss., Ottawa, Saint Paul University, 1997.

¹³⁷ J.A. CORIDEN, “The Rights of Parishes”, in *Studia canonica*, 28 (1994), p. 306.

¹³⁸ For an appreciation of the legislation on education leading to the 1917 Code and the 1917 Code itself, see especially C. BOFFA, *Canonical Provisions for Catholic Schools (Elementary and Intermediate)*, Canon Law Studies no. 117, Washington, DC, The Catholic University of America, 1939. In chapters II-V, the author treats the history of catholic schools from the first centuries of the Church up to the 1917 Code. B. DUNN, *Catholic Schools in Newfoundland: An Investigation into their Nature According to the Code of Canon Law*, JCD diss., Ottawa, Saint Paul University, 1991, esp. Chap. II, Church Teaching and Legislation on Catholic Schools. Also BORDONARO, *Separate Schools in Ontario, Canada*, esp. Chap. II, The 1917 Code of Canon Law and the Education of Children. J. DORAN, *Can a Diocesan Bishop Approve a Policy Containing Selective Entry Criteria to Restrict Religious Variation in Catholic Schools? A Study of Canon 806, §1*, JCL diss., Ottawa, Saint Paul University, 1992, contains a précis of conciliar, papal, and curial documents prior to the 1917 Code, pp. 5-14.

however, the bulk of Gasparri's sources draw on the teachings of the popes of the nineteenth and early twentieth centuries. In a sentence, Europe in the nineteenth century saw the emergence of industrial and economic development, the rise of nationalism and an upsurge in academic liberalism which challenged the Church's classical position that she alone had a right to educate since full education included faith and morals, the prerogative of the Church.¹³⁹ Beginning with Gregory XVI (r. 1831-1846), Pius IX (r. 1846-1878), Leo XIII (r. 1878-1903), Pius X (r. 1903-1914), and Benedict XV (r. 1914-1922), the popes consistently reiterated the Church's right to educate. The culmination of these statements came with Pius XI (r. 1922-1939), *On the Christian Education of Youth* (see footnote 141 following).¹⁴⁰

Bouscaren writes that "The general doctrine regarding Catholic education is in part presupposed, in part very concisely stated in these canons; it is contained more fully in the encyclical of Pope Pius XI [...]"¹⁴¹ The principles espoused in the canons were long familiar to New Zealand Catholics through the teachings of the councils and diocesan synods (chapters one and two): that religion had a place in education (c. 1372), and that children be educated in the faith according to their understanding (c. 1373). That Catholic children not attend non-Catholic or "mixed" schools (c. 1374), was the reason for the rift between the Catholic Church and the rest of the country in the debates leading to the *Education Act, 1877*. That in turn led to the establishment of a Catholic system of schooling that received no support from the

¹³⁹ For an historical background to this era, see J. BOWEN, *A History of Western Education*, vol. III, "The Modern West Europe and the New World", London, Methuen and Co. Ltd., 1981; P. JOHNSON, *A History of Christianity*, London, Weidenfeld and Nicolson, 1976, Part Eight, "The Nadir of Triumphalism (1870-1975)", pp. 461-517.

¹⁴⁰ For a collection of the popes' teachings, see *Papal Teachings, "Education"*, Boston, St Paul Editions, 1960.

¹⁴¹ BOUSCAREN, *Canon Law*, p. 763. His reference is to PIUS XI, Encyclical Letter on the Christian Education of Youth, *Divinis illius Magistri*, 31 December 1929, in *AAS*, 22 (1930), pp. 49-86; English translation in *Encyclical Letter on Christian Education of Youth (= Christian Education)*, Washington, DC, National Catholic Welfare Conference, 1936.

government, and whose survival depended on the sacrificial generosity of the faithful. Moreover, the faithful understood well the obligation to support catholic schools according to their means (c. 1379 §3). Furthermore, since catholics believed that the secular national education system was not an option for them, their right to establish schools from primary through intermediate to secondary (c. 1375) was, for them, a given. The state never challenged the right of catholics to establish their schools, but it vehemently resisted any suggestion that it should contribute in any way to the same. As early as 1884 the First Synod of Auckland imposed upon priests the obligation of personally watching over their schools. By the time of the second synod in 1888 a diocesan inspector was appointed to appraise the school “both for its general progress and in a special way its religious instruction” (decree 23). That religious instruction be subject to inspection (c. 1381) and that the local ordinary, either personally or through a delegate, visit any school (c. 1382) was nothing new to the Church Down Under.¹⁴²

Writing on the Irish influence in catholic education in New Zealand thirty years before the 1917 Code, Akenson reviews it thus:

In the third quarter of the nineteenth century, the Irish bishops pushed for what they wanted with a rough and hard clarity. Shorn of rhetoric, Cullen and his fellow bishops demanded that: (1) it be recognised that all education was religious education and thus there could be no separation of the secular from the religious curriculum; (2) thus, all Catholic children were to be taught in Catholic schools; (3) in such schools, the teachers were to be Roman Catholic; and (4) the supervision of the teachers was to be under the control of the local parish priest, in the case of primary schools, and of either the bishop of the diocese or an official of a regular order, or order of nuns, in the case of secondary schools; (5) religious integration of Catholics and Protestants in schools was condemned, except in the case of Protestant children enrolling in a Roman Catholic school that was under secure Catholic control; (6) that the state was to recognise that it had no fundamental rights in education.

¹⁴² “Down Under”, to or in Australasia, ORSMAN, *The New Zealand Dictionary*, p. 81.

In summary, he concludes, "These were operational propositions and they were part of the kit bag of the Irish, and Irish-descended, bishops and clergy who took over the New Zealand Church."¹⁴³ So they were. But, more significantly, they were also the values which came to be expounded in the seven canons on "schools" in the 1917 Code of Canon Law.

Conclusion

The colonial Church began in New Zealand initially as missions under the care of a roving pastor. The country, beginning as a vicariate apostolic, was divided by Rome in 1848, creating the dioceses of Auckland and Port Nicholson, later called Wellington. In 1885, the First Plenary Council of Australasia, of which New Zealand was a part, discussed the issue of parish priests. The Fathers argued that "it would be very desirable, that in accordance with this custom of the entire Church there should be a parish priest in the proper sense of the term as in other catholic countries". Consequently they decreed that the principal mission would have an irremovable rector. In keeping with the decrees of the council, the First Synod of Auckland in 1886 made the parish priests of six of the principal parishes, irremovable pastors. With the promulgation of the 1917 Code, irremovable rectors remained where the law found them. Such, in law, have the status of irremovable rectors, or in local parlance, parish priests.

The new Code of Canon Law established the requisites for a parish: a division of a diocese into distinct territorial parts, each part having its own church with a definite group of the faithful and a rector placed over it as its proper pastor for the care of souls (c. 216 §1). Initially the canon caused some confusion since a parish under Propaganda did not have the character of a benefice. In the end, Rome ruled that divisions of a certain territory into districts with definite limits, to which a rector is assigned to take charge of the people and the church, became parishes *ipso facto* on the promulgation of the new Code. Whatever doubts might have lingered, by the time of the Fourth Plenary Council of Australia and New Zealand

¹⁴³ AKENSON, *Half the World from Home*, p. 168.

in 1937, the conciliar Fathers declared that parishes *in regionibus nostris*, are *verae paroeciae* – they have the status of true parishes.

We also addressed, in this chapter, the issue of parochial temporal goods, arguing from canon law that whatever the parish legitimately acquires, it owns. The decrees of the councils and diocesan synods placed an obligation on each parish priest and the people to establish parish schools. So it was that the catholic parish plant, with few exceptions, became readily distinguishable as a church, school, presbytery, convent, and hall. The right of administering the temporal goods of the parish (with perhaps, the exception of the convent which in many instances belonged to the Sisters) was the parish priest's alone. The research on the status of the parish primary school indicates that these schools were rightfully the possession of the parish, to be administered by the parish priest. Diocesan schools, *mutatis mutandis*, were the rightful property of the diocese, administered as of right directly or indirectly by the diocesan bishop.

With its promulgation, the 1917 Code introduced into ecclesiastical legislation the institute of the moral (juridical) person. Some moral (juridical) persons arise by virtue of the law itself, such as a parish or diocese; others, such as a school, arise by way of a decree of a competent superior. In the case of a parish or diocesan school this would be the diocesan bishop. We asked whether the diocesan bishop may have given parish or diocesan schools juridical personality independently from that which they had prior to the new Code, thereby making them juridical persons in their own right. To effect this, the law requires a special intervention of the diocesan bishop, the legitimate superior. Since our research yielded no concrete evidence that this occurred, the conclusion can only be that the schools are parochial or diocesan apostolates as the faithful, clergy and laity, have always understood them.

From 1856, to protect by civil law the ecclesiastical goods of the Church, an Act of Parliament created the bishop of Auckland (and subsequently the bishops of the other

dioceses) a corporation sole. In recent years, the bishops sought to update this Act, along with a hundred and twenty years of amendments, in a single piece of legislation. Consequently, parliament passed the new Act – the *Roman Catholic Bishops Empowering Act 1997*. Since the bishops eschewed other options, the corporation sole remains the vehicle for the civil administration of the dioceses, Auckland included, for the foreseeable future.

Canonically then, our studies have led us to conclude that the primary schools built by the offerings of the laity are part of the temporal goods of the parish, administered as of right by the parish priest. The secondary schools were built similarly from the financial giving of the laity, administered as of right by the diocesan bishop. The former, constituting an integral part of the juridical personality of the parish have the status of a parochial apostolate. In like manner, the latter constituting an integral part of the juridical personality of the diocese, have the status of a diocesan apostolate. And that is how the *Private Schools Conditional Integration Act* found them in 1975.

CHAPTER THREE

THE PRIVATE SCHOOLS CONDITIONAL INTEGRATION ACT 1975 AND THE EDUCATION ACT 1989 – CANONICAL IMPLICATIONS

“One of the iron laws of historiography is that the richer the data are, the more complex the story to tell” (Donald Harman Akenson).¹

Introduction

In this chapter we discuss the impact of the civil legislation upon the canon law of the Church when a parish or diocesan school becomes integrated with or part of the state system. We will examine the impact of the *PSCIA 1975* on the canonical status of the schools as we left them in chapter two from two main perspectives: first, the impact of the Act upon the bishop and parish priest’s right to administer the schools as part of the apostolate proper to the juridical person of both the diocese and the parish. Second, we will investigate the effect of the Act upon that portion of the temporal goods of the parish and diocese that comprise the school. From this analysis we will deduce whether following integration the canonical status of parochial and diocesan schools may have changed.

3.1 – REACTIONS TO THE PRIVATE SCHOOLS CONDITIONAL INTEGRATION ACT 1975

We touched briefly on the introduction of the *PSCIA 1975*, enacted on 10 October 1975, in chapter one. The entry of the bill into New Zealand’s parliamentary process was marked by as much controversy as its 1877 forbear.² When the bill in its final form did

¹ D.H. AKENSON, *Small Differences: Irish Catholics and Irish Protestants, 1815-1922*, Montreal, McGill-Queens’ University Press, 1988, p. 98.

² Some members of the National opposition were scathing in the way in which the Bill was handled during its various stages. Among the objectors, the Hon. Sir Roy Jack, Member for Rangitikei,

emerge, the legislation was rushed through the House in the final sittings of 1975 in a manner which various writers referred to as “steamrolled”, a “legislative scramble”, and “rushed through in frantic haste, in the dying hours of Parliament”.³ The editor of the *New Zealand Tablet*, having said that the Act represented a landmark in the history of education, commented that it was, “however, singularly unfortunate that a Bill of this magnitude and importance should have been debated in the circumstances it was. The rush of legislation of the last few days of Parliament was scandalous.”⁴ Ironically, the Labour Party was defeated at the polls a few weeks later, and it became the prerogative of the incoming National Government to implement the Act, of which many of its members were highly critical during its formative process.

In a Statement by the New Zealand Catholic Bishops’ Conference read at all the masses on Sunday 14 December 1975, the bishops gave the Act cautious approbation:

We find that the Act is compatible with the essential principles of Catholic education. Hence we judge that it could be implemented in the Catholic sector of private schools, subject to acceptable regulations and agreements. However, there are certain aspects of the Act that we find less than satisfactory. Some of these relate to our own schools [...] and the teachers employed therein. We hope that as the principles of the Act are brought into

said, “As the bill now stands, it is full of fish hooks and broken glass. It should be sent back to a committee so that it can be properly dealt with, improved, and made acceptable [...] . As it stands it is thoroughly bad legislation and should bring the greatest discredit on the Labour Government.” The Hon. Brian Talboys, Deputy Leader of the Opposition, claimed that he had never heard of a minister doing what this Minister of Education had done: “simply refusing to have any discussions with other than a select group on the amendments he had made. I have a feeling of shame about the way the minister has done this.” The Member for Ruahine, the Hon. Les Gandar, quoting the New Zealand Education Board’s Association representative, Mr H.P. Fowler, called the Bill “a shotgun wedding.” See NZPD, vol. 402, 1975, pp. 5186, 5190, 5213.

³ See ATKINS, *The Effects of Integration*, p. 16; CUMMING, *State Education*, p. 362; *New Zealand Tablet*, 10 November 1975, p. 7.

⁴ *New Zealand Tablet*, 15 October 1975, p. 2.

operation these inadequacies will be able to be rectified, to our satisfaction [...].

The joint executive of the Catholic Education Council in their statement said of the new Act: "It offers a new solution to the difficulties under which our schools have been labouring for some years. There is no compulsion involved. It is a unique piece of legislation in so far as schools are free, after close study of its provisions, to use it or carry on as they are."⁵ The Hon. Phil Amos, Minister of Education, summed up an appreciation of the legislation: "I believe that the work that has been done over the past 2½ years is of historic interest to the system of education in New Zealand [...] . I believe, therefore, we shall be opening up a new era in the system of education in New Zealand."⁶

The *New Zealand Tablet*, shortly after the Act was passed by Parliament, lamented in an editorial that it was "A poor effort. What has been described as the most important measure in the field of education in New Zealand in nearly a century went through Parliament recently – and the public was told scarcely a word about it."⁷ Jack Mulheron agreed: "Surprisingly, integration, representing the biggest change in NZ education in a century, was almost ignored by departments of education in universities. Individual academics [...] were clear exceptions. The establishment of state denominational schools and the abolition of the secular clause has not aroused curiosity in the Religious Studies departments either."⁸

In its editorial of 22 October 1975, the *New Zealand Tablet* said that, "the Church has been given a very good deal by this measure." However, a fortnight later, "having had the whole Act examined, and after taking legal advice", the paper reversed its opinion: "we are

⁵ *New Zealand Tablet*, 22 October 1975, p. 8.

⁶ NZPD, vol. 402, 1975, p. 5184.

⁷ *New Zealand Tablet*, 22 October 1975, p. 3.

⁸ MULHERON, *State Aid*, p. 13.

withdrawing that judgment and saying now that we have a situation that does not give us the protection for the character of our schools that we were promised. We do not believe the Bishops could accept the Act as it stands.”⁹

Although some saw the legislation as mending the divisions of the past, others saw it having the opposite effect. A *New Zealand Tablet* editorial considered that “It should mark an end to the division and bitterness that have been seen in this field over the years”.¹⁰ Archbishop Reginald Delargy, in a pastoral read at all the masses on Sunday 21 March 1976, said: “The Bishops of New Zealand welcomed the Act as an historic milestone marking the end of long-standing division and mistrust.”¹¹ Conversely, Professor Ivan Snook deliberated five years later:

By seeking a neat political solution, the negotiators created a legal fiction which now reveals gross contradictions and causes deep frustrations. Expediency won out over principle and broader questions were ignored. At the best of times the provision of education requires overall planning. In times of scarce resources this need becomes imperative. “Integration” was seductive because it looked as if it would facilitate such planning; in fact it has proved inimical to it, creating in many minds the suspicion of two systems, one well endowed, one deprived. It is surely a major irony that the Act which was to heal at last the wounds of 1877 should have served to open them anew.¹²

In January 1976, just two and a half months following the passing of the *PSCIA 1975*, despite the disquiet of the catholic press and the misgivings that the bishops expressed in their December statement following the passing of the Act, Delargy notified the new minister of

⁹ *New Zealand Tablet*, 10 November 1975, p. 2.

¹⁰ *New Zealand Tablet*, 22 October 1975, p. 3.

¹¹ *New Zealand Tablet*, 31 March 1976, p. 25. Archbishop Delargy, auxiliary to Archbishop Liston since 1958, became bishop of Auckland on 18 September 1970. He subsequently became bishop of Wellington on 1 May 1974, and cardinal on 24 May 1976.

¹² MCGEORGE, *Church, State, and New Zealand Education*, p. 57. Also quoted by SHUKER, *The One Best System?*, p. 258, and MULHERON, *State Aid*, p. 19.

education that, subject to the framing of suitable regulations and agreements, he proposed to negotiate integration for the schools of the archdiocese. The issue had been discussed with the Catholic Education Board, by a representative meeting of all catholic education authorities in the archdiocese, the Archdiocesan Pastoral Council and the Archdiocesan Senate of Priests. However, those most directly affected, the rest of the laity, were informed of the decision in a pastoral letter, read at all masses on 21 March 1976. The other dioceses followed suit. The decision to move with such alacrity “shocked many Catholic parents, and home and school associations are beginning to protest strongly against the rush. They fear for the future of the schools if these schools are integrated under the Act as it now stands. They want the Bishops to move with caution [...] (*Tablet*, 3 March 1976)”. As far as diocesan secondary and parochial primary schools were concerned, however, the decision of the bishops was a *fait accompli*. As outlined in chapter one, the initial process of integration was slow, picking up over 1981-1982; but by March 1983 all the primary schools of the Auckland diocese were integrated.

3.2 – THE PRIVATE SCHOOLS CONDITIONAL INTEGRATION ACT 1975

The Act, in 10 parts, consists of 83 clauses covering 50 pages of print. It remains outside the scope of this thesis to address in detail every feature of this “complex and massive piece of legislation”¹³ which impinges on canon law. Instead, we will concentrate on salient areas sufficient to consider the impact of the act on the canonical status of catholic schools.

3.2.1 – “Integration”

Snook, writing on the integration act and its aftermath, advances that Jonathan Hunt seems to have been the first to use the term “integration”, and his proposal to the Labour Party caucus took the term seriously: “Schools which integrated would receive 100% aid and

¹³ *New Zealand Tablet*, 22 October 1975, p. 8.

would come under complete state control; religious instruction would have to be given outside school hours.”¹⁴ While the caucus regarded the initial scheme as too radical,¹⁵ nevertheless it appeared in the 1969 Labour manifesto in a modified form as: “Labour would encourage any independent schools that wished to integrate themselves into the State system and would safeguard salaries and conditions of any teachers at these schools.” Unlike the initial proposal, the manifesto contained neither a reference to religious instruction, nor did it define “integration”. About the same time the word “integration” appeared in another context altogether. In July 1967, the bishops brought to New Zealand a sociologist, Anthony Spencer, to study the catholic school system and to make recommendations. He produced an interim report, dated 27 June 1971, in which he interpreted the history of catholic education in New Zealand from a sociological perspective. Not only was Spencer highly critical of many aspects of catholic schooling, but also of the style of some bishops’ leadership in education. The report was ignored by the bishops and never published. Because of time and cost overruns, Spencer did not complete the final evaluation. Nevertheless, it was his conviction that the ultimate solution to the difficulties in catholic education lay in integrating with the state system:

The second main conclusion [of this study] is that a solution to the problem of Church-State relations in the field of education is to be found in the ultimate integration of most of the Catholic school system into the State system, on terms that will ensure the achievement of the basic ends of both Church and State, on the lines of the Scottish settlement of 1918.¹⁶

In an intuitive recommendation, Spencer outlined the changes that necessarily would occur should the proposal be accepted by the Church and the state. First, Spencer recommended a complete change of strategy in the Church’s approach to funding and control:

¹⁴ MCGEORGE, *Church, State, and New Zealand Education*, p. 46.

¹⁵ WILSON, *The State Aid to Private Schools Issue*, pp. 45-46.

¹⁶ SPENCER, *Interim Report*, p. 408.

The abandonment by the Catholic Church in New Zealand of the long campaign for State Aid for Catholic-Church controlled schools [...] would mark a complete break with the tradition of the past century. Although the basic ends of all the main parties would be unchanged, a strategy of integration, as distinct from aid, would create a new political situation.¹⁷

The arguments of both sides, Spencer believed, could be resolved in this new political climate by negotiation. In his words:

The bargain the Church would seek to strike would be mutual acceptance of influence in place of a mutual rejection of control. Generations of Protestants and Secularists have been alarmed at the prospect of State subsidisation of Catholic-controlled schools. Generations of Catholics have been alarmed at the prospect of their children being exposed to education controlled by Protestants and Secularists. What is proposed is a sub-system within the State system where the State's power of control would be limited by a legal guarantee of Catholic Church influence. As in the Scottish model¹⁸ this influence would be exercised through the granting (or withholding) by the Bishops of approval (on grounds of religious belief and character) to candidates seeking appointments in Catholic schools. In respect of Catholic schools entering this sub-system within the State system, the Catholic church would relinquish all rights of control. These "Integrated" schools and their contents would be sold to the State. They would thenceforth be administered by the District Education Boards, the School Committees and Secondary School Boards.¹⁹

Spencer concluded that catholic schools would be administered precisely as other state

¹⁷ Ibid., p. 413.

¹⁸ The Education (Scotland) Act 1918. The Scottish model proposed by Spencer had already been quoted by some bishops previously in a Memorandum dated 8/1949. (See *supra*, chapter one, pp. 48-49.) Spencer, however, argued that these authors misunderstood the ramifications of the Act, since they demanded all the benefits given to denominational schools but rejected the other half of the Scottish solution: the Catholic Voluntary schools "were sold, lock, stock, and barrel, to the Education Authorities. They became public schools [...]." Thus the Scottish Education Act ensured Catholic influence while the Local Authority acquired control. See SPENCER, *Interim Report*, pp. 34, 261-262. In 1949 nothing would have been further from the NZ bishops' minds.

¹⁹ Ibid., p. 413.

schools but with three differences: 1) Only teachers having the approval of the bishop could be considered as candidates for teaching appointments; 2) Denominational religious instruction could be given during permitted periods of religious education, and denominational services held during assembly. Provision would have to be made for religious instruction and observance; 3) School catchment areas would have to overlap non-catholic state schools.²⁰

The Labour government, coming into power in 1972, immediately established a State Aid Conference which discussed, among other things, integration.²¹ The rest is, as the expression goes, history. While the bishops in 1971 chose to ignore the recommendations of the interim report, visionary and unpalatable as they may have been, most of the recommendations concerning influence and administrative control were, in one way or another, incorporated into the *PSCIA 1975*.

The bishops were clear that the Act did not say that integrated schools would become state schools; rather they saw “the vision of a truly national system of education” which had begun to take shape in the new Act, and they looked forward to being able to play a full part in what they called a “new partnership.”²² Mackey develops the ideas thus:

A national system is one which allows for the richness and diversity of a democracy to express itself in the educational system. A partnership between State schools and what we conveniently call private schools is at least a working approximation to that ideal. The present Private Schools Conditional Integration Act comes very close to that ideal.²³

²⁰ Ibid., pp. 413-414.

²¹ See *supra*, chapter one, pp. 62-64.

²² Statement by the New Zealand Catholic Bishops' Conference on the Private Schools Conditional Integration Act (1975) to be Read at all Masses Sunday, 14 December 1975.

²³ *New Zealand Tablet*, 21 April 1976, “What Bishop Mackey Thinks about Integration”, pp. 28-29.

However, there were those who disagreed with this understanding. Mulheron maintains that at the time of the integration negotiations in the early 1970s and prior to the implementation of the Act:

[...] many people sincerely believed that integration meant Catholic and Protestant children – indeed all NZ children – would be educated together in integrated schools. They supported integration in principle because of this perception. But “integration” was really a promotion word which concealed the fact that Catholic schools would remain essentially private while receiving total State aid.²⁴

The Act itself succinctly describes “integration” as: “the conditions and procedures on and by which a private school may become established as part of the State system of education and remain part of that system on a basis whereby the education with a special character which it provides is preserved and safeguarded [...] .”²⁵

3.2.2 – “Conditional” Integration and Education with a Special Character

O’Neill recalls that on the last day of the State Aid Conference discussions, J.D. (Des) Dalgety succeeded in getting the title changed from “integration” to “conditional integration”. The significance of the move was lost on O’Neill “due to the noise being made by the builders” who were renovating the building nearby. Subsequently, Loretta Petit, interpreting the expression in the title of the Act, says that it “refers to the point that the Catholic Schools would be allowed to integrate into the state system on the ‘condition’ that the special

²⁴ MULHERON, *State Aid*, pp. 7-8.

²⁵ *PSCIA 1975, 2. Interpretation*, p. 750. Hence, within the Act an “ ‘Integrated school’ means a private school originally established to provide education with a special character that, in accordance with the provisions of this Act, has, by the free choice of the Proprietors of the school, been established as an integrated school, and has thereby become part of the State system of education in New Zealand [...] ” (ibid., pp. 749-750).

character would be maintained.”²⁶ Gregory Lee appears to understand it thus: “The Act was premised on the assumption that private schools would be entitled to full state aid only if they satisfied certain statutory requirements.”²⁷ Dobbs, the director-general of education, speaking to *Tablet* expressed his own views on the key point:

The conference had made it quite plain that it saw no point in our considering unconditional integration, and the key point of the concept of conditional integration which emerged right at the beginning, and was never under threat of repudiation, was that the integrated schools would be permitted to retain their existing character.²⁸

Whatever may be said of the revisionist understanding, in all the negotiations leading up to, and following from, the Act, the non-negotiable, the *raison d'être*, that which had to be protected at any price as far as the catholic negotiators were concerned, was that which they considered constitutive of catholic education. The right words, when they were ultimately found were *education with a special character*. Thus the Act defines “Education with a Special Character”, necessarily broadly, as “education within the framework of a particular or general religious or philosophical belief, and associated with observances or traditions appropriate to that belief”.²⁹ O’Neill would later comment on the definition as follows:

Every word and phrase in the statement was looked at frontwards, backwards and sideways. It had to cater, not only for Catholic schools but for any other private schools which might wish to become integrated, hence the word “philosophical”. It was left to each school’s integration agreement to specify

²⁶ L. PETT, “New Zealand Integration: Dilemma of Special Character”, in *Journal of Thought*, vol. 20 (1) 1985, p. 80.

²⁷ LEE, “The 1975 Private Schools Conditional Integration Act”, p. 46.

²⁸ *New Zealand Tablet*, 11 December 1974, p. 3.

²⁹ *PSCIA 1975, 2. Interpretation*, p. 749.

further the particular special character of each school.³⁰

3.3 – THE INTEGRATION AGREEMENT – SOME OF ITS EFFECTS

A catholic school becomes integrated or part of the state system when the proprietor and the minister of education, on behalf of the Crown, enter into a formal agreement known as the integration agreement. Once signed, the integration agreement imposes both mutual obligations and mutual rights not only upon the signatories, but also upon other parties. Thus the agreement effects the Act. Given the complexity of the Act, as mentioned earlier, this chapter treats only some of those issues raised in chapter two insofar as they impinge directly on determining the canonical status of a catholic school, namely the capacity of the bishop and parish priest to administer their schools; the effect of the Act on the temporal goods of the diocese and parish; and the significance of the Act for the teachers in the catholic schools.

3.3.1 – The Impact of the *Private Schools Conditional Integration Act* on the Role of the Parish Priest as the Administrator of the Parish School

In chapter two, having discussed the canonical role of the parish priest and his spiritual and administrative relationship with the parish school, we maintained that since the parish school came under the purview of that which is considered canonically to be a parish, the parish priest administered the school as of right – he possessed a *jus in re*. The internal running of the school remained the competency of the head teacher or principal.³¹

³⁰ J. O'NEILL, Speech Notes, Board of Trustees Training, Christchurch Diocese, 15-17 March 1995, p. 1.

³¹ “Management of the primary schools was shared between the Principal and the Parish Priest. The way management responsibility was divided reflected the tradition of each parish, the tradition of each institute, and the respective personalities and interests of Principal and Parish Priest. Generally speaking, the Parish Priest as School Manager saw that the school was kept in a reasonable state of repair, and suppliers’ bills paid. As Parish Priest he had a fairly close interest in the catechetical and liturgical activities of the school. Apart from that, management was exercised by the Principal, and

We showed also that throughout the history of the Church in New Zealand, various councils and diocesan synods confirmed the importance of the parish priest in the life of the school, which the laity understood as the parish priest's rightful role. Indeed it was the catholic way. Spencer, in a sociological analysis of management and the relationship between the religious institute who staffed the schools, the diocesan bishop, and the parish priest, observes that, "There was a high degree of decentralisation. The Bishops exercised minimal control. Management [of the school] was shared by the institute and the Parish Priest. Once an institute, a parish and a school had been established, all decisions were routine, not critical." He then describes the system as "detached from the market economy. In so far as exchanges were involved they were characteristic of barter economy rather than money economy. It was economically very stable."³² As a consequence of the above understanding, Spencer maintains that, "Until the late 1950's the Catholic Laity of New Zealand seem to have accepted clerical control as legitimate."³³

3.3.3.1 – The Winds of Change

Then there occurred a series of changes that questioned the conventional role of the parish priest as administrator of the parish school. Only the more significant developments will be discussed here. Following the rejection of the 1956 petition for State Aid, McLaren observes that "the Catholic educational interest groups withdrew to prepare for the next round. They now looked critically at the sweeping powers parish priests had over their

the Community Superior and the Provincial or General Superior. In particular, the Provincial or General Superior took all the decisions about staff to the school, changes, training, home leave, etc. while the Principal allocated roles and tasks within the school" (SPENCER, *Interim Report*, pp. 125-126).

³² Ibid., pp. 19-20.

³³ Ibid., p. 247.

schools and admitted that there was need for reform.”³⁴ Concomitant with this, cracks began to appear in the simple system described by Spencer earlier. The rising costs of staffing and maintenance led the bishops to introduce school fees in 1959. Faithful to the classic stance of “a place in a Catholic school for every Catholic child”,³⁵ no child would be refused entry if its parents could not afford to pay school fees since the parish priest had confidential discretionary power to reduce or even suspend fees where necessary. Parish priests, though, were caught between the traditional policy and a burgeoning school population. The consequence led to the overcrowding of classrooms with corresponding negative effects on the teachers and pupils.³⁶ Adding to these difficulties was the growing complexity of education itself: the whole business of catholic education had come to the point where it was beyond the parish priest’s capability to manage it as it had been until now. Decentralisation, as described above, was rapidly disintegrating.

3.3.1.2 – Some Consequences of the Emergence of the Laity

In July 1959, the bishop of Auckland in a confidential circular recommended the establishment of Parent-Teacher Associations in parishes so as to have some influence in the upcoming referendum on Religious Instruction in State Schools. In these associations the bishop reaffirmed the dominant role of the parish priest.³⁷ As the associations went from

³⁴ MCLAREN, *Education in a Small Democracy*, p. 60.

³⁵ “In other countries of mixed creeds [...] a heavy burden weighs upon Catholics, who under the guidance of their Bishops and with the indefatigable co-operation of the clergy, secular and regular, support Catholic schools for their children entirely at their own expense; to this they feel obliged in conscience, and with a generosity and constancy worthy of all praise, they are firmly determined to make adequate provision for what they openly profess as their motto: ‘Catholic education in a Catholic school for all the Catholic youth’ ” (PIUS XI, *Christian Education*, pp. 31-32).

³⁶ See *supra*, chapter one, p. 50, footnote 113.

³⁷ “Success of practical help and pleasant working will depend on the parish priest’s encouragement (e.g. by attending meetings faithfully), advice and control, joined with the members, taking initiative and using their head for ways and means” (Circular to Parish Priests, 21 July 1959).

strength to strength, they gave the laity a voice and a power which they hitherto did not have. Lay initiatives, however, directly challenged the traditional decision-making and leadership-roles of both the bishop and the parish priests; the shift from a hierarchical to a collaborative model was beginning. August 1966 saw the Auckland Diocesan Federation of Catholic Parent-Teacher-Friend Associations seeking guidance from the diocesan bishop on proposals for a future plan of action regarding catholic education. Reading the signs of the times, they wished to promote a "Catholic Education Day": "The prime purpose of this exercise would be to focus the attention of the public, both Catholic and non-Catholic on the Catholic education system within the diocese, its achievements; what it does and what it costs, and its present and future problems both financial and non-financial." A second letter of the same day asked the bishop, should he feel so disposed, to pronounce again acceptance and recognition of the PTA movement.³⁸ His response, without any accompanying reasons, was immediate and to the point: "I do not see my way to sanction the holding of a Catholic Education Day: the time does not appeal to me as opportune." To the second letter he responded, "Since the Association came into being, after my unsuccessful effort to have it accepted 30 years ago, I have many, many times at Conferences of priests warmly commended it as a valuable part of educational life. I have refrained from giving it a directive to have it accepted, sensing it

ACDA, LIS 190-1/). The bishop's stress on the importance of the parish priest may be seen in the following samples of correspondence: "I have made a change [...] bringing in the parish priest, who is the Bishop's representative and manager of the parish school" (Letter to Mr. Hubbard, 23 February 1960, on approving the Constitution and Rules of the Parent, Teacher, Friend Association for the Diocese of Auckland. ACDA, LIS 190-12/). "A word of guidance. The Association is doing very well and is worthy of fostering and of being given freedom to initiate and work out their plans themselves, always subject to the approval first of the parish priest" (Letter 10 November 1960, appointing Rev. John Sloane, SM, Rev. A. Timmerman, and Rev. N. Berridge, spiritual directors for the sub-federation in their parishes of the PTF. Association. ACDA, LIS 190-1/).

³⁸ Letter of Mr F.L. Bish, vice-president, and chairman Publicity and Membership Committee, Auckland Diocesan Federation of Catholic Parent-Teacher-Friend Associations, to Bishop Liston, 5 August 1966. ACDA, LIS 190-1/.

advisable to let it win its place in every school. Happily, that is coming to pass.”³⁹ Following the rejection of the education day by the bishop, the Auckland Federation of PTFAs held their annual general meeting on the 16th of October. The bishop wrote to the president, Bob Hubbard, saying that he found himself unable to be present at the meeting “because of some of the resolutions set down for consideration. They show an ignorance of the workings of our schools and their high place in the educational world of our country: they are irresponsible and offensive.” He concluded by saying that he would make his letter known to the parish priests of the diocese.⁴⁰ This exposition serves to illustrate some of the tensions as lay initiatives began to challenge the traditional role of the clergy in education.

3.3.1.3 – A Revision of the Church’s Strategy

Besides these changes, by the early sixties there was a growing awareness among the laity and some bishops that a high clerical profile was unhelpful to the Church’s cause, serving only to intensify sectarian prejudices. Desmond Piggan, vice-president of the Federation of PTFAs, in a speech delivered to a PTA seminar in November 1962, made it clear that the conventional role of the clergy would have to change: “Now is called for action of a different nature if we are to succeed. It is politician’s work, and churchmen are as ‘lambs among wolves’ ”; “Finally, the negotiators must be identified with the electors, not the clergy, for

³⁹ Letter of Bishop Liston to Mr Bish, vice-president of Auckland Diocesan Federation of Catholic Parent-Teacher-Friend Associations, undated. ACDA, LIS 190-1/. The letter was reflective of another written in March 1959 to Mr T.C.L. Booth, who wishing to set up a Council of Catholic PTAs in the Waikato, sought consent for the same, by submitting a prospective constitution for the bishop’s approval, and asking if the catholic inspector could be present at their next meeting: “I have been instructing the parish priests for some time to let the Parent-Teacher-Association in their parishes grow slowly in order to have wisdom and strength; accordingly I do not see my way to give approval to the proposal set down in your letter” (Letter of Bishop Liston, 23 March 1959. ACDA, LIS 190-1/).

⁴⁰ Letter of Bishop Liston to Mr. Hubbard, president, Auckland Diocesan Federation of Catholic Parent-Teacher Associations, 8 October 1966. ACDA, LIS. 190-1/.

Members of Parliament and Ministers of the Crown look to electors.”⁴¹ Many of the clergy readily concurred with this position.

Maureen Wilson argues that the establishment of the Interdenominational Committee for Independent Schools (ICIS) was very significant in changing the political climate, ultimately convincing the government of the need to support financially private schools.⁴² As Snook describes it: “The significance of this committee was that it was interdenominational rather than Catholic, lay rather than clerical, and educational rather than ecclesiastical.”⁴³ When Bishop Kavanagh formed the Catholic Education Council he was, in respect to lay involvement, ahead of the play. O’Neill recalls:

Being on the executive of the Council [ICIS],⁴⁴ Mr Hubbard had the ear of Bishop Kavanagh. The bishop preferred to stay in the background and have others fire the bullets he fashioned. He had learned from experience that it was politically wise that the Church itself, whether through bishops or the Holy Name Society not be seen in the forefront. In his view the negotiations were better carried out by those directly affected, namely parents, schools administrators and teachers.”⁴⁵

To conclude, this period led to a change in the thrust of the argumentation for financial assistance. The argument, hitherto, appealed to distributive justice. It now shifted to

⁴¹ Quoted in SPENCER, *Interim Report*, p. 267.

⁴² WILSON, *The State Aid to Private Schools Issue*. See O’NEILL, “Catholic Education in New Zealand”, p. 174; MCGEORGE, *Church, State, and New Zealand Education*, p. 45; M.J. MCMENAMIN, *The Special Character of a Catholic School: Theory and Practice*, MA thesis, Auckland, NZ, University of Auckland, 1985, p. 7.

⁴³ MCGEORGE, *Church, State, and New Zealand Education*, pp. 45-46.

⁴⁴ Hubbard was chairman of the Auckland Diocesan Federation of PTFAs, executive member of the Catholic Education Council, and on the executive of ICIS.

⁴⁵ O’NEILL, “Catholic Education in New Zealand”, p. 174. Spencer maintains that these bodies “represented a further weakening of the ‘clerical’ image, as did the Lay Catholic membership of the Combined Interdenominational Committee” (SPENCER, *Interim Report*, p. 298).

proposing the view that catholics, i.e., a large group of people contributing to the good of New Zealand education, could no longer afford to do so.

3.3.1.4 – The Demise of the Power of Administration of the Parish Priest

The government did respond to the call for assistance but the administration of the subsidies reduced further the parish priest's power of administration: the government preferred to deal with central diocesan offices rather than with hundreds of parishes. So it was that the diocesan education offices took over the administration of these subsidies, along with the recruitment and payment of the increasing number of lay teachers. O'Neill sums it up as follows:

Education was becoming more complex and Bishops and parish priests had more pressing pastoral duties than to try to discover why a teacher was underpaid or to debate with a principal who wanted a new floor polisher.

At the same time school fees became centralised. Parishes continued to collect the fees for primary pupils and had to supplement them with parish funds for unpaid fees and for remission of fees in hardship cases, but the fees had to be transferred to the diocesan office from parishes. [...]

While all this was administratively sound it meant that the schools administration became separated from the parish administration. Direct contact between the school and the parish diminished. The principal of the parish was more inclined to telephone the diocesan office rather than knock on the presbytery door. Schools were now beginning to be thought of as a drain on the parish funds rather than a part of parish life as integral to it as the parish church itself.⁴⁶

Gone was decentralisation. Diocesan offices of necessity subsumed the bulk of those administrative tasks relating to the parish school which were once the prerogative of the parish priest, but which had now become more complex and time-consuming. *De facto*, the

⁴⁶ O'NEILL, "Catholic Education in New Zealand", p. 175.

parish priest was no longer capable of administering the highly involved organism that the parish school had become since the middle fifties.

Ironically, the centralisation called for by some educational critics was now forced upon the catholic system. As far back as 1954, Richard McSweeney called for “the establishment of a strong central Office of Education for the whole of New Zealand” rather than having to rely on the parish clergy. “Such an office would correspond roughly in organisation to the government Education Department.”⁴⁷ Among a series of remits of the Auckland Diocesan Federation of PTFAs dated 4 July 1964, was one declaring that, “There is a need for a central diocesan body in the form of a Catholic Education Board which would be responsible for the financial and curricular activities of our schools.”⁴⁸

3.3.1.1 – The Result of Increasing Lay Teachers in Catholic Schools

Finally, the increasing number of lay teachers led to a weakening of the power of administration of the parish priest. Again, O’Neill describes the transition thus:

While schools were staffed exclusively by Religious, there were well understood protocols which established the relationships between the priests of the parish and the teachers in the school. All knew their place from long practice. When the schools became lay staffed and with lay principals who were more accustomed to the ways of doing things in the State system and perhaps had family and other duties outside the parish, new protocols had to be established, not without mutual tension in many cases.⁴⁹

⁴⁷ R. MCSWEENEY, *The Catholic School System in New Zealand*, MA thesis, Auckland, NZ, Auckland University College, 1954, p. 127.

⁴⁸ ACDA, LIS 58-3/.

⁴⁹ O’NEILL, “Catholic Education in New Zealand”, p. 176. See also SPENCER, *Interim Report*, pp. 242-243. In a sentence, Spencer sums up the difficulties: “Bringing one or two lay teachers into a miniature social system like this created acute problems” (p. 243).

3.3.2 – The Status of the Parish Priest in the Act

As outlined earlier, the previous decade and a half had seen a gradual erosion of the parish priest's administrative control.⁵⁰ In January 1975, the *New Zealand Tablet*, posed the question "Where does the integration agreement leave the bishop of the diocese in regard to any need that may arise for him to intervene in a Catholic school?" The paper then considered the parish priest: "It also involves the parish priest who is an extension of the bishop, and who, traditionally, has been closely concerned with his parish school. The fact that there has been some whittling away of this role does not alter the basic point at issue."⁵¹

The Act and its agreement reflect the changes that had occurred over the previous fifteen years. As mentioned earlier, the government preferred to deal with one central body. Hence all the parishes were represented by the bishop – in civil law, according to the corporation sole. The civil-legal title of all parish plant, including the school, is thus vested in the bishop of the diocese as corporation sole. Moreover, since there is no recognition in civil law of the parish, parish priest, or parish school as such, or of the rights of canonical ownership, the new Act reflects this understanding. Accordingly, in the case of a parish primary school, the bishop, and not the parish priest, is the "proprietor" as understood by the Act:

"Proprietor" [...], in relation to a private school or an integrated school, means that corporation, body of trustees, or other person or body of persons, which or who have the primary responsibility for determining the special character of the school and for supervising the maintenance of that special character, and in which or in whom is vested in trust, or which or who are the registered proprietors of, the land and buildings that constitute the school

⁵⁰ In current parlance, the word "control" often has pejorative connotations, relating to the misuse or abuse of power. In relation to administration, we use the word in the sense of administrative capacity sanctioned by canon law, civil law, or both.

⁵¹ *New Zealand Tablet*, 22 January 1975, p. 2.

premises.⁵²

The Act, under Section 40, in specifying the powers and responsibilities of the proprietor in regard to an integrated parish school, now gives to the proprietor those responsibilities which once belonged to the parish priest as administrator – school improvements, capital works, insurance, etc. (See Appendix 2A). This dimension of the administration of primary schools now rests with the diocesan offices. The legislation could not be clearer: the right of administration hitherto exercised by the parish priest and given him by the law of the Church insofar as it applies to the parochial school, belongs now in this Act to the bishop. A handbook, *Guidelines for Integration*, produced at the end of 1979 by the New Zealand Catholic Bishops' Conference, summarises it thus: "the proprietor has the right to ensure that the school property is maintained in a state of repair, order and condition comparable to a similar State school."⁵³

What then is the parish priest's relationship to the parish school under the Act? O'Neill describes it this way: "A significant place had to be found for the parish priest. This was achieved by providing that each school could have a chaplain, appointed by the proprietor. In the case of primary schools, the parish priest has this status."⁵⁴ The section on chaplains contained in the *Guidelines* attests: "In parish primary schools and in regional primary schools for which a parish priest or his assistant has pastoral responsibility, the same priest will normally be the chaplain. There need be no conflict of role if both functions are vested in the same person."⁵⁵ The parish priest finds his place listed in the *Guidelines* among the proprietor's "servants, agents and licensees".

⁵² PSCIA 1975, 2. Interpretation, p. 750.

⁵³ NEW ZEALAND CATHOLIC BISHOPS' CONFERENCE, *Guidelines for Integration* (= *Guidelines*), 21 December 1979, Auckland, Catholic Publications Centre, 1979, Preface.

⁵⁴ O'NEILL, *Speech Notes*, p. 4.

⁵⁵ *Guidelines*, p. 30. See Appendix 2B.

Again, in regard to the parish school, the Act does recognise the former administrative autonomy of the parish priest. No longer acting in his own capacity, the parish priest under the Act becomes the proprietor's representative – a delegated position. The *Guidelines* affirm that the parish priest, having been appointed as chaplain to the parochial school, has the “day to day responsibility for ensuring that the special character of the school is being maintained.”⁵⁶ In order to do this, the *Guidelines* prescribe for the chaplain reasonable access to the school, occasional attendance at staff meetings, and a close working relationship with the principal and director of religious studies. Any concerns that the chaplain may have for the preservation of the special character of the school may be discussed with the principal, at his discretion, along with any other party involved. Over and above this, the parish priest has a much wider function: “he has full pastoral responsibility for all those people who belong to the community of faith” (See Appendix 2C).

In the question and answer pamphlet, *Integration – Questions People Ask*, the leaflet poses the question: “Has the Parish Priest lost his traditional role in our schools?” In a curious response, (the more so since it was issued under the chairmanship of Bishop Kavanagh, himself a doctor of canon law, and, presumably, very well aware of the traditional role of the parish priest before his administrative role was minimised), the document emphatically responds:

No. However the role will change. He will still be required to attend to the pastoral needs of all associated with the parish schools and he will be enabled to fulfil his function more effectively having the burden of financial and administrative worries ceased. He may well be involved in administration if he is the proprietor's representative on school committees and other Bodies concerned with our schools.⁵⁷

⁵⁶ Ibid., p. 20.

⁵⁷ CATHOLIC EDUCATION COUNCIL OF NEW ZEALAND, *Integration – Questions People Ask, The Private Schools Conditional Integration Act, 1975. The Private Schools Conditional Integration Amendment Act, 1977.*

Possibly, the writer of the document may have envisaged little change under the new legislation or perhaps the writer was unaware of the parish priest's customary role. Speculation aside, the parish priest's traditional role before and under the Act had changed – significantly and irrevocably.

3.3.3 – The Parish Priest's Administrative Capacity Following Integration

The previous discussion could lend itself to the conclusion that short of spiritual responsibilities – assisting with religious instruction, celebrating masses, and liturgies, etc. – the parish priest's administrative role over two decades, relative to the parish school, had been whittled away to nothing. The negotiators of the new Act envisaged a more collaborative and spiritual role for the parish priest; some areas, however, would remain distinctly his own. The integration agreement of a primary school determined that of the seven members who comprised the school committee, the parents of children attending the school elected six members, while one member was appointed by the proprietor of the school. Usually this person was the parish priest.

As the proprietor's representative, the parish priest is a full member of the school committee, sharing responsibility for the special character of the school and the well-being of the proprietor's property. In another capacity, the parish priest might be called upon to act as a referee for anyone applying for a position in a catholic school. Furthermore, the *Guidelines* attributed to priests in parishes the function “of acting as the proprietor's agent in according preference of enrolment and the reduction or waiving of school dues”.⁵⁸

⁵⁸ *Guidelines*, p. 21.

3.3.3.1 – Preference of Enrolment

This controversial and much-debated process is but one measure to safeguard the special character of the catholic school. Section 29 (1) of the *PSCIA 1975* affirms that: “Parents who have a particular or general philosophical or religious connection with an integrated school shall have preference of enrolment for their children at the school.” The *Guidelines* explain preference for enrolment further:

After discussion with other Catholic proprietors the Bishops of New Zealand have approved a description of the special character of a Catholic School. In essence it describes the school as being “Catholic”. The connection with a Catholic integrated school is therefore a religious and not a philosophical one. If a parent or guardian has a religious connection with the Catholic Church, then the children of that parent or guardian are entitled to preference of enrolment before others who do not have a preference may be enrolled. A non-preference child may not be enrolled until all those applicants who have a preference are enrolled.⁵⁹

The rationale underlying this provision is that the special character is sustained by those who believe in it, live it, and support it. Those who do not believe in the special character, who are indifferent to it, or who actively oppose it, threaten its preservation. For this reason the integration agreement contains a clause restricting non-preferential pupils to 5% of the total school roll.⁶⁰ The clause in the integration agreement appears thus:

⁵⁹ Ibid., p. 25. In considering “**LEGAL ISSUES IN GRANTING PREFERENCE**”, a relatively recent memorandum to parish priests recalls that: “The connection may be **particular or general**. It is not necessary, therefore that the family be full members of the parish, attending Mass regularly and active in parish life.” Under “**PASTORAL CANONICAL AND THEOLOGICAL ISSUES IN GRANTING PREFERENCE**”, the document states that “It is Catholic baptism which basically connects a person to the Catholic church. Baptism gives a person a right to a Christian education (see Can. 217)”, Memorandum, PREFERENCE OF ENROLMENT, Advice for the Guidance of Parish Priests, Pat Dunn, Bishop of Auckland, August 1997, nn. 5 (a), 6.1 (a).

⁶⁰ More recently, the NZCBC, “given the now changed political and societal circumstances our schools find themselves in, plus the formal request from the Government” agreed on a case by case basis to increase maximum non-preferential students to 10% of the maximum roll. The bishops cited England and Wales where “although there are no national guidelines, there is general view that a

10. (a) **PREFERENCE** of enrolment at the School under section 29 (1) of the Private Schools Conditional Integration Act 1975 shall be given only to those children whose parents have established a particular or general religious connection with the Special Character of the School and the Controlling Authority shall not give preference of enrolment to the parents of any child unless the Proprietor has stated that those parents have established such a particular or general religious connection with the Special Character of the School.⁶¹

school's mission is impaired when it admits more than 10% non-Catholics" (Policy Document of the NZCBC, September 1996, Policy on Criteria for Increasing the Number of Non-Preference Enrolments in Catholic Schools, pp. 1, 4.0; 2, 4.3). A fallacy in the bishops' logic relating to the figure of 5% or 10% appears to be the reliance of the preservation of the special character on the fact of baptism alone, a form of *ex opere operato*. Included among the baptised are those "who, though belonging to the Church, have never given true personal commitment to the message of revelation" (SACRED CONGREGATION FOR THE CLERGY, General Catechetical Directory, *Ad normam decreti* (= AN), 11 April 1971, in AAS, 64 (1972), 18; English translation in FLANNERY II, p. 542); Furthermore, the Congregation for Education observes that "baptism by itself does not make a Christian – living and acting in conformity with the Gospel is necessary" (SACRED CONGREGATION FOR CATHOLIC EDUCATION, Instruction, *Catholic Schools, Malgré les déclarations* (= MD), 19 March, 1977, in *La documentation catholique*, no. 15 (7-21 août 1977), 47; English translation in FLANNERY II, p. 616). At what point the proportion of students and teachers who belong to the Churches which are not in full communion with the catholic Church, or who belong to ecclesial communities, or who are nominal catholics, for example, threatens the integrity of the special character by weight of numbers becomes a moot point.

⁶¹ The difference between preference and enrolment should be noted. The proprietor – not the principal, nor board of trustees – decides whether such a connection exists and, therefore, whether a pupil becomes preferred. In practice this becomes the responsibility of the parish priest or the ethnic chaplain of the parents or guardian or care giver of the prospective pupil. In Auckland this takes the form of a preference certificate which states the name of the parents or guardian, their parish, and that they have eligibility for preferential enrolment for the prospective pupil. The parish priest, ethnic chaplain (or their designees) sign and date the card. Parents with a preference card have preference of enrolment when there is pressure on the roll. See THE NZ COUNCIL OF PROPRIETORS OF CATHOLIC SCHOOLS, *Handbook for Boards of Trustees of Catholic Integrated Schools* (= *Handbook*), 8.1.3, p. 26. The original *Handbook* was issued by the New Zealand Council of Proprietors of Catholic Integrated Schools in 1989, and replaced the earlier *Guidelines for Integration* produced in December 1979, for the New Zealand Catholic Bishops' Conference. Outlining responsibilities, duties which are shared with other trustees, advice, and helpful information, the *Handbook* is addressed primarily to the proprietor's appointees on the boards of trustees: "While Proprietors address this *Handbook* primarily to their Appointees, they also offer it to all Trustees of Catholic Integrated Schools, along with principals and their senior management teams. All share responsibility for the special character of their respective schools. The *Handbook* is not a legal document and should not be read as such." The proprietors issued a revised *Handbook* in July 1998.

Over the years, clergy and laity alike have criticised the criteria establishing this connection. Parish priests, for instance, subject the criteria to a wide divergence of interpretation; frequently, they may employ additional subjective judgment factors in determining whether preference should be granted or withheld. By way of example, in regard to the above, Bishop Peter Cullinane, summing up some of the difficulties in establishing the criteria, interprets the criteria for preference as follows:

If, for example, disgruntled parents were to take us to Court for declining to acknowledge preference status, the judge would not be interested in whether the marriage is regular or irregular, or whether the parents go to Holy Communion, or attend Mass every Sunday, or when the children are going to be baptised. He would only want to determine whether these parents are parishioners; people who claim to be Catholics, or who at least have not formally left the church. If they are, then that is their “general religious connection with the special character of the school.” The school is that aspect of the church to which they are looking at this time. On that basis the law would accord them preference over other members of the wider community.”⁶²

The *Guidelines* remind all those involved in a catholic school that it is the bishop of the diocese who has “the authority to determine whether or not an applicant parent or guardian has a religious connection with the Catholic community and therefore with the school.” The parish priest’s authority in this regard is no longer ordinary, but delegated:

He [the bishop of the diocese] will obviously delegate his authority to those who know which people have this connection with the Catholic community. To have a connection with the special character requires a connection with a parish. This has been acknowledged in practice over a long period of years and was the basis of the negotiations. Hence the basic evidence that a parent needs to produce is a note from a parish priest [...] .⁶³

⁶² P. CULLINANE, *Summary of Bishop’s Comments about Enrolments and Preference at Priests’ Assembly, September 1995.*

⁶³ See *Guidelines*, p. 27.

The Auckland diocesan pamphlet, *Catholic Schools, Our Heritage*, says that “when a parish priest cannot, in good faith, sign the form, a parent may refer the matter to the Diocesan Director of Religious Education.” Similarly, the *Guidelines* state that a fear that a non-preference applicant might, if enrolled, jeopardise the catholic character of the school, should be referred to the Diocesan Director of Religious Education for a decision.⁶⁴ To conclude, this discussion serves to illustrate the retention by the parish priest of a singular administrative capacity, albeit delegated, following the integration of the parish school.⁶⁵

3.3.4 – The Administration of Schools Following Integration

Under the Act, the local District Education Board, augmented by one member jointly appointed by all the proprietors of integrated schools, becomes the controlling authority of a primary school.⁶⁶ The other members of the board are drawn from the school committees of state and integrated primary schools. Its function is essentially administrative and financial. The school committee by contrast, represents parents, administers funds for repairs, cleaning, etc., and generally supports the principal. A catholic secondary school has a board of governors as its controlling authority composed of four representatives of the proprietor (depending on the integration agreement), five members elected by the parents, a teacher

⁶⁴ Ibid.

⁶⁵ In August 1977, the bishop of Auckland brought down a “Policy re delegated Authority from the Bishop to determine Preference of Enrolment (in terms of Section 29 (1) of the 1975 Integration Act) in parishes where there is no resident priest.” In such cases, two persons – a member of the parish council and a proprietor’s representative on the board of trustees – form a committee to determine the eligibility of those applying for preference of enrolment.

⁶⁶ “25. Control and Management – (1) Every integrated school that is a primary school shall be controlled by and shall be subject to the general supervision of the Education Board of the education district in which the school is situated, and shall be managed by a School Committee.

(2) Every integrated school that is a secondary school shall be controlled and managed by a Board of Governors constituted pursuant to section 51 of the Education Act 1964, or by such other controlling authority as may be required pursuant to that section” (*PSCIA 1975*, p. 17). (1) and (2) were repealed by the *Education Act 1989*.

representative, and a person appointed by the local education board.

Importantly, one should note that the controlling authority – the District Education Board for a parish school and the Board of Governors for a diocesan secondary school – are boards, controlled neither by the diocesan bishop as the proprietor, nor by the parish priest as delegated representative of the proprietor.⁶⁷ For this reason the bishop's interests as proprietor are represented by one person for a primary school and four persons (out of eleven) for a secondary school. We contend that the bishop, having consigned his administrative capacity to the controlling authority, forfeits canonical control of an integrated school. The inherent flaw in the proprietor's representation, from a canonical perspective, is that the statutory ratio of the proprietor's representatives to the rest of the members of the board without provision for majority voting power, or power of veto, or reserved powers, or other safeguards, is insufficient to ensure the bishop of canonical control.⁶⁸ The Act does not give him these powers. On the contrary, if the bishop believes that the special character "has been or is likely to be jeopardised, or the education with the special character provided by the school as defined in the integration agreement is no longer preserved and safeguarded", he

⁶⁷ The controlling authorities are neither the state, nor agencies of the government, nor agencies of the Minister of Education. The controlling authorities derive their powers and functions directly from the Act of Parliament which established them, a status that controlling authorities jealously guarded.

⁶⁸ For a discussion of reserved powers, see MAIDA, *Ownership*, pp. 26-27, 45-65. In his treatise he proposes that "Where, on the one hand, the Board of trustees so dominates the management of a charitable institution, and on the other, a Diocese [...] abdicates its responsibility to control and direct such an institution, the Diocese [...] may, in effect, 'lose' the institution." (pp. 54-55). In this regard, O'Neill would write: "When the Private Schools Conditional Integration Act was a Bill before parliament it was given a canonical going over by Bishop Kavanagh, a canonist himself, and his advisors. Bishop Kavanagh accepted that it would be inappropriate to ask that New Zealand law impose Canon law on citizens, even on Catholic citizens. He did ask, however, that nothing in civil law should prevent Catholics abiding by the requirements of their own Canon law" (O'NEILL, "Solving Disputes – Catholic-style", in *New Zealandia*, October 1993, p. 29). Maida, continuing, would say that, "Such a condition ['losing' the institution] will arise only where the respective administration officials of a Diocese [...] have failed to exercise the administrative responsibilities imposed upon them by the law of the church" (MAIDA, *Ownership*, pp. 54-55).

does not have the power or the right to intervene directly as he could prior to integration. Instead, “he may refer the matter to the Chairman of the Integration Standing Committee”.⁶⁹

Canonically then, we consider that the bishop and the parish priest no longer administer catholic schools as formerly. The conclusion can only be that following a school’s integration, that part of the apostolate of the parish and diocese which is the catholic school is no longer under the control of the bishop or the parish priest. Canonically, this apostolate now rests with the respective controlling authorities. Nevertheless, under the Act the bishop’s powers are in some wise kept intact insofar as they apply to maintaining the special character. We will discuss this later in the chapter.⁷⁰

3.3.5 – The Impact of Integration on the Teachers in Catholic Schools

As we discussed in chapter one, the inability of religious teaching orders to maintain their numbers, beginning in the early sixties, led to parochial and diocesan schools increasingly employing lay teachers. Not all lay teachers, however, were catholics.⁷¹ Since the catholic

⁶⁹ See *PSCIA 1975*, Section 3 (4), pp. 751-752; Section 41, p. 772. While one may interpret these Sections as reserved powers, they do not give the proprietor autonomy or canonical control. The exercise of the bishop’s “reservation” – intervention, or discretion – always remains subject to review in the High Court. On this point the *New Zealand Tablet* wrote, citing Bishop Brian Ashby’s address to the Christchurch Diocesan Pastoral Council: “The big remaining doubt concerned Section 41 of the Act which said that if all things failed, the proprietor (in the case of diocesan schools, the bishop [...]), in the event of a clash in the school, could take the matter to the standing committee. A number of ‘our objectors’ would have said that this was not a strong enough protection of the rights of the proprietor. When the Bishops and major Superiors recently had a long meeting with the deputy-general of the Education Department and others, discussion turned afterwards on the question: ‘What more could we conceivably have in the way of control?’ There did not seem to be a satisfactory answer to that one, and it ‘remained a disquiet in the Act as we have it’ ” (*New Zealand Tablet*, 17 December 1975, p. 5).

⁷⁰ *PSCIA 1975*, Sections 3, 7f, 41, 68.

⁷¹ “Slightly more than half the teachers in integrated schools in 1982 were non-Catholic” (PETIT, “New Zealand Integration”, p. 83, quoting John Jolliff interview, New Zealand Department of Education, Office of Deputy in Charge of Integration, 2 June 1982). In 1992 there were 1734 catholic

negotiators understood well that critical to the sustaining of the special character of a school is the quality of its teachers, one question among others, which occupied them for over nearly three years of working out the principles of integration was, “At what point does the presence of several non-catholic teachers in a school threatens its catholic ethos?” First, the catholic parties drew on one base document from Vatican II, *Gravissimum educationis*. Of teachers it enunciated:

Teachers must remember that it depends chiefly on them whether the Catholic school achieves its purpose. They should therefore be prepared for their work with special care, having the appropriate qualifications and adequate learning both religious and secular. They should also be skilled in the art of education in accordance with the discoveries of modern times. Possessed by charity both towards each other and towards their pupils, and inspired by an apostolic spirit, they should bear testimony by their lives and their teaching to the one Teacher, who is Christ. Above all they should work in close cooperation with the parents.⁷²

Second, those on the working party:

[...] consulted widely, including picking the brains of those who had preceded us through similar trials, notably Scotland, England and Papua New Guinea. [...] The next warning we had was the need to have sufficient Catholic teachers in the school who know what a Catholic school is. If we are obliged to supply education with a special character we must have the teachers who can do it.⁷³

Following the passing of the Act, the appointment of teachers was criticised by catholic and non-catholic interests alike. For example, Dalgety, one of the Church’s four appointees to consider amending the new Act, warned that, “once integrated you give away part of your

teachers (including 168 religious) and 938 non-catholics, Document “Integration of New Zealand Catholic Schools” issued by the National Proprietors, p. 4.

⁷² GE, 8; FLANNERY, p. 733.

⁷³ O’NEILL, Speech Notes, p. 3.

traditional freedom to hire and fire teachers.”⁷⁴ In like manner, Mackey said that, “even for schools that integrate, there are some aspects which we find worrying.” On teachers, he asked: “Do the appointments procedures allow the appointment of teachers who would not only be apathetic to the special character of the school, but would be inimical to its very nature?”⁷⁵

As another safeguard to maintaining the special character, the Act included provisions for “tagged” teaching positions.⁷⁶ Petit interpreted this as a compromise:

Catholic representatives to these negotiating sessions wanted the concession of being allowed to choose their own teachers. Opponents were adamant, arguing that this practice would only result in perpetuating two separate school systems. In compromise measures, the proprietors of integrating schools were permitted to have a limited number of “tagged” positions and a consultant to advise on the suitability of teachers to be appointed.⁷⁷

⁷⁴ Address to parents, Cardinal McKeefry School, Wellington, *New Zealand Tablet*, 17 March 1976, p. 4.

⁷⁵ *New Zealand Tablet*, 21 April 1976, “What Bishop Mackey Thinks about Integration”, p. 29.

⁷⁶ While every teaching position is important, some are critical in maintaining the special character. Each school’s integration agreement requires that specific wording related to conditions of appointment be placed in advertisements calling for applicants for certain teaching positions. The requirements concern a willingness and an ability to take part in religious instruction or special requirements related to the character of the school. Such positions are called “tagged” positions. In a primary school, for example, tagged positions include the principal, deputy principal, and the director of religious studies (DRS). The *Handbook* states that for the positions of principal and director of religious studies, “It is the policy of the New Zealand Catholic Bishops’ Conference that only baptised Catholics will be declared acceptable for the primary positions referred to [...]. In addition, applicants must satisfy the requirements in the Integration Agreement for these positions, namely, be willing and able to take part in Religious Instruction appropriate to the special character of the school. Only a committed Catholic could fulfil these requirements” (*Handbook*, 5.7, p. 14). The agreement further dictates that there are a number of tagged positions in a predetermined ratio to the staffing entitlement of the school (originally set at about 60% primary; 40% secondary). Again, the criteria are such that these positions could be filled only by a committed catholic. See *ibid*.

⁷⁷ PETIT, “New Zealand Integration”, p. 81.

This arrangement, Petit claimed, “only gives the proprietor indirect control of the teachers who will be expected to preserve the special character of the integrated school.” Furthermore, “unless the advisor maintains close ties with the proprietor, there is an obvious danger to the special character.”⁷⁸

According to Gregory Lee, quoting the *Listener*, this provision was criticised on the grounds that it restricted the movement of teachers between integrated and state schools. Not alone that, but teachers were judged in their initial appointment and continuing service against the special character clauses which, he said, were based on undisclosed moral criteria.⁷⁹ Snook, that same year, examining the position of teachers under integration, declared: “Part of the original attraction of ‘integration’ was the belief that there would be free movement of teachers from one type of school to another to the advantage of both.” His observations led him to conclude that only necessity has led to the appointment of non-catholics and the *policy* is in the opposite direction: “There is little in the way of free movement between state and integrated schools. Positions in integrated schools are not genuine options for many qualified teachers.”⁸⁰ Agreeing with Snook, Mulheron pressed a more serious charge:

Teachers in integrated schools are free to apply for all positions in public schools on a basis of total equality with other applicants. There is no such free movement into integrated schools. This has enabled some teachers to gain promotions solely on the basis of their religious belief or sympathy: promotions which they could not have attained in open competition.⁸¹

Lee cited the official catholic position as follows: “We are concerned, it is true, to protect the special character of our schools [...] one would see that a Catholic would be more likely to

⁷⁸ *Ibid.*

⁷⁹ LEE, “The 1975 Private Schools Conditional Integration Act”, p. 47; *Listener*, 24 October 1981, pp. 23-24.

⁸⁰ MCGEORGE, *Church, State, and New Zealand Education*, p. 54.

⁸¹ MULHERON, *State Aid*, p. 6.

be able to do this than a non-Catholic.”⁸² We present these positions simply as samples of concern and criticism at the time relating to the position of teachers under the Act.

The Act of 1975 created another important effect: when a school integrated, it changed the employer-teacher relationship in catholic schools. Hitherto, the parish priest employed the teachers for the parochial school (in the period between receiving the first of the government subsidies and integration the Catholic Education Office took over this function) while the bishop employed the teachers for the diocesan colleges. Following the integration of a school, the respective controlling authorities now become the employer of teachers. After one hundred and thirty years, the employing authority of a catholic school following its integration is no longer the Church (or at least the clergy) but a controlling authority created by the Integration Act.⁸³

3.3.6 – The Effect of the Act on the Buildings and Land Comprising the Parish School

Prior to the passing of the Act the negotiators in their proposals were careful to preserve the extant conditions of ownership. In the case of the parochial and diocesan schools, this meant that there was never any suggestion of not retaining the land and buildings that comprised a catholic school.⁸⁴ It was precisely their retention that led to the taking out

⁸² LEE, “The 1975 Private Schools Conditional Integration Act”, p. 47; Pat Hoult, executive director of the Catholic Education Office, cited in *Listener*, 24 October 1981, p. 24.

⁸³ “Q. Does the Board of Governors appoint all teachers of the secondary school? A. Yes – and it must do so in terms of the Act, i.e. to meet the requirement of maintaining the Catholic character of the school. [...] Q. Does the Education Board appoint teachers to integrated primary schools? A. Yes – through the District Appointments Committee consisting of the District Senior Inspector, one Board appointee, one member appointed by the NZEI (the Primary Teachers Organisation) and one appointed by the Bishop. Q. Does the Bishop’s appointee on the Appointments Committee have the power of veto on that committee? A. No. The Appointments Committee as a whole is charged with the responsibility to ‘meet the requirements of maintaining the special character of the school’ ” (*Integration – Questions People Ask*, Questions 30-32).

⁸⁴ Report of the Integration Working Committee, 6 December 1974, p. 19. ACDA, MAC 38-2/.

of loans, serviced by the faithful in attendance dues.

Section 7 of the Act, in specifying the conditions of the integration agreement, said that the agreement may include provisions for any or all of the following matters:

- (a) Specifying the land and buildings which shall constitute the integrated school to which the agreement refers:
- (b) Specifying any part of the land or buildings owned by the Proprietors and used in conjunction with the school before integration which shall not constitute part of the integrated school [...].

The above conditions appear in the integration agreement for primary schools as follows:

3. ON behalf of the Proprietor it is hereby agreed that: –

(a) The Proprietor is the owner of all the land and improvements more particularly described in the First Schedule hereto (hereinafter referred to as “the Proprietor’s land”) and of which for the purposes of this Deed of Agreement, the School premises form part only. The School premises for the purposes of this Deed of Agreement being the land and improvements more particularly described in the Second Schedule hereto (hereinafter referred to as “the School premises”).

(b) The Proprietor shall set apart and appropriate as owner all the School premises and all the chattels and other assets of the Proprietor associated with the school exclusively for the purposes of the School as an integrated School, so that the Controlling Authority of the School shall have exclusive right to the possession and use of the school premises and chattels –

PROVIDED THAT

(i) At the request of the Proprietor, the School Committee may grant the use of the School premises and chattels to the Proprietor or other persons or persons at any time when the school premises and chattels are not required for school purposes and the School Committee shall not unreasonably or arbitrarily withhold its consent. The School Committee may require the person or persons to pay a reasonable fee to the School Committee as a condition of such use.

(ii) With the consent of the Proprietor, the School Committee may grant the use of the School premises and chattels to other person or persons at any time when the School premises and chattels are not required for School purposes and the Proprietor shall not unreasonably or arbitrarily withhold his consent. The School Committee may require any such person or persons to pay a reasonable fee to the School Committee as a condition of such use.

In 1974 the Working Party on Integration proposed that:

The Government would in some appropriate way formalise the arrangement to use the school site and buildings and would be responsible thereafter for maintenance and minor capital works. Some method would need to be found for excluding from this arrangement any part of the land and buildings not appropriate to a State school.⁸⁵

The “arrangement to use the school site and buildings” became the integration agreement which deeded the exclusive use of the school to the controlling authority. When the negotiators circulated the draft agreement for discussion, the chancellor of the Auckland diocese, Frank Wright was unequivocal in his opinion:

Exclusive use of premises (Land and improvements) is alienated by the proprietor –

In our circumstances I believe this to be disastrous.

The use of the premises could perhaps be given to the School Authority only for the hours required for school purposes. It would be intolerable for parishioners who have paid for and developed land to have to pay a fee for the use of it e.g. as a parking area on Sundays.

At least only a minimum area of land should be alienated – however, this may be excluded by page 3, para “6” – “All the school premises.”

I see no particular difficulty with most secondary schools but anticipate unacceptable problems with schools in a parish setting e.g. St X, parking area used as part of the playground for the Marist Boys.⁸⁶

⁸⁵ STATE AID CONFERENCE, *Report, 1974*, p. 2.

⁸⁶ **MEMO:** Re: Integration Agreement, 10 October 1978, from Rt Rev. F. Wright, chancellor. ACDA, MAC 41.

In the seventeen years since the integration of the schools, variants of the difficulties outlined by the chancellor have continued in one guise or another.⁸⁷

3.3.7 – Alienation – A Consideration

Munday writes that “contracts, pacts or agreements are the principal means by which the Church acquires temporal goods.” Moreover, “most of the acts of its administration of temporal goods, wherever there is need and especially in matters requiring the alienation of church property, the Church carries out by means of contracts.”⁸⁸ Joseph Cleary likewise writes that the Code understands alienation as a contract, hence the canons regulating the

⁸⁷ “Suppose [...] that a parish wants to use the school grounds for parking during Sunday Mass. The board says no because the cars will break up the asphalt. Or a parish group wants to use the school hall but the school says it left it untidy last time. From here on the plot might go as follows. The parish says that the property is theirs so they have a right to use it. The board says that the bishop signed an Integration Agreement which gave the school exclusive use of the property. The parish replies that, by Canon Law, it owns the property, not the bishop. The board counters with the Education Act that the board has complete discretion to control the management of the school as it thinks fit. All it needs now is a lawyer’s letter and it’s all on” (O’NEILL, “Solving Disputes”, pp. 28-29); “The roll of School A has fallen. School B, in another parish, has a rising roll and needs more buildings. To move some building from School A to School B would solve the problem. School A objects to losing any school accommodation because whatever they have is being used even if for non-teaching purpose. The Board of School A with the support of their parish priest and their parish finance council claim that the building is parish patrimony and must stay where it is” (Letter of John O’Neill, SM, to Bernard Waters, 29 January 1997). In a similar scenario, a Catholic Integrated Schools Board removed a classroom from parish property. The parish priest prevented a repetition of the episode after consulting with the parish council and the local board of trustees, Letter of Rev. X to Bernard Waters, 28 April 1998. In another case, “the school presumed they had full use of the Church car park for dropping off and collecting children. Animosity with the neighbours over this large volume of traffic resulted with several rather heated meetings with the [municipal] council involved. The present situation exists where the school encourages parents with older children to use the drop off area in X Avenue. While there is much less in the morning however, it is still bedlam in the afternoon. So this problem although seeming dormant at the moment, is ongoing” (Letter of Joan Doe, secretary of St X Parish, to Bernard Waters, 17 April 1998).

⁸⁸ MUNDAY, *Ecclesiastical Property in Australia and New Zealand*, p. 89.

alienation of church property are found under the title "Contracts."⁸⁹

While the CIC/17 does not give an explicit definition of the term "alienation", nevertheless commentators, "uniting one idea common to all commentators and canon 1533" (CIC/17),⁹⁰ concur that alienation has a broad or extended meaning and a restricted or narrow meaning. The term alienation is derived from the Latin *alienare*, to transfer (property etc.), to give to somebody else (by sale or otherwise), give up or lose possession of, alienate; (pass.) to fall into somebody else's hands, be lost to one. To make something another's, to let go, to transfer.⁹¹ Hence canonical commentators define alienation in these or similar terms:

the transfer of *direct* ownership of an object to another. This transfer of direct ownership may be made in return for some other consideration, as in a *sale*; in return for direct ownership over another object, as in *exchange*; or it may be made gratuitously when one person makes another a free *gift* or *donation* of an object.⁹²

Joseph Stenger opines that all commentators agree on the restricted significance of the term, that is, they agree "that alienation is a contract transferring the full dominion of ecclesiastical property. In other words, the ownership is lost and the property, along with the proprietary

⁸⁹ J.F. CLEARY, *Canonical Limitations on the Alienation of Church Property: An Historical Synopsis and Commentary*, Canon Law Studies no. 100, Washington, DC, The Catholic University of America, 1936, p. 2. *De contractibus* is found under Title XXIX, incorporating cc. 1529-1543 CIC/17.

⁹⁰ J.B. STENGER, *The Mortgaging of Church Property*, Canon Law Studies no. 169, Washington, DC, The Catholic University of America, 1942, p. 75.

⁹¹ *Oxford Latin Dictionary*, Oxford, At the Clarendon Press, 1968, p. 96; *Cassell's Latin and English Dictionary*, New York, Macmillan Publishing Company, 1987, p. 13.

⁹² E.L. HESTON, *The Alienation of Church Property in the United States: An Historical Synopsis and Commentary*, Canon Law Studies no. 132, Washington, DC, The Catholic University of America, 1941, p. 69. See also C. BACHOFEN, *A Commentary on the New Code of Canon Law*, 4th ed., St Louis, B. Herder Book Co., 1925-1936, vol. VI, p. 593; BOUSCAREN, *Canon Law*, p. 832; CLEARY, *Canonical Limitations on the Alienation of Church Property*, p. 2; MUNDAY, *Ecclesiastical Property in Australia and New Zealand*, p. 95.

title, passes into the complete and pacific ownership and possession of another.”⁹³

In considering the extended or broad meaning, the same commentator warns that “there are almost as many opinions on the extended sense as there are commentators.”⁹⁴ So it is that Cleary writes: “The concept, therefore, broadens to include transfer, concession, or remission of a real right (*jus in re*) by contract, gratuitous or onerous, in which ownership is restricted.”⁹⁵ Further on he considers that, “The canonical concept of alienation reaches out to include stipulations as well: the giving in security, the taking of special mortgages and the granting of long term leases.”⁹⁶ Edward Heston, similarly says:

The term “alienation” admits of an even wider signification. Under this aspect it goes beyond the direct transfer of ownership and comprises every transaction in which dominion is even *diminished* without being given up entirely, or which exposes the Church to the juridical danger of losing or lessening her proprietary rights over goods possessed. Thus the language of the Code applies the term “alienation” to *mortgages*, which confer on another a conditional right and title to Church property; to *leases* and *rentals* extending for a period of time longer than nine years since complete ownership of property is thus hampered by another’s legal right to its use [...].⁹⁷

On pages 169-170 we cited part of every parish or diocesan school’s integration agreement, by which the proprietor as owner of the school premises, set apart and appropriated the

⁹³ STENGER, *The Mortgaging of Church Property*, pp. 75-76.

⁹⁴ *Ibid.*, p. 75. He cites LARRAONA, *Commentarium Codicis*, in *Commentarium pro religiosis* (Romae, 1920-1934: *Commentarium pro religiosis et missionariis*, Romae, (1935 -), XIII (1932), 189, note (624): “*Ut ex autorum examine patet statim, plura incerta et obscura remanent in doctrina alienationis et obligationum post Codicem.*”

⁹⁵ CLEARY, *Canonical Limitations on the Alienation of Church Property*, p. 3. Cleary refers the reader to WERNZ, *Jus decretalium*, III, n. 154; VERMEERSCH-CREUSEN, *Epitome*, II, n. 851.

⁹⁶ CLEARY, *Canonical Limitations on the Alienation of Church Property*, p. 3.

⁹⁷ HESTON, *The Alienation of Church Property*, p. 70.

exclusive right to the possession and use of all chattels and other assets associated exclusively with the school, to the controlling authority. In the case of a parish primary or diocesan secondary school these are part and parcel of the ecclesiastical goods of the respective juridical person – the parish or the diocese as the case may be. Church property does not cease to be church property even though the juridical person possessing the property is not recognised by the civil law.⁹⁸ Under Clause 3 of the integration agreement, schedules 1 and 2 detail this component of the parish and diocese which was deeded to the controlling authority by the diocesan bishop, thereby diminishing or lessening the parish's and diocese's proprietary rights.

In order to investigate the canonical implications of the previous section, one must ask what precisely is the civil-legal nature of this deeding to the controlling authority, the use and possession of the school's premises and chattels? What legal term may we find to describe it? As mentioned earlier, the parties to the integration agreement are, on the one hand, the Crown, i.e., the government acting through the minister of education; and on the other hand, the proprietor, i.e., the diocesan bishop as owner in civil law of the parochial and diocesan schools.

The agreement, once signed by the parties, however, is unusual in that it imposes rights and obligations on other persons and bodies who were not party to it: the education board, the school committee, the principal, teachers, and for a secondary school prior to 1989, the board of governors. After 1989 the agreement affected boards of trustees of both primary and secondary schools. In this respect, we consider that the integration agreement is a unique and distinct contract having no precise equivalents among other contracts within New Zealand legislation. Once signed, it has the force of law, derived from the *PSCIA 1975*. Practically, the powers, rights, and duties which arise from the integration agreement have their origin in the Act itself. Thus O'Neill sums up the consequences of this innovative

⁹⁸ See CLEARY, *Canonical Limitations on the Alienation of Church Property*, p. 7.

feature: "These powers and duties are a matter of law and not (in the case of non-parties), and not merely (in the case of parties), a matter of agreement."⁹⁹

Thus the appropriation of the use of the school and chattels is neither a licence nor a rental. Nor is it, despite similarities, a lease, since a lease does not oblige non-parties in the manner of the integration agreement.¹⁰⁰ Rather, as stated above, the integration agreement

⁹⁹ Letter of John O'Neill, SM, to Bernard Waters, 22 April 1998. *Tablet* summarised the benefits of integration as follows:

- Salaries of all teachers, including Religious, will be paid to State standards.
- School buildings and grounds will be maintained at State cost. They will receive all equipment, publications, furniture on the same basis as in State schools. They will be staffed fully according to State standards. Caretakers, secretaries and teacher aides will be employed on the same basis as in State schools.
- Transport to the nearest integrated Catholic school will be available on the same basis as if it were a State school.
- Education advisers in music, maths, etc. will be fully available to our schools.
- State-organized in-service training will be available to our teachers on an equal basis with State teachers.
- Our teachers will have the benefits of membership of State employee organizations (e.g., NZ Educational Institute and Post-Primary Teachers' Association).
- Our schools will be receiving newly-trained teachers who are not available to us now: they will have free access to the pool of trained teachers in the country.
- There will be interchange of teachers between State and integrated schools" (*New Zealand Tablet*, 22 October 1975, p. 8).

Significant as these benefits were, they were by no means the only advantages: the Act of 1975 and the subsequent integration agreements contained also various clauses by which civil law enabled the proprietor to maintain the special character, the catholic ethos of an integrated school.

¹⁰⁰ "Creation of a Licence: A licence is normally created when a person is granted the right to use premises without becoming entitled to exclusive possession of them, or where exceptional circumstances exist which negate the presumption of the grant of tenancy. If the agreement is merely for the use of the property in a certain way or on certain terms while the property remains in the owner's possession and control, the agreement operates as a licence, even though the agreement may employ words appropriate to a lease" (*Halsbury's Laws of England*, vol. 27 (1), p. 27). Hence it differs from "Leases. An instrument in proper form by which the conditions of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the tenant [...]" (*ibid*, p. 60). Black considers a lease variously: "Any agreement which gives rise to relationships of landlord and tenant (real property) or lessor and lessee (real or personal property)." "Contract for exclusive possession of land or tenements for determinate period." "Conveyance, grant or devise of

(along with a statement of its other rights and obligations) creates a unique and distinct contract by which the use of the school, the land, and the buildings is deeded to the controlling authority by virtue of the *PSCIA 1975*. Canonically, however, the appropriated land and buildings comprise the temporal goods which belong either to the juridical person of the parish or that of the diocese.

Concerning contracts, c. 1530, §1 CIC/17 states that:

Saving the ruling of canon 1281, §1 [requiring permission of the Apostolic See for the valid alienation or transfer of images and relics of great importance], to alienate imperishable [*bona quae servando servari possunt*] ecclesiastical property, whether movable or immovable¹⁰¹ there is required:

- 1° A written appraisal of the property made by reliable experts;
- 2° A justifying reason, i.e., urgent need, the evident advantage of the Church or piety;
- 3° the permission of the legitimate superior, in the absence of which alienation is invalid.

§2. Other opportune precautions needed to prevent injury to the Church shall not be overlooked but shall be specified by the respective superior according to the circumstances of the case.

realty for designated period with reversion to grantor. Conveyance or grant of estate in real property for specified period or at will" (*Black's Law Dictionary*, p. 889); "A lease is a contract by which property, whether movable or immovable, is let to another for his use for a determined time at a specified price or rent" (BOUSCAREN, *Canon Law*, p. 844). See also MUNDAY, *Ecclesiastical Property in Australia and New Zealand*, pp. 116-117. Halsbury outlines the content of a lease as follows: "1) date; 2) parties' names and description; 3) the consideration; 4) the operative words; 5) the parcels or description of the property demised*; 6) the exceptions and reservations; 7) the reddendum, that is the amount of rent and the person to whom, the time at which, and the manner in which it is to be paid; 8) the tenant's covenants; and 9) the provisos and conditions" (*Halsbury's Laws of England*, vol. 27 [1], p. 104). *While the relationship is one of contract, it also operates as a conveyance. The usual word for this is "demise" (*ibid.*, p. 105).

¹⁰¹ "Immovable property is that which cannot be moved from place to place either naturally (as a field, or a building, or legally (as windows, doors, fixtures, lights, plumbing and the like). Movable property is that which can be transferred from place to place; as livestock, grain, merchandise, money" (BOUSCAREN, *Canon Law*, p. 802). Concerning perishables, Woywod writes that, "The formalities mentioned in Canon 1530 are not required when there is question of goods which cannot be kept without danger of spoiling (e.g., fruits and vegetables, eggs, and the like)" [WOYWOD, *A Practical Commentary*, p. 184].

Abbo-Hannan, agreeing with the above commentators' definitions, consider that: "In the strict sense, alienation is the juridical transfer, with or without compensation, of the ownership of property to another."¹⁰² They continue: "But canons 1530-32 are applicable, in virtue of canon 1533, not only to alienation in the restricted sense just noted, but also in a wide sense, and this includes practically every contract involving ecclesiastical property [...]"¹⁰³

Woywod concurs, saying that the rules of c. 1532 apply, not only to the sale of ecclesiastical goods, but also to burdening the ecclesiastical property in any manner. Hence, "The formalities demanded by cc. 1530-1532 apply, not only in an alienation properly so-called, but also for any contract which may have a prejudicial effect on the status of the church (**Canon 1533**)."¹⁰⁴ He continues by saying that while the contract itself may be advantageous to the Church (e.g., the leasing of property to others for payment to the Church), nevertheless he considers that the church property as such, is for the time being, less valuable.¹⁰⁵

In like manner, Bouscaren includes these examples of alienation: "Any act by which the use of property is transferred to another, as rental, a lease, and the like. [...] In general, any act by which church property is subjected to burdens, either *in perpetuum* or for a long

¹⁰² ABBO-HANNAN, *The Sacred Canons*, vol. II, p. 735.

¹⁰³ *Ibid.*, pp. 735-736. Bouscaren agrees: "[Alienation] In a wider sense [...] includes any lawful act by which use or usufruct of property, or some claim upon it, is given to another, though the naked ownership is retained. Under this head would come rentals, leases, mortgages, and the like. In the canons which follow alienation is to be understood in this wide sense and may be defined as any lawful act whereby the ownership of church property is transferred to another, or is exposed to the danger of loss, or is withdrawn from the direct possession of the Church for a considerable length of time, or, in general, any contract by which church property is placed in a less favorable condition by reasons of burdens or obligations imposed upon it" (BOUSCAREN, *Canon Law*, pp. 832-833). Also see BACHOFEN, *A Commentary*, vol. VI, p. 593; WOYWOD, *A Practical Commentary*, p. 184. For cc. 1479, 1531-1533, 1541-1542, see Appendix 3.

¹⁰⁴ WOYWOD, *A Practical Commentary*, p. 185.

¹⁰⁵ *Ibid.*

time, such as granting the use, the usufruct, or easements of any kind.”¹⁰⁶ Given the peculiar legal characteristics of the integration agreement and considering its relationship to the canons applying to contracts, one may safely assert that the canonical legislator never envisaged the unique situation of the alienation in a broad sense of a country’s whole catholic school system whose land and buildings comprise part of the juridical personality of each parish or diocese. Put another way, the canons dealing with contracts do not apply precisely to deeding to the controlling authority for an unspecified period of time, every parish and diocesan catholic school, all 270 plus of them, by the bishops acting as corporations sole. Instead, the canons treating contracts reflect a more conventional or conservative understanding: they contain provisions for contracts, as contracts are commonly understood.

The Holy See is the legitimate superior for the alienation of precious goods, and goods which exceed in value thirty thousand lira or francs¹⁰⁷ (c. 1532, §1), along with the taking out of a lease exceeding thirty thousand lira or francs in value and lasting over nine years (c. 1541).¹⁰⁸ Otherwise it is the local ordinary according to the provisions of c. 1532, §2. We considered earlier that the integration agreement, by virtue of its unique nature does not bring about a situation of lease between the proprietor and the controlling authority – or subsequent to 1989, the board of trustees. Hence we posit that the canons which deal specifically with leases do not apply to the deeding across of the use of the land, school buildings, and chattels therein since strictly, the contract did not create a lease situation. In the words of Cardinal Williams: “No consideration has been paid so that a legal contract between controlling authority (Board of Trustees) and proprietor has come into being. There is no rental, even peppercorn, paid to the proprietor.”¹⁰⁹ Even though the integration

¹⁰⁶ BOUSCAREN, *Canon Law*, p. 833.

¹⁰⁷ For a discussion of the corresponding international rates at the time, see *ibid.*, pp. 836-838.

¹⁰⁸ See *ibid.*, p. 845; ABBO-HANNAN, *The Sacred Canons*, vol. II, p. 737; BACHOFEN, *A Commentary*, vol. VI, pp. 597-599.

¹⁰⁹ Letter of Thomas Cardinal Williams to Bernard Waters, 26 March 1998.

agreement brought about a contract alienating the use of the land and buildings from the parish or diocese to the controlling authorities, the parishes and diocese still retained ownership of their respective temporal goods. The bishops asked no permission from the Holy See since none was needed.¹¹⁰ The other provisos for alienation were met accordingly.

Returning to the provisions of c. 1530 regarding the alienation of temporal goods: this discussion concerns temporal or ecclesiastical goods belonging to the Church. As discussed in chapter two, "Church" in this context means a moral or juridical person. Hence the school property which is the subject of this discussion belongs either to the diocese or the parish. The requirement of c. 1530, §1, 1° that a written appraisal of the property (to be alienated) be made by reliable experts, is adequately met by several considerations: insurance companies replace buildings at replacement value, diocesan administration offices retain the collateral value placed on the plant by banks or the government department responsible for floating loans for capital development (formerly State Advances Corporation), and the bank's own valuation for mortgage or loan purposes.

In chapter one we outlined the events leading to the point where, without government assistance, the catholic school system would have collapsed. Driven by urgency, the bishops had the choice of closing their own diocesan schools and instructing parish priests to do likewise, thereby flooding the state system with pupils, or negotiating a political compromise that enabled the catholic system to continue.¹¹¹ If ever a situation graphically fulfilled the conditions of c. 1530, §1. 2°, this was one of them. Heston examining the canon writes that,

¹¹⁰ Ibid. The only permission needed from Rome by the bishops following their decision to integrate their own diocesan schools and the schools belonging to the parishes was approval from the Congregation for Evangelisation to take out loans at the negotiated rate of interest over 25 years from the Housing Corporation using the school properties as security. This was sought and given.

¹¹¹ "The options were clear: either obtain full Government responsibility for the payment of operating costs, or close the Catholic schools." Letter of Thomas Cardinal Williams, president, NZCBC, to Eduardo Cardinal Pironio, prefect, S. Congregation for Religious and Secular Institutes, 24 February 1981.

“The canon does not require a serious cause for each and every transaction, but only a just cause, that is one whose gravity is in proportion to the importance of the proposed transaction.”¹¹² In this instance the cause was at once just and serious. The canon, by way of examples, affirms that this just cause may be one or other of three kinds: first, an urgent need; second, the evident advantage to the Church; third, piety. That these conditions were met in the New Zealand situation is self evident.

3.4 – SOME UNANSWERED QUESTIONS

On 8 November 1974 the president of the NZCBC, Bishop Kavanagh, received a brief letter from the apostolic pro-nuncio, Archbishop Angelo Acerbi. Acknowledging receipt of the minutes of the meeting of the episcopal conference of 19-22 August 1974 by the Sacred Congregation for the Evangelisation of Peoples, the pro-nuncio wrote: “As far as the integration of Catholic schools is concerned, Propaganda wishes to have precise details.”¹¹³

On behalf of the episcopal conference, Kavanagh responded to the pro-nuncio:

You will appreciate that precise details are impossible, because no scheme or formula exists. What we are endeavouring to do is to bring into existence a relationship with the State that will preserve the character of Catholic schools and give us by a more equitable sharing in funds gathered by the State from common tax rates, the means to preserve and develop Catholic schooling in New Zealand. [...] No one is committed, or is his organization committed to any formula. The basic Catholic position has been set out in six fundamental points. We are concerned to get these points fully accepted and adequately

¹¹² HESTON, *The Alienation of Church Property in the United States*, p. 84. “A just cause is required, not for the validity of the alienation, but for its lawfulness” (BOUSCAREN, *Canon Law*, p. 834). “The lack of a justifying reason does not affect the validity of the alienation, as it did in the opinion of pre-Code authors. Cf. De Meester, *op cit.*, III, no. 1485” (ABBO-HANNAN, *The Sacred Canons*, vol II, p. 735).

¹¹³ Letter of Angelo Acerbi, apostolic pro-nuncio, to John Kavanagh, president, NZ Episcopal Conference, 8 November 1974, N. 49/74.

expressed in legal terms.¹¹⁴

In the same letter Kavanagh pledged to forward to the pro-nuncio full documentation given to the Catholic Education Council in May of that year, along with relevant documentation from the State Aid Conference (which Kavanagh called the “Amos Conference”).¹¹⁵

On the 20 March 1975, the pro-nuncio wrote to the bishops the following:

His Eminence, Cardinal Garrone, Prefect of the Sacred Congregation Pro Institutione Catholica, in a recent letter to me on the question of Catholic schools in New Zealand mentioned the dedication and sense of responsibility with which the interested parties are studying the problem of the Catholic school.¹¹⁶

Then on 21 October 1975, the secretary to the pro-nuncio expressed on behalf of Cardinal Garrone for the Sacred Congregation for Education “deep appreciation and gratitude [...] to the Bishops of New Zealand and to all people who, in one way or another, have been working with generous dedication, clarity and firmness in defence of the Catholic schools in New Zealand.”¹¹⁷ The letter went on:

¹¹⁴ Letter of John Kavanagh, president, NZ Episcopal Conference, to Angelo Acerbi, apostolic pro-nuncio, 11 November 1974.

¹¹⁵ “I have asked Father J. O’Neill, SM, of St Patrick’s College, Wellington, to send you relevant documentation arising from this Conference.” O’Neill, however, has no recollection of being asked to forward documentation to Rome, or of sending any. Letter of John O’Neill, SM, to Bernard Waters, 22 April 1998, p. 9.

¹¹⁶ Letter of Angelo Acerbi, apostolic pro-nuncio, to John Kavanagh, president, NZ Episcopal Conference, 20 March 1975, Prot. N. 274/75. At this point in the letter, the pro-nuncio cited the Italian original. A translation is as follows: “The clarity with which the representatives of the Catholic school are pursuing a dialogue which is intended to safeguard rights and to strengthen them, frees us from the necessity of reminding them to act prudently, and leads us to be confident that their work will lead to the proper resolution of the various problems.”

¹¹⁷ Letter of R. Molinar, charge d’affaires a.i., to John Kavanagh, president, NZ Episcopal Conference, 21 October 1975, Prot N. 608/75.

This same Sacred Congregation, after careful and attentive consideration of the several documents dealing with the conditional Integration of Private Schools into the National system of Education, is in general quite satisfied with the position taken by those responsible for Catholic Education in New Zealand.¹¹⁸

The letter concluded with a conveyance of “the support and best wishes of the Sacred Congregation as expressed above, in your important work for the future of the Catholic Church in New Zealand.”

In the absence of correspondence referring to just what were “the several documents” that Rome received in the end, one may hazard a guess: besides the minutes of the Episcopal Conference, almost certainly the catholic “six principles”. The Report of the State Aid Conference 1974, was freely available from the Government Bookshops; furthermore the NZCEO distributed copies of it widely. In like manner, the Integration Bill when introduced into parliament was a best seller. The catholic press – *New Zealand Tablet* and *Zealandia* – covered the State Aid Conference and events leading up to the passing of the *PSCIA 1975* and beyond. These issues were constantly debated in the catholic press over this time. Acerbi had access to all this information, and given his interest in integration, one may presume almost certainly relayed it to the respective Congregations.

Furthermore, the dicasteries concerned had every opportunity to avail themselves of the situation regarding integration by way of the *ad limina* visits.¹¹⁹ The New Zealand bishops

¹¹⁸ Ibid. The secretary noted that “there are only two important points not sufficiently clear for the Sacred Congregation”: one was a concern about the formation of teachers in regard to the specific character of the catholic school; the second concerned the financial arrangements should an integrated school decide to return to unintegrated status.

¹¹⁹ Lit. “to the threshold” of the apostles’ tombs. The diocesan bishop’s five-yearly visit to venerate the tombs of Saints Peter and Paul in Rome. The visit also includes the bishop’s reporting on the state of his diocese to the Roman pontiff. See Apostolic Constitution, *Pastor bonus*, 28 June 1988, in *AAS*, 80 (1988), arts. 28-32, pp. 867-868; *adnexum*, pp. 913-917; English translation in J. CAPARROS, M. THÉRIAULT, and J. THORN (eds), *Code of Canon Law Annotated, Latin-English*

made such a visit in 1978 during the integration negotiations.¹²⁰ Given the above, some questions remain: “Following integration, what exactly did the Congregations understand would be the consequences of integration? Did the Congregations appreciate the loss of administrative control over the school to a controlling authority not under ecclesiastical authority and, therefore, radically changing the canonical status of the school? Did the Congregations understand that integration would necessitate the loss of the use of the school to the parish and diocese so long as the school remained integrated, i.e. alienation in the broad sense? Is the Congregations’ seeming approval of integration tantamount to validating the bishops’ decision to alienate both administrative control of the school, and its use to the respective juridical person?” Tantalising as these questions are, any answers remain no more than speculation in the absence of further information.

3.5 – THE CANONICAL STATUS OF PARISH AND DIOCESAN SCHOOLS UNDER THE 1917 CODE OF CANON LAW – AN OPINION

What may be said of the canonical status of parochial schools at this point, that is, following their integration and before the promulgation of the 1983 Code and the passing of the *Education Act 1989*? The question may be considered from two aspects: first, from the perspective of the parish priest’s right to administer the parish, which includes the school; second, from the perspective of considering the alienation of the school which comprises a portion of the temporal goods of the juridical person of the parish.

Edition of the Code of Canon Law and English-language translation of the 5th Spanish-language Edition of the Commentary prepared under the responsibility of the INSTITO MARTÍN DE AZPILCUETA, Montréal, Wilson & Lafleur Limitée, 1993, Arts. 28-32, p. 1209; Appendix 1, pp. 1263-1271. See also cc. 395, §2, 399, 400.

¹²⁰ Because of an oversight relating to the 1983 Code of Canon Law which withdrew the decennial faculties that the New Zealand bishops enjoyed, the bishops, with the approval of the Apostolic See, did not have another *ad limina* visit until 1988.

3.5.1 – Primary Schools

Thus far we have outlined the history of gradual government assistance and the increasing complexity for the parish priest of managing a school, leading to the point where diocesan offices became responsible for the administration of schools and the employment of teachers. These factors led to the erosion of the parish priest's capacity to administer the school as an integral part of the juridical person of the parish. Once a school was integrated, the administration of the parish school became shared in varying degrees among the diocesan offices, the controlling authority – the District Education Board – and the school committee.¹²¹ Provision for the parish priest's involvement in the parish school now comes by way of his being appointed chaplain. Administratively, the parish priest, no longer acting in his own right but in a delegated role as the proprietor's representative, collaborates with the other members of the school committee. While national guidelines outline particular responsibilities regarding the special character and the school property, nonetheless his powers are the same as those of the other members. The diocese relegates to him the

¹²¹ McReavy, discussing the role of the ordinary as invigilator, considers that the local ordinary "is not the direct and immediate administrator of all church property in the diocese, but only that which is canonically vested in the diocese as a whole". Quoting Vermeersch-Creusen, McReavy agrees that "since the establishment of benefices, it is alien to the law that the Bishop should take upon himself the whole administration; in fact, were he to attempt it, in cases other than those envisaged by the law, he would not act not only unlawfully, but invalidly, except in regard to property pertaining to him" (MCREAVY, "Parochial Property", pp. 7-8. McReavy cites *Epitome iuris canonici*, II, n. 840 and refers the reader to VROMANT, *De bonis Ecclesiae*, n. 174, 182; CLAEYS-BOUUAERT-SIMENON, *Manuale iuris canonici*, III, n. 270; BESTE, *Introductio in Codicem*, p. 739). Bouscaren likewise writes: "Since each individual moral person in the present organization of the Church enjoys financial autonomy and has the administration of its own property, the ordinary cannot dispose of such property. All administrative acts must be made in the name of the moral person" (BOUSCAREN, *Canon Law*, p. 825). Neither Bouscaren nor McReavy addresses the canonical position of a bishop's intervening to partially administer the temporal goods which are not his own as in the case of a parochial school. Constraints of space do not allow us to address the speculative issue to what extent the bishops presumed to proceed to integration as civil owners of the schools, without taking into consideration the canonical ownership and administration of the schools which were not theirs, and whether they would have acted otherwise if the parishes were, like the dioceses, civilly incorporated. This does reveal the tensions, however, outlined elsewhere between the corporation sole as owner and the juridical person as owner.

responsibility of providing for the shortfall of unpaid attendance dues in default of non-paying parents, signing the preference of enrolment card for parishioners, acting as a referee for prospective teachers, and having the discretion of determining the waiver of attendance dues in the face of parents' hardships. In this respect, the parish priest no longer administers the parish school according to the provisions of the 1917 Code.

At this juncture the point should be made that in the gradual taking over of the administration of the schools and the employment of the teachers by the diocesan offices, secondary schools were, at least, managed by their own diocesan office. The administration of parish schools on the contrary was subsumed into diocesan administration leading to a certain loss of parochial identity. Despite the school committees drawing their membership mainly from parishioners - the schools' ranks being filled with their children - nevertheless the principals, teachers, and school committees looked increasingly to the diocesan office and the Education Department for policy and the resolution of difficulties. Not surprisingly, some primary schools became more and more isolated from the domain of the parish while others became autonomous to the extreme. Consequently, more recent times have seen efforts on the part of both the schools and the parishes to strengthen their relationship.

3.5.2 – Diocesan Schools

In regard to the increasing difficulty of administration, diocesan secondary schools found themselves in an identical situation to parochial schools. Unlike parochial schools, however, their administration was entrusted to various religious congregations. They too, upon reaching a point at which the changes in education outstripped the ability of the religious to manage the schools successfully, had these responsibilities taken over by diocesan offices. At integration the administration of such schools became shared between the controlling authority – the board of governors – and the diocesan offices.

We consider that the conclusion in the previous section relating to parish priests applies equally to the bishop: under the Act he no longer administers the diocesan secondary school according to the provisions of the Code. Forfeiting canonical control of the school on its integration, the bishop's right to intervene directly in maintaining the catholic ethos as catholics expect of him, is likewise lost under the Act.

In regard to the land and buildings comprising the schools, the integration agreements deed to the controlling authority the use of these temporal goods belonging to the juridical persons of the parishes in exchange for the government's meeting all operating costs of the schools. As stated earlier, the unique legal nature of the integration agreement created a contract, alienating the use of these parish schools indefinitely. For the diocesan schools, we apply this discussion *mutatis mutandis*.

In conclusion, regarding the canonical status of parochial and diocesan schools, following integration and considering the law at the time – the 1917 Code – we argue that while the diocese and parishes are left with the naked ownership of the schools' land and buildings, their exclusive use by the respective juridical persons has been alienated indefinitely. Concomitantly, their administration remains no longer completely in the hands of the bishop and the parish priest; instead, the administration is shared among a variety of agencies, more or less, depending on the statutory requirements. These agencies include the proprietor's diocesan offices, the controlling authorities, and school committees operating under statute. Consequently, the apostolate of the catholic school, formerly the expression of one of the apostolates of the diocese and the parish, remains no longer under their exclusive purview.

3.6 – THE CODE OF CANON LAW 1983 ON CATHOLIC SCHOOLS

The same year that the last of the schools in Auckland diocese were integrated saw

the promulgation of the new Code of Canon Law.¹²² Book III of the Code, “The Teaching Office of the Church” under Title III “Catholic Education”, contains three introductory canons which drew on *Gravissimum educationis* of Vatican II. The three canons treat parents’ rights to educate their children (c. 793, §1), the right to avail themselves of the helps that civil society provides for a catholic education (c. 793, §2), the Church’s right to educate (c. 794, §1), a pastor’s responsibility such that the faithful may receive a catholic education (c. 794, §2), and the holistic nature of education (c. 795). Chapter one, entitled “Schools”, contained eleven canons (cc. 796-806).

Canon 803, a new canon, that is, a canon that has no antecedent in the 1917 Code, is pertinent to the discussion determining the status of parochial and diocesan schools according to the understanding of what a catholic school may be. In the historical setting of 1917, the Code of the same year saw no reason to define what makes a school catholic; in the context of the day it was self evident. In 1968, however, the *coetus* studying the magisterium of the Church, turned its attention to what precisely makes a school catholic. Addressing the issue of “proper church schools” the *coetus* asked:

What sort of school is this understood to be?

- A school which is subject in all things to the ecclesiastical hierarchy?
- A school which is subject to this hierarchy, only in reference to what lies within its proper competence? How are the limits of this competence set?
- A school which is established and administered by a common agreement with the State?
- An official school which is in fact completely Catholic (certain countries in South America and certain territories of the Federal Republic of Germany)?

Furthermore, there needs to be raised at this point a question of principle concerning the *identity* of the Catholic school:

- Is a school Catholic through its juridic character (founder, director, administrator, etc.)?

¹²² JOHN PAUL II, Apostolic Constitution, *Sacrae disciplinae leges*, 25 January 1983, in *AAS*, 75 (1983), p. xiv, decreed that the Code “come into force from the first day of Advent in the year 1983”. English translation in *The Code of Canon Law in English Translation*, p. xv.

– Or is a school Catholic rather through the spirit which animates it?¹²³

A little later in the discussion the *coetus* considered again defining a catholic school:

The question arose of the Catholic school and its definition. One consultor felt that the Catholic school could be defined by the administration of the school. Those schools are Catholic which are founded by the church and run according to its fundamental principles of education and in which there is an atmosphere imbued with the evangelical spirit.

The Reverend Secretary thought that it must be said that those schools are Catholic in which there is in fact an education given that is imbued with such a spirit, and which are at least implicitly recognised as such by the ecclesiastical authority. He proposed, however, that no definition of a Catholic school be given in the Code and that they treat only the norms regarding the choice of schools by parents.¹²⁴

The 1983 Code answers the question empirically, or as one commentator observes, by choosing “what is perhaps the simplest and most verifiable criterion: operation or recognition by Church authority (either directly or indirectly exercised in the establishment of a public juridic person).”¹²⁵ In other words, the legal response to the question: “What makes a school Catholic?” lies in the intervention “either direct or indirect, of church authority.”¹²⁶ Thus c. 803, §1 asserts:

A catholic school is understood to be one which is under the control of the competent ecclesiastical authority or of a public ecclesiastical juridical person, or one which in a written document is acknowledged as catholic by the

¹²³ *Coetus studiorum de magisterio ecclesiastico*, Session II, 13-17 February, 1968, in *Communications*, 25 (1988), p. 127.

¹²⁴ *Ibid.*, pp. 137-138.

¹²⁵ CORIDEN, *The Code of Canon Law*, p. 568.

¹²⁶ *Ibid.* “Juridically, that which constitutes a catholic school depends either on who controls it or on a legal acknowledgment by the proper authority” (SHEEHY, *The Canon Law. Letter & Spirit*, p. 440).

ecclesiastical authority.¹²⁷

The canonical definition of a catholic school then depends either on who controls the school: the competent ecclesiastical authority – the diocesan bishop, the conference of bishops, or a public ecclesiastical juridical person, such as a diocese or a parish; or whether it is recognised as catholic by the ecclesiastical authority in a written document.¹²⁸

The canon poses certain problems. Nothing resembling it appeared among the canons of the initial draft schema. According to the *fontes*, c. 803, §1 derives from paragraphs 33-37 and 71 of the Instruction *Catholic Schools* issued by the Sacred Congregation for Education.¹²⁹ However, if one compares the text of nn. 33-37 of *Catholic Schools* with c. 803, §1, even the most creative and imaginative construct does not lend itself to a distillation of the text such that the *fontes* purport is the source of c. 803, §1. Turning to n. 71, the only section that in some wise resembles the sentiments of the canon is the following:

¹²⁷ The canon does not have an exact equivalent in the Code of Canons of the Eastern Churches. However, see c. 632: "A school is not considered Catholic in law unless it was established as such by the eparchial bishop or by a superior ecclesiastical authority or has been recognized as such by them", *Codex canonum Ecclesiarum Orientalium, auctoritate Ioannis Pauli PP. II promulgatus*, Typis Polyglottis Vaticanis, 1990, *Code of Canons of the Eastern Churches, Latin-English Edition*, translation prepared under the auspices of THE CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 1992, p. 319.

¹²⁸ In answering the question: "Who is the competent ecclesiastical authority whose permission is required for a school to call itself Catholic?", Coriden lists certainly the Holy See, the diocesan bishop, and other local ordinaries according to c. 134. He considers that "nothing prevents the authority from being delegated, e.g., to a superintendent of schools (cf. c. 137)" [CORIDEN, *The Code of Canon Law*, p. 568].

¹²⁹ *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Libreria Editrice Vaticana, 1989, p. 224. SACRED CONGREGATION FOR CATHOLIC EDUCATION, Instruction, *Catholic Schools, Malgré les déclarations*, 24 June 1977, in *La documentation catholique*, no. 15 (7-21 août 1977), p. 709, nn. 33-37; p. 713, n. 71. English translation in A. FLANNERY (gen. ed.), *Vatican Council II: More Postconciliar Documents* (= FLANNERY II), Collegeville, MN, The Liturgical Press, 1982, pp. 613-614, nn. 33-37; pp. 622-623, n. 71.

Moreover, lay involvement in Catholic schools is an invitation 'to cooperate more closely with the apostolate of the bishops',¹³⁰ both in the field of religious instruction and in more general religious education which they endeavour to promote by assisting the pupils to a personal integration of culture and faith and of faith and living. The Catholic school in this sense, therefore, receives from the bishops in some manner the 'mandate' of an apostolic undertaking.¹³¹

In the absence of a published discussion surrounding these texts as *fontes* of the canon, one might logically assume that the mandate received by the catholic school "in some manner" is in fact the recognition of a catholic school by the competent ecclesiastical authority, either through control or in a written document, according to the provisions of c. 803, §1. That appreciation, however, forces the text somewhat. In the meantime, precisely how the *fontes* provide a source for the first paragraph of the canon remains to be seen.¹³²

A further difficulty lies in the interpretation of the verb *moderatur* which the English commentaries translate synonymously as "control", "supervise", or "under the direction

¹³⁰ This phrase occurs in SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church, *Lumen gentium* (= LG), 21 November 1964, in AAS, 57 (1965), 33; English translation in FLANNERY, p. 391. This in turn derives from PIUS XII, Allocution, *Six ans sont écoulés*, 5 October 1957, AAS, 49 (1957), p. 927. A similar idea also recurs in SECOND VATICAN COUNCIL, Decree on the Bishops' Pastoral Office in the Church, *Christus Dominus* (= CD), 28 October 1965, in AAS, 58 (1966), 17; English translation in FLANNERY, pp. 573-574. See also Decree on the Apostolate of Lay People, *Apostolicam actuositatem* (= AA), 18 November 1965, in AAS, 58 (1966), 23; English translation in FLANNERY, p. 789.

¹³¹ The instruction *Catholic Schools* cites the Decree on the Apostolate of Lay People, 24: "the hierarchy brings into closer conjunction with its own apostolic functions such-and-such a form of apostolate, without depriving the laity of their rightful freedom to act on their own initiative. This act of the hierarchy has received the name of 'mandate' in various ecclesiastical documents" (*Catholic Schools*, p. 623, n. 71).

¹³² For an account of the conception of c. 803, see *Communicationes*, 29 (1997), pp. 249-251. A translation of the same appears in Appendix 4.

of.”¹³³ The terms “control” and “supervise”, for example, in English usage are finely nuanced; neither word is necessarily interchangeable in a given context. In the absence of a precise meaning, one might ask what the legislator might mean by control?¹³⁴ Furthermore, what dimension of a catholic school does the canon envisage as coming under the control of the competent ecclesiastical superior or a public juridical person? The canons give general provisions, their particular application depending on local conditions. Broadly, certainly the dimensions of “formation and education in the catholic religion” (c. 804, §1); that “teachers of religion in schools, even non-catholic ones are outstanding in true doctrine, in the witness of their christian life, and in their teaching ability” (c. 804, §2); and the appointment or approval of teachers of religion and likewise their removal or the demand that they be removed (c. 805) would come under the control of the competent ecclesiastical authority. The canons suggest that an inability of the competent ecclesiastical authority or a public juridical person to have control over any, some, or all of the above provisions means that the school cannot be said to be a catholic school according to the meaning of the first clause of c. 803, §1. Before considering an integrated school according to c. 803, §1, we need to treat of a further piece of civil legislation that impacted on the life of an integrated school and, therefore, on any canon law that might apply.

¹³³ Canon 803 – §1. *Schola catholica ea intellegitur quam auctoritas ecclesiastica competens aut persona iuridica ecclesiastica publica moderatur, aut auctoritas ecclesiastica documento scripto uti talem agnoscit.* “Control” (*The Code of Canon Law in English Translation*, p. 146; SHEEHY, *The Canon Law. Letter & Spirit*, p. 440); or “supervise” or “under the direction of” (CORIDEN, *The Code of Canon Law*, p. 568).

¹³⁴ Discussing c. 803, Rodger Austin asks what is meant by the term “control”: “As the Latin verb means ‘to regulate’, it is my view that the law means the ultimate authority for conducting, directing, governing, regulating, managing the school rests with the public juridic person. The Italian translation of the Code can be of help as the Italian language has two different words for ‘control’ and ‘supervise’. The one used in the Italian translation means control” (R. AUSTIN, “Catholic Schools of Religious Institutes and Canons 805-806”, in CANON LAW SOCIETY OF AUSTRALIA & NEW ZEALAND, *Newsletter*, 1996, no. 1, p. 12).

3.7 – THE EDUCATION ACT 1989

As we discussed in chapter one, the taskforce that reviewed education administration presented its findings to the prime minister and the minister of education, David Lange, in April 1988. What the review committee found was that the present administrative structure was overly centralised. Consequently, “almost everyone feels powerless to change things they see need changing.” The taskforce insisted that “an effective administration system must be as simple as possible and decisions should be made as close as possible to where they are carried out.”¹³⁵ The radical change proposed by the taskforce had as its basis what in essence those familiar with the teaching of the Church would understand as the principle of subsidiarity:

Individual learning institutions will be the basic unit of education administration. This is where there will be the strongest direct interest in the educational outcomes and the best information about local circumstances. People in the institutions should make as many of the decisions that affect the institution as possible – only when it would be appropriate should decisions be made elsewhere.¹³⁶

Envisaging a partnership in the running of learning institutions between the teaching staff (the professionals) and the community, the taskforce proposed that “The mechanism for creating such a partnership will be a board of trustees.”¹³⁷ The decentralisation proposed by the taskforce would mean that the Department of Education now becomes a Ministry concerned only with major policy, while the day-to-day running of the school would become the responsibility of the board of trustees. The taskforce’s recommendations were accepted by

¹³⁵ *Administering for Excellence*, p. xi.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

the Minister and became translated into law.¹³⁸

No one in the preceding years could have envisaged the paradigmatic shift that would rearrange yet again the management of the integrated catholic schools. Having bought into the state system, catholic schools along with their state counterparts would now be subject to whatever policy shifts the government believed it needed to enact. O'Neill described the change as the "greatest educational upheaval since 1877."¹³⁹

3.7.1 – Representation and Responsibilities of the Board of Trustees

According to Section 4 of the Act, every primary and secondary school shall have a board of trustees.¹⁴⁰ For an integrated school, membership of the board comprises five parent representatives, the principal, a staff representative, no more than two persons co-opted by the board, and four trustees appointed by its proprietors (Section 5). In the Auckland diocese usually one of the four representatives of the proprietor for a primary school is the parish priest, while another priest is appointed by the proprietor for a secondary school. Thus the Act of 1989 amended the *PSCIA 1975* by replacing the board of governors (of a secondary school) and the District Education Board (of a primary school) with the board of trustees.

Under the Act, the board of trustees became responsible for two main areas: the appointment of all staff, whether teaching or non-teaching,¹⁴¹ and the maintenance of the

¹³⁸ See *supra*, chapter one, pp. 67-69.

¹³⁹ O'NEILL, "Catholic Education in New Zealand", p. 180.

¹⁴⁰ "A board – (a) Is a body corporate with perpetual succession and a common seal; and (b) May hold real and personal property for the purposes of this Act or the Education Act 1964; and (c) May sue and be sued, and otherwise do and suffer everything bodies corporate may do and suffer" (*School Trustees Act 1989*, Second Schedule, p. 22).

¹⁴¹ The board of trustees can delegate to a staffing committee the power to recommend persons for appointment or even to actually appoint. At least one member must be a proprietor's appointee. See

school property. In regard to the appointment of teachers to “tagged positions” the *Handbook* reminds the board that under the legislation of the *Education Act 1989* it may consider for appointment “only those applicants who have been declared acceptable by the proprietor (5.7).” The *Handbook* warns the proprietor that other than through his appointee(s) he does not have as such, a right to determine the suitability of the applicants (5.12).¹⁴² This remains the responsibility of the board. Again, for secondary school appointments, the 1989 Act does not give the proprietor the right to intervene directly except through his appointees (6.13).

Prior to integration several observers expressed concerns over the appointment of suitable teachers to catholic schools and the dismissal of those whose life was inimical to the special character. The question and answer pamphlet on integration for example, posed the question: “How can unsuitable teachers be removed?” The answer was:

Appointments procedures are such that this should seldom happen. If a case arises, it can in some circumstances be solved by transfer of the teacher to another school. In more serious cases the disciplinary procedures of the Education Act can be invoked. In all cases the teacher must be treated justly.¹⁴³

For all that, even the best-regulated screening procedures may not always be adequate to safeguard appointments. Moreover, people and their circumstances can and do, change. A question that arises from this is just what powers the proprietor or the board has in removing a teacher who is no longer acceptable in terms of a tagged position. In 1996 the executive of the New Zealand Catholic Education Office studying the question reaffirmed that an action

Handbook, 4, p. 10.

¹⁴² “Acceptability – The distinction between ‘acceptability’ and ‘suitability’ is important. For Tagged Positions the Proprietor through his/her agent determines which applicants are acceptable in terms of the special character. The Board decides which of the acceptable applicants is the most suitable for the position. In considering suitability for tagged or general position the board needs to give strong consideration to religious qualifications and experience” (*Handbook*, 5.10, p. 15).

¹⁴³ *Integration – Questions People Ask*, Question 37.

may be initiated only by the board; a proprietor has no powers to intervene other than those conferred through his appointees to the board.¹⁴⁴ Alternatively, the proprietor may invoke Section 3 (3) of the *PSCIA 1975* when he believes the special character is at risk.

Should either of these options end up in a civil court the executive believed that proving that a particular action or behaviour jeopardised the special character would not be easy. In regard to the proprietor's action, the executive suggested that "he must be able to demonstrate that the special character of the school is being undermined or placed in jeopardy. It would probably be relatively difficult to win such a case against an individual teacher."¹⁴⁵ In the end the document does no more than confirm that in civil law the bishop as proprietor does not have the power to remove any teacher, including teachers of religion.

To return to the taskforce reviewing education: the taskforce in addressing the maintenance of the school property acknowledged the condition of ownership in the case of integrated schools.¹⁴⁶

The board of trustees will be responsible for all maintenance that can be expected to occur within a ten year cycle. This would include both major and minor maintenance – such as painting of school buildings; cleaning and caretaking; maintenance of grounds; plumbing, carpentry and electrical repairs; the supply, maintenance and replacement of equipment, furniture and stores. Provision for this will be made in each year's bulk grant, and the board

¹⁴⁴ NEW ZEALAND CATHOLIC EDUCATION OFFICE, *A Teacher in a "Tagged" Position Who is no Longer Considered Acceptable. A Guide for Boards of Trustees*, 30 April 1997. See 2.1.5., p. 1; 3.3.3., p. 2.

¹⁴⁵ NZCEO, *A Teacher in a "Tagged" Position*, 4.5., p. 4.

¹⁴⁶ "In the case of integrated schools and some other specific instances, the state does not own the property but has agreed – by separate contract – to maintain it. In these cases the existing legal contract [the integration agreement] will have to be taken into account in deciding who is responsible for maintenance and capital works" (*Administering for Excellence*, p. 48).

will be expected to budget for maintenance over a ten year cycle.¹⁴⁷

So it is that among other things, the *Handbook* outlines directives for the use of school property. Reminding trustees that “Any building on the Proprietor’s land belongs legally to the Proprietor (9.8.5)”, the document reaffirms the proprietor’s deeding of the use of the school premises to the board of trustees. Their use by the board is not unconditional but subject to the conditions of the integration agreement.¹⁴⁸

In the immediate years following the passing of the 1989 Act, issues of governance, the relationship of the board of trustees to the principal, and the delineation of responsibilities needed clarification. In brief, the Act made the overall governance of the school the responsibility of the board of trustees while the role of the principal was to manage the school.¹⁴⁹

In conclusion, the *Education Act 1989* put the day-to-day running of the schools squarely in the hands of parents and teachers. Canonically, this control vis-à-vis the control exercised by boards under the 1975 Act made no difference whatsoever. In short, the proprietor’s already-changed canonical capacity to administer the schools after their integration was unaffected by the *Education Act 1989*.

¹⁴⁷ Ibid.

¹⁴⁸ *Handbook*, 9.9.1-3, p. 34. These provisions correspond to Clause 3, paras (i), (ii), quoted above (p. 29) and clauses 12 and 13 of the Integration Agreement.

¹⁴⁹ MINISTRY OF EDUCATION, *A Guide to Governance and Management. Principals’ Implementation Task Force*, September 1990, Wellington, Learning Media, Ministry of Education, Wellington, 1990, see pp. 1-6.

**3.8 – THE CANONICAL STATUS OF PARISH AND DIOCESAN SCHOOLS IN AUCKLAND
UNDER THE CODE OF CANON LAW 1983 – AN OPINION**

Canon 803, §1 says that a school may be understood to be catholic by:

- being under the control of the competent ecclesiastical authority
- being under the control of a public juridical person
- being acknowledged as catholic by the ecclesiastical authority in a written document.

Given the present civil legislation, our considered opinion is that since the bishop is unable to intervene directly in a catholic school but may only act through a secondary body – the board of trustees – which is not under his authority, he does not have the control envisaged by the first clause of the canon. The preservation of the special character, entrusted to the bishop in a special way, if threatened may, in the last resort, be defended by a statutory body which is not under the bishop's control – the Integration Standing Committee. The civil law thus circumscribes the bishop's canonical control over the school.

We maintain furthermore that following integration the parish priest's right to administer the school as one of the apostolates of the parish was taken over by a controlling authority outside the power of the parish priest. The same occurred in respect of the bishop and diocesan schools. Despite some difficulties in knowing precisely what the legislator means by "control" in this canon, we consider that it is reasonable to conclude that the exercise of any power of a competent ecclesiastical authority or a public juridical person which is not direct or delegated, but which under the control of a non-Church body altogether, is not what the canon envisages as control. Hence the integrated schools may no longer be considered under the control of a public juridical person – the parish or the diocese – according to the second clause of c. 803, §1.

Since the very inception of the schools in New Zealand, the bishops have always

referred to them as catholic schools; innumerable documents over their one-hundred and fifty year history testify to their catholicity. Under integration the agreement statutorily affirms that the schools which are the subject of this thesis are catholic schools:

The School is a Roman Catholic School in which the whole School community through the general School programme and in its Religious instructions and observances, exercises the right to live and teach the values of Jesus Christ. These values are as expressed in the Scriptures and in the practices, worship and doctrine of the Roman Catholic Church, as determined from time to time by the Roman Catholic Bishop of the Diocese of Auckland.¹⁵⁰

In conclusion, it seems evident to us that integrated schools have the status of catholic schools according to the third clause of c. 803, §1: i.e., acknowledged as catholic by the ecclesiastical authority in a written document, i.e., the integration agreement.¹⁵¹

3.9 – A DECREE OF THE CONGREGATION FOR THE EVANGELISATION OF PEOPLES ON THIS ISSUE

In 1954 the bishop of Auckland employed John Doe as a teacher in a diocesan secondary school, which school was administered by a religious congregation of brothers for the bishop. On 26 January 1982 this diocesan school became integrated, its administration now passing to a board of governors as the controlling authority under the *PSCIA 1975*. Following the passing of the *Education Act 1989*, the administration of the school passed from the board of governors to a board of trustees.

¹⁵⁰ See *Handbook*, 3., p. 8; Integration Agreement 5.

¹⁵¹ The use of the designation "catholic" derives directly from AA, 24. It appears in the Code first as part of c. 216: "No initiative, however, can lay claim to the title 'catholic' without the consent of the competent ecclesiastical authority." It appears elsewhere throughout the Code; see cc. 300, 808. Since the law is not retroactive (c. 9), those schools called catholic prior to the 1983 Code retain their designation.

On 27 June 1989, the board of trustees dismissed Doe because he had reached the age of 60. The board did this by virtue of a bylaw which it passed on 5 May 1988. Having taught until integration on an income that was not at parity with his state counterparts, Doe wanted to teach until the age of 65 – the civil law age for retirement – in order to provide for his future. Since the grounds for dismissal were none other than that Doe had reached the age of 60, he sought redress against this injustice, logically turning to the successor of the bishop who had employed him initially.

Believing that the bishop of Auckland was the administrator of the school through its board of governors, he appealed to the board on the basis of c. 1733 to repeal its decision on the grounds of financial hardship to himself. Since the board failed to respond effectively, Doe appointed a canonical advocate seeking recourse to the bishop of Auckland against an administrative decree of a body subject to his authority. Eventually the petition went before the Congregation for the Evangelisation of Peoples, the competent dicastery for New Zealand in such a matter.¹⁵²

Doe, in the meantime, presented a personal grievance case before the civil Employment Court against the “College Board of Trustees & Another.” A transcript of the evidence indicates that the bishop under questioning presumed that he was no longer the aggrieved teacher’s employer following integration but rather that the state was, through the board of governors:

Counsel: In matters of employment at St X College, do you regard that as part of your function as proprietor?

Bishop: Prior to integration the bishop of the Diocese as proprietor was also responsible for the employment of staff. Post integration the situation changed

¹⁵² In this study we do not consider the principal reason for the recourse – the addressing of the injustice of Doe’s dismissal by the board. Instead we focus on the attendant points of law raised by the Congregation and the Tribunals insofar as they concern the status of the catholic school.

so that the employer became the State.¹⁵³

Since Doe had already presented a case before the civil courts, which the Congregation said “were the competent tribunal for your case”, the petition before the Congregation was delayed in the hope that “a tentative conciliation would take place. When that failed, the documentation was examined.”¹⁵⁴ The letter further informed the petitioner that:

After a lengthy study, I regret to inform you that the recourse which you instituted against the Board of Trustees of St X College in the Diocese of Auckland, New Zealand and consequently against the Right Reverend Bishop of Auckland, New Zealand is rejected as this Dicastery has no competency as there is no hierarchical authority directly involved.¹⁵⁵

Included with the response was a decree declaring that the Congregation for the Evangelisation of Peoples:

DECREES THE PETITION REJECTED as lacking foundation, as the Board of Trustees of St X College, Auckland, is not a canonically recognized ecclesiastical authority according to the norms of CIC. c. 48, and therefore there is no basis in Canon Law for instituting an “administrative Recourse” against the Board nor against the Bishop of Auckland.¹⁵⁶

The Congregation said in effect two things: first that the board of trustees is not competent to issue a decree according to the norms of c. 48; second, the board is not a body under the control or authority of the bishop of Auckland. Hence no recourse can be taken against the

¹⁵³ Transcript of Evidence, Employment Court, *John Doe v St X College Board of Trustees & Another* (personal grievance pursuant to S. 218), 18-21 November 1991, p. 13.

¹⁵⁴ Letter from the Congregation of Evangelisation of Peoples to John Doe, 19 August 1993, Prot. N. 1745/93.

¹⁵⁵ *Ibid.*

¹⁵⁶ Congregation for the Evangelisation of Peoples, Decree, 19 July 1993, Prot. N. 3277/93.

bishop. From the perspective of our study, since this situation applies to every integrated school, the conclusion can only be that these schools are no longer under the canonical control of the diocesan bishop.

3. 10 – A DECREE OF THE SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA ON THIS ISSUE

Unhappy with this decision, Doe then sought recourse from the Supreme Tribunal of the Apostolic Signatura against the decree of the Congregation for the Evangelisation of Peoples. The Supreme Tribunal in *congresso* rejected this petition as lacking foundation. Once more Doe interposed recourse to the college of judges, seeking to overturn the decision of the *congresso*. Responding to this recourse, the judges in their decision noted among the defects of what was presupposed in the case by the plaintiff:

- that the council of administration of St X’s is not an ecclesiastical, executive authority, as is evident from the competency of the council given by reason of the *Integration Agreement*.
- that neither is the bishop able to be considered the hierarchical superior of the council of administration, as is clear from the competency of the same bishop in relationship to St X’s College from the aforesaid document – the *Integration Agreement*.¹⁵⁷

Hence the judges considered that, “It is clear that the Congregation for Evangelisation of Peoples rightly determined on 19 July 1993 that in the case there was lacking the presupposition for hierarchical recourse which was rightly affirmed in the challenged decree of the *congresso*.”¹⁵⁸

What is relevant to our study is the fact that the judges, “taking into account the

¹⁵⁷ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *The Loss of a Teaching Position in a Catholic School (Mr Doe – Congregation for the Evangelisation of Peoples)*, 30 June 1994, Prot. N. 24582/93 C.A., Auckland, pp. 5-6.

¹⁵⁸ *Ibid.*, p. 6.

argument of the plaintiff and his advocate after the challenged decree”, declared:

– that against their assertion, St X’s College, saving the rights of the Bishop of Auckland as regards the property and buildings and also the special Catholic character, from the year 1982 by means of an agreement with the State, was no longer a Catholic school “which is under the control of the competent ecclesiastical authority or of a public juridic person” (c. 803, §1) but only which “in a written document is acknowledged as Catholic by the ecclesiastical authority” (ibidem).¹⁵⁹

The judges continued:

– that in this case, in vain is c. 231, §2 invoked, because at least from 1982 the plaintiff was not giving special service to the Church, as is clear from the fact that from then he took his wage not from the ecclesiastical authority or a public ecclesiastical juridical person, but from the State; and also from this that the control of the school and teachers, saving the special rights of the bishop, hereafter pertain to the council of administration (*Board of Governors*, later *Board of Trustees*), which body is not endowed with ecclesiastical power, under the bishop.¹⁶⁰

In the end the tribunal judged neither to reform the decree of the *congresso* nor admit recourse before the judges.

Conclusion

We consider that the material analysed in this chapter clearly indicates that once a school became integrated, the civil law impinged directly on 1) the bishop’s and parish priest’s capacity canonically to administer the school, and, 2) the use of the school plant. What then may be said of the canonical status of catholic schools? In chapter two we demonstrated how the legal imperatives, that schools be built to educate children in the faith,

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

came by way of the various councils, synods, and the 1917 Code of Canon Law. Accordingly, both diocesan and parochial schools were built through the financial giving of the laity. *Ergo*, we consider that it is reasonable to conclude that these schools are rightly considered to be the temporal goods of the respective juridical personality that legitimately acquired them (c. 1499 CIC/17), administered as of right by the parish priest or bishop. Furthermore, the catholic school, being a vehicle of one of the apostolates of the parish or diocese, constitutes an integral part of their respective juridical personalities.

Our analysis of the information suggests further that once a school became part of the state system, integration significantly altered its canonical disposition in two main ways. First, the bishop and the parish priest forfeited their right canonically to administer the school as an expression of the apostolate of the diocese or parish. Following integration, controlling authorities administered the schools. The substitution of the controlling authorities by boards of trustees in 1989 made no difference to what had occurred on integration. In regard to the protection of the proprietor's interests: since the law does not give him through his representatives/appointees either power of veto, reserved powers, or majority voting rights, our considered opinion is that he effectively does not have canonical control over any integrated school. Should the special character be placed in jeopardy, or no longer preserved and safeguarded, the bishop may appeal to the Integration Standing Committee. This body, however, is outside the authority of the bishop.

Second, concerning that portion of the temporal goods of the parish or diocese which constitute a school: the integration agreement deeds to the board of trustees all the chattels and other assets associated with the school exclusively. While the parish or diocese retains the naked ownership of the buildings and land, the bricks and mortar and the earth on which they stand, their use to the respective juridical persons has been alienated indefinitely by the integration agreement.

Given these considerations, may integrated schools be considered catholic by canonical definition? Following the promulgation of the 1983 Code and using c. 803, §1 as a reference, we propose that by virtue of the loss of the administrative capacity of the parish priests and the bishop, along with the placement of this capacity in the hands of controlling authorities not under their authority, these schools from the time of their integration were no longer under the control of the competent ecclesiastical authority or of a public juridical person as formerly. They were, however, by virtue of their integration agreement, considered catholic schools by the ecclesiastical authority in a written document. Therefore, the canonical status of an integrated school is that it is a catholic school, acknowledged as such by the ecclesiastical authority in a written document.¹⁶¹

In treating in summary form the historical background leading to the *PSCIA 1975*, along with the debates surrounding the presentation of the bill, together with its subsequent bouquets and brickbats, we have attempted to give no more than a hint of the complex of dynamics impinging on the educational life of the Church in New Zealand. While integration was a critical issue for the bishops, priests, and laity of New Zealand, catholic interests were not the sole concern of the negotiators or the government. To this extent the Act remains for catholics a compromise.¹⁶²

Nearly a quarter of a century later one may ask, "Was there another way? Could it have been done differently?" While "hindsight is always twenty-twenty",¹⁶³ revisionist perspectives frequently have that which was not available to those involved in the events

¹⁶¹ Prior to integration, these schools would have been understood to be catholic schools according to all three provisions of c. 803, §1.

¹⁶² See *New Zealand Tablet*, 21 April 1976, "What Bishop Mackey Thinks about Integration", p. 29.

¹⁶³ B. WILDER (Samuel Wilder), in J.R. COLUMBO, "Wit and Wisdom of the Moviemakers" (1979), Chap. 7, in *Oxford Dictionary of Modern Quotations*, (T. AUGARDE, ed.), Oxford, Oxford University Press, 1991, p. 311.

under discussion at the time – namely, the advantage and luxury of the absence of pressure, with the wisdom and insight brought about through reflection, tempered by the passage of the years. Our history shows that while there was some posturing by Church authorities at the time, the catholic negotiators had no serious alternative to integration.¹⁶⁴ The Church simply did not have the resources to stay faithful both to its plank of “a place in a catholic school for every catholic child” and go it alone financially. Alternate options? There were none.

The catholic school system had been built on the personal, moral, and financial sacrifices of parents, teachers – religious and lay – and pastors for almost one hundred years. Given the urgent educational demands of the decade prior to 1975 and the constantly-changing arena of negotiation, the bishops saw any solution as acceptable which guaranteed the survival of the catholic school system. In the words of Cardinal Williams, “At that time, one aspiration dominated the thinking of those involved in Catholic education – survival. [...] Integration ensured survival.”¹⁶⁵ In review, while the letter of the law may not have been obeyed in every instance, the bishops were not about to sacrifice the system for the sake of legal provisions which may have hindered rather than helped the process.¹⁶⁶ In the momentum

¹⁶⁴ Catholic energies in the integration negotiations were devoted totally to incorporating the catholic “six principles” leading to a Bill which would enshrine catholic school interests as far as possible. Of the original eight members comprising the Integration Working Party, four of the negotiators (plus two reserves who later joined the working party) were Roman catholics. It was a balance which some of the opponents of integration would later criticise: “No one seemed to ask why 10% of NZ’s schools were represented by 6 members and 90% represented by 4. Why were only Catholic schools represented?” (MULHERON, *State Aid*, p. 11. See also MCGEORGE, *Church, State, and New Zealand Education*, p. 47).

¹⁶⁵ “Cardinal Provides an Inspiring Review of Catholic Education”, in *Welcom*, no. 124, October, 1996, p. 5.

¹⁶⁶ Publilius (also called Publius) Syrus would say of such a situation two thousand years earlier: *Necessitas dat legem non ipsa accipit* (Necessity gives the law without itself acknowledging one.); proverbially, *Necessitas non habet legem* (Necessity has no law.), PUBLIUS SYRUS, *Sententiae* no. 444, in J. and A. DUFF, *Minor Latin Poets*, cited in *The Concise Dictionary of Quotations*, (A. PARTINGTON, ed.), 3rd rev. ed., Oxford, Oxford University Press, 1997, p. 256. Also quoted in L. DE MAURI, *Regulae juris: raccolta di 2000 regole del diritto eseguita sui migliori testi, con l’indicazione delle fonti, schiarimenti, capitoli riassuntivi e la versione italiana riprodotta dai più,*

of the need to preserve the catholic schools the bishops in the end did the only thing that was open to them to ensure the survival of the system – integrate. O’Neill would say that by virtue of integration “Catholic schools continue to exist. Without integration most would either be closed now, or reserved for those who could afford the high fees necessary to keep them going”¹⁶⁷ – not the New Zealand catholic way!

celebri commentatori, 11a ed., Milano, U. Hoepli, 1949; reprint. 1984, p. 153.

¹⁶⁷ O’NEILL, “Catholic Education in New Zealand”, p.179.

CHAPTER FOUR

TOWARDS 2000 AND BEYOND

“To teach in order to lead others to faith is the task of every preacher and every believer”
(Saint Thomas Aquinas).¹

Introduction

Our previous analysis of New Zealand Church history shows how the catholic pioneers valued the place of the catholic school in the mission of the church. From 1877, when the state adopted a system of schooling that catholics understood to preclude the teaching of the faith, they developed at their own expense a parallel system. Church legislation, the *ius vigens*, which reiterated constantly the importance of the catholic school, came by way of the various plenary and provincial councils and diocesan synods. While some of the legislation was localised, drawing on the experience of the English-speaking world – England, Ireland, and the United States – much of it reflected the nineteenth-century appreciation of the Church’s role in education. The arrival of the 1917 Code brought little that was new to the church Down Under; rather, the new Code may be said to have synthesised law that had become the *modus operandi* for the New Zealand church since Pompallier’s day. Before discussing catholic schools further, however, one needs to consider the insights of the Second Vatican Council on catholic education along with subsequent developments. Any further discussion from a canonical perspective must necessarily be set against the context of this council.

¹ St Thomas Aquinas, *Summa theologica*, III, 71, 4 ad 3. Translation in JOHN PAUL II, *Catechism of the Catholic Church*, Ottawa, Publications Service, Canadian Conference of Catholic Bishops, 1994, p. 198, n. 904.

4.1 – THE INTERVENTION OF THE CONCILIAR PRINCIPLE

Delivering his allocution to the Code Commission in 1965 on the relationship of the Second Vatican Council to the task of revising the Code, Paul VI said of canon law that “It must be adapted to the new needs of the people of God and to the new spirit characteristic of the Second Vatican Council [...]”² Nine years later, Paul VI addressing the students on the “Course of Renewal in Canon Law” at the Gregorian University, said that for a better understanding and application of canon law they should be guided by a *novus mentis habitus*, “a new mental attitude” introduced by the Vatican Council.³ Ladislav Örsy, commenting on this phrase, observes that the pope does not give any exhaustive description, still less a technical definition, of what this attitude is.⁴ Nevertheless, this newness characterises the new Code: “the fundamental basis of the ‘newness’ which, while never straying far from the Church’s legislative tradition, is found in the Second Vatican Council and especially in its ecclesiological teaching, generates also the mark of ‘newness’ in the new Code.”⁵

Addressing the question of “newness”, John McIntyre opines that since the 1983 Code of Canon Law presents the canons of Vatican II, this means that the canons are to be read and interpreted in the light of the council and not vice versa. Old norms, where they exist, he continues, “must be similarly translated in the light of the council. In other words, we cannot proceed methodologically directly from the Code of 1917 to the Code of 1983; the conciliar

² PAUL VI, Allocution to the Cardinals and Consultors of the Pontifical Commission, 20 November 1965, *AAS*, 57 (1965), p. 988. English translation in *CLD*, vol. VI, p. 145.

³ PAUL VI, Allocution, “Canon Law and the Church’s Pastoral Mission”, 14 December 1973, in *AAS*, 66 (1974), p. 10. English translation in *CLD*, vol. VIII, pp. 100-101.

⁴ L. ÖRSY, *Theology and Canon Law*, Collegeville, MN, The Liturgical Press, 1992, p. 10.

⁵ JOHN PAUL II, *Sacrae disciplinae leges*, p. xiv.

principle must intervene.”⁶ Inasmuch as the relationship of the Second Vatican Council to ecclesiastical law calls for this *novus habitus mentis* – a new mindset, a new mentality, a conversion in one’s approach – to this end we will consider summarily some of the teachings of Vatican II on education, particularly the place of the catholic school, and the canons of the 1983 Code derived from these teachings.

4.2 – AN OVERVIEW OF THE TEACHINGS OF THE SECOND VATICAN COUNCIL WITH PARTICULAR REFERENCE TO CATHOLIC SCHOOLS

The Dogmatic Constitution on the Church, *Lumen gentium*, presented the Church’s understanding of its own nature: “Christ is the light of humanity; and it is, accordingly, the heart-felt desire of this sacred Council, being gathered together in the Holy Spirit, that by proclaiming his Gospel to every creature (cf. Mk. 16:15), it may bring to all that light of Christ which shines out visibly from the Church.”⁷ Evangelisation then remains the perennial challenge for the Church and this by the mandate of the risen Christ: “Go into all the world and preach the Gospel to the whole creation” (Mk 16:15). Canon 781 reflects this teaching, saying that the Church of its nature is missionary.⁸

⁶ J. MCINTYRE, *The Sources of Law*, (cc. 1-95), Class Notes for the Private Use of Students, Ottawa, Faculty of Canon Law, Saint Paul University, 1994-1995, pp. 5-6. He concludes the section by saying that “This puts hermeneutics at the heart of canonical activity”, *ibid.*, p. 6.

⁷ *LG*, 1; in FLANNERY, p. 350. “The Church was founded to spread the kingdom of Christ over all the earth for the glory of God the Father, to make all partakers in redemption and salvation” (*AA*, 2; in FLANNERY, pp. 767-768); Decree on the Church’s Missionary Activity, *Ad gentes* (= *AG*), 7 December 1965, in *AAS*, 58 [1966], 2; English translation in FLANNERY, p. 814. Later Paul VI would say that evangelisation is the essential function of the Church; it exists to preach the gospel: PAUL VI, *Evangelisation in the Modern World*, *Evangelii nuntiandi* (= *EN*), 8 December 1975, in *AAS*, 68 [1976], 15. English translation in FLANNERY II, p. 716. English quotations of conciliar and post conciliar documents may have been modified to incorporate inclusive language.

⁸ Canon 781 draws directly from *AG*, 35; See also JOHN PAUL II, *Encyclical Letter on Missionary Activity*, *Redemptoris Missio*, 7 December 1990, in *AAS*, 83 (1991), 48; English translation in *Origins*, 20 (1990-1991), p. 555.

Those who respond to the word in faith become followers of Christ, having accepted his call to holiness: “You must therefore be perfect just as your heavenly Father is perfect” (Matt. 5:48). By baptism the Christian becomes set aside or consecrated and becomes part of a holy people – the People of God, the Church. Chapter 5 of *Lumen gentium* proclaims the call of the whole Church to holiness; hence the mission of the whole Church is not only to become holy itself, but to make the whole world holy.⁹

To help the Church fulfil its mission, bishops share in Christ’s priestly, prophetic, and kingly roles; they exercise the threefold office, or function of sanctifying, teaching, and governing, expressed as service.¹⁰ The laity, too, share in this triple office and for the same reason: “The apostolate of the laity is a sharing in the salvific mission of the Church” (*LG*, 33).¹¹ Hence the bishops of the Second Vatican Council remind the laity that “their apostolate is exercised when they work at the evangelization and sanctification of all” (*AA*, 2). In this regard, the prophetic office, the right and duty to teach, to proclaim, to witness, remains the

⁹ “In the Church not everyone marches along the same path yet all are called to sanctity [...]” (*LG*, 32); “[the laity] are called by God that, being led by the spirit to the Gospel they may contribute to the sanctification of the world, as from within like leaven” (*LG*, 31). “By their secular activity they help one another to achieve greater holiness of life, so that the world may be filled with the spirit of Christ and may the more effectively attain its destiny in justice, in love and in peace” (*LG*, 36). See also *LG*, 39-42; *AA*, 16, 31 (a). Canon 210 succinctly has it: “All Christ’s faithful, each according to his or her own condition, must make a whole hearted effort to lead a holy life and to promote the growth of the Church and its continual sanctification.”

¹⁰ See *LG*, 21, 25-28; *CD*, 13-19; c. 375 §1, §2.

¹¹ On the laity’s sharing in the threefold office, c. 204 declares: “Christ’s faithful are those who, since they are incorporated into Christ through baptism, are constituted the people of God. For this reason they participate in their own way in the priestly, prophetic and kingly office of Christ. They are called, each according to his or her particular condition, to exercise the mission which God entrusted to the Church to fulfil in the world.” Canon 759 contains the same truth: “The lay members of Christ’s faithful, by reason of their baptism and confirmation, are witnesses to the good news of the Gospel, by their words and by the example of their Christian life [...] .” See *LG*, 11-12, 31, 33-35; *AA*, 29. See also B.F. GRIFFIN, “The Threefold *Munera* of Christ and the Church”, in E.G. PFNAUSCH (ed.), *Code, Community, Ministry. Selected Studies for the Parish Minister Introducing the Code of Canon Law*, (2nd rev. ed.), Washington, DC, The Canon Law Society of America, 1992, pp. 16-17.

raison d'être of the catholic school.¹² It is, however, only one means of exercising this right and duty.¹³

4.2.1 – *The Declaration on Religious Education: Gravissimum educationis*

The Fathers of the Second Vatican Council, having declared that every person has an inalienable right to an education, affirmed that: “True education aims at the formation of the human person in the pursuit of his ultimate end and of the good of societies of which, as man, he is a member, and in whose obligations, as an adult, he will share” (*GE*, 1). Turning its attention specifically to christian education, the council listed the principal aims of christian education as follows: the baptised are gradually introduced into a knowledge of the mystery of salvation so that they may daily grow more appreciative of the faith received; they should learn to adore God the Father in spirit and in truth (Jn 4:23) especially through liturgical worship; they should be trained to conduct their personal lives in righteousness and in the sanctity of truth, according to the new persons they have become in baptism (Eph. 4:13); they are to mature in Christ and build up the mystical body; they are to witness to the hope that is in them (1 Pet. 3:15); finally, they are to promote the christian formation of the world (*GE*,

¹² We do not enter the debate summarised by Patrick Walsh of “those who doubt that the Church’s involvement in the process of formal schooling is a valid extension of the command to ‘teach all nations’ and secondly, those who doubt the validity of the actual form this takes, both as regards structures and methods of teaching [...]” (P.J. WALSH, *The Special Character of a Catholic School; A Literature Review and Interview Investigation*, MA thesis, Auckland, University of Auckland, 1987, p. 21). We acknowledge simply that a catholic school shares in the prophetic mission of the church. See *MD*, 9, 16; CONGREGATION FOR CATHOLIC EDUCATION, *The Religious Dimension of Education in a Catholic School. Guidelines for Reflection and Renewal (= RD)*, 7 April 1988, Boston, MA, St Paul Books & Media (Vatican translation), 1988, p. 19, n. 34; CONGREGATION FOR CATHOLIC EDUCATION, *Instruction, The Catholic School on the Threshold of the Third Millennium (= On the Threshold)*, 28 December 1997, Vatican City, Congregation for Education, 1997, in *Origins*, vol. 28, no. 23 (November 19, 1998), nn. 5, 11, pp. 400, 401.

¹³ See c. 761.

2).¹⁴ Thus this appreciation of education distinguishes christian or catholic education from merely secular education.

The declaration affirms that since parents have given their children life, parents must be recognised as the primary and principal educators. Not only is this education a serious obligation for parents, but it remains a primary and inalienable duty and right (*GE*, 3, 6). While the family has the primary responsibility of supplying education, nevertheless civil society or the state also has a duty to protect the rights of children to an adequate education, watching over their health, being vigilant about the ability of teachers and their training, and in general promoting the whole work of schools. In the declaration the conciliar Fathers warn that the state must take cognisance of the principle of subsidiarity (*GE*, 3). Finally, the Church itself has a duty to educate, not simply because it is a human society capable of educating, but especially because “it has the duty of proclaiming the way of salvation to all, of revealing the life of Christ to those who believe, and of assisting them with unremitting care so that they may attain to the fullness of that life” (*GE*, 3).¹⁵ In considering the various means of education the council considered foremost catechetical instruction¹⁶ while “the school is of outstanding importance” (*GE*, 5).¹⁷

¹⁴ JOHN PAUL II, Apostolic Exhortation, *The Christian Family in the Modern World, Familiaris consortio* (= *FC*), 22 November 1981, in *AAS*, 74 (1982), in 39 repeats this section verbatim; see FLANNERY II, pp. 848-849. Canon 795 provides a more succinct rendering of the above description. See also c. 1136.

¹⁵ *Ibid.* See PIUS XI, *Christian Education*, pp. 6, 9-10.

¹⁶ “Bishops should be especially concerned about catechetical instruction. Its function is to develop in men a living, explicit and active faith, enlightened by doctrine” (*CD*, 14. See c. 773). “Catechesis is that form of the ministry of the word directed toward those who have been evangelized, that is, who have heard the gospel and responded in faith. [...] Catechetical instruction aims at rendering the faith lively, explicit, and operative. In other words it is the local community’s effort to make disciples out of believers, to nurture them in Christian living, and help them develop and mature in faith” (J.A. CORIDEN, *An Introduction to Canon Law*, New York/Mahwah, NJ, Paulist Press, 1991, p. 106).

¹⁷ See PIUS XI, *Christian Education*, pp. 29-30.

4.2.2 – The Declaration and the Catholic School

The council declared that “Among the various organs of education the school is of outstanding importance” (*GE*, 5). Emphasising again that “The Church’s role is especially evident in Catholic schools” (*GE*, 8), the bishops observe that catholic schools are no less zealous than other schools in the promotion of culture and in the human formation of young people. The bishops continue:

It is, however, the special function of the Catholic school to develop in the school community an atmosphere animated by a spirit of liberty and charity based on the Gospel. It enables young people, while developing their own personality, to grow at the same time in that new life which has been given them in baptism. Finally, it so orients the whole of human culture to the message of salvation that the knowledge which pupils acquire of the world, of life and of men is illumined by faith. Thus the Catholic school, taking into consideration as it should the conditions of an age of progress, prepares its pupils to contribute effectively to the welfare of the world of men and to work for the extension of the kingdom of God, so that by living an exemplary and apostolic life they may be, as it were, a leaven in the community (*GE*, 8).¹⁸

The conciliar Fathers reiterated the relevance of the catholic school: “Since the Catholic school can be of such service in developing the mission of the people of God and in promoting dialogue between the Church and the community at large to the advantage of both,

¹⁸ See also *LG*, 31 above. The declaration quotes PIUS XI, *Christian Education*, p. 30: “It is necessary not only that religious instruction be given to the young at certain fixed times, but also that every other subject taught, be permeated with Christian piety. If this is wanting, if this sacred atmosphere does not pervade and warm the hearts of masters and scholars alike, little good can be expected from any kind of learning, and considerable harm will often be the consequence.” Here Pius XI quotes Leo XIII’s encyclical *Militantis Ecclesiae*, 1 August 1897; English translation. in C. CARLEN, *The Papal Encyclicals 1878-1903*, vol. 2, Wilmington, NC, Consortium Book: McGrath Publishing Company, 1981, pp. 419-423. In a similar vein, Conrad Boffa writes: “it is this Catholic religious spirit, actuating teachers and pupils, manifesting itself in the entire educational system, and bearing the burden of the work of education, that constitutes the essence of the Catholic school. In a true sense of the word, this spirit makes it an *Einheitschule*, because it creates inherent unity: unity of curriculum, union between teacher and pupil, between school and Christian family. It is this very unity which alone can endow education with abiding success” (BOFFA, *Canonical Provisions for Catholic Schools*, p. 99).

it is still of vital importance even in our times” (*GE*, 8).

Having asserted the Church’s right to establish schools of any kind or grade, the declaration reminded parents of their duty to send their children to catholic schools wherever possible, to give such schools all the support that they can, and to cooperate with them in educating their children (*GE*, 8, 9).

4.2.3 – The Declaration and Teachers

On the importance of teachers, the bishops assert unequivocally:

Let teachers realise that to the greatest extent possible, they determine whether the Catholic school can bring its goals and undertakings to fruition. They should, therefore, be trained with particular care so that they may be enriched with both secular and religious knowledge, appropriately certified, and may be equipped with an educational skill which reflects modern-day findings. Bound by charity to one another and to their students, and penetrated by an apostolic spirit, let them give witness to Christ the unique Teacher, by their lives as well as by their teachings” (*GE*, 8).

4.2.4 – Reflections

G. Emmett Carter, introducing the Declaration on Education in Walter M. Abbott’s edition of the conciliar documents, says that the whole concern of the council is with education in one form or another, and this may explain why the declaration broke little new ground. It chose to confine itself to restatements of basic positions in education.¹⁹ In the council’s own words, “the sacred Synod hereby promulgates some fundamental principles concerning Christian education, especially in regard to schools.”²⁰

¹⁹ G.E. CARTER, “Education”, in W.M. ABBOTT, (gen. ed.), *The Documents of Vatican II*, London, Geoffrey Chapman, 1967, pp. 634-635.

²⁰ *GE*, Introduction, in FLANNERY, p. 725.

John C. Bennett, responding to the declaration, commented that the document “does not add to the significance of the council. It is something of a holding operation that keeps alive traditional emphases.”²¹ This statement appears to acknowledge that the council could not always say new things on every subject. The bishops, however, did not intend the declaration to be the last word: in promulgating “some fundamental principles concerning Christian education, especially in regard to schools”, the council stated that, “These principles should be more fully developed by a special post-conciliar commission and should be adapted to the different local circumstances by episcopal conferences.”²²

4.3 – POST CONCILIAR TEACHINGS

“The implementation of the documents and directives of the Second Vatican Council depends in great measure on the direction given to us by official, post-conciliar documents.”²³ Of the post conciliar documents, three of them concerned education; two of them relating specifically to catholic schools. Developing the principles of the Second Vatican Council, the Sacred Congregation for the Clergy issued the General Catechetical Directory in April 1971.²⁴ Twelve years after the closing of the council the Sacred Congregation for Catholic Education sought to develop “the thinking of this declaration, limiting itself to a deeper reflection on the Catholic school.”²⁵ Five years later the same Congregation issued an instruction entitled *Lay Catholics in Schools: Witnesses to Faith*.²⁶

²¹ J.C. BENNETT, “A Response”, in ABBOTT, p. 652.

²² *GE*, Introduction, in FLANNERY, p. 726.

²³ Thus wrote Timothy Cardinal Manning, Archbishop of Los Angeles, in his Foreword to FLANNERY II, p. xxi.

²⁴ See *supra*, chapter three, p. 160, footnote 60.

²⁵ *MD*, 1, FLANNERY II, p. 606.

²⁶ SACRED CONGREGATION FOR CATHOLIC EDUCATION, *Instruction, Lay Catholics in Schools: Witnesses to Faith, Les laïcs Catholiques*, (= *LL*), 15 October 1982, in *La documentation catholique*,

4.3.1 – The Instruction *Catholic Schools: Malgré les déclarations*

Because this document provided also a primary source cited in the *fontes* for the *coetus* which drafted the canons on catholic schools, this section provides a précis of the principal ideas enunciated therein. The Congregation, in appreciation of “diverse situations and legal systems in which the Catholic school has to function in Christian and non-Christian countries”, recommended that “local problems be faced and solved by each church within its own social-cultural context” (*MD*, 2, 68). Addressing all who are responsible for education (*MD*, 4), the Congregation repeated the teaching of Vatican II that evangelisation is the mission of the Church (*MD*, 7).

The document in proclaiming that the Church establishes its own schools “as a privileged means of promoting the formation of the whole person”, sees the school also as “a centre in which a specific concept of the world, of people, and of history is developed and conveyed” (*MD*, 8, 16, 26, 29, 35, 36, 45). Consequently, “The Catholic school forms part of the saving mission of the Church, especially for education in the faith” (*MD*, 9). Thus the Church is “absolutely convinced that Catholic schools perform a vital service for the Church” (*MD*, 15).

Since the school helps its pupils to achieve an integration of faith and culture and faith and life (*MD*, 37, 38, 49, 50), the statement reaffirms the declaration’s position on the importance of teachers. The achievement of the specific aims of a catholic school “depends not so much on the subject matter or the methodology as on the people who work there. The extent to which the Christian message is transmitted through education depends to a large extent on the teachers” (*MD*, 43, 73, 78). At the same time, the document by appreciating the bishop’s role in watching over the orthodoxy of religious instruction and Christian morality in schools, reminds the whole educative community that they have the responsibility “to

ensure that a distinctive Christian educational environment is maintained in practice” (*MD*, 73). Chiefly this responsibility devolves upon the parents who, in entrusting their children to the school, do not abdicate their own responsibilities but co-operate actively with the school in giving the children a christian upbringing (*MD*, 73).

Because Christ is the foundation of the whole educational enterprise, his revelation gives new meaning to life and assists human beings to live according to the Gospel (*MD*, 34): “In him the Catholic school differs from all others which limit themselves to forming men and women.” (*MD*, 47) By contrast a catholic school’s purpose is to form christians (*MD*, 47). Without reference to Christ and his gospel the catholic school loses its purpose (*MD*, 55).

While acknowledging that the proper place for catechesis remains the family, assisted by other Christian communities, especially the parish, the Congregation says that “importance and need for catechetical instruction in Catholic schools cannot be sufficiently emphasised” (*MD*, 51). In the planning and organisation of catholic education the Congregation recalls the principles of collaboration between the hierarchy and those who work in the apostolate. The document, having stated that the assigning of various responsibilities is governed by the principle of subsidiarity, then declares that “ecclesiastical authority respects the competence of the professionals in teaching and education.” Citing the Decree on the Apostolate of Lay People (*MD*, 25), the Congregation affirms that “the right and duty of exercising the apostolate is common to all the faithful, clerical and lay, and lay people have their own proper competence in the building up of the Church” (*MD*, 70).

In conclusion, the above instruction, while not professing to be in any way comprehensive, nevertheless provides a review of the principal ideas of the Congregation. Later in this chapter we will address some important sections omitted from the declaration.²⁷

²⁷ Of the three canons on Catholic education and the eleven canons on Catholic schools, cc. 793, §2, 796, §2, 798, 800, §2, 801, 803, §1, §2, and 804, §1, §2, draw directly on the document *Catholic*

4.4 – CATHOLIC SCHOOLS AND THE 1983 CODE OF CANON LAW

4.4.1 – Some Reactions to the 1983 Code of Canon Law in Light of the Drafting Process

When the CLSA Task Force submitted its Preliminary Report on the Draft of Canons on the Church's Teaching Office, it considered that "despite its many significant improvements over the present law" the present text "must be judged uneven, inadequate, and not ready for promulgation."²⁸ In short, "It is simply not good enough for the People of God."²⁹ The Task Force considered the deficiencies of the *schema* under two main concerns: the first related to a lack of recognition of the laity and the second to what it called "the excessive attempts at 'thought control' in the Church."³⁰ The Task Force members commented further that while "the faithful, lay men and women, are mentioned several times in relationship to various teaching functions, they are almost certainly always called upon to share in something which is clearly conceived as of the primary responsibility of the

Schools.

²⁸ CANON LAW SOCIETY OF AMERICA, *Task Force for the Revision of the Code of Canon Law. Task Force Critiques of the Initial Draft Schemata for the Revision of the Code*, (1978), "Preliminary on the Draft of Canons of the Church's Teaching Office" (= *Initial Schemata*), [various pagings], Washington, DC, Canon Law Society of America, 1978, pp. 1-2.

²⁹ The CLSA Task Force noted that the most recently revised version of the *Lex Ecclesiae fundamentalis* had not been circulated so that the "necessary comparison cannot be made accurately." The Canon Law Society of Great Britain and Ireland, in submitting its Report on the *Schema*, was similarly critical: "There are, however, serious deficiencies to which attention must be drawn. The first concerns what can only be described as a serious ambivalence in respect of the *Lex Ecclesiae Fundamentalis*. Quite apart from the fact that this underlines once again the present very unsatisfactory position arising from the absence of even a current official draft text of the LEF – and therefore the practical impossibility of making other than provisional comment on a *Schema* which would appear to have been unable clearly to determine where it stands vis-a-vis any LEF" (CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND, *Report on the Schema canonum libri III. De Ecclesiae Munere Docendi*, October 1978, London, The Society, 1978, p. 4).

³⁰ *Initial Schemata*, p. 3.

hierarchy.” In brief, the Task Force criticised the *schema* for failing to recognise the rights of the faithful to participate in the prophetic office. It said, moreover, that this *lacuna* does not present the vision of *Lumen gentium* which proclaims that the People of God share in Christ’s prophetic office.³¹ Thus the Task Force concluded that, “The vision which emerges from the proposed canons is the old twofold church: *docens* and *discens*.”³² Rather than the division of bishops and laity who share in their office, John Paul II, in promulgating the Code, proclaimed that among other elements expressing an authentic image of the Church was “the further teaching that portrays the Church as a communion”.³³ Similarly, Francis G. Morrisey wrote, “The overriding doctrinal principle on which the law is founded is that the Church is

³¹ Listed among the elements expressing a true and authentic image of the Church, John Paul II listed specifically “the teaching by which all members of the People of God share, each in their own measure, in the threefold priestly, prophetic and kingly office of Christ, with which teaching is associated also that which looks to the duties and rights of Christ’s faithful and specifically the laity” (JOHN PAUL II, *Sacrae disciplinae leges*, p. xiv).

³² Initial *Schemata*, p. 3. Örsy asks what is the meaning of the distinction between the teaching Church and the Church taught – *ecclesia docens* and *ecclesia discens*? By way of reply, he says “Its correct meaning is certainly not that there are two distinct groups of Christians, one doing the instructing, the other the learning.” Rather the whole Church without exception, is a learning Church. Each and every person in it has a calling to proclaim the word. So while revelation is the possession of the whole Church, God has provided for two necessities: first, the Church must continue to grow in its understanding of the Word, but, secondly, the Word has to be safeguarded in the process. The bishops have a specific role: “The bishops are the custodians (not exclusive possessors) of the Word.” Should diverse opinions arise which would threaten communion, bishops have the capacity to bring a judgment in the Spirit: it may not be inspired, but it will not fail in truth either. See L. ÖRSY, *The Church: Learning and Teaching*, Collegeville, MN, The Liturgical Press, 1992, pp. 39, 45. Michael Himes proposes that the division of the community into an *ecclesia docens* and a numerically much larger *ecclesia discens* has been quietly abandoned. He agrees with Örsy that the responsibility to be teachers of faith applies to all members of the Church in their various callings. However, this is not the same as saying that magisterium within the Church is exercised by all in the same manner or in the same degree. Nor does it deny the magisterial role of the hierarchy. See M. HIMES, “The Ecclesiological Significance of the Reception of Doctrine”, in *The Heythrop Journal*, 33 (1992), p. 155. For further references, see R.M. GULA, *What are They Saying about Moral Norms?*, New York, Paulist Press, 1982, p. 27, footnotes 11 and 12.

³³ JOHN PAUL II, *Sacrae disciplinae leges*, p. xiv.

a communion (*Lumen gentium*, no. 13), the People of God.”³⁴ Later, the final report of the 1985 Assembly of the Synod of Bishops said that “The ecclesiology of communion is the central and fundamental idea of the council’s documents.”³⁵ Despite the insight of Vatican II that among the People of God there is a diversity of service but a unity of purpose which is expressed in communion, its practical expression in juridical terms appears to remain at present, juridically imprecise.³⁶

Turning its attention to what it considers the second major fault of the *schema*, the Task Force opines that there is “a paternalistic preoccupation with the control of Catholic teaching and discourse at every level. It is pervasive and consistent.” Among the examples it chooses is that the teaching of the catholic religion in any school is subject to the Episcopal Conference and the local bishop (*schema* c. 55); the local bishop has the right to approve or remove teachers of religion (*schema* c. 56); and the use of the name “Catholic” is reserved

³⁴ F.G. MORRISEY, “The Laity in the New Code of Canon Law”, in J.F. HITE, G.J. SESTO, and D.J. WARD (eds), *Readings, Cases, Materials in Canon Law*, Collegeville, MN, The Liturgical Press, 1990, p. 323. The article appeared originally in *Studia canonica*, 17 (1983), pp. 136-170.

³⁵ THE SYNOD OF BISHOPS, “A Message to the People of God”, from the Extraordinary Synod of Bishops, in *Origins*, vol. 15, no. 27, (December 19, 1985), p. 448.

³⁶ James H. Provost comments accordingly: “The revised code attempts to take seriously the sense of Church as a communion, a bonding together of people in the Lord and with one another at various levels of their Church experience. Many of the structures of the old code are still there, but the attempt has been made to address them in a new context” (J.H. PROVOST, “Approaching the Revised Code”, in PFNAUSCH, *Code, Community, Ministry*, p. 13). Bishop James Malone, of Youngstown, Ohio, offers a further insight into the nature of communion. Addressing the annual meeting of the Association of Catholic Colleges and Universities (ACCU), he said: “I was particularly helped by one analysis which gave me an insight about *communio*. The analysis pointed out that the popular understanding of *communio* presumes that the word *communio* is a combination of the words *common* and *unity*, with the emphasis on unity rather than on commonality. This is said to be the usual understanding of *communio*. But then this analysis went on to propose that the real root of *communio* is not *unio* (union) but rather the root is *munus* (office, function, or duty): *com-munus*. The focus is shared responsibility, shared duties, *com-munis*” in *Origins*, vol. 24, no. 35, (February 16, 1995), p. 591.

to the Holy See or Episcopal Conference.³⁷ In the end the Task Force considers that the provisions are objectionable, not because of their concern for the integrity of the faith and the protection of the christian faithful, but because among other things, they are anachronistically inapplicable.³⁸

When the Canon Law Society of Great Britain and Ireland considered the *schema*, they called for a greater attention to the principle of subsidiarity than the *schema* gave. Without citing particular canons, the Society observed, “The exercise of the *munus docendi* in particular is necessarily such that it must take account of a great variety of local cultural circumstances, needs, and opportunities [...] .” The Society believed that the catering for this ought to be left to episcopal conferences or, if appropriate, to the local bishop. It concluded the section by saying, “It is suggested that the Schema be re-examined in this light.”³⁹ In the Society’s opinion, “A further deficiency concerns the very considerable number of canons which are merely exhortatory – many of them being simple repetitions of conciliar documents.” The Society asserted that “Such canons are not law and their presence in a legal Code must only reduce its impact.”⁴⁰

³⁷ *Initial Schema*, p. 4. Schema c. 55 becomes c. 804, §1. *Schema* c. 56 becomes c. 805. (The new Code omits the *schema* reference to interdiocesan schools under the conference of bishops.) *Schema* c. 59 on the use of the word “catholic” becomes c. 808. Its application to schools is c. 803, §3.

³⁸ *Initial Schema*, p. 6. The Task Force then touches on a critical notion – that of expressing in law the teaching of the Church: “The church has a legitimate and authentic concern for the ‘stewardship of the mysteries’ and the propagation of the truth of the gospel, and it must develop effective disciplinary means to express that concern.” John Paul II would also touch on the difficulty when he promulgated the 1983 Code: “If it is impossible perfectly to transpose the image of the Church described by conciliar doctrine into canonical language, nevertheless the Code must always be related to that image as its primary pattern, whose outlines, given its nature, the Code must express as far as possible” (JOHN PAUL II, *Sacrae disciplinae leges*, p. xiv).

³⁹ CLSGBI, *Report on the Schema*, p. 4.

⁴⁰ *Ibid.*

Despite the criticisms cited above, most of the canons in the *schema* relating to catholic education and catholic schools arrived in the new Code with little or no amendments.⁴¹ Treating the canons of Title III on Catholic Education in the new Code, John P. Boyle, having noted that most of the canons have no antecedents in the old Code declared that “This chapter is another in a long series of protests by the Church in the 19th and 20th centuries against the monopoly on education claimed by the modern State.”⁴² Earlier, the Task Force discussing the opening canon of the draft, had said: “The canons which all follow assume that *Ecclesia* here means *hierarchia*.” Boyle takes up the same point when discussing schools:

Canon 800 asserts the right of the *Church* (which in this context seems to mean the institution or the hierarchy) to establish and to oversee schools in any discipline at any level. Section two of the same canon exhorts the *faithful* to favour such schools by supporting their establishment and maintenance. The formulation of the canon better reflects the way in which the debate with the modern state has been carried on than the ecclesiology of *Lumen gentium*.⁴³

⁴¹ As mentioned in chapter three discussing c. 803, some canons did not appear in the draft *schema*. See also c. 800, §2; c. 801.

⁴² J.P. BOYLE, “Church Teaching Authority in the 1983 Code”, in HITE, *Readings, Cases, Materials in Canon Law*, p. 354. The article appeared first in *The Jurist*, 45 (1985), pp. 136-170. Barbara Anne Cusack by contrast, observes that, “In terms of the 1917 code, four of these canons are new inclusions, six are modifications of the old law with either serious changes or only minor changes or expansions; only one canon appears to be a mere rewording of its predecessor from the 1917 code” (B.A. CUSACK, *A Study of the Relationship of the Diocesan Bishop and Catholic Schools Below the Level of Higher Education in the United States*, Canon Law Studies no. 525, Washington, DC, The Catholic University of America, 1998, p. 142. In a footnote she continues: “New canons appear as cc. 796, 797, 799, 801; those with minor modification or expansion, cc. 800, 802, 804, 806; those with more extensive modification, cc. 798, 803; c. 805 appears to have undergone only a rewording from the previous law.”

⁴³ BOYLE, “Church Teaching”, p. 354. In regard to c. 800, Cusack notes that the canon does not specify the meaning of “the Church” here. Questioning to whom this right refers – the People of God, the hierarchy, those approved for such action by the hierarchy – she offers three possible interpretations. First, “If the establishment of schools is an expression of the Church’s general right to educate as a fulfilment of the mission entrusted by Christ, then it is a right accorded to the whole Church, the People of God in general. It could be said that, in keeping with their primary right and

Continuing his discussion, Boyle proposes that the right of the bishop to supervise the teaching of religion and the designation of teachers of religion (c. 804) is an indicator of problems faced by the Church elsewhere. He considers that, "Throughout the title there is a remarkable emphasis on hierarchical control of teaching." Doubting that "this emphasis can be explained entirely as a reflection of the Church's determination to maintain the independence of its schools in pressures from the state", he interprets it as a "mechanism of control." Further mechanisms consist in reserving the use of the name "Catholic" to a church authority and the nomination or removal of teachers of religion. Thus, he argues, the academic world perceives these mechanisms of control more as threats of manipulation than defenses against governmental pressure."⁴⁴

In summary, Boyle says that, "The new Code of Canon Law represents something of a puzzle. It reflects at important points the inconsistencies of the underlying conciliar documents and of the period of implementation which has followed the council."⁴⁵ Perhaps nowhere is this more clear than in the canons on catholic schools. If one is to take into account the earlier discussion on the conciliar principle, or respond to Paul VI's *novus habitus mentis*, or John Paul II's "newness" in the Code, then the eleven canons on catholic schools represent a true challenge. A study of the *fontes* shows that the canons draw heavily

obligation to educate their children, parents as members of the People of God could establish and supervise schools and have this action be an exercise of this right of the Church. Or it could be asserted that the founding and supervision of schools would be an expression of the right of the Christian faithful as a whole to undertake apostolic activity as expressed in canon 216 [...] ." Acknowledging that the establishment and supervision of schools is controlled in various ways either directly or indirectly by the diocesan bishop, "it could be claimed that the right of 'the Church' to establish schools refers to a right of the hierarchy." Finally, Cusack proffers a third possible interpretation: the right of founding and supervising schools as an expression of the mission of the Church as the People of God. This right, she says, is exercised with a view to the common good. In its exercise "the right rests with the People of God with due respect for the special moderating role of the bishop" (CUSACK, *The Diocesan Bishop and Catholic Schools*, pp. 151-153).

⁴⁴ BOYLE, "Church Teaching", pp. 354-356.

⁴⁵ Ibid, pp. 358-359.

upon the declaration, *Gravissimum educationis*, which in its turn relies upon Pius XI's *Christian Education*; this encyclical reaches back to the teachings of Pius IX and Leo XIII. Six of the eleven canons in the 1983 Code cite the 1917 Code as their *fontes*, these 1917 canons deriving principally from papal declarations during the 19th and early 20th centuries. The challenge for the canonist interpreting this section of the Code seems to be how he or she might bring a new attitude of mind to bear on the interpretation of many canons whose origins derive from ecclesiastical reactions to specific difficulties in the late 19th early 20th centuries. There appears to be a sense in which the canons look backwards rather than forwards. Furthermore, the difficulty intensifies when, as mentioned above, the canons look like merely exhortatory canons.

McIntyre describes the tension thus: "In certain respects, the new Code seems to have one foot in Vatican I and another in Vatican II. Understandably, the posture occasions a certain awkwardness, which shows up from time to time in our foundational canons. It shows up in the tensions between hierarchy and subsidiarity."⁴⁶ To conclude, the comments of John A. Alesandro sum up the difficulties within Book III, including the canons on catholic schools:

In general, Book III combines the old with the new. It depends significantly on the conciliar decrees, and yet it draws many of its texts from the canonical tradition. At times, this results more in a juxtaposition of canons than in their integration, but the intent of the legislation is clearly to harmonize the norms. This desired harmony should be kept in mind when interpreting the canons.⁴⁷

4.5 – "CATHOLIC EDUCATION"

At this juncture, it becomes appropriate to investigate what "catholic education"

⁴⁶ J. MCINTYRE, *The Law of Persons*, (cc. 204-297), Class Notes for the Private Use of Students, Ottawa, Faculty of Canon Law, Saint Paul University, 1994-1995, p. 96.

⁴⁷ J.A. ALESANDRO, "General Introduction", in *CLSA Commentary*, p.17.

might mean. A comparison of the various conciliar and post-conciliar documents reveals that the term appears to be used interchangeably with christian education, including religious education, religious instruction, christian formation, christian doctrine, doctrinal instruction, religious formation, and education in faith, among others.⁴⁸

The submissions made by the New Zealand Catholic Education Council before the Education Commission in 1960 described catholic education this way:

Although the Catholic system agrees that education must prepare the individual to live as a member of society, he refuses to stop short at this being the final aim.

The aim of education is twofold: To prepare the individual for this life and also for the next. Each of these two must be attended to, but they must not be treated as two separate entities, for they are closely related parts of a whole. Life is viewed as a whole; for it is through the activities of this life that man attains his final end. The purpose of education is to fit men and women for life, and the purpose of life is to fit them for eternity.

It follows for Catholics that no valid distinction can be made between what is fitting as preparation for this life and for the hereafter [...] . Religion can therefore not be set apart to be treated as one subject among others which the child must be taught; it must rather be looked upon as the "integrating and all-pervading factor" which illuminates all facets of knowledge by bringing them into a spiritual focus.⁴⁹

⁴⁸ For example, christian education (*GE*, 1; *MD*, 1, 2, 19, 40; *AN*, 8; *MD*, 73, 84); religious education (*GE*, 7; *LL*, 56, 58); christian formation (*GE*, 7; *MD*, 45); christian doctrine (*LG*, 41; *CD*, 13; *GE*, 7); catholic education (*MD*, 58; *ML*, 70, 91); religious instruction (*LL*, 56; *AN*, 19; JOHN PAUL II, Apostolic Exhortation, Catechesis for our Time, *Catechesi tradendae* (= *CT*), 16 October 1979, in *AAS*, 71 (1979), 69; English translation in FLANNERY II; religious formation (*LL*, 60, 62); education in faith (*MD*, 9; *AN*, 91); apostolic education (*AA*, 30). These examples are by no means exhaustive.

⁴⁹ *Report of the Commission*, pp. 835-836. "[...] it must never be forgotten that the subject of Christian education is man whole and entire, soul united to body in unity of nature, with all his faculties natural and supernatural, such as right reason and revelation show him to be" (PIUS XI, *Christian Education*, p. 23).

The Sacred Congregation for Catholic Education reiterated this integrated or holistic approach to education, when it declared that the catholic school is committed to the development of the whole person (*MD*, 35). Thus the task of the catholic school “is fundamentally a synthesis of culture and faith, a synthesis of faith and life; the first is reached by integrating all the different aspects of human knowledge through the subjects taught, in the light of the Gospel; the second, in the growth of the virtues characteristic of the Christian” (*MD*, 37).

In the light of the faithful’s baptismal call to lead a life in harmony with the gospel, c. 217 asserts that the faithful have a right to a christian education which enables them to reach maturity and live out the mystery of salvation. Aidan McGrath, in interpreting the canon, says that it “refers to christian education in its widest sense. This is a much broader concept than the education of children or even than catholic education as legislated for in Cann. 793-821.”⁵⁰ McGrath continues:

The goal of education is twofold: the maturity of the human person, and the knowledge and living of the mystery of salvation. Neither can be separated from the other. The precise nature and form of this education will vary according to the needs of each individual and the level of growth which he or she has attained.⁵¹

Citing Ghirlanda, McIntyre observes that c. 217 is fundamentally connected with the vocation to holiness (c. 210). Furthermore, it represents another aspect to spiritual formation (c. 214). Developing the idea, McIntyre writes:

⁵⁰ A. MCGRATH, “Christ’s Faithful”, in SHEEHY, *The Canon Law. Letter & Spirit*, p. 123.

⁵¹ *Ibid.* Provost notes that while the specific wording of c. 217 is not traceable to any particular conciliar text, nonetheless it draws on several Vatican II statements. See J.H. PROVOST, “The Obligations and Rights of All the Christian Faithful” in *CLSA Commentary*, p. 151. See also *GE*, 1, 2; VATICAN COUNCIL II, *Pastoral Constitution on the Church in the Modern World, Gaudium et spes* (= *GS*), 7 December 1965, in *AAS*, 58 (1966), 16, 19; English translation in FLANNERY; *AA*, 30; The wording of c. 217 comes from the *Lex ecclesiae fundamentalis*, 17 §1.

In addition to spirituality (*la formation*), the injunction to holiness requires learning (*la scolarité*) as well. In English, we merge both aspects under the word “education” but the European tradition distinguishes between *die Bildung* or informal training and *die Erziehung* which has to do with schooling. The distinction turns on the difference between formation (c. 214) and information (c. 217).⁵²

McIntyre considers that the canon recognises the right to a christian education (in contrast to a catholic one discussed in Book III). In regard to the canons of Book III concerning catholic education, José González Maria del Valle similarly notes that there are two aspects to education, whether secular or religious: education, which is directed towards the systematic learning of a branch of knowledge; and formation, which is the instilling of standards of behaviour and action. Formation is directed toward the person as an individual as distinct from a group or class and is intended directly for the practice of religion. Hence, “Religious formation, as opposed to religious education is intended directly for the practice of religion.” As such, it becomes primarily the responsibility of the parents. They may, however, avail themselves of the religious assistance that is available in schools.⁵³

Kenneth W. Schmidt, in considering the way the 1983 Code uses the word “education”, offers the following opinion:

The 1983 Code of Canon Law uses the Latin term *educatio* in an equivocal manner. Sometimes, following the common secular understanding, the term indicates formal instruction and teaching (c. 796, §1). At other times the expression specifies Christian or Catholic education (c. 794, §1). Finally, the term conveys the notion of personal growth and formation which encompasses all the facets of human development. Canon 795 contains all

⁵² MCINTYRE, *The Law of Persons*, (cc. 204-297), p. 42. See also H.H. BUETOW, *The Catholic School: Its Roots, Identity and Future*, New York, Crossroad Publishing, 1988, p. 7.

⁵³ See J.M. GONZÁLEZ DEL VALLE, “Catholic Education”, in CAPARROS, *Code of Canon Law Annotated*, pp. 519-520.

three meanings in its description of education.⁵⁴

James H. Provost, comparing the right to a christian education enunciated in c. 217 with the obligations of Book III concerning catholic education, considers that the difference seems to be that in dealing particularly with parental obligations, “the Code is concerned that the education of children embrace all the elements necessary to embrace full communion in the Church, whereas the overall right applies to deepening any Christian’s communion and commitment to Christ.”⁵⁵ He also concludes that as such, c. 217 has a broader scope.⁵⁶

Hence, the various appreciations of education discussed previously encompass evangelisation, – the process of implanting the faith for the first time, thereby securing the acceptance of the word of God (*AN*, 17)⁵⁷ – and catechesis. As mentioned earlier the function of catechesis “is to develop in someone a living, explicit and active faith, enlightened by

⁵⁴ K.W. SCHMIDT, “‘The Raising of Children’ as an Essential Element of Marriage”, in *Canon Law Society of America. Proceedings of the Fifty-Ninth Annual Convention, October 13-16, 1997*, La Jolla, California, Washington, DC, The Canon Law Society of America, 1997, p. 223.

⁵⁵ J.H. PROVOST, “The People of God”, in *CLSA Commentary*, p. 151.

⁵⁶ In the end, the distinction between the aims of christian education and catholic education appears to turn on c. 205 which admits of various degrees of *communio*. Thus catholic education orients itself to those who are in full communion. Despite the opinions cited in the preceding pages, the discussions of the *coetus de magisterio ecclesiastico* appear to indicate that as far as the *coetus* was concerned, the terms “christian” and “catholic” were univocal; certainly it had little difficulty substituting one for another while drawing on the same source. The title of Book III, title III changed from *De scholis*, to *De educatione Christiana*, eventually arriving as *De educatione catholica*. See L. ROBITAILLE, *Christian Formation, Class Notes for the Private Use of Students*, Ottawa, Faculty of Canon Law, Saint Paul University, 1995-1996, pp. 106-107, *infra*, Appendix 5. Canon 205 derives from Saint Robert Bellarmine; see R. BELLARMINE, *Opera omnia*, Ex editione veneta. Pluribus tum additis tum correctis, iterum edidit Justinus Fèvre, “De conciliis III, cap II”, Paris, apud Ludovicum Vivès, 1870, vol. 2, pp. 317-318.

⁵⁷ See *CD*, 11, 13; *AG*, 6, 13. For a more complete analysis of the relationship of evangelisation to catechesis see *AN*, 17-19; For a full exposition of the meaning of evangelisation see PAUL VI, *Evangelization in the Modern World*, in *FLANNERY II*, pp. 711-761.

doctrine" (*CD*, 14; *AN*, 17).⁵⁸ Frequently, however, it is aimed at people who, although they belong to the Church, have never given personal commitment to the revealed message: "This shows that in certain circumstances evangelisation can precede or accompany catechesis as such. In all cases, however, it must be born in mind that conversion is always part of the dynamism of faith and that every form of catechesis must involve evangelisation" (*AN* 18). In regard to the school, the pope says that the school provides catechesis with possibilities that are not to be neglected. Furthermore, "The special character of the Catholic school, the underlying reasons for it, the reasons why Catholic parents should prefer it, is precisely the quality of the religious instruction integrated into the education of the pupils" (*CT*, 69).⁵⁹

4.6. – CATHOLIC EDUCATION WITHIN PRIMARY AND SECONDARY SCHOOLS IN NEW ZEALAND

4.6.1 – The Religious Education Curriculum⁶⁰ in Catholic Primary Schools

Describing education-in-faith as a "broad umbrella term for the lifelong process of each person's faith journey" which includes evangelisation, catechesis, and religious education, the *Curriculum Statement* acknowledges that the three dimensions are complementary, "taking place within the total framework of the faith community: in school,

⁵⁸ In defining catechesis, John Paul II quotes Paul VI, *AN*, 17-35. John Paul II treats catechesis at length in *CT*. English translation in FLANNERY II, pp. 762-814. A revision of *AN* appears as CONGREGATION FOR THE CLERGY, *General Directory for Catechesis* (= *GDC*), Washington, DC, United States Catholic Conference, 1998. See also c. 773.

⁵⁹ See *GDC*, 259-260. The Congregation for the Clergy declares that "Special consideration is given to the relationship between catechesis and the teaching of religion in school, since both activities are profoundly interconnected, and, together with education in the Christian home, are basic to the formation of children and young people" (*GDC*, 60).

⁶⁰ NATIONAL CENTRE FOR RELIGIOUS STUDIES (= NCRS), *Curriculum Statement*, Wellington, New Zealand, National Centre for Religious Studies, 1997.

parish, family and beyond.’⁶¹ Recognising that several approaches can be taken when teaching religion to children, the curriculum opts for a “religious education” approach. It defines religious education in the catholic primary classroom as follows:

Religious Education in the Catholic primary classroom encompasses:

- teaching and learning what the Catholic Church believes and teaches.
- understanding and appreciating the ways the Catholic Church celebrates, lives and prays.
- teaching children how to respond freely to God according to their gift of faith.⁶²

Since children in catholic schools have different experiences of the Church, the *Curriculum Statement* proffers a quotation to show how the religious education approach meets the different needs of children:

‘Religious Education is education in, for, and about religion’

- For children who are actively part of the Catholic community – Religious education will educate them in or within their religion.
- For children who are not yet active or part of a community – Religious Education will prepare them for the time they will commit themselves to religion.
- For children who will never make a commitment to religion – Religious Education will teach them about religion so they will understand how it affects the lives of committed believers.⁶³

We discussed earlier that one of the effects of the shift in administration was, in some instances, to dislocate the primary school from the parish. We shall return to the relationship

⁶¹ Ibid., p. 6. For an expression of the interrelatedness of the home, school, and parish in the educational process, see Appendix 6A.

⁶² NCRS, *Curriculum Statement*, p. 15.

⁶³ Ibid. See P. MALONE and M. RYAN, *Sound the Trumpet*, Wentworth Falls, NSW, Australia, Social Science Press, 1994, p. 79.

of the school to the parish later in this section. Meantime, the *Curriculum Statement* indicates that in the life-long process of education-in-faith, many people and groups have a formative role: the child itself, the family, the teacher, the school community, the parish, and the diocese. (See Appendix 6B.)

4.6.2 – The New Zealand Secondary Religious Education Syllabus

When the National Secondary Working Party met in March 1986, “They saw the need for a ‘religious education’ approach rather than the ‘catechetical approach’ which prevailed at the time.”⁶⁴ Consequently, the *Syllabus* also describes education-in-faith as a broad umbrella-term which includes evangelisation, catechesis, and religious education.⁶⁵ In the light of the above, the NCRS sees the rationale of the syllabus from this perspective:

IN THE CATHOLIC SECONDARY RELIGION CLASSROOM THE MAJOR TASK OF THE TEACHER IS RELIGIOUS EDUCATION

This is **NOT** to say that evangelisation or catechesis do not sometimes take place in the Religious Education classroom. It is rather that the aim and approach of the teacher is geared directly to fostering thought about religion. This classroom focus on knowledge and understanding of the Catholic faith tradition, of other religions and of contemporary religious issues, may in turn help towards promoting conversion (evangelisation) or sharing and deepening

⁶⁴ NATIONAL CENTRE FOR RELIGIOUS STUDIES, *Understanding Faith. Religious Education in the Catholic Secondary School, Syllabus Document, Form 3-7*, Authorised by the NZCBC, Auckland, National Centre for Religious Studies, 1991, p. 8.

⁶⁵ See NZCBC, *We Live and Teach Christ Jesus: Guidelines for Living and Teaching Faith in Church in New Zealand: New Zealand Catechetical Directory*, Wellington, The Conference, 1974, n. 1. The *Syllabus* acknowledges that these three dimensions of education-in-faith are complementary, taking place within the total context of the catholic secondary school. Practically this means that the treatment of each of these aspects may be more appropriate in some situations than in others: “Catechesis and Evangelisation occur within the total fabric of the life of the School and at times in the classroom, but in timetabled Religious Education classes, it will be religious education that is stressed” (NCRS, *Syllabus*, p. 12).

faith (catechesis).⁶⁶

In conclusion, A. Purnell succinctly describes the correlation between religious/catholic education/formation-in-faith (or corresponding terms used by the council Fathers and Congregations), evangelisation, and catechesis as follows:

[...] in a school setting [...] the pupils range over a whole spectrum of commitment: some will come from very committed Christian Catholic families and some may be themselves; others, the exact opposite. When, therefore religious education is presented to the pupils of such wide-ranging commitment, it will be received in different ways; some will receive it as "catechesis", some may be evangelised by it, while others will simply hear it as religious education.⁶⁷

To sum up, in the preceding pages we have attempted to present succinctly the various conciliar and post-conciliar teachings that impinge on an understanding of the role of the catholic school along with a practical application of these teachings in the New Zealand catholic school context. In the intervening years between the promulgation of the 1983 Code of Canon Law and the present time, the pope and the Congregations have continued to issue further documents that deal with the topics discussed hitherto. We will meet these documents in due course.

4.7 – FURTHER TEACHINGS ON CATHOLIC SCHOOLS

In October 1982, the Sacred Congregation for Catholic Education issued another

⁶⁶ Ibid. The *Syllabus* then declares that "A vital point in all this is the need to recognise that the students in a class may vary markedly in their background in the faith and in their level of commitment. This freedom must be respected."

⁶⁷ A. PURNELL, *Our Faith Story. Telling It and Sharing It*, London, Collins Liturgical Publications, 1985, p. 74. Despite the distinctions made above between evangelisation, catechesis, education, and formation, the Congregation for Clergy reminds us that: "Nevertheless in pastoral practice it is not always easy to define the boundaries of these activities" (*GDC*, 62).

instruction, *Lay Catholics in Schools: Witnesses to Faith*⁶⁸ – in essence a rework of previous teachings. Acknowledging that lay catholics have become more and more vitally important in schools in recent years (LL, 1) the Congregation repeated that it is “lay teachers, and indeed all lay persons, believers or not, who will substantially determine whether or not a school accomplishes its objective” (LL, 1). The document reiterated several of the themes that we have observed in previous conciliar and post-conciliar teachings: the power of witness (LL, 5, 9); the laity’s sharing in the priestly, prophetic and kingly functions of Christ (LL, 6); the laity’s commissioning by Christ himself (LL, 6); and the call to holiness in order to sanctify the world (LL, 7).

As to the school itself, the Congregation reaffirmed the parents as “first and foremost educators” while “the school has a value and an importance that are fundamental” among the means which will assist the parents (LL, 12); the school is society’s response to the right of each individual to an education (LL, 13); the lay catholic exercises a role of evangelisation not only in the catholic school but in all the different schools (LL, 14). In n. 24, the document drawing on nn. 15-23 defined a lay catholic educator as:

a person who exercises a specific mission within the Church by living, in faith, a secular vocation in the communitarian structure of the school: with the best possible professional qualifications, with an apostolic intention inspired by faith, for the integral formation of the human person, in a communication of culture, in an exercise of that pedagogy which will give emphasis to direct and personal contact with students, giving spiritual inspiration to the educational community of which he or she is a member, as well as to all the different persons related to that community.

It is to such that the Church entrusts the school’s educational efforts in the belief that lay teachers have the conviction that “they share in the sanctifying and therefore educational mission of the Church: they cannot regard themselves as cut off from the ecclesial complex” (LL, 24).

⁶⁸ See *supra*, p. 215, footnote 26.

In the second chapter, “Living One’s Personal Identity”, the Congregation, having repeated the Declaration by saying that education concerns a synthesis between faith and culture and between faith and life (*LL*, 29-31), states the importance of witness: “Conduct is always more important than speech [...] The more completely an educator can give concrete witness to the model of the ideal person that is being presented to the students, the more this ideal will be believed and imitated” (*LL*, 32). Noting the “real impoverishment” that will arise with the depletion of priests and religious from catholic schools, the Congregation acknowledged that for the immediate future in many countries the continued existence of Catholic schools will depend upon the laity (*LL*, 45). Under these circumstances, bishops will entrust schools to competent laity (*LL*, 46). It is religious instruction, religious education, that is the important instrument for bringing about the synthesis of faith and culture mentioned above. In this regard, the teaching of religion, as distinct from and at the same time complementary to catechesis properly so called, ought to be part of every school curriculum (*LL*, 56).⁶⁹

Chapter III treats of the formation and updating that the laity need to give witness to the faith in the school (*LL*, 60-70). The final chapter considers the support that the teachers need; this may be found first in the teacher’s own faith (*LL*, 72) and second in the community (*LL*, 73). Finally, the document considers the support of the school by families (*LL*, 80) and ends on a hopeful note as it considers the evangelical potential of millions of lay Catholics.

⁶⁹ This distinction, cited by the document as coming from JOHN PAUL II, Discourse to the Clerics of Rome Concerning the Teachings of Religion and Catechesis, 5 March 1981, *Insegnamenti di Giovanni Paolo II*, 1981, IV, 1, n. 3, p. 630, would be taken up in subsequent documents: see *RD*, 70; *GDC*, 73.

4.8 – THE CATHOLIC SCHOOL IN NEW ZEALAND IN THE LIGHT OF CONCILIAR AND POST-CONCILIAR TEACHING

4.8.1 – The Role of the Laity

Relative to primary schools, in the previous chapter we outlined the gradual breaking down of the management-powers of the parish priest in the domain of education, a capacity that the parish priest exercised since the inception of catholic schools in New Zealand. Furthermore, we explained how the parish priest forfeited his right to administer the school.⁷⁰ Again, we have seen that with the reception and management of government grants, the laity became more and more responsible for the management of the schools. The shift in clerical control was, perhaps, less observable in the secondary school arena. With the integration of each parochial school, however, the dislocation from the past was complete.

But integration had another effect, whether it was appreciated or not at the time by the People of God at large, and that was that it precipitated the New Zealand Church, at least in the realm of education, more closely into the vision of Church proclaimed by Vatican II. Integration introduced the catholic school system into a partnership with the state and the state's way of doing things. On the one hand, while many of the principles that came by way of this partnership may be said to be secular, on the other hand many of them may be seen to

⁷⁰ Coriden in this regard observes that rights in the Church “must be understood in a qualified, non-absolute sense” J.A. CORIDEN, “The Rights of Parishes”, in *Studia canonica*, 28 (1994), p. 295. Moreover, in exercising their rights the christian faithful must take into account the common good of the church (c. 223, §1). Discussing parochial rights and duties prior to the council, Coriden states that, “Parochial rights and duties nearly always referred to the rights and duties of the pastor” (ibid., p. 308). While the changes in education in New Zealand led to the relinquishment of the parish priest's right to administer the school, nevertheless such changes brought about a clearer acknowledgment of the rights of the lay faithful. In the handing over to the laity of a significant portion of school administration, for example, one sees clearly the exercise of another important conciliar principle – the principle of subsidiarity. Thus “Parents and pastors and all the Christian faithful share responsibility for the Church's educational efforts [...] . The role of sponsorship and support are congregational as well as individual.” Ibid., p. 305. In this regard, we note that the parish priest's right (*jus in re*) to administer the school is not an absolute right but a right relative to the common good.

have been promulgated by the Second Vatican Council.⁷¹

By virtue of this symbiosis, we can can rightly argue that integration brought about a model of Church, at least in regard to catholic education, more in keeping with the teachings of the council than had previously existed.⁷² Not everyone, however, saw integration this way. A review of the debates and discussions leading up to and following the passing of the *PSCIA 1975* shows that concerns about integration fell into two main categories: the first involved the bishop's loss of power in regard to his perceived role in the school; and the second concerned the preservation of the special character in the long term.

Concerning the first, given the involvement of the bishop in catholic school system since 1838, it comes as no surprise that when observers examined what the role of the bishop might be in an integrated school, many expected the bishop to have the same profile as he had in the past; or at least, the same rights in regard to a catholic school if he chose to exercise them. Spencer, assessing the implication of the strategy following 1877, observes: "The leadership never asked whether it was necessary to have Church control in order to secure Catholic religious influence."⁷³ This tension was debated again and again following the passing of the *PSCIA 1975*. Thus in representative quotes the *Tablet* would say:

⁷¹ Concerning business enterprises, the bishops of Vatican II taught that, "[...] it is persons who associate together [...] . Therefore, while taking into account the role of every person concerned – owners, employers, management, and employees – and without weakening the necessary executive unity, the active participation of everybody in administration is to be encouraged" (*GS*, 68).

⁷² Simmons, in describing the early 20th century parish, presents a model which persisted until integration: "In the parishes [...] the accent on clergy and religious in the pattern of ecclesiastical life had an effect on the lay people. From being competent and equal partners in the Church, quite capable of calling bishops and priests to account when necessary and accustomed to have a responsible role in both administration and religious education, they drifted towards regarding themselves and being regarded as second-class citizens in the Kingdom of God. Church affairs, they came to believe, were not their business. They remained generous and loyal, responded well to the initiatives and calls of the clergy, but they were passive followers rather than leaders" (SIMMONS, *In cruce salus*, p. 205).

⁷³ SPENCER, *Interim Report*, p. 18.

A careful reading of the Act shows that under it the Bishops will have no real control over their schools (10 November 1975, p. 7).

Our position is quite simple. The Bishop is the chief pastor and teacher in the local Church. This is a responsibility he cannot abdicate and still be Bishop, even if he wanted to.

The *Tablet* has said before, and no one has challenged us on it, that we cannot see how any bishop could accept the loss of power this Act involves. The Bishops obviously agree with us; hence the reservations they have publicly expressed about it (17 March 1976, p. 5).

The *Tablet*, in expressing these opinions, undoubtedly reflected how many laity understood the role of the bishop in the seventies. While some laity involved in education were familiar with the teachings of the Vatican Council, the general populace in 1975 were by no means *au fait* with the shift in the ecclesiology of the Church. Most of the laity, conditioned by the past, scarcely realised their own rightful involvement in areas considered as belonging to the domain of bishops, priests, and religious alone.

When the *Tablet* discussed the ramifications of the *PSCIA 1975*, it believed that "As far as parents are concerned, the general effect of the Act would appear to be to increase their participation in and responsibility for the schools."⁷⁴ Its perception was correct: with the establishment of the controlling authorities and later, the boards of trustees, parents – the laity – took on a statutory responsibility for an integrated school. Regarding the responsibilities of the boards of trustees, Bishop Leonard Boyle, on behalf of the CECNZ, sums it up:

Boards of trustees also have their duties and rights. They exercise general supervision over the operation of the school, see to the employment of teachers and staff; provide for the school's material needs from the funds allocated by Government; operate according to statutory requirements and, in the case of a Catholic school, do all this in such a way that the school reflects its Catholic character.⁷⁵

⁷⁴ *New Zealand Tablet*, 22 October 1975, p. 8.

⁷⁵ *Handbook*, Appendix 6, p. 63.

In regard to the canons on catholic education, then, the board of trustees has the potential to be a vehicle enabling parents to have a school that best promotes the catholic education of their children (c. 793, §1). Furthermore, the board of trustees has a direct influence on the quality of the content of formation and education that is the subject of c. 795. They also have responsibility for the calibre of instruction in their school – the focus of c. 806, §2. Moreover, this same board ought to be able to provide the opportunity for effective parent-teacher collaboration promoted by c. 796, §2.⁷⁶ Thus trusteeship effects precisely in one way the support of catholic schools envisaged by c. 800, §2.

Boyle describes the partnership thus: “Parents, teachers and administrators are partners in the task of educating young people. Each partner has an indispensable role; each has rights and duties which, if properly understood, integrate with the rights and duties of the other partner.”⁷⁷

4.8.2 – Teachers in an Integrated School

Beginning with the Declaration on Education, the conciliar and post-conciliar documents stress the importance of the witness of the teacher in a Catholic school.⁷⁸ The teacher of religion, however, gets singled out for particular consideration: “The religion teacher is the key, the vital component, if the educational goals of the school are to be achieved. But the effectiveness of religious instruction is closely tied to the personal witness given by the teacher; this witness is what brings the content and the lessons to life.”⁷⁹

⁷⁶ The canon derives from *GE*, 8. See also *MD*, 73; *LL*, 34.

⁷⁷ *Handbook*, Appendix, 6, p. 62.

⁷⁸ See *supra*, chapter three, p. 165. “The witness and conduct of teachers are of primary importance in imparting a distinctive character to Catholic schools” (*MD*, 78); See also *RD*, 26; *On the Threshold*, 14.

⁷⁹ *RD*, 96.

The Code of Canon Law likewise distinguishes the teacher of religion from other teachers: c. 804, §2 declares that, “the local Ordinary is to be careful that those who are appointed as teachers of religion in schools, even non-catholic ones, are outstanding in true doctrine, in the witness of their christian life and in their teaching ability.” It is the teacher of religion that c. 805 gives the local ordinary the right to name or approve. Not alone that, but the canon gives the same ordinary the right of removal or the right to demand the removal of teachers of religion for reasons of religion and morals. We addressed earlier the consideration that the negotiators perceived certain positions in a catholic school as essential for the preservation of its special character. Although the *PSCIA 1975* and its agreement provide the proprietor with some discretion by way of tagged positions, the discretion is by no means absolute. In this regard we also discussed some difficulties in dismissing a teacher whose attitude or morality may not be in conformity with the catholic ethos.⁸⁰ As discussed earlier, while the Code of Canon Law may give the bishop these rights, the ability to enforce them, given a teacher’s appeal to civil law, may very well prove impossible.⁸¹

Given the consistent emphasis in ecclesiastical documents on the importance of the power of witness of the teacher, one must question why the various documents, including the Code of Canon Law, make a distinction between teachers of religion and teachers who do not

⁸⁰ As far back as 1975, the *Tablet* expressed fears in this regard: “As far as teachers are concerned, there have already been problems in some of our schools where the occasional lay teacher has taken a position on social issues in opposition to the teachings of the Church. As things stand now, they can be dealt with. We doubt that this would be possible under these [integration] provisions” (*New Zealand Tablet*, 22 January 1975, p. 2).

⁸¹ Coriden comments that “It is difficult to imagine how the ordinary will exercise or vindicate this right in schools which are not directly under ecclesiastical control” (J.A. CORIDEN, “The Teaching Office of the Church”, in *CLSA Commentary. The Code of Canon Law*, p. 569). Morrisey agrees: “It may not always be possible for the ordinary to control the appointment or dismissal of teachers of religion in state-run or state-aided schools” (F.G. MORRISEY, “Catholic Education”, in SHEEHY, *The Canon Law. Letter & Spirit*, p. 441). Canon 805 replaces c. 1381, §3 CIC/17. Gasparri’s *fontes* list several documents, all relating to an age when clerical control was perceived by Rome as essential for the preservation of catholicity.

teach religion.⁸² Discussing some problematic areas in law concerning catholic schools in the United States, Mary Angela Shaughnessy indicates an inconsistency in the distinction between teachers of religion and those who do not teach religion.⁸³ In the light of the case outlined in the previous footnote, Shaughnessy believes that the case raises questions of fairness that are not easily answered. She asks: "Is it just to hold religion teachers to a different standard than that for other teachers? Is a religion teacher really different from other teachers, or are all teachers role models and, hence, teachers of religion?"⁸⁴ Given the thrust of the Church's documents concerning the position of teachers as role models, Shaughnessy's arguments have a compelling logic.

John Paul II, addressing lay administrators and teachers in Catholic schools declared:

By accepting and developing the legacy of Catholic thought and educational

⁸² While certain prerequisites exist for teachers applying for tagged positions, nevertheless the Catholic Integrated Schools Board ostensibly recognises the obligation on all teachers irrespective of whether they teach religion or not: "Teachers are role models. A school community rightly expects its teachers to act as to be appropriate models for its children. Conduct by a teacher which would give the school community grounds for thinking that the teacher's attitude is antagonistic to the special character or the school would not only be unprofessional, it could damage or even destroy that teacher's effectiveness" (The Character of a Catholic School. Brief Statement for the Information of Teachers. Issued by the Catholic Integrated Schools Board).

⁸³ While outlining issues that pertain to American catholic schools, the examples that Shaughnessy uses are universal: "A second case [...] was brought by a new teacher whose contract was canceled prior to the opening of the school year when the principal discovered that the plaintiff had been divorced and remarried and, hence, not considered a Catholic in good standing. The school had three faculty members in similar situations, but it argued that those people did not teach religion, and the plaintiff was being hired to teach religion. The plaintiff stated during the trial that 'he didn't divulge his marital history because he knew [the principal] would not have hired him under those circumstances.' The court found for the school; part of its reasoning was the fact that the plaintiff had been a Catholic seminarian for six years and he knew that he would not be a suitable candidate for a religion teacher in a Catholic school. Although the school prevailed, its position would have been strengthened if it had a written policy on the subject of divorced teachers who remarry without Church approval" (M.A. SHAUGHNESSY, *The Law and Catholic Schools: Approaching the New Millennium*, Washington, DC, National Catholic Educational Association, 1991, pp. 58-59).

⁸⁴ SHAUGHNESSY, *The Law and Catholic Schools*, p. 61.

experience which they have inherited, they take their place as full partners in the church's mission of educating the whole person and of transmitting the good news of salvation in Jesus Christ to successive generations [...] Even if they do not "teach religion," their service in a Catholic school or educational program is part of the church's unceasing endeavour to lead all to "profess the truth in love and grow to the full maturity of Christ the head" (Eph. 4:15).⁸⁵

Since the issue of being able to dismiss any teacher in an integrated school remains unresolved to some extent, we suggest, among other conclusions, that the NZCEO might find it profitable to return to the question and consider it in the light of the experience of other countries. With the power of hiring and firing any teacher firmly in the hands of the board of trustees, such a body needs not only a knowledge of just what constitutes preserving the special character but also a finely developed sense of justice in the face of such decisions. National guidelines at least should be drawn up so that a board of trustees does not proceed arbitrarily in making such decisions.

While acknowledging the difficulty of dismissing a teacher, nevertheless, as indicated above, it remains unfair to pick and choose who will be held to such a policy. In New Zealand the issue may well have been compounded by demands placed on those who hold tagged positions as distinct from those who do not. In justice proprietors owe it to their employees and agents to produce a policy that is applied equally to all.

4.8.3 – The Bishop as Proprietor

The *PSCIA 1975*, after declaring that "An integrated school shall on integration continue to have the right to reflect through its teaching and conduct the education with a special character provided by it", states the responsibilities of the proprietor:

⁸⁵ JOHN PAUL II, *Address on Catholic Schools*, 12 September 1987, US pilgrimage, in *Origins*, vol.17, no. 17, (October 8, 1987), p. 279.

The Proprietor of an integrated school shall, subject to the provisions of the integration agreement, –

- (a) Continue to have the responsibility to supervise the maintenance and preservation of the education with a special character provided by the school.
- (b) Continue to have the right to determine from time to time what is necessary to preserve and safeguard the special character of the education provided by the school and described in the integration agreement.⁸⁶

As previously cited, the integration agreement defines the special character of a Catholic school as follows:

The school is a Roman Catholic school in which the whole school community, through the general school programme and its religious instructions and observances exercises the right to live and teach the values of Jesus Christ. These values are as expressed in the Scriptures and in the practices, worship and doctrine of the Roman Catholic Church, as determined from time to time by the Roman Catholic (Bishop of the diocese).⁸⁷

By way of exposition, the *Handbook* declares that, “it is the Bishop of the diocese who has the ultimate responsibility to determine whether the practices, worship and teachings, in a school are indeed Catholic. The bishop of the diocese (in union with the Pope and all other Catholic bishops) exercises the Church’s teaching authority.”⁸⁸ We have considered already some of the provisions whereby the proprietor maintains the special character: (a) tagged positions for teachers; (b) preference of enrolment; (c) the presence of the parish priest as chaplain; (d) the proprietor’s appointees on the board of trustees; and (e) the right of the

⁸⁶ *PSCIA 1975*, Part 1, Conditional Integration, 3. Preservation of special character of an integrated school, p. 751.

⁸⁷ *Handbook*, 3.5, p. 8; *Integration Agreement*, 5; *NCRS, Curriculum Statement*, p. 8.

⁸⁸ *Ibid.* In this regard, we see how the diocesan bishop meets the provisions of cc. 753; 773; 774, §1; 775, §1; 780; 804, §1, §2. For a study of the catechetical role of the diocesan bishop see J. TOBIN, “The Diocesan Bishop as Catechist”, in *Studia canonica*, 18 (1984), pp. 364-414. On the diocesan bishop as teacher, see “The Teaching Ministry of the Diocesan Bishop: A Pastoral Reflection”, National Conference of Catholic Bishops, 14 November 1991, in *Origins*, vol. 21, no. 30, (January 2, 1992), pp. 474-491.

proprietor to appeal to the integration standing committee in the event of the special character being jeopardised.

4.8.4 – The Proprietor’s Appointees

While much cooperation between parents and the school staff occurs informally, the Act also provides for formal or necessary cooperation and representation of the parents as elected or co-opted members of the board of trustees. Four persons appointed by the school’s proprietor represent the his interests. Ideally, they represent the proprietor in the supervising and maintaining of the school’s special character, while ensuring that the school remains a catholic school, fulfilling the primary objective for which it was founded.⁸⁹ The *Handbook* declares that the proprietor’s representatives, either as a group or individually are advised to report frequently to him and should do so promptly if matters of moment arise. Furthermore, it is a condition of acceptance of appointment as a proprietor’s appointee that the proprietor receives a report at the date of the annual meeting (by 31 May) or at a time determined by him.⁹⁰

The yearly report includes a checklist on “religious observances” in which the appointee(s) comment, among other things, on the policy of the school in relation to school prayer, retreats, reception of the sacraments, liturgies, etc.⁹¹ Under “religious instruction”, the proprietor’s representatives comment on the hours per week programmed for formal religious education and are asked to give their “general impressions on the Religious Education programme of the school.”⁹² Under “staff development/professional development”, the

⁸⁹ See *Handbook*, 1.3 (a), p. 4.

⁹⁰ *Ibid.*, 11.1; 11.2, p. 42.

⁹¹ *Ibid.*, 11.6.12, p. 43.

⁹² *Ibid.*, 11.6.14; 11.6.15, p. 43.

proprietor's appointees comment on such areas as the board's policy "concerning professional development of teachers so that their teaching and conduct can reflect the school's special character." In a final example, the representatives are asked, "What is the Board policy concerning development for Trustees to enable them to ensure that the special character is maintained?"⁹³ Over and above the report, "If any one of the Proprietor's Appointees has a concern that some action by the Board may have a deleterious effect on the special character of the school", they should refer the matter to the proprietor. The proprietor will take whatever action he believes is necessary through the board.⁹⁴

The examples outlined above are representative only and do not include the complete checklist. They do show, however, the principle of subsidiarity in practice. Furthermore, they are ways in which the bishop exercises his right of vigilance and visitation according to c. 806, §1. While this right belongs to the diocesan bishop alone, the right may be exercised through delegates of the bishop as the above instances illustrate.⁹⁵ As we have seen, several persons share in the bishop's responsibility of maintaining the special character. Such involvement more closely resembles the vision of Church taught by the Second Vatican Council.⁹⁶

One final example will suffice to demonstrate how the bishop-as-proprietor exercises

⁹³ Ibid., 11.6. 21; 11.6.22, p. 44.

⁹⁴ Ibid., 2.5. We have discussed earlier the limitations of the proprietor's involvement despite representation through certain board members. However, in the routine running of a school, the preceding measures provide the proprietor with a way of exercising vigilance according to the provisions of c. 806, §1 and maintaining the special character according to the Act.

⁹⁵ See CORIDEN, *CLSA Commentary*, p. 569; CUSACK, *A Study of the Relationship between the Diocesan Bishop and Catholic Schools*, p. 182.

⁹⁶ See *LG*, 33; *AA*, 25; *MD*, 70; *LL*, 78; *Catechism of the Catholic Church*, n. 904. *Catholic Schools* succinctly has it: "While the bishop's authority is to watch over the orthodoxy of religious instruction and the observance of Christian morals in the Catholic schools, it is the task of the whole educative community to ensure that a distinctive Christian educational environment is maintained in practice" (*MD*, 73).

his oversight and visitation through deputed agencies. The Education Review Office (ERO), a stand-alone government agency independent of the Ministry of Education, reviews areas of performance as an independent auditor: whether boards of trustees meet their legal obligations, how well the management and staff achieve their aims or goals, how successfully the pupils develop essential skills, etc. The ERO may also comment freely on the special character.⁹⁷

Likewise, the Catholic Integrated Schools' Boards have their own appraisal of the special character which, in the outline of the appraisal process, is called the catholic character. This appraisal becomes another way in which the proprietor under Section 3 of the *PSCIA 1975* exercises his responsibility to supervise the maintenance and preservation of the education with a special character provided by the school. Senior officials of the Catholic Integrated Schools Board visit a catholic school which has received prior notice of the visitation from a schedule of visits. Before the review, the school provides documentation related to the school's mission statement, its charter, religious education policy, etc.

Parents contribute to the appraisal by filling in a questionnaire which takes the form of a graded opinion from 1 (strongly agree) to 7 (strongly disagree) covering the whole range of school life. As well, parents have an opportunity to add their own comments. Over the day of visitation, the appraisers meet the principal, the director of religious studies, teachers, the parish priest, and the children, through class visits and during intervals. Representatives of the board of trustees and parents also meet if possible.

The principal and board of trustees have four weeks in which to respond to the report

⁹⁷ "The overall purpose of the Education Review Office (ERO) is to provide regular, independent, evaluative reports for the Minister of Education; the governing authorities and managers of schools, early childhood centres, and other education organisations; and parents and all those in the wider community with an interest in the performance of the education sector and the educational achievements of learners" (*New Zealand Official Yearbook 1997*, 100th Edition, D. ZWARTZ (ed.), Wellington, Statistics New Zealand, 1997, p. 222).

in writing. The final report follows, which the diocesan bishop receives as the proprietor of the school. The parish priest also receives a copy. Should any recommendations arise from concerns about the catholic character, the appraisers schedule a follow-up visit in the next term.⁹⁸ Again, through deputed agencies, the diocesan bishop exercises his vigilance and visitation, which vigilance is shared also by the laity according to their role and competence.

4.9 – THE RELATIONSHIP OF THE PARISH TO THE PRIMARY SCHOOL

In the previous chapters we outlined the close relationship of the school to the parish, a relationship which in some instances following a school's integration, became less close than in former years. The *Handbook*, in treating the special character, addressing the matter of the school community says "because the school is an integral component of the pastoral ministry of the Church, its community comprises the local church led by the Bishop of the diocese. In the case of a parish school the local church is actualised in the parish."⁹⁹ Patrick Lynch, Executive Director of the Catholic Education Office, writing of the catholic school's mission to proclaim Jesus Christ to all, says "The fruitful fulfilment of this evangelising mission, implies a strong relationship between the local parish and the catholic school."¹⁰⁰ The Congregation for Clergy, in its latest document on catechesis, acknowledging that the *locus* of catechesis occurs in the christian community – the family, parish, catholic schools, christian associations and movements, basic ecclesial communities – reaffirms the catholic school as a most important *locus* for human and christian formation (*GDC*, 259). The Congregation's understanding of the complementary nature of the school and the parish may be seen in its

⁹⁸ We have not discussed the school charter, religious observances and instruction, the appointment of a chaplain and chaplain's team, or the health syllabus. These remain further areas subject to the proprietor's supervision.

⁹⁹ *Handbook*, 3.2, p. 8. See also cc. 369 (*CD*, 11); 515, §1, (SECOND VATICAN COUNCIL, *The Constitution on the Sacred Liturgy, Sacrosanctum concilium*, 4 December 1963, in *AAS*, 42; English translation in FLANNERY, p. 15).

¹⁰⁰ P. LYNCH, "Standing Up and Being Counted", in *New Zealandia*, September 1996, p. 26.

discussion of the parish as an environment for catechesis: "The parish is, without doubt, the most important *locus* in which the Christian community is formed and expressed." Quoting *Catechesi tradendae*, the Congregation called the parish "the prime mover and pre-eminent place for catechesis." It continued: "While recognizing that in certain occasions, it cannot be the center of gravity for all of the ecclesial functions of catechesis", it "must integrate itself into other institutions."¹⁰¹

In this regard, we see that the parish and the school are not autonomous entities pursuing goals independently of one another. Ideally the aims of both ought to converge. Thus the parish and the school remain interrelated vehicles of the same saving mission of the Church.

4.10 – FURTHER CONSIDERATIONS OF A FINANCIAL NATURE

O'Neill noted that in the period prior to integration, some people were critical of the cost of the schools. While some complained that so much money was going into the schools that little was available to be used elsewhere, others were beginning to think of the schools as a drain on the parish funds rather than a part of parish life as integral to it as the parish church itself.¹⁰² Following the passing of the *PSCIA 1975*, the *Tablet*, discussing the implications of the Act, said, "There will still be an element of sacrifice about Catholic education because we remain completely responsible for capital expenditure."¹⁰³ Having outlined the benefits,¹⁰⁴ the same paper in the same issue observed: "The main debit is that there will be no assistance whatever with capital costs. These remain our responsibility."

¹⁰¹ See *GDC*, 257; also *CT*, 67.

¹⁰² O'NEILL, "Catholic Education", pp. 171, 176.

¹⁰³ *New Zealand Tablet*, 22 October 1975, p. 3.

¹⁰⁴ See *supra*, chapter three, p. 175, footnote 99.

The bishops' conference in a statement on integration said, among other things, that "parents of children attending Catholic schools and the Catholic community generally will be called upon to provide financial assistance for our schools." They went on:

It must be realised therefore that if the Catholic system becomes integrated we will be back substantially in matters of money to where we were until the teacher crisis came upon us. The element of sacrifice would remain, but it would not be beyond the capacity of the Catholic community to bear, and we are sure that it would be accepted with the same willingness and sense of purpose as has been characteristic of the Catholic people of our generation and of those which have gone before us.¹⁰⁵

Mackey interpreted catholic schools being able to charge attendance dues as a concession:

[...] the major protagonists, such as the New Zealand Educational Institute and the Post-Primary Teachers' Association, have conceded a great deal to us. They held, and hold, that schools should be free. Nevertheless, they have conceded to us attendance dues so that we can own our properties and pay for our capital debts.

This is a major concession on their part and offers to us not only the right to own, so that our schools are aided rather than owned by the Government, but also offers us the opportunity for expansion. This growth is also recognized by the Act.¹⁰⁶

Nine years later, *Zealandia* reported Mr Pat Hoult, executive director of the New Zealand Catholic Education Office, as being sharply critical of the financial aspect of the Act saying that integration had failed in its original objective of relieving catholic parents of a financial burden that they had been carrying for the last century: "We are no better off now than we were before the State Aid Conference of 1973 at which the concept of integration

¹⁰⁵ NZCBC, Statement by the Catholic Bishops' Conference on Integration, Preliminary Suggestions by Mr D.P. Neazor, undated. ACDA, MAC 39-3/4.

¹⁰⁶ *New Zealand Tablet*, 21 April 1976, "What Bishop Mackey Thinks about Integration", p. 29.

was born.”¹⁰⁷ In the same article, Bishop Denis Browne was reported as saying “it is certainly a fact that the Church is now facing a very heavy financial commitment. But the generosity of Catholic people is something in which I have every confidence. While the total figure looks alarming, it is the price we Catholics put on our education.”¹⁰⁸

Not surprisingly, the provision of the *PSCIA 1975* to allow integrated schools to charge attendance dues drew criticism from some commentators:

This situation [touting for custom] is exacerbated by the provision of the Act allowing integrated schools to charge attendance dues. Many who supported integration did so in the belief that it would spell the end of state-aided elitist schools. They must have been bitterly disappointed to find that at the last minute an amendment to the Bill destroyed that hope [...] the ordinary Catholic schools have not reduced their (admittedly low) fees [...].¹⁰⁹

Lee, discussing issues and controversies surrounding the Integration Act, citing *Listener*, writes that critics conclude that integrated schools have benefited at the expense of state schools, largely because of low interest rate Housing Corporation loans and the ability to charge fees to cover their loan repayments.¹¹⁰ He continues:

The Catholic response has been that hefty debt has been incurred because of the necessity to upgrade their school buildings to state schooling standards. Catholic educational spokespersons have argued that a large part of the actual cost of rebuilding and renovating to meet state standards has been borne by the Catholic community. They also complained that attendance dues would need to be increased to cover capital expenditure on upgrading and erecting

¹⁰⁷ *Zealandia*, 21 October 1984, p. 16.

¹⁰⁸ *Ibid.*

¹⁰⁹ MCGEORGE, *Church, State, and New Zealand Education*, p. 56.

¹¹⁰ LEE, “The 1975 Private Schools Conditional Integration Act”, p. 48. See *Listener*, 24 October 1981, p. 24; 28 August 1982, p. 26.

buildings.”¹¹¹

Discussing Section 35 of the Act, Atkins concludes:

Though Article 35 of the Integration Act states clearly that every pupil enrolled at an integrated school shall be given free education on the same terms and in accordance with the same conditions as pupils enrolled at a State school are given a free education, this will never happen in New Zealand’s Catholic Schools because of the enormous debt authorities have run up on their schools.¹¹²

Likewise, Akenson would say:

Characteristically the section concerning school fees (clause 35) seemed to say one thing and actually meant another. Every pupil enrolled in an ‘integrated’ school ‘shall be given free education on the same terms and in accordance with the same conditions as pupils enrolled in a State school are given free education’. Except that (clause 36) the Catholic ‘integrated school’ could charge ‘attendance dues’. [...] This offered an opportunity for some very creative accounting and Catholic parents must have been somewhat surprised to find that ‘free’ education was just as expensive as the old fee-paying form.¹¹³

Attendance dues are not the only costs carried by the catholic educating community. Liston, some 25 years before integration, declared: “We are not asking the State to bear the cost of it [the teaching of religion], but we are asking the State to bear the cost of State-demanded service being done in private schools, namely the teaching of State-set secular subjects to

¹¹¹ LEE, “The 1975 Private Schools Conditional Integration Act”, p. 48. See *Listener*, 9 October 1982, p. 24; *Dunedin Star Midweek*, 5 October 1983, p. 1; *Otago Daily Times*, 14 February 1986.

¹¹² ATKINS, *The Effects of Integration*, p. 134. Section 35 of the PSCIA 1975, p. 767, reads: “Free education – (1) Every pupil enrolled at an integrated school shall be given free education on the same terms and in accordance with the same conditions as pupils enrolled at a State school are given free education. [...]”

¹¹³ AKENSON, *Half the World from Home*, p. 188.

State-set standards.”¹¹⁴ While the negotiators struck a better deal than Liston’s consideration, a reference of Bishop Ashby’s shows that the administration of the catholic dimension of a school would be carried still by the committed catholic:

One other matter to which reference should be made is the necessity to find monies to fund the organisation which will be required both at national and diocesan level to deal with administration and religious education. [...] we will not be entitled to use any portion of attendance dues revenue to meet these costs. This means that they would ordinarily have to be met by the diocese and would of course come ultimately from the pockets of the people.¹¹⁵

So it remains for each diocese.¹¹⁶ There is some kind of irony in the fact that the Act of 1975 statutorily accommodated the catholic right to teach the faith – the denial of which in the Act of 1877 was the cause for the parting of the ways between the catholic sector and the state – but left the ordinary catholic putting as much into catholic education as he or she had always done. In 1877, and the generations following, the Church assumed that this was worth the effort. Whether this assumption can be sustained in 1999 and beyond gives a cause for candid research.

In the previous chapters we have indicated that an assumption that catholic schools

¹¹⁴ Memo to Boards of Governors on the Question of State Aid to Private Schools, April 1949, p. 6. ACDA, LIS 184.

¹¹⁵ B.P. ASHBY, “The Financial Implications of Integration”, Christchurch, 22 May, 1978.

¹¹⁶ In Auckland diocese the parish allocation of 15% on the second collection at mass yields the diocese a variable income of c. \$500,000 p.a. Of this figure, the diocese spends about 17% on catholic-schooling expenses including among other things, the office of the Vicar for Education (which office spends a proportion of its time on catholic school business), a subsidy to the NZCEO (\$56,000), and a per capita subsidy towards NCRS. In Hamilton diocese, by contrast, of the 25% allocation to the diocese from the second collection (\$380,276 in 1997), catholic character expenses amount to \$176,000, or 42%. Since this figure comes by way of mass-attenders, Hamilton diocese has recently introduced a special character “request” to parents arguing that 80% of families attending catholic schools are non-church goers and therefore have not supported the parishes (and, therefore, the diocese), directly. CATHOLIC DIOCESE OF HAMILTON, *Catholic Character Contribution & Catholic Education Funding*, Hamilton, Catholic Diocese of Hamilton, August 1998.

were the means of securing the future of the Church undergirded the diocesan and parochial strategies of the past.¹¹⁷ Such strategies dictated that a disproportionate amount of parish and diocesan funds be spent on catholic schools. Today, a more circumspect appreciation of the prophetic role of the Church by pastors and people means that more and more agencies of catholic education, evangelisation, and catechesis draw on the same (or less) disposable income. The single thrust plan (or putting all eggs in one basket approach) which concentrated on only one means of education – children and catholic schools – without complementary energies being spent on their parents, may be seen in retrospect to have been seriously flawed. Hence, adult education, parish-based sacramental programmes, expenses for specialist involvement in parishes, catechetical programmes, the support of far greater diocesan resources than ever before, along with the increasing consciousness of paying lay parish workers (in view of the diminution of the numbers of clergy and religious), all draw off the same dollar. In this regard, catholic schools no longer can claim the lion's share of monies available for education, but instead they too compete alongside every other agency involved in fostering the Church's prophetic ministry.

The debts from current loans will cease on maturation of the term, while suspensory loans amortise at the end of 25 years. For the future, however, unless the government is prepared to pay for the capital expenditure of any future expansion of catholic schools, the system will continue to rely on attendance dues.¹¹⁸ Hence catholics will always service their real estate. In the past, Church control over catholic teaching necessitated Church ownership of schools.¹¹⁹ Such a tenet, that ownership equals control, appears no longer viable. Catholic

¹¹⁷ See *supra*, chapter one, pp. 42-44.

¹¹⁸ Attendance dues vary from diocese to diocese. In Auckland diocese, primary school attendance dues are \$34 per term for four terms, GST included. As well, parents are asked to contribute voluntarily \$3.40 per term per child towards the special character costs.

¹¹⁹ LISTON, Memo: To Boards of Governors on the Question of State Aid for Private Schools, April, 1949, p. 5. ACDA, LIS 184.

authorities then must seriously appraise any future venture which may place the People of God heavily in debt for just one expression of its commitment to catholic education.

4.11 – CATHOLICS ATTENDING NON-CATHOLIC SCHOOLS

While the primary focus of this study has been on catholic schools in order to arrive at some conclusions regarding their canonical status, an attendant issue needs to be considered, albeit briefly. We have seen how the Church expended tremendous energy and resources – both personal and financial – and sacrifice on catholic schooling. Our history shows that while the teaching of the councils reinforced, with sanctions, a high attendance of catholic children within their own system,¹²⁰ the question must be raised whether our history shows that the same energies were spent on catholic children attending non-catholic schools. Sadly, the answer has to be a resounding “No!”, over generations catholic children attending non-catholic schools have been the poor cousins of catholic education, while educational authorities were obliged in justice to do as much for these children as for those attending catholic schools.

Despite the sanctions, rigorous, draconian, and unjust as they were, a significant proportion of catholic children never attended catholic school. Precisely what this figure may be can only be approximated. Chris van der Krogt, citing figures between 1927 and 1936, concluded that “On the basis of these figures, it would seem that about 64% of Catholic primary school pupils attended their Church’s school in 1926 and about 70 percent in

¹²⁰ “It is possible to compare its [the Catholic education system] quantitative achievement in providing a Catholic education for its clientele (i.e. its coverage) with the quantitative achievement of other Catholic education systems. [...] In New Zealand the Catholic education system in 1956 had a coverage of 69.1% in the age group 5-14. In England and Wales in 1955 the coverage in the same group was estimated by Dean from Newman Demographic Survey data at 69.3%. [...] the closeness of the two figures is remarkable if we remember that in New Zealand the value of State Aid in goods and services was probably 1% or 2% of operating costs, while in England and Wales it was around 99%. [...] In any comparative assessment, the coverage of the Catholic education system in New Zealand must be regarded as a notable achievement” (SPENCER, *Interim Report*, p. 58).

1936.”¹²¹ Agreeing more or less with Spencer’s figures, he concludes:

If about two-thirds of Catholic children attended Catholic primary schools – and the proportion was increasing – the policy of requiring children to attend Catholic schools was quite successful. Nevertheless more than one third of Catholics had some experience of state education, whether at the primary or secondary level. Liston estimated that 40% of Catholic school children attended public schools; he was probably about right, though some of these children would have been secondary pupils who had already attended Catholic primary schools.¹²²

The ratio of one-third of Catholics attending non-Catholic schools was quoted by Geoffrey Grey, director of religious education in Christchurch diocese, in 1982.¹²³ While not having more recent figures for the Auckland diocese, one may presume that this figure is approximately correct nationally.

In regard to Catholics attending non-Catholic schools, the Second Vatican Council said:

Acknowledging its grave obligation to see to the moral and religious education of all its children, the Church should give special attention and help to the great number of them who are being taught in non-Catholic schools. This will be done by the living example of those who teach and have charge of these children and by the apostolic action of their fellow students, but especially by the efforts of those priests and laymen who teach them Christian doctrine in a manner suited to their age and background and who provide them with spiritual help by means of various activities adapted to the requirements of time and circumstance.¹²⁴

¹²¹ VAN DER KROGT, “ Good Catholics and Good Citizens”, p. 27.

¹²² Ibid. Van der Krogt cites *Month*, 2 February 1931, p. 15.

¹²³ ATKINS, *The Effects of Integration*, p. 137, quoting *Zealandia*.

¹²⁴ *GE*, 7.

While national strategic objectives include the goal of enabling “as many Catholic people as possible to be educated in Catholic schools”,¹²⁵ the bishop in his non-proprietor role should be mindful of those who do not choose this option for catholic education and who are entitled to receive equally quality catholic education from alternate sources provided through the parish and the diocese.

4.12 – LEADING CANON 796, §1

Örsy, writing on the guiding principles of canonical interpretation, makes reference to “the particular genre of ‘leading canon’, which may determine the meaning of several others to follow.”¹²⁶ In this respect, c. 796, §1 tells us that Christ’s faithful are to consider schools as of great importance, since they are the principal means of helping parents to fulfil their role in education. The canons that follow support and supplement this basic tenet accordingly. The *fontes* affirm that c. 796, §1 is based on *GE*, 5: “Among the various organs of education the school is of outstanding importance.”¹²⁷ The Congregation for Catholic Education, treating lay catholics in schools, says that “the school has a value and an importance that are fundamental” (*LL*, 12). Comparing the texts, we note that the Code’s expression of the affirmations above is more firmly nuanced than either the conciliar or post-conciliar texts.¹²⁸ We have seen that the teachings derived from papal statements over

¹²⁵ NEW ZEALAND NATIONAL COUNCIL OF PROPRIETORS, *National Strategic Plans for Schools*, “*Light New Fires*”, 1996-2000 AD, 8.

¹²⁶ ÖRSY, *Theology and Canon Law*, p. 57, footnote 4.

¹²⁷ The conciliar Fathers make reference to PIUS XI, *Christian Education*, pp. 29-30; PIUS XII, *Allocutio*, 31 December 1956, to the Association of Catholic Teachers of Bavaria, in *Discorsi e Radiomessaggi*, vol. 18, p. 746. See FLANNERY, p. 730. An English translation appears in *The Pope Speaks*, “The State and the Catholic School”, vol. 4, no 1, 1957, pp. 21-22.

¹²⁸ *GE*, 5: “*Inter omnia educationis instrumenta peculiare momentum habet schola [...]*”; *LL*, 12: “*[...] l’école a une valeur et une importance fondamentales parmi les moyens qui aident et complètent l’exercice de ce droit et de ce devoir de la famille.*”

preceding centuries contend that catholic school education, as distinct from secular education, is holistic or integrated. What gives it this dimension revolves about the expression of, and presumed development in, the catholic faith. This premiss, it seems to us, underlies c. 796, §1. Given this assumption, the question arises, "Can one presuppose the underlying assertion of c. 796, §1?" While acknowledging the exhortatory nature of the canon, on the face of it a difficulty appears to lie in the words "[...] schools [...] **are** (emphasis added) the principal means of helping parents to fulfil their role in education." Since the efficacy of the means (the catholic school) of this total education appears to be self-evident, the canon prompts one to ask, "What is the nature of this assumption? Does it reflect an empirical truth which is readily demonstrable or does it lie in the realm of a founded hope or a pious wish? Does the canon as it stands reflect a presumption which is subject to being overturned in the face of contrary evidence? How does one test the claims of such assertions? Wherein lies the evidence? What are the values underpinning this canon? In short, are catholic schools effective means of formation and education in faith as the canon suggests?"

Paragraph 5 of the declaration draws on *Christian Education*, an encyclical, as we have noted, which encompasses the teachings of the 19th and 20th centuries. There is much about the canon as it stands which suggests the historical ascription described by Spencer.¹²⁹ In which case, the canon may represent a period piece, a nostalgic canon, which looks back to the claims of the popes in the 19th and 20th centuries, rather than being reflective of post-conciliar times. Since it derives from an era in which Church authorities, especially in the controversial domain of education, at times made statements which were accepted without question by those whom they really affected, we may, on the threshold of the millennium, need to be somewhat circumspect in accepting without question the presuppositions of an historically-conditioned canon (that is, that catholic schools are the primary catholic educational vehicle) when it is removed from its historical context. Thus, given the charge to see the Code through the newness of the Second Vatican Council, the canon arrives at a point

¹²⁹ See SPENCER, *infra*, p. 264, footnote 143.

of tension as to its verifiable relevance and how one reinterprets a canon in the light of the conciliar principle, while appreciating at the same time, its continuity with the past.

4.13 – A QUESTION OF NOMENCLATURE – “PARISH” AND “DIOCESAN” SCHOOLS

We argue that one of the effects of the Integration Act and its subsequent agreement was that the administration of the schools became the responsibility of two agencies: the controlling authority – later the board of trustees – and the proprietor who exercises his powers through the diocesan administration offices and his representatives on the board of trustees. We have already noted some difficulties in regard to civil law vis à vis canon law. Again, this arrangement appears to have created an anomalous situation regarding the interplay of the two systems of law: on the one hand, the bishop acting as corporation sole takes civil responsibility for certain aspects of the administration of the school, while on the other hand the bishop through the diocese appears to continue to act as if the canonical status of the schools remained unchanged following integration. In other words, the bishop in some respects appears to consider the schools as being under the control of the competent ecclesiastical authority or of a public ecclesiastical juridical person. Practically, this means that certain aspects of administration – the collection of attendance dues from the parents, the signing of the preference card – in some instances remain the responsibility of the parish through its parish priest.¹³⁰

¹³⁰ For the administration of attendance dues, “All proprietors have united themselves into ‘collectives’ or ‘boards’ [...] The reason for the formation of each group is simply to unite the proprietors [...] so that together they might the better sustain the financial and administrative burdens consequent upon integration, so that resources might be better managed and applied, so that attendance dues might be uniform over the Catholic school system in the region, and so that loan monies might be more readily negotiated” (Letter of Thomas Cardinal S. Williams, president, New Zealand Catholic Bishops’ Conference, 24 February 1981, to Eduardo Cardinal Pironio, prefect, Sacred Congregation for Religious and Secular Institutes). To date the Board of Proprietors has no canonical standing, being simply a de facto assembly of proprietors fulfilling an executive function.

Such administrative costs are often carried against the parish.¹³¹ One might argue that since the loans taken out service the real estate of the parish, then the parish should collect the fees since it is administering its own real estate. Logically, however, it seems that this arena of administration should be in the hands of the board of proprietors or an agency appointed by them. Thus the board of proprietors becomes responsible for the collection of outstanding debts – not the parish. Again, contrary to a diocesan memo, we fail to see how the juridical person of the parish becomes liable for the debts of its parishioners.¹³² Thus the collection and administration of attendance dues, where these remain a parish responsibility, act as a service provided at parish expense for a school whose administration no longer remains the responsibility of the juridical person of the parish.¹³³

Similarly, the signing of the preference card, verifying “a particular or general religious connection with the Special Character of the School” has been delegated by the proprietor to the parish priest. The merits of this “pastoral” encounter remain at best dubious, because the parish priest and parents often meet with differing expectations. Since baptism establishes the required connection, the presentation of a baptismal certificate (a simple administrative procedure) could be more appropriately handled by the school authorities – the principal, for example.

¹³¹ For example one parish secretary “spent one day a week or slightly more” in administering the attendance dues (Letter of Joan Doe, secretary St X Parish, to Bernard Waters, 28 April 1998).

¹³² See *supra*, chapter two, p. 109, footnote 91. Traditionally, any parishioner has been free to approach the parish priest for a waiver of school fees (now attendance dues) in cases of hardship. Since we have argued that the school is no longer under the authority of the parish priest and in keeping with the principle of subsidiarity, this discretion could well be exercised by the school authorities while others of the faithful (the St Vincent de Paul Society, more wealthy parishioners, commercial sponsors, for example), could be approached by the school to assist in a domain traditionally perceived by many to be the prerogative of the parish priest.

¹³³ Attendance dues are not the only expense for parents: extra costs include activity levies which cover items as diverse as visiting cultural groups, school productions, cultural visits, sports equipment, affiliation fees, transport, prizegiving, engraving, Life Education Trust, etc. These expenses occur for state-school parents also.

This leads to the question, "In what sense are integrated catholic schools parish schools or diocesan schools?" Much of the discussion in this paper centred on what clergy and laity alike called the parish or parochial school. We argued that since the parish school was (formerly) an expression of one of the apostolates of the juridic person called the parish, it may properly be called a parish school. Following integration, the question arises, "In what sense may we say that an integrated primary school is a parish school?" Canonically, it appears reasonable to us that despite the parish's retaining ownership of the bricks and mortar and the land on which they stand comprising the school; despite the retention of the parish's name on the school, despite the parish priest being the bishop's appointee on the board of trustees; despite his being appointed chaplain to the school; despite the board of trustees' being comprised of parishioners; and despite the presence of parishioners' children in the school, the administration of the apostolate of the school is no longer under the control of the parish priest. *Ergo*, we conclude that catholic schools are no longer strictly a canonical apostolate of the parish as a juridical person. In this sense then, in our considered opinion, schools formerly considered parochial schools are parish schools no longer. We propose that following integration, if parishioners send their children to the catholic school, then in this sense it is a "parish school". Moreover, while the parish retains the ownership of the school, in this sense also one may consider them as parish schools.

One does not find the designation "parish school" or "diocesan school" in canon law. Rather it has become a convenient practical definition, a colloquialism, which describes the relationship of the school to the rest of the parish or diocese. As we have seen, clergy and laity alike commonly understood the term to mean a school in some sense under the control of the parish priest. Such distinctions may appear niggardly or inconsequential to ordinary parishioners who see little difference in the school that they attended and the one which their children attend, other than the disappearance of the religious, and that as parents they "have more say in the running of the school." The faithful may consider the distinctions above as nothing less than legalistic nit-picking, irrelevant to school life at large. In the long run,

though, such distinctions have a value since they help clarify the otherwise blurred boundaries of accountability, ownership, and responsibility, as we have seen in the examples given.

4.14 – A RETURN TO SPECIAL CHARACTER

Underpinning our discussion of the canonical status of diocesan and parochial schools has been an appreciation of the necessity to preserve the very reason for their existence: the freedom to proclaim the catholic faith, to have schools wherein the catholic ethos is maintained, to express our catholic identity. The *PSCIA 1975* embraces all these concepts in the notion of special character. Hitherto, we have discussed the various statutory provisions that are in place to safeguard, as far as possible, the special character. We noted also that ultimately, it is the bishop of the diocese who carries the responsibility to determine whether a school is indeed catholic.

We have proposed earlier that an integrated school has the canonical status of a catholic school by its being recognised as such by the competent ecclesiastical authority – the diocesan bishop – by virtue of a written document (c. 803, §1). If one speculates that an integrated school, despite all the legal provisions in place, reaches a point that the bishop believes he should take the drastic procedure of withdrawing the title “catholic” from it, is he, under the Act, free to do so?¹³⁴ The obligation to keep the school catholic is, under the *PSCIA 1975* and the *PSCI Amendment Act 1977*, a requirement of civil law. The bishop would need to be able to prove his claim that the school is no longer catholic. Any or all of the parties (including the minister) to the integration agreement could seek redress from the courts if such an attempt was made. Canonically this simply reinforces the position that a bishop does not have canonical control over an integrated school.

¹³⁴ This speculation presupposes that all attempts at pastoral dialogue have failed and the bishop in consultation with his advisers believes that he has no other option. All parties are aware of his intentions.

Nevertheless, even though schools may not be totally under the control of the diocesan bishop, this does not mean that they exist in isolation from his authority. According to Lawrence Bordonaro, writing of schools which are “in fact” catholic (c. 803, §3) but do not subscribe to the conditions of c. 803, §1, it would be an “incorrect assumption” that they are not subject to Church law: “For as their function or purpose is in some way connected with the Church, they, to various degrees, are also subject to canonical norms and principles.”¹³⁵

As mentioned earlier, one of the principal concerns of commentators at the time of integration was the preservation of the special character in the years ahead. A year after the passing of the *PSCIA* into New Zealand legislation, Osmund Uniake, principal of Francis Douglas Memorial College, New Plymouth, expressed concern about preserving the catholic ethos: “My fear is not that the Catholic school system may survive (under integration), but that it may not preserve what is unique to it.”¹³⁶ Frederick Bliss, then provincial of the Society of Mary and former rector of two of the Marists’ colleges, warned in 1984 that integration brought a new situation and new needs: “It is essential that ‘special character’ becomes a reality.” Reacting to the “mountain of administrative and managerial tasks imposed by integration”, he considered that “the Church has not come to terms with what ‘special character’ really means.”¹³⁷ Petit believed that despite the efforts of catholic adherents to

¹³⁵ L. BORDONARO, *Separate Schools in Ontario, Canada*, p. 156. We consider New Zealand catholic schools to have the same canonical status as those in Ontario. Continuing his discussion Bordonaro says of such schools that even if they are “ [...] not canonically established by ecclesiastical authority, are subject to the Code of Canon Law in matters that pertain to their Catholicity, for they have been acknowledged and recognized as Catholic schools in written documents by ecclesiastical authority according to Canon 803, §1, and are therefore subject to those canonical norms that pertain to their Catholicity” (ibid., p. 158).

¹³⁶ In another statement he declared that, “There is a very real danger of assimilation by the larger system, in spite of legislation which is generous in this regard” (*New Zealand Tablet*, 22 December 1976, p. 5).

¹³⁷ *Zealandia*, 7 October, 1984, p. 7.

maintain the special character of their schools, “the failure to communicate effectively a workable definition and a description of the nature of the special character constitutes a danger to its preservation.”¹³⁸ She concluded that proprietors have reason to be concerned since, among other things, the special character may be “eroded by the apathy of the very people the schools are meant to serve.”¹³⁹ The historian Cummings expressed doubts that over the years the special character will remain distinctive:

As New Zealand’s national system of education was about to enter its second century, the total situation was an intriguing one. There was the appearance of the country accepting as practical politics that each individual was a member of the State and that the State should attend to the educational needs of all children, for only simpletons blinded by optimism believed that in the course of years an “integrated” school would maintain its special character.¹⁴⁰

In the end, mindful of the cautionary or even sceptical opinions just quoted, the responsibility for the preservation of the special character rests with the whole community. Thus Mackey, shortly after the passing of the Act, wrote: “ If Catholic parents are as conscientious in playing their part on school committees and school boards, then I have no fear for the future.”¹⁴¹ Twenty years later, O’Neill would state absolutely: “The legal machinery to keep our schools Catholic is all in place. It has been accepted by parliament – all main political

¹³⁸ PETT, “New Zealand Integration”, p. 81. She continued her argument by saying “terms as ‘exercises the right to live and teach the values of Jesus Christ’ and ‘values [...] in the Scriptures and in the practices, worship and doctrine of the Roman Catholic Church as determined from time to time by the Roman Catholic Bishop of the diocese’ may be understood by many Catholics but remain vague, ill-defined, and arbitrary to non-Catholics.” While a vague and narrow definition threatens the special character, Pett believed the one provided by the NZCEO – “a set of values which must ‘permeate the total daily life of the school, and involve teachers, pupils, and parents and, indeed the whole community to which the school belongs. It is not just a question of so many hours per week of religious instruction’ ” – equally threatening by reason of its being too idealistic and too difficult to implement. *Ibid.*

¹³⁹ *Ibid.*, p. 84.

¹⁴⁰ CUMMINGS, *History of State Education*, p. 362.

¹⁴¹ *New Zealand Tablet*, 21 April 1976, “What Bishop Mackey Thinks about Integration”, p. 29.

parties – and the state teacher organisation and STA. If any school fails to be Catholic we will have no one to blame but ourselves.”¹⁴²

4.15 – CODA: A RESPONSE TO CALLS FROM THE PAST – LOOKING TO THE FUTURE

4.15.1 – Review

As outlined in the previous chapters, the stand-alone position of catholics in regard to their schools following the *Education Act, 1877*, derived largely from the legacy of the Church’s claims regarding its own rights in education. That catholic schools were the best schools for education simply on the basis that they were catholic schools, continued to be the unquestioned rationale for generations of New Zealand catholics who continued to build schools and to send their children to them. With the emergence of the laity in the late fifties and early sixties, and their expectation of having a greater say in the policies of catholic education, some of the laity – in particular those who had a concern about the future of catholic education – believed that the time was ripe to examine these traditional claims. The attempts of the laity, however, to engage the bishop of the diocese at this time in any such examination was, as we have seen, met by his resistance, effectively confounding any such scrutiny of the catholic school system. Hence, at a critical phase in the education-life of the Church an opportunity to consider the strengths and weaknesses of the system was lost. This inertia of Church authorities objectively to consider the effectiveness of catholic schooling would continue to be a recurrent feature of catholic life, and, as in the sixties, always at a point of crisis.

In regard to the above, Spencer in his report, analysed the authorities’ approach to schools as follows:

¹⁴² O’NEILL, *Speech Notes*, p. 5.

The thing that mattered above all else was the ascription of the school, Catholic or non-Catholic. Given the ascription, the achievement could be taken for granted: no State school could possibly provide a satisfactory education, (because it was godless); and no Catholic school could fail to provide an excellent education (because it was permeated with a Christian atmosphere, was staffed by dedicated teachers, and was protected by the teaching authority of the Church).¹⁴³

Spencer, having noted that catholic leadership stressed that for both the individual and the community, education was understood and assessed as a means and not an end,¹⁴⁴ then observes that “the emphasis on instrumentality was effectively contradicted by the emphasis on ascription.” Hence, he argues, “If education really is a means and not an end it is a matter of great importance to assess the extent to which it achieves the end.” Thus he concludes: “By basing its assessment on ascription instead of achievement the logic of Catholic educational philosophy was sabotaged.”¹⁴⁵

The lack of appraisal of the system was also a criticism of Felix Donnelly, former director of catholic education for Auckland diocese from 1962-1971:

I am critical of Catholic schools, since the Church has never made any effort to check out whether the manpower, cost and effort in maintaining them are justified. The Bishops did not want to look at the issue during my time in education. Any criticism of the Church’s involvement was frowned upon.¹⁴⁶

¹⁴³ SPENCER, *Interim Report*, p. 136.

¹⁴⁴ For the individual, education was “not to be enjoyed as an end in itself, but was to be treated as a means to the ultimate possession of God in the life hereafter, as a means of formation of a good citizen and of a good spouse or parent. For the community it was a means of transmitting the Christian culture from one generation to the next, and hence of the survival of the Catholic community” (SPENCER, *Report*, p. 137). See Simmons, O’Neill, and Williams *infra*, p. 269, footnote 155.

¹⁴⁵ SPENCER, *Interim Report*, p. 137.

¹⁴⁶ F. DONNELLY, *One Priest’s Life*, Auckland, Australia and New Zealand Book Company, 1982, pp. 79-80.

O'Neill, commenting on this era, records also that:

some began to question whether Catholic schools were pastorally necessary or even effective. Criticism of the overlarge sized classes, of the standards began to be heard. Others complained that so much money was going into schools that little was available to be used elsewhere. Elsewhere often meant the religious education of those Catholic children who were not in Catholic schools.¹⁴⁷

E. Anne Atkins says of the period:

Historically, in the 1960's and early 1970's, 252 teaching Religious left their school, many left religious life. Their defection created a spiritual problem, disillusioned youth left the Church. At this point, the Catholic Authorities missed an opportunity: to investigate causes of the spiritual malaise and to ask serious questions about whether Catholic schools were the best solutions to it. In turn, they turned a spiritual problem into a financial one by replacing the religious with paid staff. In turn this financial problem became a political one with the Catholic Authorities seeking increased government assistance to their schools.¹⁴⁸

The call by the laity for an examination of catholic schools continued: the Auckland diocesan synod included catholic schools on its agenda.¹⁴⁹ Following the Seventeenth Auckland Diocesan Synod held in October 1989, a remit on education recommended that the bishop "set up a working party to study the effectiveness of Catholic schools in the Diocese, with special regard to the number of young people leaving the Church upon leaving school. 204 Agrees. 20 Disagree. 3 Abstain." To date there has been no committee response to this

¹⁴⁷ O'NEILL, "Catholic Education", p. 171.

¹⁴⁸ ATKINS, *The Effects of Integration*, Abstract.

¹⁴⁹ "Areas of concern [of Catholic secondary schools] are: • they fail to contribute significantly towards their pupils' faith – could even be counter productive; • parents could be asked to demonstrate their Catholic commitment in some way when enrolling their children; • they are elitist in being beyond the financial means of many average single income families; [...] . This recommendation also looks in a practical way at other means of improving the system" (*Towards Tomorrow. Auckland Diocesan Synod 1989. Auckland Synod News*, p. 7).

remit.

4.15.2 – Appeals by the Congregation for Education to Study Catholic Schools

Over twenty years ago, the Congregation for Education, cognisant of the impact of modern society upon the school,¹⁵⁰ said that “loyalty to the educational aims of the school demands constant self-criticism and return to basic principles” (*MD*, 67). The same Congregation in *The Religious Dimension of Education in a Catholic School* (1988), noted current trends among pupils which challenge the peculiar goals of catholic education. These trends reflect recurring refrains from concerned parents, teachers, and priests alike: the abandonment of faith by young people (*RD*, 15); religious indifference (*RD*, 16); and that for some youth their years spent in a catholic school appear to have had no effect or even made them reject outright expressions of faith (*RD*, 19). In this regard the Congregation suggests that the faults could lie with the catholic school itself. The document concludes with a suggestion “that further study, research, and experimentation be done in all areas that affect the religious dimension of education in catholic schools. Much has been done but many people are asking for even more” (*RD*, 115).

On a contemporary note, the Congregation, conscious of more specialised and complex developments in education, called for “courageous renewal” of the catholic school: “The precious heritage of the experience gained over the centuries reveals its vitality precisely in the capacity for prudent innovation. And so, now as in the past, the Catholic school must be able to speak for itself effectively and convincingly” (3). The Congregation went on to say that it was not merely a question of adaptation, but of missionary thrust, the fundamental duty

¹⁵⁰ “One must recognize that, more than ever before, a Catholic school’s job is infinitely more difficult, more complex, since this is a time when Christianity demands to be clothed in fresh garments, when all manner of changes have been introduced in the Church and secular life, and, particularly, when a pluralist mentality dominates and the Christian Gospel is increasingly pushed to the sidelines” (*MD*, 66).

to evangelise, to go towards men and women wherever they are so that they may receive the gift of salvation (3).¹⁵¹

Over the years, the inherited assumptions and presumptions of the hierarchy and the laity concerning the effectiveness of catholic schools have been subject to much study by writers and researchers alike.¹⁵² While some studies appear to show that catholic schools are effective according to determined criteria, other studies contradict the effectiveness of catholic schools, raising serious questions about the validity of the suppositions underpinning the justifications for their existence. Many of these studies relate to the status of a catholic school – not in canonical terms – but in terms of the catholic values purportedly espoused by such schools.

4.15.3 – “Light New Fires” 1996-2000 AD

Given the incentives to examine the effectiveness of catholic schools, we acknowledge the response of the New Zealand Council of Proprietors of Catholic Integrated Schools. On the 1st of March 1996, this body released the final draft of a National Strategic Plan for Schools; its mission statement: “To Provide Quality Catholic School Education in Aotearoa - New Zealand.” This multi-faceted, in-depth plan to take Catholic schools into the next millennium involves the cooperation of every sector of society, Church, and state. The ten goal strategy¹⁵³ examines most areas which impinge on the life and future of the catholic

¹⁵¹ *On the Threshold*, p. 5.

¹⁵² For a summary appreciation of studies relating to special character, see WALSH, *The Special Character of a Catholic School*; See also M.J. MCMENAMIN, *The Special Character of a Catholic School: Theory and Practice*, MA thesis, Auckland, University of Auckland, 1985.

¹⁵³ The ten goals include evangelisation, Catholic character, living community, excellence, partnership with the Crown, development and expansion, leadership, promotion, treaty commitment and resources. NEW ZEALAND COUNCIL OF PROPRIETORS OF CATHOLIC INTEGRATED SCHOOLS, *National Strategic Plans for Schools, “Light New Fires”, 1996-2000 AD*.

school, calling for research into various dimensions of catholic schools. Understandably, since the strategies are those of the proprietors of catholic schools – the bishops and religious – “Light New Fires” relies on a conviction that catholic schools are effective, hence, the underlying strategy of their promotion beyond 2000. Not everyone, however, as we have indicated, shares the conviction of the proprietors as to the effectiveness of catholic schools.

4.15.4 – An Appeal for Concomitant Research

Consequently, while the ingredients of formal schooling are constantly subject to review and criticism, just how effective the school may be in its catholic claims, remains a moot point. As mentioned in previous paragraphs, while some studies have been made on the underlying tenets of the rationale of the catholic school in New Zealand, these studies have, in the main, been single person studies, devoid of the financial resources that an in-depth study would require. In so far as this is lacking, the New Zealand catholic school remains a largely unexamined myth. While “The achievements in their school system in New Zealand during the past century are a source of legitimate pride for Catholics,”¹⁵⁴ nevertheless it seems opportune that on the brink of the millennium, the New Zealand Church, that is the whole People of God, the *Christifideles*, owe it to themselves for the sake of truth and justice to address honestly the undone business, the missed opportunities of the past. Moreover, given our history, the time seems particularly opportune since the catholic Church in New Zealand can address these issues from a stance of relative tranquility.

In this respect we celebrate the incentive of the council of proprietors in “Light New Fires”. Besides this initiative, however, we also recommend an examination of catholic schools and by means of an independent, comprehensive, multi-disciplined scientific study, evaluate their effectiveness in the light of the demands placed upon them by the teaching of

¹⁵⁴ MCSWEENEY, *The Catholic School System in New Zealand*, p. 127.

the Church.¹⁵⁵ In addition, we suggest that while studies on catholic schools in other countries

¹⁵⁵ Such a study might, for example, 1) empirically test Leo XIII's premiss (and repeated down the decades – Pius XI, *Christian Education*, p. 31; *GE*, 8; *MD*, 43; *RD*, 33; *On the Threshold*, 33; SPENCER, p. 136; Hout, in PETT, p. 85; c. 802, §1 CIC/83 – that: "It is necessary not only that religious instruction be given [...] but that every other subject taught be permeated with Christian piety" (*Militantis Ecclesiae*). While *RD* 55-61 presented an appreciation of the pedagogy the question nevertheless arises how a non-christian or indifferent catholic teacher in a catholic school might imbue his or her subjects with this christian piety since *nemo dat quod non habet* – one cannot give what one does not have. In a *reductio ad absurdum*, how might accounting, or typing, or technical drawing, or gymnastics, taught in a catholic school, differ from those taught in a non-catholic school? The point is not made lightly given the repetition of this tenet.

The study might 2) examine the nature of the relationship of the school to the parish: "Through the school Catholic children would be trained in their religion as well as secular subjects and would emerge as citizens and parishioners" (SIMMONS, *In cruce salus*, p. 203); "The Catholic school was regarded as essential for the preservation of the Church [...]" (O'NEILL, "Catholic Education", p. 170); "I will argue that from the Victorian era onwards Catholic church leaders in New Zealand, adopting attitudes and honouring precedents from Ireland, latched on to the school system as the single most important mechanism for preserving the faith [...]" (AKENSON, *Half the World from Home*, p. 159); "Our schools are essential to the vitality of the parish, and its most precious resource" (Cardinal Thomas Williams, Opening Speech, Catholic Schools Convention, Wellington, 26-28 September 1996, p. 8). To what extent do these statements reflect a testable truth? Given the hundreds of thousands of catholic school products over the decades what percentage are actually committed to the parish – or to the Church at large? Is there evidence that the catholic school in New Zealand was a more successful vehicle at handing on and preserving the faith than any other means? Which leads to 3) Given the presumptions and assumptions that catholic schools are effective, by what criteria does one demonstrate this? – "I think, we ought really to be ready for a change, to say that [even] if in this secular world we have religious instruction [at all] in the school, we have to assume that we will not be able to convert many in schools to the faith. But the students should find out what Christianity is; they should receive good information in a sympathetic way so that they are stimulated to ask: is this perhaps something for me?" (J. RATZINGER, *Salt of the Earth. The Church at the End of the Millennium*, San Francisco, Ignatius Press, 1997, pp. 125-126); "Finally, one of the characteristics of American Catholic education 'is its success' [...] in terms of the relationship between Catholic education and the practice of the faith" (Dr James Griesgraber, "The Catholic School of the '80s", John Paul II/US pilgrimage, in *Origins*, vol. 17, no. 17, [October 8, 1987], p. 279). Does "practice" mean mass attendance? Can mass attendance be used as a measure of the success of catholic education or catholic commitment? If some or many (present or past) attend mass, does this indicate the success of a catholic school? Conversely, if no one attends mass, is a catholic school a failure? – "If Church attendance, active participation and allegiance to the Church is the yardstick of the leaven in the mass, as some would say it is, then the Catholic school has failed – or has it? I do not believe so" (Dr Patricia Cooke, Director for the Institute of Human Development, Perth, Western Australia, Speech to Catholic Schools Convention, Wellington, 26 September, 1996, p. 9). 4) The study may contrast the expectations of parents, pupils, teachers, bishops, and other proprietors. Are their expectations realistic or are the demands placed on the school too much for it to carry – disproportionate to those placed on the family, parish, or other agency of education? " — Need to be aware of what religious education

– Australia, Canada, Great Britain, Ireland, the United States – may have similarities or even parallels, they may not necessarily translate precisely into the New Zealand situation. In this regard, without in any way wishing to “reinvent the wheel”, given the singular nature of our history, the small ratio of catholics to non-catholics in New Zealand, and the uniqueness of the intervention of the Integration Act in the life of catholic schools, we propose that we deserve to have our own research, to draw our own conclusions, and to generate our own recommendations for 2000 and beyond. Necessarily such a study will impinge on various dimensions of parish and family life.

Spencer believed that “It is not possible to assess the effectiveness of the Catholic education system without a specific evaluation study.”¹⁵⁶ Walsh, in his turn, considers that it is important to appraise a school’s success in religious education, because all the discussion concerning the philosophy of catholic education, its various concepts, definitions, and aims count for little if the catholic school system is an abject failure in regard to its special character. He too notes that only limited research has been done in this complex area.¹⁵⁷ Agreeing with the above authors, we repeat the appeal for a comprehensive study to measure a catholic school’s effectiveness, leaving the last word to Michael Winter: “Some would say

is, and is not, attempting to achieve. — Need to appreciate the limitations of the role of the school and of the importance of complementing the work of home and parish” (*Syllabus document, secondary schools*, p. 13). 5) Conscious that baptism by itself does not make a christian (*MD*, 47), the study might research what proportion of students who, “although they belong to the Church have never given personal commitment to the revealed message” (*AN*, 18). Thus knowledge of the religious commitment of the pupils and their parents may lead educators to a slightly different thrust or emphasis in religious education, evangelisation, or catechesis. Finally the study might compare the religious practices of catholic pupils who attended catholic schools and non-catholic schools to see whether catholic school education makes any difference. We propose that such a study not be confined to students of the present but looks at the influence of the catholic school over preceding generations as a gauge of how well it has achieved its purpose. The above suggestions are made in consciousness of the need to respect the freedom of the individual’s right to privacy along with the liberty to participate or not in such a study.

¹⁵⁶ SPENCER, *Interim Report*, p. 137.

¹⁵⁷ WALSH, *The Special Character of Catholic Schools*, pp. 68-69.

that the spiritual effect of a school on a child's character cannot be assessed empirically. If this is the case, it means that the whole operation of providing Catholic schools goes forward on the basis of an unverified hypothesis."¹⁵⁸

Conclusion

This chapter opened by acknowledging the necessity of the intervention of the conciliar principle in any understanding of the canons of the 1983 Code of Canon Law. Since the canons on catholic education and catholic schools drew in part from the teachings of the Second Vatican Council and subsequent post-conciliar teachings, we treated these sources in a summary overview. In treating "catholic education", we considered that from the multiplicity of terms used by the Church in its teachings, education included both formation and the acquisition of knowledge. Moreover such education encompassed evangelisation and catechesis.

Prior to the arrival of the eleven canons on catholic schools in the 1983 Code, we noted some disquiet among English-speaking critics that the canons as they appeared in the initial draft *schema* did not take sufficiently into account the teachings of the council. Despite this concern, most of the canons of the *schema* appeared in the 1983 Code. In our opinion, we proffered that these eleven canons create some ambivalence, arriving as they do at a point of tension between responses from the past to specific situations and their reflection of education in the post conciliar era.

Turning our attention to c. 796, §1, the canon which leads the canons on catholic schools, we considered the underlying value espoused by this canon, that is, that the catholic school is the principal means of helping parents provide their children with a catholic

¹⁵⁸ M. WINTER, *Blueprint for a Working Church; A Study in New Pastoral Structures*, St Meinrad, Ind., Abbey Press, 1973, pp. 47-48.

education. The canon, claiming its origins from the 19th century, makes an assumption which seems to us to be by no means self-evident. Such an assumption, we believe, is open to empirical verification. Moreover, for some others, as we have indicated, the assumption also remains in dispute. Since the principles of canon law are subalternated, that is, they rely on other disciplines, we recommend as one of the conclusions to this dissertation, that those concerned with catholic education in New Zealand, besides promoting catholic schools beyond 2000, commission a multi-disciplined, independent study on the effectiveness of catholic school education.

In looking at a critical participant in the catholic school – the teacher – we noted the distinctions that Church teachings and the Code make in regard to teachers of religion and those who do not. We offered the suggestion that since the witness of every teacher is significant in the life of a student, such distinctions have no real place in the life of a school. We recommend that the education authorities set national guidelines to minimise arbitrary decisions by boards of trustees in dealing with an unsatisfactory teacher. At the same time, we noted that despite certain rights given to the diocesan bishop by canon law (the removal of teachers of religion, for example), civil law may in fact preclude him from acting on those rights.

Finally, in comparing the spirit of the canons, along with their exhortations, to the New Zealand situation, we observed that one of the single most positive effects of integration was to precipitate all those involved in the field of catholic education – parents, children, education administrators, boards of trustees, teachers, bishops, and priests, – into a model of shared responsibility and collaboration which was envisioned by the Second Vatican Council. In this regard we drew on many current examples in the diocese of Auckland which supported the exhortations of the canons.

GENERAL CONCLUSIONS

A critical analysis of the canonical and historical data related to the status of catholic schools in New Zealand yielded the following substantial conclusions:

First, the historical overview described catholic education from the arrival of the first catholic missionaries in 1838, through the sectarian debates leading to the *Education Act, 1877*, with its secular clause, which persuaded catholics to establish a self-funded parallel education system of their own. With the post-World War II war expansion of the catholic population, the decline in religious vocations, inflation, and rising costs of capital development, the struggling catholic system sought assistance from successive governments which responded by giving a series of grants. In the end these grants were insufficient to sustain the flagging school system. A solution came by way of the *PSCIA 1975*, which, leading to a partnership between the Church and the state in education, relieved catholics of the crippling cost of teachers' salaries and maintenance. The *Education Act 1989* followed, placing the management of primary and secondary schools in the hands of boards of trustees.

Second, the various plenary councils and diocesan synods gave the fledgling Church in New Zealand its own ecclesiastical law. This law, among other things, provided for the establishment of parishes, the appointment of a proportion of irremovable pastors, and the concomitant establishment of catholic schools as an apostolate of each parish. The promulgation of the 1917 Code of Canon Law confirmed in universal law the above entities, which entities are preserved under the 1983 Code. Hence, the buildings comprising the parochial school, sustained by monies given by the faithful to the parish, are properly temporal goods of the parish as a juridical person, rightly administered by the parish priest as the lawful administrator. Civil law ownership, not recognising the canonical entity of the parish or parish priest, is vested in the diocesan bishop as corporation sole. The corporation sole precludes civil ownership by the parish of its own goods, contrary to the provisions of canon law.

Third, the *PSCIA 1975* impacted variously on the above-mentioned canonical entities:

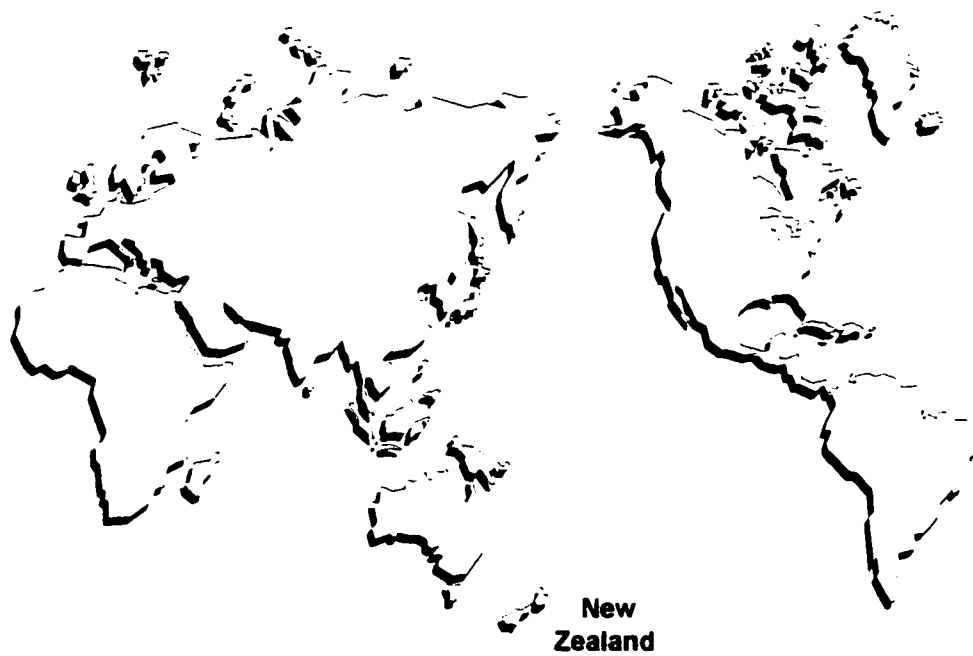
a) The Act deeded to the controlling authorities – afterwards the boards of trustees – the use of the school property for as long as the school remains a school; this constitutes alienation in the broad sense. b) The administration of the school as the apostolate of the parish, was taken from the parish priest and placed in the hands of the laity. In this respect, since the parish priest no longer administers this apostolate, canonically it no longer remains under the control of the parish as juridical person. In this sense the catholic school remains no longer an apostolate of the parish. This argument applies to the diocesan bishop and diocesan schools *mutatis mutandis*. c) In regard to the 1983 Code of Canon Law, an integrated school has the canonical status of a catholic school according to the third clause of c. 803, §1, that is, a catholic school “which in a written document is acknowledged as catholic by the ecclesiastical authority.” For schools commonly described as diocesan and parish schools, the diocesan bishop has this competence. d) Decrees of both the Congregation for Evangelisation of Peoples and the Apostolic Signatura, which, having studied the status of an integrated school in another context, confirmed the conclusions which have flowed logically from our analysis of the relevant canonical principles.

Fourth, in the light of the teachings of the Second Vatican Council along with subsequent teachings, and taking into account the various advantages that came by way of integration allowing the catholic system to survive, the most positive single effect of integration was that it placed the administration of the schools more properly in the hands of the laity. Thus the intervention of the Act in the life of the Church brought about a model of collaboration, at least in education, between Church authorities and the laity that probably would not have occurred otherwise. This reflected more exactly the ecclesiology of the council. In this regard integration acknowledged the conciliar principles of both subsidiarity and cooperation in the mission of the Church.

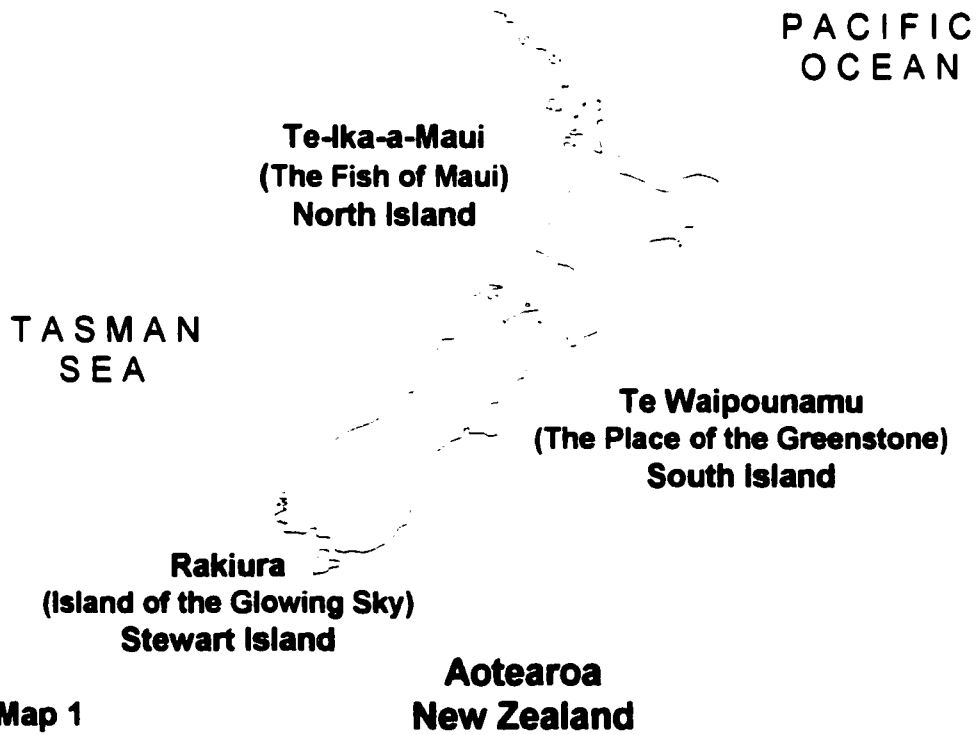
Finally, the proprietors of catholic schools have in place positive and optimistic

strategies as they look to take catholic schools beyond 2000. To the several calls of the past from many sources calling for an examination of the effectiveness of catholic schools, we added our own – that now, more than ever, we need to study the strengths and weaknesses of the catholic school system. Thus we might build on our past, strengthening the positive elements of catholic schools, analyse the weaknesses, and if necessary, in the courageous spirit of our forebears that has marked our previous history, introduce new strategies for catholic education. This education is, after all, the reason catholic schools exist: such an education “is especially directed towards ensuring that those who have been baptised, as they are gradually introduced into a knowledge of the mystery of salvation, become daily more appreciative of the gift of faith which they have received” (*GE*, 2).

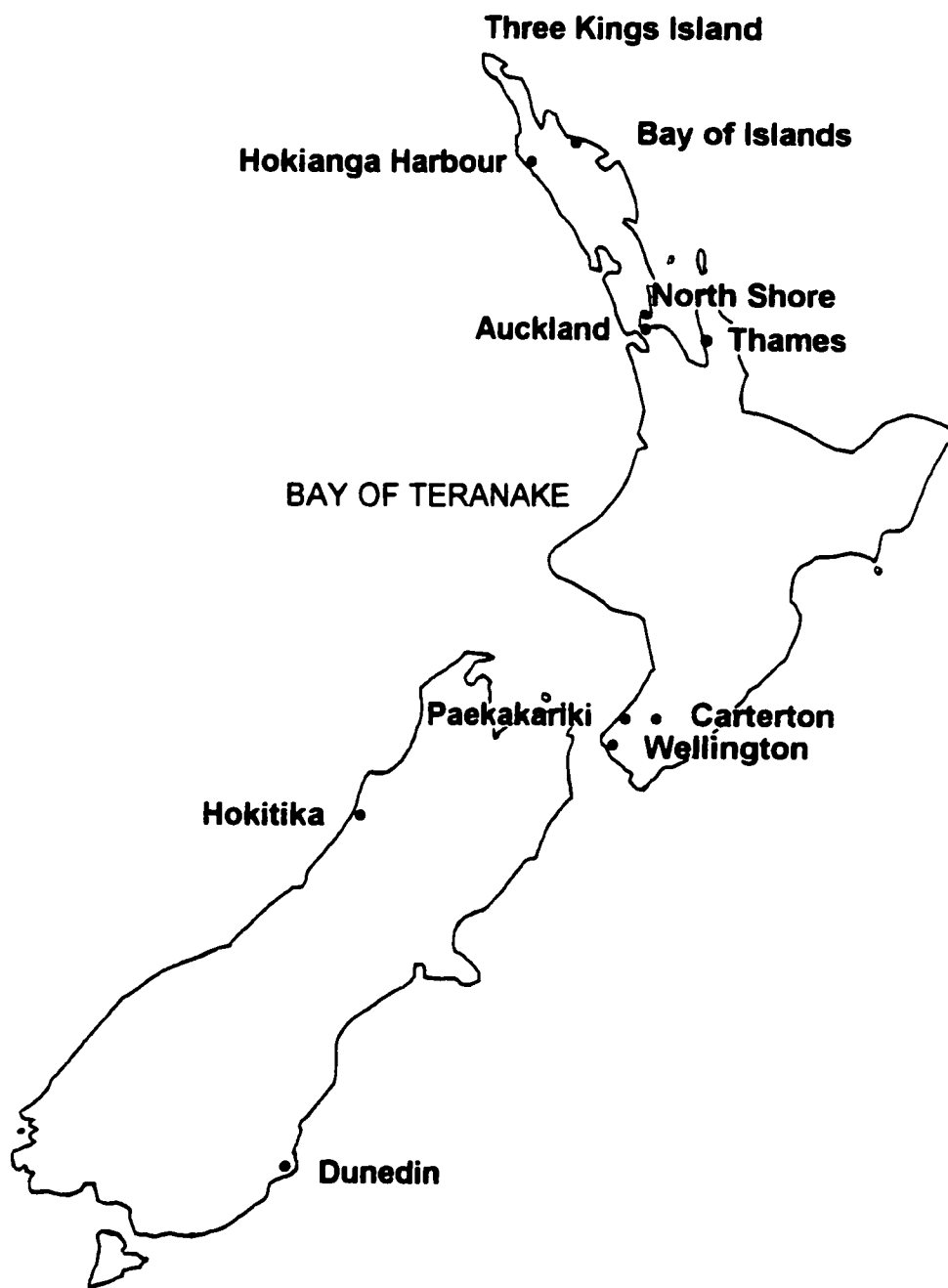
APPENDIX 1



New Zealand's Place in the World

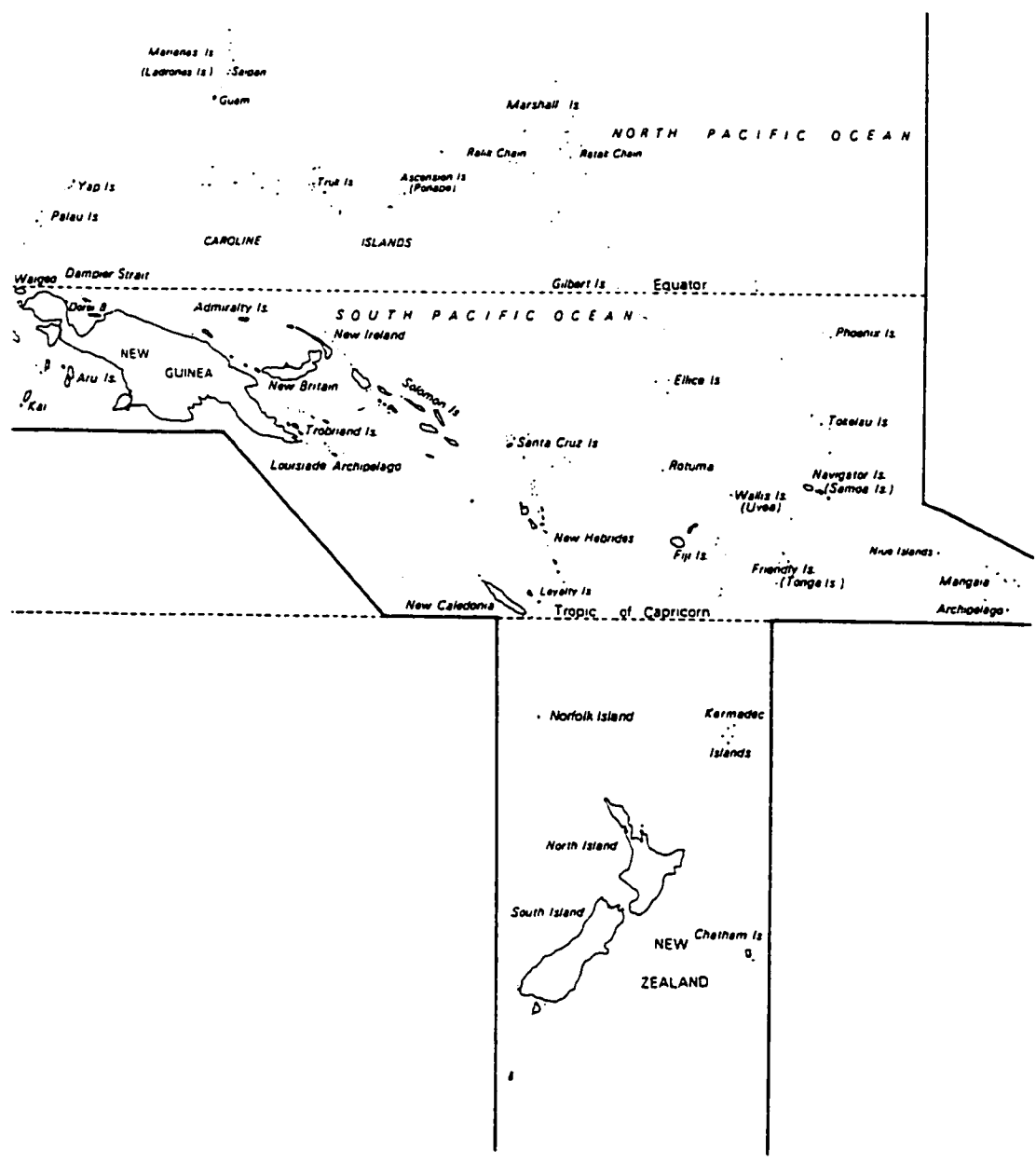


Map 1



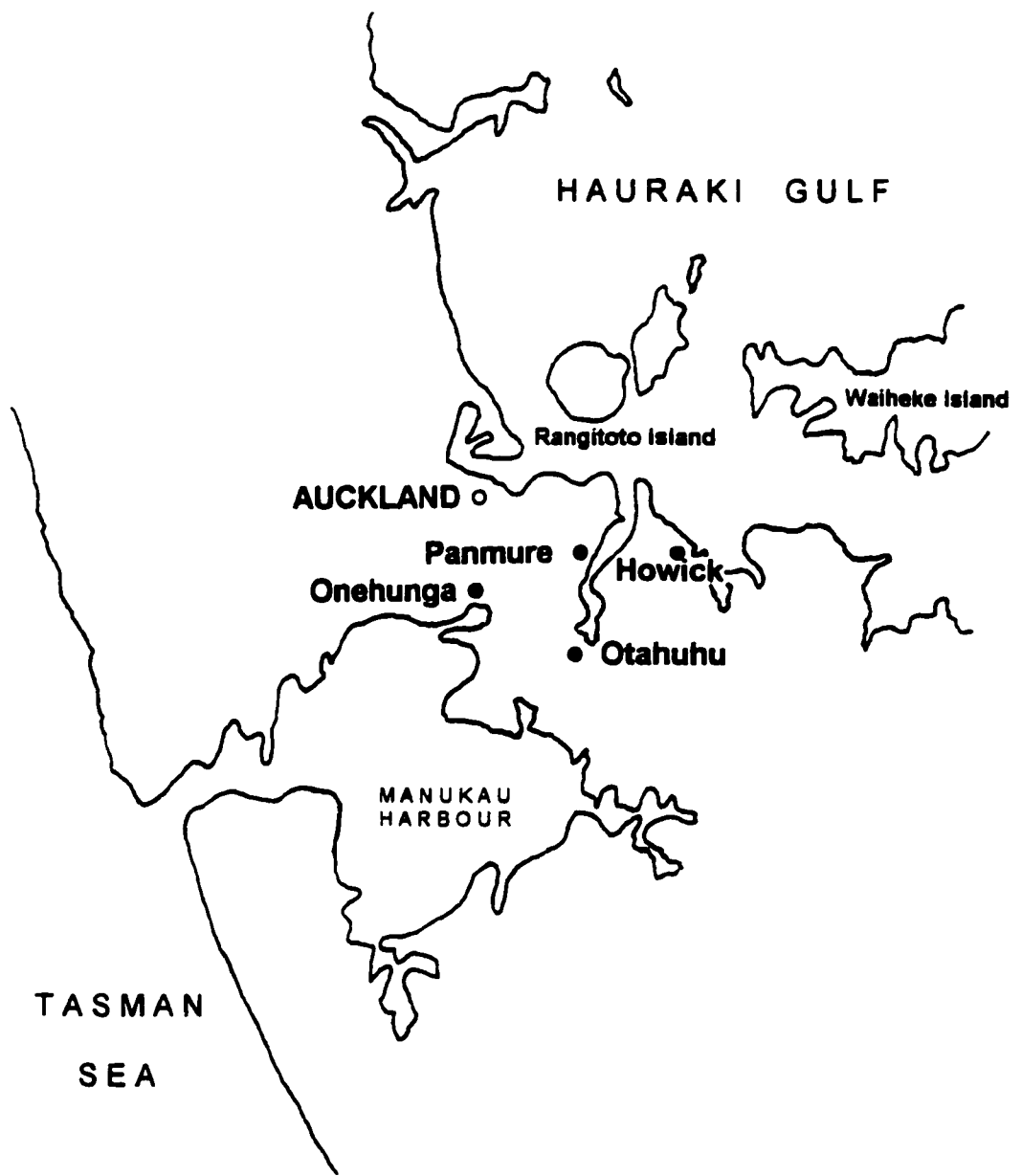
Map 2

Place Names Found in Text



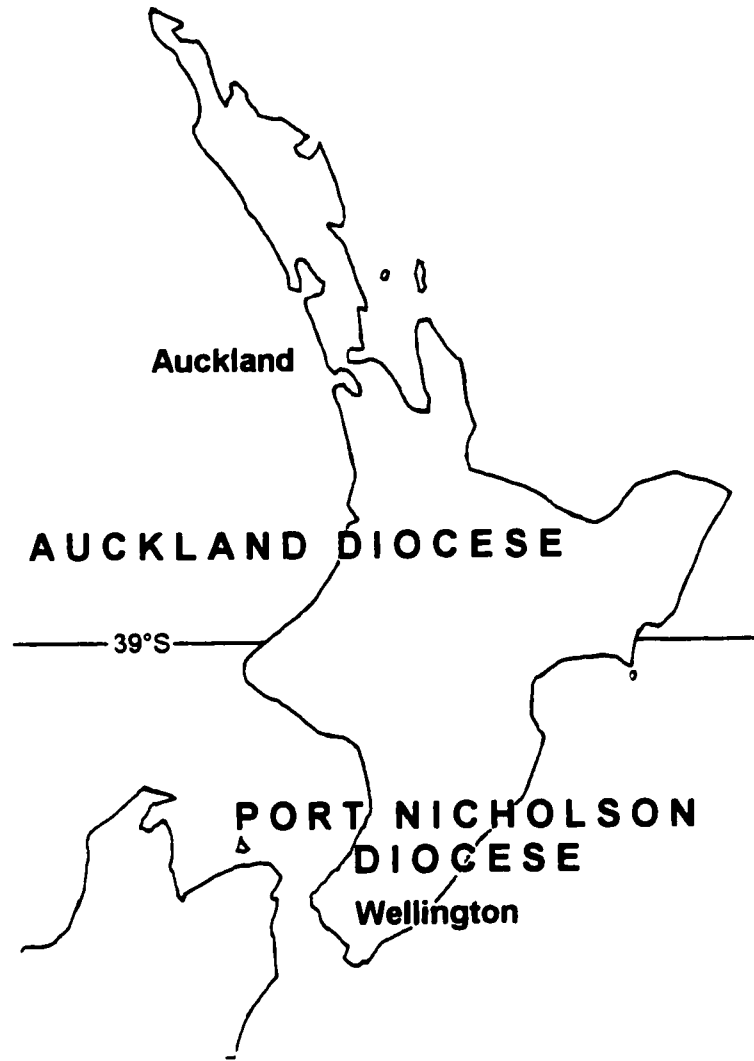
**The Vicariate Apostolic of Western Oceania
10 January 1836 (Wiltgen)**

Map 4



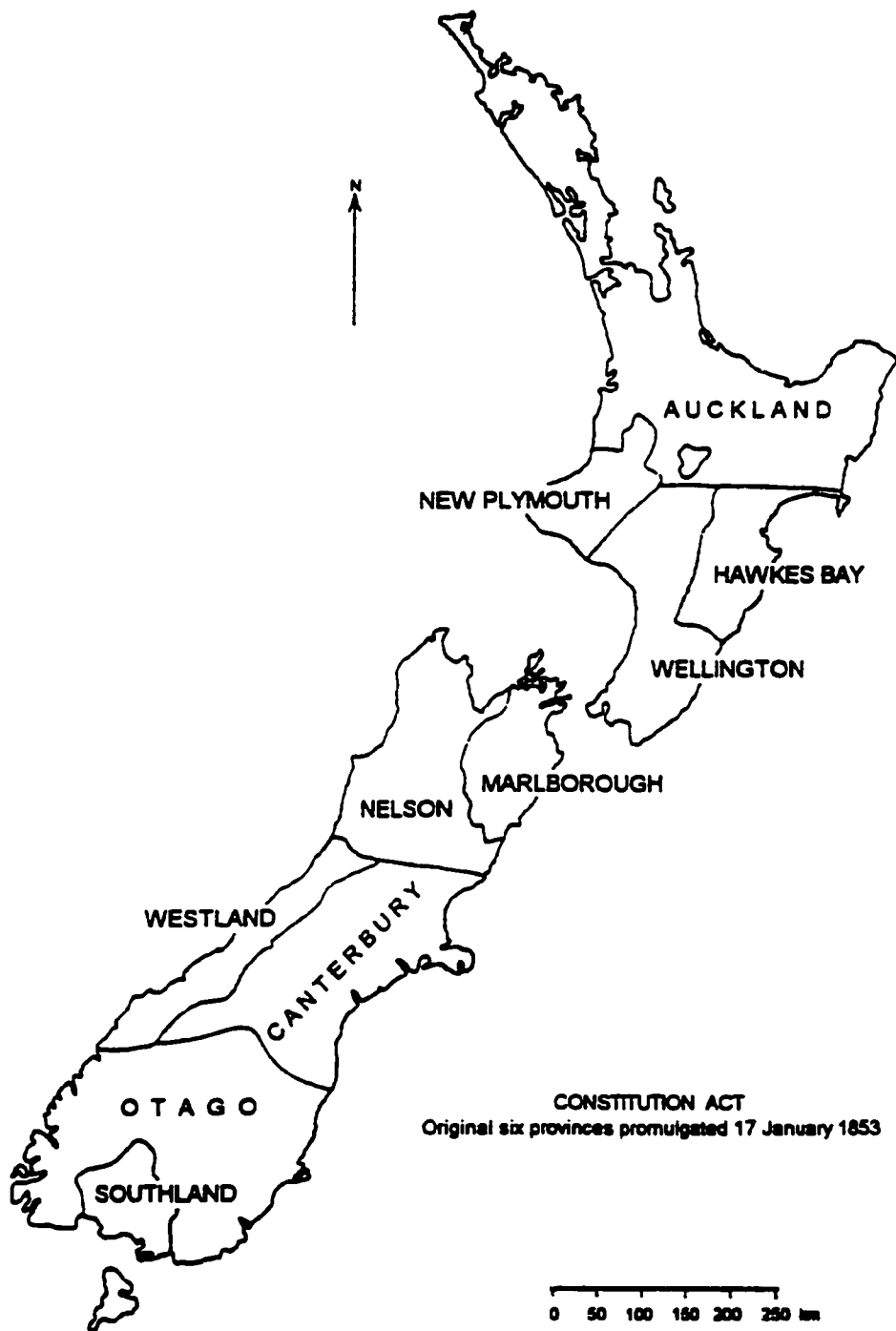
Auckland and the Fencible Settlements 1847

Map 5

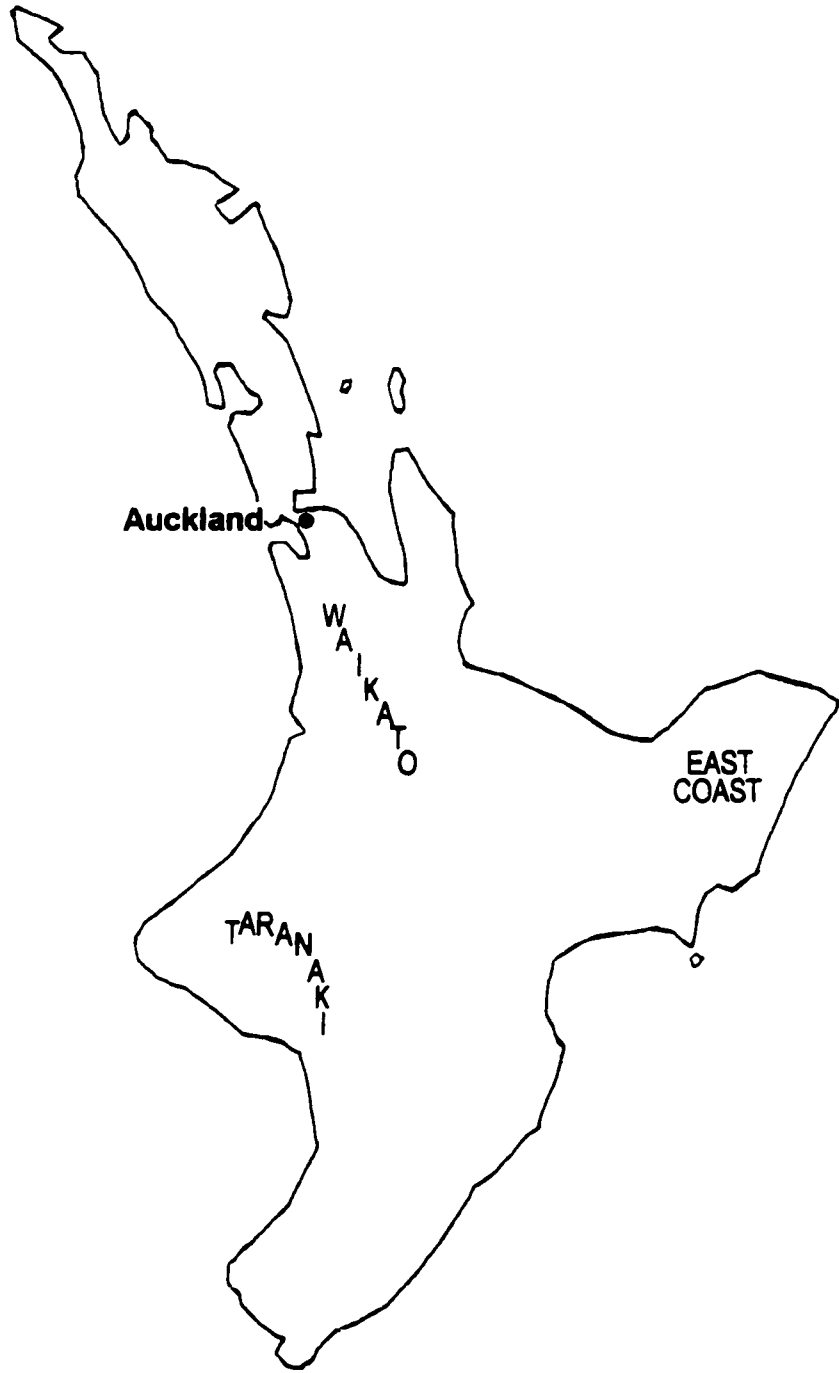


Auckland Diocese 1848

Map 6

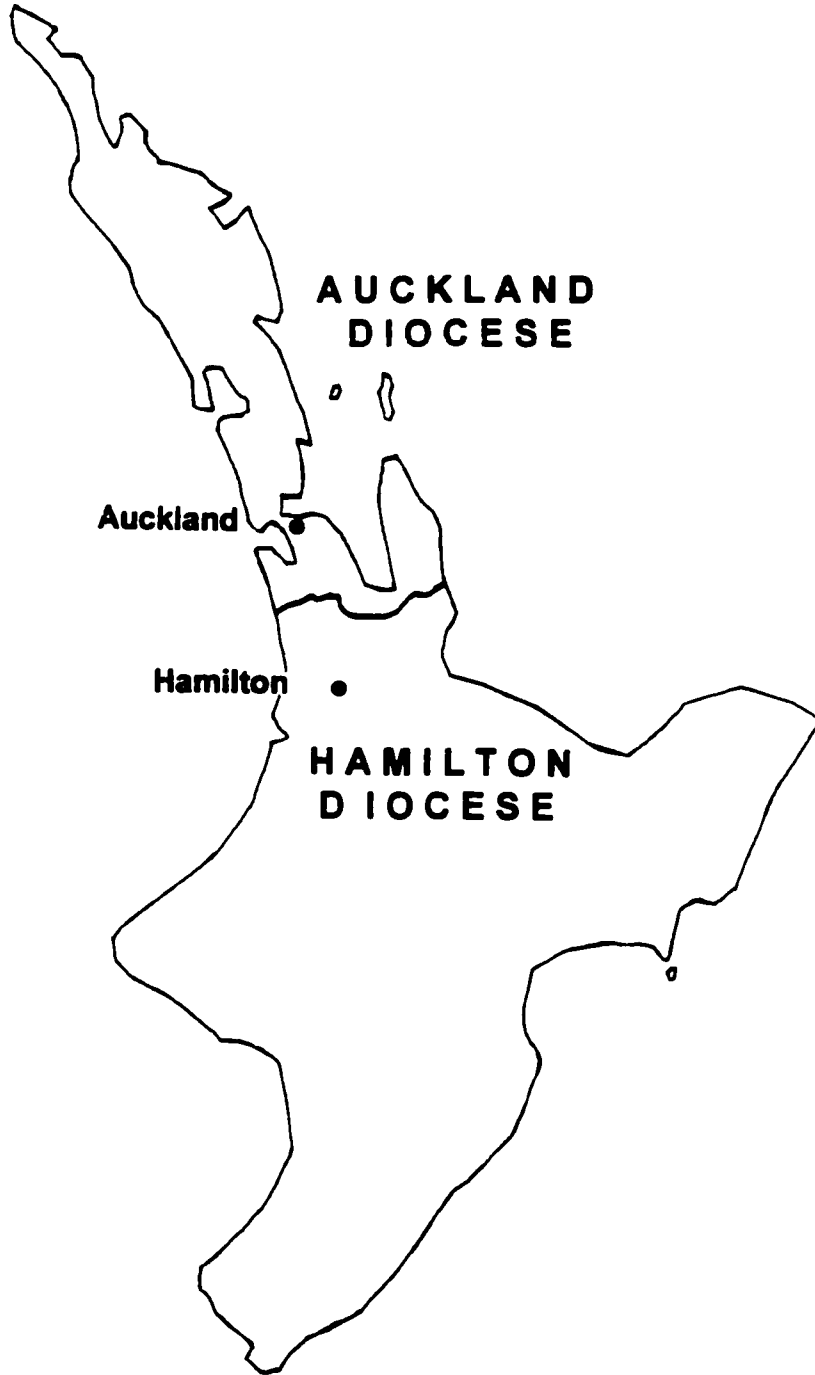


Map 7



Area of the Land Wars

Map 8



Auckland Diocese 1980

Map 9

Private Schools Conditional Integration Act 1975

PART VI

PROPRIETORS OF AN INTEGRATED SCHOOL

40. Powers and responsibilities of Proprietors – (1) The Proprietors of an integrated school shall [, subject to section 3 of this Act,] exercise such powers and accept such responsibilities as may be specified in any integration agreement to which they are a party.

(2) Subject to the provisions of subsection (1) of this section, the Proprietors of an integrated school –

- (a) Shall own or hold upon trust the land and buildings that are specified in the integration agreement as constituting the school premises; and
- (b) Shall accept and meet the liability for all mortgages, liens, and other charges upon the said land and buildings; and
- (c) Shall plan, pay for, and execute, over such period as may be specified in the integration agreement, such improvements to the school buildings and associated facilities, as may be required in accordance with the integration agreement to bring the said buildings and associated facilities up to the minimum standard laid down from time to time by [the Secretary] for State schools; and
- (d) Shall plan, execute, and pay for such capital works as may be approved or required, from time to time, by the Minister, with a view to replacing, improving, or enlarging the school, its buildings, and its associated facilities in order to maintain the school, its buildings, and its associated facilities at the minimum standard laid down from time to time by [the Secretary] for comparable State schools; and
- (e) May own, or hold upon trust and control, and maintain any land, buildings, and associated facilities that, although not part of the integrated school in terms of the integration agreement, are regarded by the Proprietors as appropriate to maintain the special character of the school; and
- (f) May, in conjunction with the controlling authority, make provision for the accommodation of pupils living away from home, including such provision for pupils attending primary schools; and
- (g) Shall insure all the buildings, chattels, and other assets owned or held upon trust by the Proprietors for the purposes of the school against risks normally insured against in some responsible insurance office in New Zealand; and
- (h) Shall arrange with their insurers that the policy of such insurance shall be endorsed to the effect that the benefit of the indemnity provided by the policy shall extend to the Minister in respect of any such buildings, chattels, and other assets paid for in whole or in part by loan or grant made out of money appropriated by Parliament:

Provided that, in any case where the Proprietors have not arranged with their insurers for the benefit of any such policy to extend to the Minister, no money appropriated by Parliament shall be used to pay any part of the cost of repairing

or replacing any such buildings, chattels, or other assets which have been destroyed or damaged from any cause whatsoever:

Provided also that any additional charges by way of premium made by the insurer in respect of the extension of the benefit of any such policy of insurance to the Minister shall not be met out of money appropriated by Parliament; and

- (i) Shall, together with its servants, agents, and licensees, have at all reasonable times access to the school to ensure that the special character of the school is being maintained:

Provided that, subject to section 41 of this Act, such right of access shall not give the Proprietor the right to question the curriculum or the teaching methods adopted by the teachers, both of which shall, subject to the provisions of the Education Act 1964 and of this Act, be controlled by the Principal of the school.

In subs. (1) the words in square brackets were inserted by s. 8 of the Private Schools Conditional Integration Amendment Act 1977.

Guidelines for Chaplains to Integrated Schools:

Section 69 (2) of the Integration Act allows that where religious instruction forms part of the education with a special character provided by an integrated school, the proprietor may employ a chaplain for duties relating to that religious instruction. The proprietor is required to notify the controlling authority the name of the chaplain and the controlling authority may not pay the chaplain out of Government funds nor allow the cost of the chaplain to be a charge on money appropriated by Parliament.

However, a person employed as chaplain by the proprietor, may also, with the consent of the Director General, be employed in the same school in a part-time teaching position, and may be paid by the controlling authority at the salary rate appropriate to the position provided the person is a competent teacher.

In any integrated school, the principal exercises full authority over all persons who work in the school whether as employees of the controlling authority or of the proprietor. However, as with other servants, agents and licensees of the proprietor, the principal may not unreasonably deny the chaplain access to the school or frustrate his efforts to carry out the duties assigned to him by the proprietor.

In parish primary schools and in regional primary schools for which a parish priest or his assistant has pastoral responsibility, the same priest will normally be the chaplain. There need be no conflict of role if both functions are vested in the same person. Reference to the functions and responsibilities of parish priests are set out in a separate guideline.

Specifically, a chaplain's role is to assist with religious instruction in cooperation with the principal; and director of religious studies. As well he has the special function of ministering to the pastoral and sacramental needs of the pupils. The masses and liturgies which he celebrates will form the central core - the focal point - of the community of faith in the school and the wider community of faith of which it is a part.

If the chaplain considers that he is being unreasonable hindered by the Principal and/or the Controlling Authority in the performance of his duties, he may discuss the difficulty with either or both of them in seeking a satisfactory solution to the problem but he cannot direct them. If satisfaction cannot be achieved he must report the matter to the Diocesan Directors who will take appropriate action.

In the case of secondary schools, while the chaplain may or may not be a priest from a parish, the role and functions will be as described above.

If a chaplain is also a part-time teacher, then in that capacity he is subject entirely to the direction of the principal as is any other teacher employed by the controlling authority.

Ideally the chaplain, principal and director of religious studies work as a partnership in forming the community of faith and worship in the school and linking that community with the wider community of parish or parishes.

Proprietors' Servants, Agents and Licensees: Functions - Responsibilities - Authority

Section 40 (2) (i) of the Private Schools Conditional Integration Act gives a proprietor of a school or schools the right, together with the proprietor's servants, agents and licensees, to have at all reasonable times access to the school to ensure that the special character of the school is being maintained: PROVIDED THAT, subject to Section 41 of the Act (quoted below) such right of access shall not give the Proprietor (or the servants agents and licensees) the right to question the curriculum or the teaching methods adopted by the teachers, both of which shall, subject to the provisions of the Education Act 1964, and of the Integration Act, be controlled by the Principal of the School.

Section 41: "**Rights of Proprietors in relation to Special Character of School**:- If a Proprietor, having visited a school pursuant to Section (40) (2) (i) of this Act, has caused to believe that the special character of the school as defined in the integration agreement is no longer preserved and safeguarded, he may refer the matter to the Chairman of the Integration Standing Committee, who shall as soon as practicable call a special meeting of the Committee to consider the matter."

A careful reading of the above is essential for appreciation of the necessity for this document, and of the importance of clearly understood delineations of responsibility and authority. While areas of responsibility and authority exercised on behalf of the proprietor may be carefully set out, the achievement of the objectives in protecting and promoting special character will be dependent on the greatest possible degree of co-operation among all of those servants agents and licensees who will act on behalf of proprietors.

PARISH PRIEST AND ASSISTANTS:

Primary Schools and Secondary Schools to which Parish Priests and assistants have been appointed Chaplains will recognise the priest as having day to day responsibility for ensuring that the special character of the school is being maintained. They must be permitted access to the school at all reasonable times and may enter classrooms during school time. Obviously, as a matter of courtesy and in the interest of good working relations priests will inform the principal of the school and teachers in advance of a visit to ensure that the time is not unreasonable.

"At all reasonable times" means that there must be good reason in relation to the school program, or particular activity for not permitting the priest to enter the school or classroom. There must be no deliberate attempt to prevent him from carrying out his responsibilities on behalf of the proprietor.

Where good relations have been established and understandings well developed, the priest will be welcomed at all times and will be able to move freely within the school. In an atmosphere where good positive attitudes of mutual trust and helpfulness are present, the priest will be a welcome member of the school team and be present in the staff room and at

occasional staff meetings. In particular there will be a very close working relationship with the Principal and the Director of Religious Studies.

Having in mind the proviso in Section 40 (i) of the P.S.C.I. Act and Section 41 of the same Act, the priest will be careful not to interfere in the activities of a school except that he should express any concern for special character maintenance to the principal who may at his discretion invite the priest to enter into a discussion with him and any other party involved, in an attempt to find a solution. If a solution cannot be found readily and amicably, the priest should refer the matter to the Diocesan Director of Religious Education who will proceed to investigate the complaint. Expressions of appreciation, encouragement, and advice and help from the priest will be his normal mode of action. While the priest has a responsibility and authority to enter the school to maintain special character, his function is much wider. He has full pastoral responsibility for all those people who belong to his community of faith.

An important function of priests in parishes is that of acting as the proprietor's agent in according preference of enrolment. For information about the granting of a preference of enrolment and the reduction or waiving of school dues you should refer to the Guidelines on Application for enrolment and preference in Catholic Integrated Schools.

1917 Code of Canon Law – Canons on Alienation

Canon 1531 – §1. A thing shall not be alienated for a price less than that specified in the estimate.

§2. The alienation shall be carried out by public auction or at least it should be advertised, unless circumstances suggest a different course; and the thing shall be awarded him, who, all things considered, put in the higher bid.

§3. The cash received from the alienation shall be carefully, securely, and advantageously invested for the benefit of the Church.

Canon 1532 – §1. The lawful superior mentioned in canon 1530, §1, 3°, is the Apostolic See if the property involved is :

1° A precious object.

2° An object whose value exceeds 30,000 lire or francs.

§2. But if the value of the objects involved does not exceed a thousand lire or francs, it is the local ordinary [who gives permission], after he has heard the council of administration, unless the object is of very slight value, and with the consent of interested parties.

§3. Finally, if the value of the objects involved lies between 1,000 lire and 30,000 lire, it is the local ordinary who [who gives permission], provided he has obtained the consent of the cathedral chapter, of the council of administration, and of interested parties.

§4. If the object to be alienated is divisible, the petition for permission or consent must specify the portions of it already alienated; otherwise the permission is invalid.

Canon 1533 – The formalities required under the rules of canons 1530-32 must be observed not only in the making of alienation in the restricted sense, but also in the making of any contract by which the condition of the Church may be endangered.

Canon 1541 – §1. Contracts leasing any ecclesiastical ground shall not be made otherwise than according to canon 1531, §2; and in them there shall always be made provision for the protection of boundaries, adequate maintenance, and due payment of rent,

with appropriate guarantees for the observance of these provisions.

§2. In the leasing of ecclesiastical property the norm of canon 1479 shall be observed and in addition:

1° If the [annual] lease is in excess of 30,000 lire and the term of the lease is more than nine years, there is required Apostolic approval; if the term is not more than nine years, the provision of canon 1532, §3, must be observed [i.e., there are required the permission of the local ordinary, the consent of the diocesan consultors, the consent of the diocesan council of administration, and the consent of interested parties].

2° If the value lies between 1,000 lire and the term exceeds nine years, the same provision of canon 1532, §3, must be observed; if the term does not exceed nine years, the governing norm is that of canon 1532, §2 [i.e., there is required the permission of the local ordinary after consultation with the diocesan council of administration, as well as the consent of interested parties, unless the term is a trivial one.]

3° If the value does not exceed 1,000 lire or francs but the term is longer than nine years, the same provision of canon 1532, §2, shall be observed; if the term does not exceed nine years, the lease can be made by the competent administrators after notifying the ordinary.

Canon 1542 – §1. In a contract of emphyteusis involving ecclesiastical property the lessee cannot pay off the rent obligation without the permission of the competent ecclesiastical superior as designated in canon 1532; but if he does pay it off, he shall give the church at least that pecuniary endowment which corresponds to the rental value.

§2. There shall be demanded from the lessee [*emphyteuta*] an adequate guaranty for the payment of the rent and the fulfilment of the conditions imposed; in the very document setting forth the agreement the ecclesiastical forum shall be designated as the arbiter for the solution of controversies that may arise between the parties and it shall be expressly declared therein that improvements follow the soil [i.e., accrue to the owner of the land].

The Formulation of Canon 803, §1

From *Communicationes*, vol. 29 no. 2. (1997) pp. 249-251.

The original Italian text is in the present tense.

[...]

The first consultor asked if the proposal of one of the episcopal conferences (cf. Adnexum I, p. 282) would be placed in front of this canon. Msgr. Secretary would prefer that nothing be added because of the difficulty of establishing the criteria by which a school calls itself, and is, catholic. The matter should be defined “substantially” only in respect of the universities. The second consultor preferred that to the text proposed by the same episcopal conference, there should be added “imbued with the christian spirit and with fidelity to the magisterium”. Msgr Secretary insisted that nothing should be said that would necessarily remain vague and very general. The ecclesiastical authority would give thought to placing the conditions that it considered suitable. The third consultor agreed with the positions of Msgr Secretary, as did the fourth consultor. The fifth consultor observed that the basis of the question is the same for schools and for universities, and that at least in the Code the use of the name catholic is controlled, even if the definition of the catholic school is not given there. On the other hand the definition has not always been the same for a university; for example, at first there was no necessity for canonical erection and then dependency on an ecclesiastical authority.

Msgr. Secretary observed that in order to have a minimum of juridical certainty, some act of a competent authority was essential, and that it was better to deal with schools and universities in separate canons because the practical application of the problem was completely different. The sixth, seventh and first consultors agreed with the suggestion of Msgr. Secretary, and the following text was proposed: “Nulla schola, etsi reapse catholica, nomen *scholae catholicae* gerat, nisi de consensu competentis auctoritatis ecclesiasticae.”

The Assistant Secretary said he openly opposed the text because did not find the proposed question to be very useful. It created a difficulty for the placement of the text which had a particular weight, to restrict in this way the meaning of the canons on schools to solely those (schools) which bear the name of catholic schools. As a matter of fact, one often spoke of [i.e. the term is often used, of] catholic schools and the right of supervision on the part of bishops, which in this case would be restricted solely to those schools bearing the name of catholic schools. Msgr Secretary proposed that it be placed at the end of the chapter as can. 57/2, or as §2 of can. 57, which will give the criteria of practical differentiation of the catholic school.

§1: Msgr. Secretary and the third consultor found it useful and necessary; the fourth

consultor useful but obvious. The second consultor found it neither useful nor necessary, because the schools being treated were not on the same plane as public schools and the teaching of secular material could not be placed under the vigilance of the bishop, and neither the bishops nor the conference could exercise this right. The direct intervention of the episcopal conference in the diocese was not pleasing to the first and seventh consultors (cf. The proposal of one congregation in Allegato I, p. 280.) The sixth consultor was of the opinion that §1 should be retained, deleting the reference to the episcopal conference.

At the end of the discussion, 7 against 2 (the second and the first consultors) preferred that §1 be kept without mention of the episcopal conference.

The fifth consultor observed that there was a certain ambiguity in the use of the word "catholic". Msgr. Secretary suggested that it would be necessary to clarify the concept of the catholic school, to express two ideas: 1) "imbued with the catholic spirit"; 2) "subject to ecclesiastical authority". It would need to be a definition which applied equally to schools established by the bishops or by religious, as well as by private persons; naturally, for the first two, "in a more stricter way.") The details would be worked out later. Now, the task was to clarify the concepts and the appropriate formulation.

The following text was proposed (Msgr. Secretary and the fifth consultor):

Paras §1. Schola catholica intelligitur eam quam auctoritas ecclesiastica aut persona iuridica ecclesiastica publica moderatur aut auctoritas ecclesiastica documento scripto uti talem agnoscit.

The text was approved by all, and will be §1 of can. 53/2.

At the proposal of the fifth consultor, it was decided to add a §2 on the qualities of teachers in a catholic school, in view of the importance that they have, after a reference to the principles of catholic doctrine which should inspire all education. The approved text is *Institutio et educatio in schola catholica principiis doctrinae catholicae nitatur oportet; magistri recta doctrina et vitae probitate praestent.*

§2: The fifth consultor came back to the necessity of defining the catholic school, so as to be able to establish more easily the ambit of the bishop's activity.

Msgr. Secretary observed that in referring to non-catholic schools, the text might perhaps be asking too much, but the third consultor, the Assistant Secretary, the sixth and seventh consultors were of a different view, since the text says only "are appointed", and not "must appoint".

The first consultor pointed out that the teachers who are to impart religious education

are spoken of in can. 56.

After a long and lively discussion, it was agreed to keep the text, but with a different placement; for the moment it is §2 of can. 55. The approved text is: *Loci Ordinarius sollicitus sit ut qui religionis institutionem in scholis, etiam non catholicis, deputentur magistri, recta doctrina vitae christianae testimonio atque arte paedagogica sint praestante.*

[...]

De Munere Ecclesiae Docendi

CATHOLIC EDUCATION

[...]

In the redaction of these canons there were initial questions to be resolved, first concerning the title of this section. The title was originally *De Scholis*. This was changed to *De educatione christiana*, which was used in both the Latin and Oriental Code redactions.²¹² The title was eventually changed in both Codes to *De educatione catholica*. It is interesting the reasons put forward in favour of both titles during the redaction of the Oriental Code:

A change into *De educatione Catholica* was suggested, but the CME (*Coetus de magisterio ecclesiastico*) took it that such a change from the conciliar terminology *De educatione christiana* would generally be felt in the Orient to be an unnecessary confessional accent. In any case the use of *schola Catholica* allows for no misunderstanding as to the contents of the Christian education.²¹³

The change of title was eventually made:

Even though the study group knew the objectives (i.e. unnecessary confessional accent) of the *coetus de Magisterio* in formulating the first schema of this section (trying to give an ecumenical opening to the canons contained in it), it took up the proposition to change the title of this chapter because it seemed that should the words “Christian education” be misinterpreted, they could give rise to many disagreements and seriously prejudice the Catholic education of young people which is so much the heart of the church.²¹⁴

Thus, the allusions to “christian education” were changed in the title and throughout the canons of this section. They now all refer to “Catholic education” in both the Latin and Oriental Codes.

[...]

²¹² *Communicationes*, 25 (1988), p. 216; *Communicationes*, 9 (1977), p. 262; *Nuntia*, 11 (1980), p. 62.

²¹³ G. NEDUNGATT, SJ., “The Schema *De Magisterio ecclesiastico* – Part 2,” in *Nuntia*, 11 (1980), p. 63. In fact, article 1 was entitled “*De scholis catholicis*”.

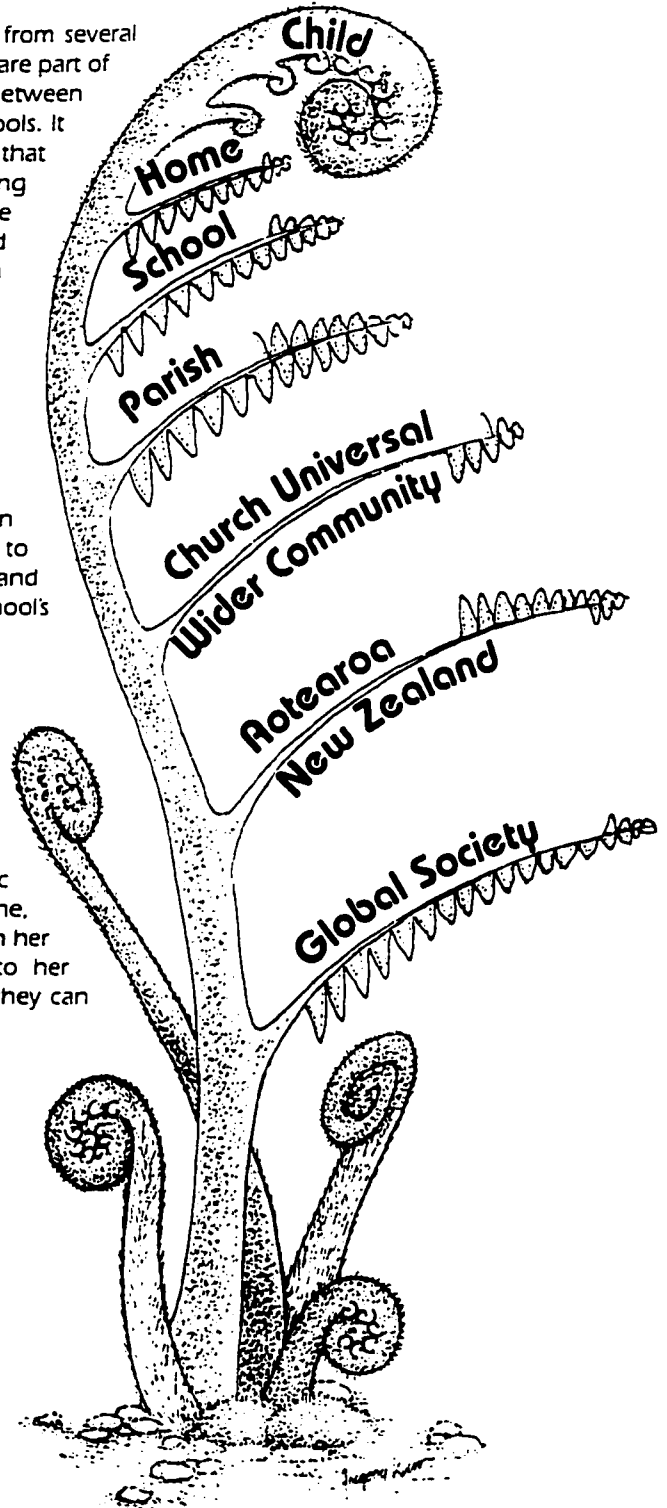
²¹⁴ “*Relazione circa la demua recognitio dello Schema.....*,” in *Nuntia*, 17 (1983), p. 35.

Education with a Special Character in the Catholic Primary School

Catholic Character and the Parish

Some Catholic schools draw their pupils from several parishes. Many Catholic Primary schools are part of a particular parish community. The links between parish and school are important for all schools. It is within the life of the parish community that children experience and practise their living faith. This involves participation in the Sacraments, liturgy, community life and service. Experience of life in the Parish community helps children to understand what it is to be a member of the Church, and their place in it, and gives meaning to what they are learning in the Religious Education programme.

- ⑨ Mutually respectful relationships within family, school and parish are vital to children's developing concepts of faith and life, and are an important part of each school's Catholic Character.
- ⑨ It is through the family, school and parish that children learn what it is to be Catholic.
- ⑨ Catholic children have the right to opportunities to learn what the Catholic Church believes through her doctrine, celebrates in her sacraments, lives through her moral teachings and prays according to her liturgical and spiritual traditions, so that they can integrate their faith with their lives.



Roles

In the life-long process of the education-in-faith of a person, many people and groups have a formative role.

Each role has a part to play in the whole process.

The Child

The child is invited to respond to his/her gift of faith, and is given the opportunity to learn what it is to be Catholic and be part of a Catholic community. Each child is invited to take his/her place as a Catholic in the Church and in the world, and enabled to do so through the effective formative roles of the family, school and parish.

The Family-Whanau

The family-*whanau* has an evangelising and catechetical role. Parents and caregivers are the first educators of their children. The *whanau*-family, *hapu* - sub-tribe and *iwi* - tribe play an important part in the formation and evangelisation of Maori children. [5] The faith and gospel values that are first learnt at home are reinforced at school and in the parish. The family-*whanau* needs to nurture the development of faith and spirituality within their children as they grow.

The Parish and the Diocese

The parish welcomes the children as they join others to participate in celebration, service, faith sharing, liturgy and social activities. Parishioners are witnesses of living faith for children. But the church community extends beyond the parish. It is through the Bishop that the parishes are linked to form a diocese and in turn the Bishop provides the links with other dioceses and the wider church.

The Teacher

The teacher is an important witness to the children and has a dual role:

- to be part of the school community in promoting the beliefs, attitudes and values which are part of the Catholic Character of the school
- to teach the religious Education programme using the varied teaching skills and styles to develop the child's knowledge and understanding of the teachings and beliefs of the Catholic Church

Along with this knowledge children will be encouraged to develop appropriate skills, attitudes and values.

The School Community

The school community has the dual role of

- creating an environment that proclaims what it teaches by providing pastoral care and fostering mutually respectful relationships, and by providing opportunities for prayer, sacramental celebrations and rituals
- teaching the Religious Education programme in a way that promotes children's learning.

Thus the schools has a partially catechetical and evangelising role and also an educational role. In these ways the school supports parents as they 'do all that they can to ensure that their children grow to know and live by their Christian faith and Christian values'. (6)

Ideally it is the effective combination of all of these roles that assists children toward maturity in faith as members of the Catholic Church.

(5) Te Kaupapa Mo Te Iwi Maori Katorica - Maori Pastoral Care Plan, p. 15

(6) We Live and Teach Christ Jesus, n. 74

1 – SOURCES

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