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**TOWARDS ALTERING CANONICAL STATUS:
A CASE FOR CATHOLIC UNIVERSITIES AND COLLEGES IN CANADA**

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

Ottawa, Canada
Saint Paul University
1995



Daniel J. Zorzi, Ottawa, Canada, 1995



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ABSTRACT

In the Apostolic Constitution, *Ex corde Ecclesiae*, John Paul II states that the Catholic university and college is a human institution wherein the members critically assist in the on-going promotion of human dignity and cultural heritage through the three-fold missions of teaching, researching, and providing various pastoral services. Moreover, the members perform these tasks, imbued with the Christian spirit and inspired with the Gospel values in order to "assure in an institutional manner a Christian presence in the university world confronting the great problems of society and culture." In short, the institution marks the confluence of two streams within a Catholic academic environment - culture and religion.

Church legislation has remained neither silent nor irrelevant on the question of Catholic higher education. In fact, the 1983 *Code of Canon Law* devotes several canons of related issues pertinent to these institutions. It does not, however, systematically address the critical topic of church-related educational institutions with respect to religiously-owned universities and colleges and their canonical status. Instead, in a more general way, the 1983 Code introduces new and broader options for canonical status, including the public and private juridic person and the public and private associations of the faithful with or without juridic personality.

Consequently, at the heart of this dissertation lies the issue of canonical status of religiously-owned, federated Catholic universities and colleges in Canada; the crux of the matter is the precise determination of and alteration to that canonical status, given the broader designations in the 1983 Code. Accordingly, based on the presumption that tracing the titles to property of religiously-owned educational institutions is the truest indicator of its present canonical status, this dissertation undertakes a canonical

investigation into the titles to property of the Basilian-owned, Canadian, federated Assumption University at Windsor, Ontario. Selecting and properly applying an option, if appropriate, presents innovative ways to direct various educational institutions within particular settings and under different governance models, while ensuring, among other concerns, the protection against exposure to civil and canonical liabilities of church-related institutions and the on-going mission of the Catholic university.

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And finally, to my family and friends, I say thank you so much for your love and support.

ABBREVIATIONS

A.C.	Appeal Cases (case reporter)
Alta. H.R.C.	Alberta Human Rights Commission
B.C.J.	British Columbia Judgments
B.C.S.C.	British Columbia Supreme Court
C.A.	Court of Appeal
CAL. RPT.	California Reports
C.C.L.T.	Canadian Cases of the Law of Torts
C.H.R.R.	Canadian Human Rights Report
D.L.R.	Dominion Law Review
Gen. Div.	General Division
O.J.	Ontario Judgments
Ont. C.A.	Ontario Court of Appeals
O.R.	Ontario Reports
R.S.C.	Revised Statutes of Canada
R.S.O.	Revised Statutes of Ontario
S.C.	Supreme Court
S.C.R.	Supreme Court Reports
S.O.	Statutes of Ontario

INTRODUCTION

A university is the place to which a thousand schools make contributions; in which the intellect may safely range and speculate, sure to find its equal in some antagonistic activity, and its judge in the tribunal of truth. It is a place where inquiry is pushed forward, and discoveries verified and perfected, and rashness rendered innocuous, and error exposed, by the collision of mind with mind, and knowledge with knowledge.¹

-John Henry Newman

In the early 19th century, teaching and preaching motivated a small group of diocesan priests to found what has become the Congregation of Priests of Saint Basil. Since that time, countless men and women have continued to benefit from this initial desire and commitment in a variety of educational and pastoral settings. In fact, many graduates have returned to the institutions to carry on the work of the founders in teaching, preaching, and administrating. While difficulties and financial burdens still prevail in the minds and pocketbooks of all those involved, the educational apostolates are striving to uphold the spirit and vision of the Basilian priests who have gone before them. But, in spite of it all, the historical accounts testify that "ces messieurs d'Annonay" embarked on a successful mission that has advanced education on three continents.

Other religious institutes and dioceses have similarly devoted much time and effort to establishing and maintaining Catholic universities and colleges throughout the world.

¹C. HARROLD, A Newman Treasury, London, Oxford Press, 1943, p. 41.

In Canada, sixteen such institutions of higher learning strive to integrate learning, illuminated by the light of faith and reason. In particular, the Congregation of Priests of Saint Basil carry out this apostolic work, in varying degrees of academic, pastoral, and administrative involvement, at five Catholic universities or colleges across the nation.

With regard to the universal church, it has remained neither silent nor irrelevant on the issue of catholic higher education. The recent Apostolic Constitution, *Ex corde Ecclesiae*, attempted to expound the nature and objectives of Catholic universities and colleges and to help clarify and maintain their identity. Also, by devoting several canons to education, the 1983 *Code of Canon Law* addresses, though in an unsystematic way, related topics pertinent to these institutions.

One particular area of church legislation that touches both the Catholic university and its sponsoring-religious body lies in the juridical relationship between the two institutions. While the 1917 Code listed three possibilities for canonical status of universities, the 1983 Code presents five principal options. Depending upon the nature of this relationship, the various laws of the Church together with supporting documents guide their work. For example, in some cases, the religious institute owns the university and controls it through a traditionally-styled membership corporation. Moreover, the university may share in the juridic personality of the sponsoring body, or it may have altered that status over the years and now enjoys another form. In short, the canonical status, or lack thereof, of church-related educational institutions determines the relevance of which canon laws, if any, apply to them.

In any event, at the core of this dissertation lies the issue of the canonical status of religiously-sponsored, federated Catholic universities and colleges in Canada; the crux of the matter lies in the precise determination of and alteration to that canonical status, given the new designations for juridic personality and associations of the faithful introduced under the 1983 Code. Choosing and properly applying an option presents

innovative ways to direct various educational institutions within particular settings and under different governance models.

It is true that an immediate problem emerges in that a discussion of this nature involves not only the claims of two legal systems, the canonical and the Canadian, but also the different legal provisions of two Codes of canon law (1917 and 1983) and the numerous provincial and municipal jurisdictions wherein the universities or colleges are located. Currently, at civil law, many of these Church-related institutions exist as not-for-profit, non-share capital corporations with charitable status; while at canon law, for various reasons, their present canonical status remains unknown or unclear. Moreover, the complexity of the discussion is enhanced by obvious and not so obvious dissimilarities in each university or college. In light of such complexities, generalizations tend to be simplistic and accurately nuanced assertions elusive. Hence, the question of the dissertation is best answered by utilizing one Canadian Catholic university and by developing a process for altering its canonical status. Subsequently, other institutions choosing to investigate the possibility of a change in their status can make use of the design.

Before the members of an institution are in a position to consider any alteration to its status, they need particular data and knowledge. Accordingly, undertaking an investigation which charts the canonical history of the institution and generates necessary data from the time of its inception to the present is necessary in order to ascertain the institution's precise present canonical status. This methodology is based on a presumption of Robert Kennedy that the original canonical status of an institution is not necessarily indicative of its current status. Specifically, the inquiry looks beyond the juridic nature of the institution as well as the acts of civil incorporation into the conveyance of titles to properties so to provide documentary evidence as to the actions and motivations of the sponsoring body that may have conveyed ecclesiastical property. Subsequently, these

evidentiary texts aid in a canonical interpretation as to whether or not the conveyance resulted in an alteration to the institution's original status. For most universities, this means that the inquiry spans three canonical periods: (1) prior to 1917; (2) from 1917-1983; (3) since the promulgation of the 1983 *Code of Canon Law*. In all, this process, though tedious, represents the truest indicator of a university's present status at canon law.

As well, other factors play a role in any decision-making which moves towards altering canonical status: (1) sound knowledge of the disadvantages and advantages of each principal option; (2) an accurate understanding of the present civil situation of the university; (3) an awareness of the types of liabilities, both canonical and civil, to which the religious body exposes itself in the operation of the charitable institution, particularly when the sponsoring body retains the titles to property of the university or college; (4) a familiarity with the history of the founders together with the historical development of the university.

By way of summary, then, in four chapters this dissertation examines each of these variables. This study begins with the presentation of two histories which serve as a preliminary step into the specific inquiry regarding the canonical status of the institution and the possible future changes to that status. Accordingly, the first narrative chronicles the development of the founding religious institute, while the second addresses the specific history and tradition of the educational institution under examination. In the end, this information constitutes one element in the decision about which option for canonical status will best suit a particular institution.

The second section of Chapter I examines general principles dealing with the nature, purpose, objectives, and identity of Catholic universities and colleges as contained in the Apostolic Constitution, *Ex corde Ecclesiae*, and in conjunction with the 1983 *Code of Canon Law*. It specifically views the Basilian-owned university in the light of these

topics emphasizing the theology of *communio* and the importance it plays in fostering an institutional identity. Having said that, the community chosen for study is the Congregation of Priests of Saint Basil and the institution is Assumption University at Windsor.

Assumption University was chosen for this study for two practical reasons. First, archival material and other evidentiary documents needed in the canonical investigation were properly preserved, chronicled, and easily accessible. Second, as the history and canonical investigation show, after remaining dormant for a number of years, and still sharing in the public juridic personality of the sponsoring religious body, Assumption is beginning new initiatives and ventures under the direction of the Basilian Fathers; consequently, its present situation suits the overriding purpose of the dissertation. That is, perhaps an alteration in the canonical status of the university is now appropriate to meet its changing situation.

Chapter Two begins the investigation into the canonical status of Assumption for the period prior to 1917 and from 1917 to 1983. Part I in this chapter presents a general overview of the law as regards charitable institutions under the *Pio-Benedictine Code* while the second section of Part I provides a contemporary analysis of the Maida and McGrath theses, both of which are relevant to the dissertation. Part II looks into the conveyance of titles to properties as the truest indicator of canonical status, utilizing documentary evidence obtained from the London diocesan archives, the Basilian Fathers Curia, and the archives of Assumption University. Thereupon, by applying the laws and concepts of Part I and the results of the canonical investigation in Part II, Part III determines the canonical status and civil situation at Assumption University at the time of the 1917 Code.

Chapter III continues the investigation into the canonical status for the period covering the 1983 Code. In four parts, this chapter begins with an overview of the

available principal options for canonical status under the current legislation. While Part I focuses on public and private juridic persons, Part II provides a commentary on the various recognized associations of the faithful, both public and private. The canonical investigation is completed in Part III with the present status ascertained, following the same methodology employed in the previous chapter. Departing from the canon law, Part IV discusses the civil situation of Assumption University, at present, in the light of the principle of federation.

The alteration to the canonical status occurs in Chapter IV. However, as mentioned earlier, deciding upon a change in status for an incorporated apostolate demands a great deal of knowledge about the civil status of the institution, its corporate structure, the history of its founders and the institute, and most important, its present status. Previous chapters examined most of these areas, including an extensive examination into its canonical history. Still, further information seems both necessary and beneficial. Accordingly, in seven parts, this final chapter continues to collect the data needed in order to complete the legal profile, both canonical and civil, of Assumption University. Thereupon, Part I presents a general overview of the charitable corporation in the light of civil law, highlighting the various common and statute laws that govern its operation. Part II focuses on statutory liabilities and attempts to show how this body of law affects all corporations. It illustrates sets of circumstances in which vicarious and third-party liability may attach. Fiduciary laws place certain obligations upon members and directors of non-profit organizations, while the Ontario Human Rights Legislation imposes strict liabilities, especially as regards discrimination and harassment. Parts III and IV obliquely touch on these important areas of law. Part V completes the look into liabilities from a canonical perspective with respect to non-juridic and juridic acts which cause damage to an individual when unlawfully posited by either a physical or juridic person or both. And finally, before proceeding to the last part which completes

the process begun in Chapter I, Part VI considers ways of avoiding liabilities at canon and civil law, including economic divestiture. Further, it discusses the disadvantages and advantages of the principal options for canonical status and introduces the declaration of intent.

As a final note, given Assumption's altered status, the epilogue raises some questions regarding the federative model itself and presents two thumb-nail sketches as possible directions for Assumption University. Integrating the denominational college into the secular university presents one portrait. A second looks at the present situation at Assumption and makes recommendations regarding its future as a specialized, autonomous institute.

CHAPTER ONE

The History of the Congregation of Priests of Saint Basil and the Development of its Apostolate at Assumption University in the light of *Ex corde Ecclesiae*

In three sections the first chapter traces the footsteps of the founding fathers of the Congregation of Priests of Saint Basil, beginning at the parish of Saint-Symphorien-de-Mahun nestled in the French mountainous region of the Ardèche and ending at Assumption University at Windsor. In particular, the first section attempts to capture the spirit of the founders as it moves from recounting the early trials of the newly-formed Association to outlining the Congregation's present apostolates on three continents. This movement, spanning some 180 years, eventually focuses on the Congregation's commitment to higher education. Consequently, the second section presents an historical and legislative overview of the development of Assumption University at Windsor. Finally, in the light of *Ex corde Ecclesiae* and the ordinances for its implementation in Canada, the last section addresses certain issues peculiar to Catholic higher education at Assumption University. As a result of introducing this papal document, a general discussion ensues concerning the nature and purpose, the Catholic identity, and the governance of religiously-owned educational institutions. The points of this discussion serve to prepare the way for the proper starting-point in the process -- an investigation into the canonical status of the university or college. To begin, Chapter 1 presents an historical overview of the Congregation of Priests of Saint Basil.

I. The Origins and Apostolate of the Basilian Fathers¹

Some thirty years ago, a French Basilian named Charles Roume successfully chronicled the first complete history of the early years of the Congregation of Priests of Saint Basil. After many years of meticulous research, *Origines et formation de la Communauté des Prêtres de Saint-Basile* recounts the crisis-laden first years of the Congregation, beginning at the parish of Saint Symphorien-de-Mahun in the Ardèche region.² Presenting portraits of the many personalities who shaped the community during its formative years against a backdrop of the political and religious struggles which affected the growth of the Congregation around the time of the French Revolution, Roume insightfully brings to life people and events in vivid and colourful detail. Unfortunately, he did not live to complete the full history that he had planned; however, other Basilians have continued highlighting the events of the day and those most responsible for the Congregation.³

Roume's presentation, suffused with trials and chaotic episodes, makes clear that at various times and with various leaders the end appeared all too imminent. In many places and on several occasions the few words of Bishop Molin seemed hauntingly true,

¹Members of the Congregation of Priests of Saint Basil are known as Basilians or Basilian Fathers.

²C. ROUME, *Origines et formation de la Communauté des Prêtres de Saint-Basile*, Imprimerie Volle, Privas, 1965, pp. 2-409 [=Origines et formation], (English translation: *A History of the Congregation of St. Basil to 1864*, translated by K. KIRLEY and W. YOUNG, Toronto, The Basilian Press, 1975, xxi, 434p.)

³See K. KIRLEY, *The Congregation of Priests of St. Basil of Viviers, France. 1922-1955*, Toronto, The Basilian Press, 1981, v, pp. 1-297; J. HANRAHAN, *The Basilian Fathers (1822-1972), A Documentary Study of One Hundred and Fifty Years of the History of the Congregation of Priests of St. Basil*, Toronto, The Basilian Press, 1973, vii, pp. 1-263 [=The Basilian Fathers (1822-1972)]; K. KIRLEY, *1922 Before and After*, Toronto, photocopied pamphlet, 45p. See also E. MCCORKELL, *Memoirs of Rev. E.J. McCorkell, C.S.B.*, Toronto, The Basilian Press, 1975, 150p; R. SCOLLARD, *Dictionary of Basilian Biography*, Toronto, The Basilian Press, 1969, 245p; A. PAGÉ, *A History of the Basilian Order in Canada*, Toronto, Toronto Press, 1924, 200p.

"This community will never last."⁴ Through it all, however, the community steered west from France to North America, fuelled by an earnest dedication to the apostolate of cultivating minds and nourishing souls. Contrary to the opinions of many, since its founding in 1822, the Basilians continue to live and work in a diversity of settings on three continents.

Desiring to promote Christian education in the mountain district of the Vivarais at the end of the French Revolution, Archbishop D'Aviau of Vienne, requested that Joseph Bovier Lapierre, later elected the first Superior General, organize and direct a school at Saint-Symphorien-de-Mahun near Annonay.⁵ Over time, to help accomplish this task, Lapierre managed to attract a group totalling ten teachers and junior masters, all of whom were secular priests.⁶ Eventually, this company constituted the original founding fathers.

Born on 25 February 1757, the son of a fairly well-to-do family, Joseph Bovier Lapierre was well-educated in rhetoric and philosophy. Following his theological studies at the Seminary of Saint Irénée, he was ordained in 1782. After several appointments throughout the diocese, he took over the parish at Sarras along with three other priests. Together, they made up a small group to whom the Sulpician Cartal had entrusted the

⁴J. HANRAHAN, *The Basilian Fathers (1822-1972)*, p. 179.

André Molin who was the Bishop of the Diocese of Viviers was born in 1759 and died in 1825.

⁵Until the Concordat of 1801 the northern part of the Vivarais which included Annonay and Saint Symphorien formed part of the Archdiocese of Vienne. Charles Francois D'Aviau (1736-1826) was the last Archbishop of Vienne. In 1802, following the suppression of the diocese, he was appointed Archbishop of Bordeaux. See C. ROUME, *Origines et formation*, pp. 110-155, (English translation: *A History of the Congregation of St. Basil to 1864* [hereafter= *A History*], translated by K. KIRLEY and W. YOUNG, p. 411).

⁶The members of the group included Joseph Lapierre and his associate, Joseph Marie Actorie, Jean Antoine Vallon, Auguste Payan, Pierre Tourvielle, Vincent Duret, André Payolle, Henri Hartinesche, Jean François Pagés, and Julien Tracol. Joseph Actorie worked with the founding fathers but did not join the Community of Priests of Saint Basil in 1822. See K. KIRLEY, *1922 Before and After*, p. 3.

rehabilitation of the *lapsi*. From 21 April to 17 June 1797, Lapierre acted as pastor, secretly ministering to the faithful.

With the arrival of spring 1797, a new day seemed to dawn in France. The Royalists did unusually well against the Jacobins in the French elections. Moreover, with the fall of Robespierre, the bitter and dangerous years appeared to end. In fact, the relative peace in France that summer and the danger looming in Rome following the Treaty of Tolentino, convinced Archbishop D'Aviau to return from exile.

Upon arriving in his diocese, D'Aviau was reacquainted with Lapierre. While the historical accounts reveal that the Archbishop "found" Lapierre acting as pastor of Sarras and later saw him established in the parish of Saint Symphorien, they are unclear as to the reason why Lapierre took up residence there. Was he forced into hiding because of the harassment inflicted on him by the patriots of Andance during the period of relative calm, or was it at the simple request of the Archbishop that he move to Saint Symphorien? While history shows that Lapierre's departure coincided with the return of D'Aviau and the charges of harassment at Sarras, Roume suggests that Lapierre would have eventually taken charge of the tiny parish, since the documents indicate with unmistakable clarity that it was the Archbishop's intention to place the parish in the hands of Lapierre, sooner rather than later, and request the establishment of a Church school.⁷

At any rate, in the summer of 1797 Lapierre assumed control of the parish, along with an existing rectory school which was formerly under the supervision of Jean André

⁷D'Aviau and Lapierre were both outlaws in the eyes of the French Revolutionary State. They were refractory priests, non-patriots, one of whom refused to swear the oath of allegiance to the Civil Constitution of the Clergy in 1790, the other who swore it and at once recanted. It was ambitious, courageous, and downright dangerous to promote Christian education in the teeth of the Reign of Terror, but this is exactly what the Archbishop did when he first contacted Lapierre in 1797 and bade him organize a school at Saint Symphorien-de-Mahun, as well as take care of the parish there." K. KIRLEY, 1922 Before and After, pp. 2-3; C. ROUME, Origines et formation, pp. 35-44.

Vacher, a Capuchin of the monastery of Monistrol-sur-Loire.⁸ With the Archbishop's encouragement, Lapierre continued the work of Vacher in the education of young boys. However, eclipsing the hope of the summer and reigning new terror on the Church, the *coup d'état* of September 1797 forced Lapierre to carry out his work in secret. As a result, Saint Symphorien, isolated in the hills of the Ardèche, proved an excellent refuge both for students and for priests.

After escaping the tyrannical laws imposed by the *coup d'état* of Fructidor, Henry Léorat Picansel, the pastor of Notre Dame of Annonay, joined Lapierre at Saint-Symphorien. Suffice to say, his stay fostered a very deep and lifelong relationship between the two priests. Moreover, Picansel proved quite helpful in writing a Rule. Though the *Picansel Rule* was not intended to be a religious rule but a simple outline of the life proper to a group of clerics involved in a common work, it eventually guided the life of the founding fathers and new members for several decades, beginning in 1802.⁹

While many heralded the summer of 1797 as the season of hope, the summer of 1801 marked a season of new life for the people of France, especially for those in the Church. With the signing of *The Concordat of 1801* between Pius VII and Napoleon on 16 July and its official promulgation in 1802, a new situation developed.¹⁰

⁸Jean André Vacher was a Capuchin of the monastery of Monistrol-sur-Loire who took for his religious name, Father Hubert of Saint Didier. "Arrested along with Rouchouse, Curé of Satillieu, and imprisoned at the Seminary of Viviers, he was freed at the time of Robespierre's death and went into hiding at Saint Symphorien-de-Mahun." R. APOLLINAIRE, "Etude franciscaines sur la Révolution," in *Revue du Vivarais*, 8 (1899), p.75. See also C. ROUME, *Origines et formation*, (English translation: *A History*, translated by K. KIRLEY and W. YOUNG, p. 44, note 1).

⁹A typed copy of the sixteen articles of Picansel's Rule of 1802 is located in the General Archives of the Basilian Fathers at Toronto. The copy was made from the original located in the Archives Basiliennes at Annonay. A reproduction of the Rule is found in J. HANRAHAN, *The Basilian Fathers (1822-1972)*, pp. 14-18.

¹⁰F. CROSS, ed., *The Oxford Dictionary of the Christian Church*, 2nd revised edition, New York, Oxford University Press, 1984, p. 327.

Meanwhile, unknown to the authorities, the small school in Saint Symphorien had grown over the years into a minor seminary, opening on 11 November 1800.¹¹ The expansion was so great that, incapable of running the school solely, Lapierre requested that D'Aviau appoint Joseph Marie Actorie, a diocesan priest, as Director. Together, Lapierre and Actorie now publicly welcomed new students and fostered the development of the Seminary. So, with the growth of the school and the realization of the *Concordat* came new found possibilities for the administrators. Moreover, with Picansel already re-established as pastor and Vicar-General in Annonay, one emerging possibility was a movement to the north.

In September 1802, the small band of teachers and junior masters followed Picansel to Annonay where they relocated the minor seminary, now called Institution Actorie. Besides Lapierre and Actorie, there were nine others who taught and lived according to the rule of Picansel. The early years, 1800-1822, brought one crisis after another, especially in 1805 when the Institution Actorie nearly closed because its director could not develop a "politically correct" history curriculum. Providentially, Pierre Tourvielle, later succeeding Lapierre as Superior General, returned to Annonay after completing graduate studies in mathematics and offered Lapierre the encouragement needed to accept the offer of Director. With Lapierre and Tourvielle as the key administrators, the school, renamed Institution Lapierre, moved forward. Actorie, now Prefect of Studies, continued to teach all subjects in the lower grades -- except history.

¹¹Though documents listing the exact figures of enrolment are difficult to find, the following statistics are reasonably close: In 1800-1801 when the school was at Saint Symphorien-de-Mahun there were 12 boarders and 40-50 day students, aged 12-30. In 1801-1802 there were 32 boarders and 60 day students. Statistics located in an official report of school inspector Baude, sub-prefect of Tournon. See C. ROUME, *Origines et formation*, (English translation: *A History*, translated by K. KIRLEY and W. YOUNG, pp. 69-70; K. KIRLEY, *1922 Before and After*, p. 4.

Taking to heart Picansel's simple rule of "work follows prayer and prayer follows work",¹² the group of ten laboured to keep Archbishop D'Aviau's desire for Christian education alive. Within ten years of arriving in Annonay, the priests had opened two auxiliary schools. Jacques Vincent Duret, an assistant in the parish of Annonay, established in 1805 the Minor Seminary of Sainte Barbe, intended primarily for the sons of poor families. In 1813, Pierre Tourvieille opened Sainte Claire school which offered a program of studies known as the French program as distinguished from the classical courses. Largely a creation of Tourvieille, the course content appealed to those interested in industry and commerce. In any event, though saddled with many financial and political setbacks, unyielding determination and a firm dedication to teaching and preaching enabled "ces messieurs d'Annonay" to make a generous contribution to education in early 19th century France.¹³

As mentioned, the beginning of the century was not without crises, even conflicts. In fact, the years 1819 to 1822 were particularly painful and arduous. The numerous changes occurring within ecclesial and governmental circles served to aggravate the complexity of the struggling priest-teachers of Annonay. Fending off attacks from the more liberal elements, while fighting accusations in the press, became part of their daily routine.¹⁴ Furthermore, since the *Concordat of 1801* failed to recognize minor

¹²This quote is located in the Preamble to the Rule. See J. HANRAHAN, The Basilian Father (1822-1972), p. 14.

¹³See K. KIRLEY, 1922 Before and After, p. 4.

¹⁴"For the most part, then, the well-to-do class in Annonay professed liberal ideas. The former revolutionaries had now rallied about Caesar and called themselves liberals; and if their convictions had been rudely and repeatedly shocked by the force of events, there remained, nonetheless, a deep feeling which turned them away from all who had thought differently from themselves during the turmoil...a certain latent anticlericalism still motivated their acts...It was precisely the political comportment of the Principal [Actorie] which rubbed them the wrong way. Once his revolutionary fever subsided, Actorie became an adept monarchist, an open enemy of the Revolution...an out-and-out reactionary." For a continuation of the analysis, see C. ROUME, Origines et formation, (English translation: A History, translated by K. KIRLEY and W. YOUNG, pp. 100-114.)

seminaries as ecclesiastical schools, the priests fought constantly with education officials who from 1817-1819 questioned the initial accreditation of the institution at Annonay -- a privilege that the College of Annonay enjoyed from the time of the creation of the University in 1809.¹⁵ Soon the College began to feel the effects of the long-lasting investigation. Indeed, the once generous bursaries now failed to support the financially-crippled institutions, suffering under the weight of the heavy taxes. Time alone would lift the burden. After having decided that the priests had maintained the highest of standards in teaching with impressive results, education officials granted accreditation to the College once again. Some eighteen years later, Nicolet, the new Rector of the Academy of Nîmes finally posted a letter to Tourvieille confirming the decision.¹⁶

During the same period, confusion reigned in the Church, too. In 1802, the Holy See had suppressed the Archdiocese of Vienne, moving Archbishop D'Aviau to Bordeaux. Annonay, which belonged to Vienne, now came under the Diocese of Mende. Following the restructuring of the boundaries in 1818, Annonay found itself assigned to the Diocese of Viviers.¹⁷ But, for several reasons, Étienne de Mons, Bishop of Mende continued to exercise his jurisdiction over Annonay. Anticipating a change, he refused to do anything decisive. Providentially, change came. In September 1821, he became

¹⁵The Concordat of 1801 granted Bishops the right to conduct a seminary and to organize it as they wished as long as it was approved by the government. The college at Annonay was not an ecclesiastical school, but a secondary school approved by the State. It was to remain so, until the creation of the University on January 1, 1809. See C. ROUME, *Origines et formation*, (English translation: *A History*, translated by K. KIRLEY and W. YOUNG, pp. 115-116); See also A. CHOMEL, *Le Collège d'Annonay (1800-1880)*, Annonay, Hervé, 1902, 245p.

¹⁶For a copy of the text of the letter, cf. C. ROUME, *Origines et formation*, (English translation: *A History*, translated by K. KIRLEY and W. YOUNG, pp. 124-125).

¹⁷"With the Civil Constitution of the Clergy, voted 24 August 1790 by the Constituent Assembly, the diocese of Viviers was attached to the Diocese of Vienne. Under the Concordat concluded between Napoleon Bonaparte and Pius VII, 15 July 1801, it became part of the Diocese of Mende. Finally, *Paternae caritatis*, 16 October 1822, restored it to Viviers." Cf. K. KIRLEY, *The Congregation of Priests of St. Basil of Viviers, France, 1922-1955*, Toronto, The Basilian Press, p. 1, note 2.

Archbishop of Avignon, leaving Claude Jean Joseph Brully de la Brunière to offer new hope in Annonay. Seeing the plight of the College, the new bishop set out at once to take some decisions, especially since a discouraged Actorie, at 54 years of age, had just tendered his resignation.

Since 1800, except for the one year 1819-1820 when he headed the major seminary in Mende, Actorie had effectively run the College as Director to 1806 and then as Prefect of Studies with Lapierre as nominal Director. Indeed, his retirement dealt a major blow to the men who had worked with him and depended upon him for so many years. Now, competing against the newly established rival school at Maison Seule and suffering the effects of three years of declining enrolment at the College of Annonay, Actorie's withdrawal almost led to a complete breakup of the College.¹⁸

Devoted to their work and distressed at the thought of its failing, Lapierre, now 65, ironically stood out as the one who had the strength to battle this crisis. Though Tourvieille had already replaced Lapierre as Director, he was determined to carry on. With his motivation, others rallied in support with a renewed spirit best captured in Julien Tracol. Of a rather timid and scrupulous temperament, Tracol, just ordained in 1819, nonetheless threw himself eagerly into the work of the College.¹⁹ Between the stormy years of 1819-1822, he took it upon himself to write a commentary on the *Rule of Picansel*. However, though the *confrères* appeared very appreciative of his effort, they desired a more intense religious life than that offered in the Rule and commentary.

But devotion alone was not sufficient to overcome the crisis of 1822. Practically speaking, the priests of the College needed money to continue their work. Without question, the support of the Catholics of Annonay helped immensely and, after bitter sessions,

¹⁸Among the residential students, the numbers had fallen from 160 in 1818-1819 to 45 in 1821-1822.

¹⁹A. CHOMEL, *La Vie de M. Tracol*. This work remains in manuscript form in the Archives Basiliennes at Annonay.

the municipal council removed the rent on the school buildings for thirty years. But, in spite of all the aids, it seemed that what was needed most was the strength of a permanent association.

On 10 September 1822, the College of Annonay hosted the third retreat since the Revolution for the priests of the city and surrounding districts. Bishop de la Brunière hoped to take advantage of this occasion to meet the priests of the Upper Vivarais, especially the ones from the College who had suggested the possibility of forming an association. Thus, de la Brunière used the retreat visit to request that the proposed association acquire the property of the rival school, Maison Seule, as a preliminary condition. Following this, he would grant Sainte Barbe and Maison Seule jointly the title of Minor Seminary of the Ardèche. Accordingly, the government bursaries allocated to the schools would be divided equally between the two institutions, henceforth under the same direction. To that end, with the purchase of Maison Seule on 24 September, the priests had fulfilled their oral contract.²⁰

The decisive moment came on 15 September 1822 when 6 priests wrote to de la Brunière requesting permission to found such an association.²¹ While the petition bears the signatures of 6 of the 10 priests, by 21 November 1822, all were in agreement. Tracol, however, was only apparently so.

At any rate, 21 November 1822, the Feast of the Presentation of Our Lady stands as a great day in the history of the Congregation of Priests of Saint Basil. With Picansel presiding in the name of de la Brunière and Actorie assisting as honorary Canon of Mende, ten members proceeded to elect the first Superior. After one ballot, the group

²⁰See C. ROUME, *Origines et formation*, (English translation: *A History*, translated by K. KIRLEY and W. YOUNG, pp. 152-173).

²¹For a copy of the text of the letter sent to de la Brunière on behalf of those requesting to found such an Association as well as de la Brunière's response to the request, cf. C. ROUME, *Origines et formation*, (English translation: *A History*, translated by K. KIRLEY and W. YOUNG, pp. 153-155).

elected for life, Joseph Bovier Lapiere. By day's end, the diocese welcomed the Association of Priests of Saint Basil.²²

Why did the new Association place itself under the patronage of Saint Basil? Over the years, many have offered explanations, suggesting that the *confrères* chose this person since Maison Seule was in the territory of a parish dedicated to this saint. In fact, the early *confrères* debated the question at great length. While some proposed Saint Francis of Assisi since the College of Annonay occupied a former Franciscan monastery, others maintained not without reason that the "Poverello" who scorned culture could hardly serve as a model for those engaged in intellectual work! In any event, they chose Saint Basil. Quite simply, as a monastic founder, he appealed to the desire of most of the men to live a simple, yet intensely religious life. Furthermore, this humanist, as a preacher and as an author of the rules of religious life and a treatise on the study of pagan classics, seemed an appropriate choice when recalling the twofold end of the Association -- teaching and preaching.

During the ensuing years, most members of the Association were slow to lend support to the drafting of a Constitution and deciding the question of professing vows. Hence, the growth of the community began to reflect this hesitation and uncertainty. In fact, after some 30 years following the foundation, the number of men in the Association of Priests of Saint Basil grew slightly, to 21, of whom seven were over 50 years of age. At the same time, however, the group committed itself to many more educational institutions. Besides the Colleges of Annonay and Sainte Barbe, the Association had

²²At the time, the formation of a religious association was permitted so long as the Ordinary gave consent. Its canonical existence came into being with the approbation of the Holy See. The *Decretum laudis* was granted by Pope Gregory XXI on 15 September 1837 while the Decree of Approbation was granted on 23 November 1863 by the Sacred Congregation of Bishops and Regulars. Translated from the Latin text, both typed copies are located in the General Archives of the Basilian Fathers, Toronto. The reprinted text is found in J. HANRAHAN, *The Basilian Fathers (1822-1972)*, pp. 41, 100.

taken on the direction of six minor seminaries and secondary schools.²³ It appeared that the Association was rapidly committing itself to many more works than the relatively small number of Basilians could accommodate. Consequently, the issue of whether or not the community could tolerate such an outlay of priests surfaced sooner than expected.

The decision to take advantage of an opportunity in Canada sparked such a debate. In 1850, Armand François Marie de Charbonnel, a former student at Annonay, who left France to teach theology in Canada, became the second Bishop of Toronto.²⁴ Wanting to establish a minor seminary, he requested the help of a young Irish Basilian named Patrick Moloney. While knowing the mind of the community on this issue, Tourvieille, then Superior General, obliged without hesitation. Choosing instead to sacrifice still more men to get yet another institution established, he managed to sway the *confrères* in Annonay to make the necessary sacrifices to help finance and support the mission effort in Canada.²⁵

Along with the problem of manpower, one of the most controversial issues with the Basilians was the taking of vows. At the bidding of de la Brunière, Tourvieille consented in 1851 to the profession of poverty, chastity, obedience, and stability. While Tourvieille understood de la Brunière's request as a sign of his approval for the life that the Association was already leading, Julien Actorie, successor to Tourvieille, viewed the move as a step in the direction of what the Church expected of regular religious

²³The schools, which were under the direction of the Basilians, included: Maison Seule (1822-1828), Bourg Saint Andéol (1846-1852), Aubenas (1852-1879; 1895-1906, 1913-1926), Vernoux (1849-1903), and secondary schools in Feyzin (1827-1847), Privas (1828-1872). See also K. KIRLEY, 1922 Before and After, p. 9; C. FROMENTON, Le petit Séminaire de Vernoux, Aubenas, Habauzit, 1922, 150p.

²⁴See R. CAUSSE, Vie de Mgr de Charbonnel, Annonay, Duculot, 1931, 120p.

²⁵For a detailed account of the beginnings of the community at Toronto, cf. C. ROUHE, Origines et formation, pp. 314-341.

congregations. The major stumbling block, however, was the vow of poverty. Indeed, this issue quietly rested until the early part of the new century.

Initially, the professing of vows really did not have much of an effect on the number of vocations admitted to the Association, but that was to change. In 1856, a discouraged Actorie wrote that "...we are growing weaker and weaker, and however little this progressive decline continues we shall soon reach zero."²⁶ But, upon Actorie's election as third superior general in 1859, he found himself in a position to attempt a turn-around. Because the authority of the Superior General in the Congregation was practically absolute, Actorie set about drawing up clearer Constitutions, moving the novitiate from the College at Privas to its own house at Feyzin, and purchasing a house near Sainte Barbe for a separate scholasticate. Further, he suspended expansion of the Basilian apostolates. Soon, in 1863, his investments began to pay dividends with moderate increases in admissions to the novitiate and calls to minor orders and ordination.

Meanwhile, in Canada, with few priests, the work continued slowly. In the first year of activity, the idea of two separate institutions seemed too ambitious. In one diocesan agreement, the Basilians were to administer Saint Mary's Minor Seminary while in another, the Brothers of the Christian Schools were to operate a college. Consequently, in early 1853, after some discussion, the Basilians assumed the direction of Saint Michael's College. However, finding men to develop the institution became a difficult task.

So, with the idea of a minor seminary left to fade, possibilities for Saint Michael's College began to appear. First, John Elmsely made available vacant lots on Clover Hill, to the north of the city. Second, de Charbonnel drafted a new agreement which allowed for the erection of the first building on the present-day site of The University of Saint

²⁶This quote is taken from the correspondence of Actorie to Tourvieille, 8 June 1856, Archives Basiliennes at Annonay, D4. Reprinted in K. KIRLEY, *1922 Before and After*, p. 10.

Michael's College.²⁷ And finally, money was loaned from the confrères in Annonay to help finance the Canadian operations.

While possibilities for growth began to take root in Canada, back in France, confrères had to face serious threats to their existence. Beginning in 1870 with the socialist programme of the Third French Republic and continuing into 1903 with the suppression of the religious congregations and the subsequent diaspora of the priests, the French Basilians taxed their wills to survive.²⁸ A determination not to allow these events to destroy the community, coupled with the knowledge that the priests and scholastics in North America were seemingly bent on charting their own course, the French confrères asked the Holy See in 1921 to recognize them as a distinct congregation.²⁹ So, by the Decree of 14 June 1922, the Basilians in France became the Congregation of Priests of Saint Basil of Viviers; the Basilians in North America became the Congregation of Priests of Saint Basil of Toronto.³⁰

²⁷See also F. BOLAND, An Analysis of the Problems and Difficulties of the Basilian Fathers in Toronto, 1855-1860, Unpublished doctoral dissertation, Ottawa, ON, University of Ottawa, 1955, 255p.

²⁸See also A. DANSETTE, Histoire religieuse de la France contemporaine, Paris, Flammarion, 1965, pp. 320-327; A. LATREILLE, Histoire du catholicisme en France, Paris, Spes, (3)1962, pp.430-460. The law, as of 1 July 1901, held that all religious congregations in France must make application for legal recognition. The French government, however, refused most requests. Consequently, religious priests, the Basilians included, either became secularized in the diocese into which they were ordained, or left the country. Since the Basilians applied to their bishop for secularization in 1903, this year is referred to in the Basilian documents as the year of suppression and the beginning of the diaspora. See K. KIRLEY, The Congregation of Priests of Saint Basil of Viviers, France 1922-1955, p.3, note 7.

²⁹At this particular time in the history of the Congregation of Priests of Saint Basil, according to Father James Hanrahan, there existed two competing conceptions of the community. The "French" version tended to view the superior as the primary source of authority. "Religious life", writes Father Hanrahan, "consisted precisely in the voluntary and life-long acceptance of obedience to the authority of the Superior." The "American" or "Canadian," or what was sometimes referred to as the "Irish" version, looked upon the community "as an effectively structured instrument of the apostolate." Cf. J. HANRAHAN, The Basilian Fathers (1822-1972), p.133. This text is also cited in M. POWER, The Making of a Modern School 1890-1919, Windsor, ON, 1989, Volume 3, p. xxi.

³⁰The original text is located in the General Archives of the Basilian Fathers, Toronto. A reprint is found in J. HANRAHAN, The Basilian Fathers (1822-1972), p. 211-212.

This congregational split lasted until Edmund McCorkell, third Superior General of the Basilian Fathers of Toronto, and Charles Roume successfully reconciled and negotiated the reunion of the French and American branches at the General Chapter of 1954. The Decree of Union was given at Rome on the Feast of Saint Basil, 14 June 1955. The late George Cardinal Flahiff finally effected the Decree at Annonay on the Feast of Saint Michael, 29 September 1955.³¹

Indeed, throughout the period of the separation, the two Congregations differed dramatically. While the Europeans practically needed a recall into being, the North Americans thrived. Almost immediately, the members in Canada effected change in their way of life; a change that appeared, for the time, well-beyond the strength of the French community.

Modifying the pattern of life in the former Province of Canada was not, however, beyond the strength of Robert Francis Forster, first Superior General in Canada. His attraction to the law fuelled a relentless persistence to develop a clear legal position and structure for the community. Armed with the *Pio Benedictine Code* of 1917³², Forster was determined to bring the Basilians into line with the requirements at canon law. His singular concern was the nature of the community; the crux of the issue was the unresolved problem with the vow of poverty, dating back to the late 19th century.

³¹A typed copy of the official request for union as well as the steps taken to effect the re-union between the French Basilians and the North American Basilians is reprinted in K. KIRLEY, The Congregation of Priests of St. Basil of the Diocese of Viviers, 1922-1955, pp. 232-262. The ceremony effecting the Decree of Union at Annonay is described in colourful detail in the same book, p. 262-263.

³²Codex iuris canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, (hereafter= CIC 1917) praefatione fontium, annotatione et indice analytico-alphabetico, P. GASPARRI, auctus, Civitate Vaticana, Typis polyglottis Vaticanis, 1933, xlvii-736p. (English translations of the canons are from S. WOYWOD, A Practical Commentary on the Code of Canon Law, revised by C. SMITH, New York, J. F. Wagner, Inc., 1948, 2 vols.). Hereafter, all references to canons of the 1917 Code are styled c. for canon and cc. for canons.

In fact, on 4 May 1898, the Congregation of Bishops and Regulars had issued a Decree to the General Council of the Priests of Saint Basil concerning the directed reworking of the Constitutions, especially as it pertained to the vow of poverty.³³ It seems that from the outset the Basilians had opted for the "modified" vow of poverty, arguing that such a vow was more in keeping with the life of the secular clergy from whom they had come and whose members they formed in the minor seminaries.³⁴ However, the Decree stated that if the priests decided to accept the indult and not profess the regular, simple vow of poverty, then they would have to consider themselves a "pious sodality, but not a true Congregation or Religious Institute." Since few paid attention to the Decree, nothing really came of it until Forster decided to re-open the question in an attempt to answer it, once and for all.

Accordingly, after much deliberation the General Chapter of 1922 voted 14 to 2 in favour of becoming a religious congregation with the three simple vows. In the case of poverty, among other revisions, the "new" version of the vow retained the right of ownership of properties and monies, though permission was required from the local superior for the use and usufruct of the same. Most capitulants seemed content with the outcome.

The discussion, however, did not end with the close of chapter. The confrères had one year to think about the resolutions. When they assembled at Saint Michael's College in June 1923 for the annual retreat, a majority signed a declaration whereby they

³³Cf. J. HANRAHAN, The Basilian Fathers (1822-1972), p. 180.

³⁴In general, there were five aspects to the "modified" vow, initially approved by the Holy See. The Basilians lived under this vow until 1922. Its chief characteristics included: the retention of the member's right to full ownership of any property or monies, though permission was required to use the property or monies; the retention of the mass stipends and casuals and the use and usufruct of the same; and the non-accumulation of local house funds from one year to the next. See K. KIRLEY, 1922 Before and After, p. 27.

accepted the simple vow of poverty. Those who did not sign were left free to remain under the old vow or to withdraw from the community.³⁵

Curiously, the historical accounts indicate that Forster was not concerned with the vow of poverty so much as the canonical title to ordination, *mensae communis*, which he and others believed, according to the 1917 Code, was granted only to religious congregations and not to pious sodalities.³⁶ So, in order to follow the laws of the Church and secure the right to the title, the chapter voted in favour of the simple vow. Forster was convinced that the Basilians had done the right thing.

While the Holy See had no problem with the Congregation using the title, *mensae communis* at ordination, the improper wording of the Constitutions held up its approval. Though Forster tried to address the issue, once and for all, by the time of his death in 1929, the section on poverty still had not received definitive approval. In fact, that approval was not to come until 14 October 1938.

Meanwhile, in Canada, the apostolates continued to grow. With the University of Saint Michael's College at Toronto (1853) and Assumption College at Sandwich (1863) more or less underway, together with several Basilian parishes in the Toronto area, the early 20th century occasioned the founding and directing of many other educational institutions. From 1901 to 1947, the Basilians steered the community to New York and New Brunswick in the east, to Detroit and Texas in the deep south, and to Alberta and Saskatchewan in the far west.

³⁵For a general discussion on the issue of the taking of vows with particular reference to the vow of poverty, cf. K. KIRLEY, 1922 Before and After, pp. 27-30.

³⁶Details are found in a letter, dated 13 June 1918, from F. Forster to J. Player, then Superior General of the Basilians in North America. Reprinted in J. HANRAHAN, The Basilian Fathers (1822-1922), p. 235-236. A carbon copy of the original is located in the General Archives of the Basilian Fathers, Toronto.

Once settled in these regions, area expansion took over. The 1950s and 1960s witnessed the establishment of secondary schools in Ontario, Indiana, and Alberta and welcomed the entry of two Basilian-sponsored colleges onto the campuses of the University of British Columbia and Alberta, respectively. Recently, the 1980s saw dramatic movement in the missionary lands of Mexico and Colombia, while in 1990 the Basilians arrived in St. Lucia.

In contrast, the community in France continues its struggle for life. Ten confrères remain in two houses -- Sainte Jeanne D'Arc at Lyon and Maison Saint Joseph at Annonay. With few Basilians physically able to teach at the Collège Privé du Sacré Coeur, the prevailing spirit is one of calm resignation that the end is near.

Indeed, Basilian history shows that as one community died, another drew life and began its search for new ways to nourish souls and cultivate minds in this rapidly changing world. While some Basilian communities must courageously face death, others are excited about new possibilities for communal and institutional life. However, all of these initiatives come with new questions, each demanding new solutions.

Assumption University at Windsor serves as the site of one such initiative. Though not at all young, this Basilian institution traces its beginnings to 1857. However, after moving through many years of activity, the University closed its doors to faculty and students and lay dormant. Today, new leaders with new approaches have begun to breathe life back into the Basilian-owned institution. But, the revival is slow and complicated.

Indeed, questions and advice, representing a number of disciplines, come from all sides, including canon law. Specifically, one such issue at canon law which greatly affects its administration highlights the canonical status of the institution. While this concern places itself at the heart of the dissertation, an important preliminary step into the investigation (as previously mentioned) addresses the history of the institution under

examination. In the end, this historical information will provide one element in determining later whether a change to the institution's canonical status is both feasible and advisable. So, the next section presents an historical overview of one of the Basilian Fathers' apostolates of higher education, outlining the specific historical circumstances that serve to define the present situation of the university under study.

II. The History of Assumption University at Windsor

A. Beginnings to 1870

Barely surviving its first fifteen years of existence, Assumption College in Sandwich (a city which was later incorporated into the City of Windsor) moved unsteadily between 1855-1870 from one administration to the next.³⁷ With the doors sometimes open, sometimes closed, it managed to stand finally on its own with the second coming of the Basilians under Denis O'Connor. Throughout the initial years many aided the crippled institution including the Jesuit Fathers, Basilian Fathers, German-speaking Benedictines, and a number of diocesan priests. Each took a turn at running the school, and each failed to establish a regime lasting more than a few years. In fact, on separate occasions, one other religious congregation and a seminary in Quebec were offered the College. Both parties, well aware of their own limitations and the College's dubious reputation, did not hesitate to decline the honour.³⁸

³⁷Assumption took its name from the Sandwich parish -Assumption Church - which in its turn had taken it from the Settlement of L'Assomption, the Jesuit mission to the Wyandots or Hurons on either side of the Detroit River. The Jesuits had left the area after their Suppression but returned to the parish of the Assumption through the invitation of Bishop Michael Power in 1843.

³⁸The idea of a College appealed to many, but the risks associated with guaranteeing its long term viability were repeatedly undertaken with more naiveté than realism. Sadly, Assumption's history can best be described as chaotic, even tragic at times. Its destiny was governed by overreaching ambition,

Dwarfed by Saint Michael's College in Toronto and Notre Dame in Indiana, the infant institution never had the opportunity to reach maturity and flourish. Chronically short of funds and battered by a series of questionable episcopal manoeuvres, the institution nearly closed permanently on several occasions. No one, least of all the local bishop, wanted to absorb its debts and take on the enormous responsibilities involved in trying to run a classical and commercial college. In an age when such schools were rare and bound to fail without an inspired leadership and devotion to education, at various times hope for the College seemed to waver.³⁹

The birth of the College at Sandwich began with Pierre Point, a Jesuit parish priest at Assumption and Superior of the Missions, who conceived the idea on 31 December 1854.⁴⁰ Accordingly, he wrote to his Superior as well as to Bishop de Charbonnel of Toronto outlining his plan for the educational institution and seeking approval for its construction. With permission, the cornerstone was laid 17 June 1855, and the doors opened officially on 10 February 1857.

Meanwhile, during the same time, with the establishment of the Dioceses of London and Hamilton, Sandwich no longer looked to de Charbonnel in Toronto for direction. Instead, the faithful sought guidance from Pierre Adolphe Pinsoneault, a

misplaced trust, and a bundle of half-truths, and outright lies. Cf. M. POWER, Assumption College. Years of Uncertainty 1855-1870, Volume I, Toronto, 1987, xxxviii, 143p. [hereafter= Years of Uncertainty]. The German-speaking Benedictines came from Latrobe, Pennsylvania. The Abbot, at the time, was Rt. Rev. Boniface Wimmer of St. Vincent's Abbey. They directed Assumption College from 19 September 1861 to 24 April 1863.

³⁹To its credit, Assumption had its moment of relative stability and prosperity, especially from 1870-1890. It attracted sizeable complements of English and French students taught by capable teachers, both clerical and lay. Moreover, beginning in 1860, it was eligible for the annual government grants.

⁴⁰For a detailed description and history of the early Assumption College, see also P. POINT, Histoire de Sandwich, unpublished manuscript, ca. 1860 located in the Archives de la Compagnie de Jésus, Province du Canada-français, Saint Jérôme, Québec.

Sulpician and former canon of the cathedral in Montreal, now the first bishop of London.⁴¹ But, given the questionable character of the new bishop and his inability to make effective decisions, Point and others listened with unease to his directions.⁴² In fact, as events unfolded, Point's judgment about Pinsoneault's lack of ability was confirmed on more than one occasion.

In fairness, upon taking possession of the diocese, the Jesuits never fully informed Pinsoneault of their plans for the development of Assumption. To complicate matters, the Directors of the College, consisting of two priests, Point and Bâby as well as a layman Casgrain, appeared somewhat bent on charting their own course. Accordingly, they signed Théodule Girardot, a school teacher from France, to a contract on 27 January 1857, to teach the primary and commercial courses. He was effectively made principal of the Sandwich common school and was allowed, by the terms of the contract, to hold classes inside the College building as well as to move his wife and family into the living quarters.

At any rate, the first two years proceeded with relative calm, but it was not to last. Sincerely anxious to have the Jesuits remain in charge of the College, Pinsoneault's dream came to an end in early August 1857 when the Jesuit Superior of the New York-Canada Mission, presumably advised by Point, decided that the Society could no longer devote any of its men to the College.⁴³ This unfortunate communiqué appeared to seal

⁴¹See also J. McMAHON, The Episcopate of Pierre-Adolphe Pinsoneault: First Bishop of London, Upper Canada, 1856-1866, unpublished master's dissertation, London, ON, The University of Western Ontario, 1982, 257p.

⁴²Still bitter about the lack of consultation in establishing the new diocese, Point never came to trust Pinsoneault. Harshly, yet perceptively, judging the chameleon nature of the bishop, he writes in 1856: "we have no proof of the stability of his opinion." This quote is taken from Point's Histoire du Sandwich and cited in M. POWERS, Years of Uncertainty, p. xiii.

⁴³The Jesuit position was simple: they believed that they could not direct both the parish and the College with the limited number of priests and brothers which they had at their disposal...Indeed they managed things so successfully...however without the addition of at least one extra man from their

the fate of College. Moreover, Assumption was now under the care of Pinsoneault.⁴⁴ Not without surprise, what transpired after the summer of 1857, historians best describe as a "pathetic comedy of errors and missed opportunities."⁴⁵

Faced with the collapse of the College, Pinsoneault needed to name a new director with haste. Convinced that he would find his replacement in Joseph Malbos, a Basilian priest who formerly taught at the Collège de Privas before joining the founding staff at Saint Michael's College, he made his request known to Soulerin, Superior at Saint Michael's College.⁴⁶ Within three months, Soulerin, Pinsoneault, and Pierre Tourvieille, Superior General of the Basilians at Annonay had reached an agreement.⁴⁷ On 9 November 1857, Malbos took charge of the College.

Feeling somewhat isolated in the small town of Sandwich, cut off from his confrères, and allowing petty squabbles and personality clashes to occupy most of his time, Malbos stayed for only one year, and then returned to France. Though his stay was

community, they would not be able to handle the growing influx of students...But, it [Assumption College] did not fit into the Jesuit scheme of things, Father Hus, the Superior of the New-York Canada Mission, and his successor, thought it wiser to concentrate their efforts on St. John's College in Fordham, New York." Cf. M. POWER, Years of Uncertainty, p. xiv.

⁴⁴In his letter of 7 August 1857, addressed to Father Point, the bishop committed the first act of self-delusion; he was unable to detect any compelling reason why he should take Father Hus' refusal literally, and believed that Father Point too should look upon his Superior's directive in the same way. Such logic...astounded and dismayed Point. See M. POWER, Years of Uncertainty, p. xiv.

⁴⁵M. POWER, Years of Uncertainty, p. x.

⁴⁶For details of his life and a colourful description of his character, see also M. POWER, Years of Uncertainty, pp. v-xvi; C. ROUME, Origines et formation, (English translation: A History, translated by K. KIRLEY and W. YOUNG, p. 329; F. BOLAND, An Analysis of the Problems and the Difficulties of the Basilian Fathers in Toronto, 1855-1860, p. 156; L. SHOOK, "The Coming of the Basilians to Assumption College. Early Expansion of St. Michael's College," in Canadian Catholic Historical Association Report, 1951, p. 62.

⁴⁷There were three terms reached in the agreement: (1) Tourvieille would name Malbos Superior of the College, (2) the bishop would operate the College, responsible for any profit or loss, (3) Malbos's tenure would last exactly one year. Registre pour les copies des lettres de M. Tourvieille 1855-1860 (=Registre), 26 November 1857, "à H. Soulerin," p. 171. This text is also cited also in M. POWER, Years of Uncertainty, p. xvii.

short, his competency in administration enabled the College to secure civil incorporation on 16 August 1858, a necessary prelude to receiving government grants.⁴⁸ Further, he published an account of the commencement proceedings for the 1857-1858 academic year. Finally, he built a student recreation room, the only addition to the building until 1875. In all, despite his shortcomings, Malbos's achievements were significant.

With Malbos's departure, Louis Musart, a diocesan priest who had been appointed as Assistant Director in July 1858 assumed the Directorship, since Pinsoneault was in Europe.⁴⁹ Hearing of the developments back in his diocese, Pinsoneault, wrote the Basilians from Rome offering them land in a bid to have them return to Sandwich.⁵⁰ Still hurting from the suppression of the diocesan grant, Soulerin was quick to respond to the bishop in a tone remarkably blunt.⁵¹

⁴⁸Malbos petitioned the government of the United Canadas for "an Act of Incorporation under the name of the Assumption College." Journals of the Legislative Assembly of the Province of Canada, (=Journals), Volume 26, Part 1, p. 547. For a copy of the Act, see M. POWER, Years of Uncertainty, pp. 131-132.

⁴⁹During this same time, Pinsoneault managed to complicate his life even more by heading to Rome to lobby to have the seat of his diocese transferred from London to Sandwich. It was transferred 2 February 1859. Bishop John Walsh then had the seat transferred back to London, 15 November 1869.

⁵⁰It is difficult, if not impossible, to pinpoint exactly when Pinsoneault was apprised of the events in the diocese. That he wrote an ingenuous letter to Father Fessard, S.J., claiming a counter offer from the Basilians which only he knew did not really exist, is proof enough that he was aware of Malbos's resignation by the time he got to Paris, and that he realized that the Superior's withdrawal brought to a close, for the time being, any hope of pursuing the Basilian connection. Further, in the letter he lays the blame of the Jesuit departure on Father Bus and then proceeds to make the fantastic claim that "the Superior General of the Basilians is prepared to take over the college permanently and send it several priests from the institute as soon as I officially ask him to." M. POWER, Years of Uncertainty, p. xxi, footnote 19.

⁵¹The negotiations proceeded unknown to de Charbonnel who was in Europe recruiting candidates for his diocese. Upon learning that Pinsoneault had contacted one of his priests, he became furious and wrote a scathing letter of rebuke to Tourvieille "for sanctioning Father Soulerin's deceitful behaviour." The Basilians in Toronto paid dearly for this indiscretion. Not only did Soulerin personally suffer, de Charbonnel suppressed the annual diocesan grant of 5,000 francs to Saint Michael's College. For a copy of the letter, see Registre, 30 September 1857, "à Msgr. de Charbonnel," p. 150. This text is also cited in M. POWER, Years of Uncertainty, p. xvii, note 9.

Scrambling, Pinsoneault arranged to meet with Peter Johannes Beckx, Father General of the Society of Jesus, to have him reconsider his involvement with Assumption. Convinced that Beckx's promise to look into the matter signaled a return of the Jesuits to the College, Pinsoneault sailed home. Playing up the conversation with Beckx, Pinsoneault had Murphy, now Superior of the New York-Canada Missions, visit Sandwich to review the situation. Suffice to say, that whatever Pinsoneault had intended to accomplish by playing the Basilians against the Jesuits, he only succeeded in alienating both communities.⁵²

Over the next several years a variety of religious men occupied the Chair of Director of Assumption College. Each community remained only briefly with the Benedictines marking the shortest stay. Meanwhile, until his resignation on 9 September 1866, Pinsoneault continued to write to Soulerin requesting to send Basilians.

With Pinsoneault's resignation and Walsh's consecration, the College embarked on a new course.⁵³ Almost immediately, serious negotiations commenced between Walsh and the Basilians over the future control of the College, culminating in the signing of a concordat between Soulerin and Walsh on 27 September 1869.⁵⁴ The following

⁵²By now the Jesuits were completely disillusioned with Pinsoneault. They left Assumption Parish, 20 December 1859. As for the Basilians, they were content to remain in Toronto.

⁵³John Walsh was consecrated Bishop of London on 10 November 1867.

⁵⁴Preliminary negotiations dealt mainly with the state of the property, the amount of land to go with the college, the direction of Assumption parish, the separation of the college from the common school, and the threatened cessation of the government grants following Canadian confederation. The negotiations concluded with Bishop Walsh of London agreeing to turn over to the Basilians the building and land of college and parish for 499 years, and also to release to them, so that they could meet mortgage payments, some of the parish revenues. For further details, see a copy of the Concordat, translated from the French, printed in H. POWER, *Years of Uncertainty*, pp. 25-27.

September 1870, Assumption College entered its most stable years since its inception, under the direction of Denis O'Connor.⁵⁵

B. The Independent College: 1870-1919

The twenty year administration of O'Connor managed to bring the College into its own. Securing a solid intellectual and financial foundation after only five years, O'Connor was in a strategic position to triple the average student population for any academic year and construct two major additions to the plant.⁵⁶ Indeed, from 1870 onwards the College never stopped growing, albeit very slowly, until it was finally absorbed by the University of Windsor in 1963.⁵⁷

Indeed, Cushing and McBrady, the next two presidents up to 1907, did an admirable job maintaining O'Connor's vision for the College.⁵⁸ That is to say, while Assumption was many things to many people, to the Basilians and the bishops who supported their work, the college's *raison d'être* was to create a distinct atmosphere in which the priests encouraged vocations to the priesthood and religious life. O'Connor

⁵⁵For a sketch of his life, see M. POWER, Assumption College: The Making of a Modern School [hereafter= The Making of a Modern School], Windsor, pp. vi-viii. See also R. SCOLLARD, "Most Reverend Denis O'Connor, C.S.B., D.D.," in Basilian Teacher, 4 (1938), pp. 88-89; F. O'BRIEN, Life Work of a Saintly Prelate, Kalamazoo, MI, Kalamazoo Augustinian Print, 1914, p. 3. O'Connor was appointed Bishop of London and consecrated on 18 October 1890, installed Archbishop of Toronto on 3 May 1899, and died 30 June 1911.

⁵⁶O'Connor managed to secure interest-free loans and sufficient monies from the confrères at Annonay, the businessmen of Windsor, and the confrères at Saint Michael's College living in Toronto.

⁵⁷For more details of his operations at Assumption College, see also M. POWER, The Making of a Modern School, pp. x-89.

⁵⁸See also W. ROACH, "Laudenus Viroi Gloriosos: R. W. McBrady, C.S.B.," in Basilian Teacher, 1 (1956), pp. 9-11; R. McBRADY, "Reminiscences," The Basilian, 1 (1935), pp. 23-23, 34; M. POWER, The Making of a Modern School, pp. xi-xii, xiii-xviii. Cf. the correspondence reprinted in M. POWER, The Making of a Modern School, Chapter 3, pp. 52ff; L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada: A History, Toronto, University of Toronto Press, 1971, pp. 280-282.

had established a *collège classique*, a junior seminary along the lines which he had known and experienced at Saint Michael's College in Toronto and the Collège de Feyzin and Collège d'Annonay in France. Preparing students for other professions, such as law and medicine, was an incidental aside. And so, while the general aim of Assumption was to nurture vocations to the priesthood, that is why the school existed in the first place, time would show that O'Connor had fashioned a College much too narrow in scope to continue flourishing to any great degree.⁵⁹

Part of the difficulty was that over the years no one really took notice of the fact that the intentions of the student population were gradually changing. Although the number of students who went on to study for the priesthood was quite significant, the number who did not steadily rose. Not until Francis Forster's arrival as the fourth president of the College, did the Basilians realize that Assumption had been drawing a different type of student and that this noticeable shift in the complexion of the student body would soon force an alteration to the pedagogical mission of the Basilian Fathers.

Reform best characterized Forster's administration.⁶⁰ Straightaway, his efforts

⁵⁹Indeed, according to L. Shook, many colleges and universities were founded by religious congregations in order to train and educate men for the priesthood. For a detailed historical review, see L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, pp. 20-400. Assumption was really four schools under one roof. There was a preparatory school for grades five to eight, followed by a choice of either a two year Commercial course or a three year Academic course, equivalent to secondary school. A four year Arts Course was also available. Theology was taught privately to those studying for the priesthood. Cf. H. POWER, The Making of a Modern School, p. vii; See also L. SHOOK, Catholic Post-Secondary Education in English-Speaking Canada: A History, pp. 3-8.

⁶⁰Eulogized "as a man of far and broad vision," Carr outlines his life and provides an overview of his accomplishments at Assumption, in H. CARR, "A Sketch of the Late Very Reverend Father Francis Forster, C.S.B.," [12 May 1930], Catalogue of the Assumption College, Sandwich, Ontario, Assumption College, 1901-1920, p. 17.; W. KELLY, "Father Forster: A Sketch of the President of Assumption College," in Canadian Magazine, January 1919, pp. 287-92; See also for some of Forster's reprinted correspondence in, H. POWER, The Making of a Modern School, pp. 70-313. Power points out that there were three themes weaved throughout Forster's administration and reflected in his correspondence. The first was his terrible relationship to Victorin Marijon, Superior General from 1910 to 1914 (see, page 13, footnote 31) which was certainly one catalyst in bringing about the separation of 1922. Because Marijon was simply not an effective Superior outside the French milieu, he found it very difficult to work as Provincial of the Canadian province. In fact, the Holy See asked Marijon to resign in 1914 (a

to change Assumption dramatically and meet the current needs did not go unnoticed. With the overall improvements to the plant and the expanded college facilities, the student population rose to capacity. By adding a fourth year to the high school course, he introduced junior matriculation in accordance with the Ontario provincial regulations, thereby solidifying Assumption's reputation as a college and not as a school. Further, because the conscription of the First World War and epidemic outbreaks of influenza were seriously depleting the ranks at Assumption, Forster toyed with the idea of an affiliation agreement between the College's Arts Department and Western University.⁶¹ At any rate, with Forster's departure in 1919 for the curial house in Toronto, he left behind a renewed College under the direction of Joseph Muckle. In all, throughout his tenure as President, Forster had successfully turned O'Connor's *collège classique* into a modern college apt for the twentieth century.

rather complicated story, see also J. HANRAHAN, The Basilian Fathers (1822-1972), pp. 124-2140). More than a personality conflict, Power writes that the lack of money and the repeated refusal of the general council to allow local superiors to borrow on a mortgage seriously affected the operation of the College. The most important letter in Forster's correspondence was sent on 17 March 1915 from Archbishop Stagni, the Apostolic Delegate. It details Forster's complaints against the general council which would neither approve his request to take a loan nor take his advice to sell the college farm to Sandwich developers. Powers writes that "local superiors and their local councils were handcuffed by Roman regulations governing the amounts that could be borrowed without Rome's explicit permission. If the amount exceed 10,000 lire or francs, the local superior, with the co-operation of the general council, would have to apply to the Congregation of Religious. To make matters even more complicated for him, the land he wished to alienate by sale -- the college farm -- was land leased [sic] by the Basilians from the Episcopal Corporation of the Diocese of London. The Basilian did not own it. For any sale to take place, the bishop would have to apply to Rome for the necessary faculties...Bishop Fallon already possessed the required indult...there was little reason to believe he would not consent." M. POWER, The Making of a Modern School, p. xxii. Further complicating the first theme was the fact that Forster's attitude toward the episcopacy and Fallon in particular was one of dislike and mistrust. And third, over bitter taxation battles regarding the college farm and the riverfront property, Forster had developed a deep disdain for the politics and people of the town of Sandwich.

⁶¹Presently this institution carries the corporate title of The University of Western Ontario at London.

C. The Affiliated College: 1919-1953

Succeeding Forster as President in 1919 was John Muckle. Under his administration, Bishop Fallon decided to pursue more forcefully the issue of affiliation. Persuaded by friends, Fallon drafted a second agreement and officially sent an application to Western University.⁶² The terms were modelled on the federation agreement between the University of Toronto and The University of Saint Michael's College. However, since Assumption was not a university and not located on the London campus, the basis of the agreement was affiliation. It remained in effect until 1953.

Upon Muckle's peremptory resignation, Daniel Dillon assumed control of the college.⁶³ Sadly, nagging community problems and tensions between Forster and Fallon complicated his tasks.⁶⁴ In the midst of such controversies, he struggled to keep the

⁶²Though initially opposed to the idea of affiliation, Bishop Fallon was swayed by two London laymen, Philip Pocock and Major Albert Murphy. Moreover, due to the fact that Western University wanted affiliated colleges, Fallon saw this as an opportune time to fulfil one of his greatest longings - to have Assumption College move to London, the city in which he lived. While Forster simply toyed with the idea of affiliation, he was more interested in a federated agreement much like Saint Michael's College in Toronto. Unfortunately, he did not see either affiliation or federation through. However, in 1919, under Muckle's administration, an affiliated agreement was drafted (See M. POWER, The Making of a Modern School, Appendix IV, pp. 357-359). Later, in the same year, still desiring that the College move to London, Fallon published a second affiliated agreement, hoping to speed up the move. However, this agreement was subsequently quashed after Muckle warned the town that he would accept the offer to move the College to London if the council did not grant his request to have the alley behind Patricia Road closed. The alley was closed, and the College remained affiliated in Sandwich. See M. POWER, The Making of a Modern School, Appendix VI, p. 362.

⁶³Daniel Dillon was President and local Superior at Assumption College from 1931-32.

⁶⁴Dillon was placed in an unenviable position when he took over as Superior. Since the 1922 Chapter in Toronto revised the Basilian Constitutions, including the method of observing poverty, some confrères, disapproving of the changes, sought incardination in some dioceses, leaving a severe shortage at Assumption. Moreover, Fallon withdrew his support and his seminarians from Assumption College, placing them in Saint Peter's School of Theology in London. Further, tensions between Forster and Fallon and Forster's brother, a London diocesan priest, and Fallon continued until Francis Forster's accidental death in 1929. L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, p. 284.

college alive by constructing a modern high school building, thereby relieving serious overcrowding at the college.

Prompted by a severe shortage of funds, Thomas MacDonald, a respected Basilian financier and President from 1932-1940, set out to refinance the college. Since his proposal of reorganization was built around the monies accrued from the development of the large paying high school and filled residences together with the Sunday work stipends, MacDonald's restructuring plan served the college well. Further, he also inaugurated the Christian Culture Series⁶⁵ in 1933-1934 and presided over the affiliation of Holy Names College which was to take care of the needs of women students.⁶⁶

The 1940-1950 period, marked by a series of events, changed the whole character of Assumption. In particular, with the establishment of the Pius XI School of Social Studies, Edwin Garvey and Désiré Barath, a layman, brought the influence of Assumption to bear on the labour force of the Windsor area. This initiative was the first real indication that Assumption had arrived as a shaping force among the people of Canada. The school was followed by an intensified interest in extension courses, in summer and night courses, and in continuing education which brought non-Catholics into the college constituency, thereby making Assumption a regional centre for post-secondary education.⁶⁷ Indeed, from 1940 to 1952, Presidents Vincent Guinan and John O'Loane fostered remarkable growth at Assumption College and prepared it to move from an affiliated institute to an independent existence as an autonomous Catholic university.

⁶⁵This is a series designed as a forum for teaching and preaching Catholic doctrine. Fulton Sheen was the first speaker. The program continues to the present at Assumption University, Windsor.

⁶⁶Holy Names College was established out of Saint Mary's Academy (founded 1864).

⁶⁷Cf. L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, pp. 285-287.

D. The Federated University: 1953-1989

During this time, several questions surfaced concerning the structure of the college. "Should Assumption be an affiliate? Should it be a specifically Catholic institution? Was its real future tied to the Essex county constituency which it served?"⁶⁸ While everyone suspected that change was in the offing, no one was quite sure where or how the change should take place.⁶⁹

An unacceptable revision in the understanding of affiliation with Western University provided motivation enough for the Basilians and faculty at Assumption to effect the change it sought by deciding to opt out of the agreement. Accordingly, under the presidency of LeBel, on 2 April 1953, Assumption sought independent college status with full university powers. Consequently, the province of Ontario amended the original act of incorporation. In conformity with the regulations at civil law, three colleges became affiliated with the new Assumption University of Windsor: Essex College, Holy Names College, a woman's division in operation since 1934, and Holy Redeemer College, the house of studies of the Redemptorist Fathers.⁷⁰

⁶⁸L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, p. 287.

⁶⁹For the most part, the push for change was not coming from the administrators but from within the faculty at large both Basilian and lay members. Some of the more prominent Basilians included: Cornelius Crowley, Edwin Garvey, Alex Grant, Carlisle LeBel, Daniel Mulvihill, John Murphy, Peter Swan, and Leonard McCann. See L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, p. 287.

⁷⁰For the legislative history of Assumption College in Sandwich, see also (1) The Assumption College Act, 1953, Statutes of the Province of Ontario, 1952-53, Chapter III; The only qualification with this Act was that the title "university" could not be used until one more affiliated college was added. So, in 1956, Assumption founded Essex College with a non-denominational board and entrusted to it instruction in medical, natural, and engineering sciences. Assumption University then amended its title to Assumption University of Windsor, The Assumption University of Windsor Act, 1956, Statutes of the Province of Ontario, 1956, Chapter 94; see also, for a discussion on the deliberation of the General Council regarding the application of Assumption College for a University charter, "Minutes of the Meetings of the General Council, 28 January 1952," in Minutes of the Meetings of the General Council, December 30, 1949 to December 28, 1960, Archives of the Secretary General of the Basilian

Assumption University of Windsor of 1953 remained a Catholic university. It had a board of governors which was exclusively Basilian; a board of regents, which was a non-denominational citizens' board of advisers on finances and general policy; it had also a senate enlarged to include representatives from all the local educational institutions and religious groups.⁷¹ The Board's first significant act occurred in 1955 which ordered the separation of the high school from the university -- the right to self-administration was granted to the school two years later.⁷²

In the fall of 1962, plans continued for a more intensive reorganization of Assumption University of Windsor. The board had voted in favour of establishing a civil university eligible for government support.⁷³ So, in December, with the passage of the

Fathers, Toronto, p. 37.

⁷¹The General Council of the Basilian Fathers gave permission "to Assumption College to transfer jointly with the Bishop who has agreed to do so, the ownership of all land and properties to the newly established Board of Governors of Assumption College." "Minutes of the Meetings of the General Council, 10 November 1953," in Minutes of the Meetings of the General Council, December 30, 1949 to December 28, 1960, Archives of the Secretary General of the Basilian Fathers, Toronto, p. 65. See L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, p. 289.

⁷²Following LeBel, other Basilian presidents included: Daniel Mulvihill (1964-1967); E. Malley (1967-1972); Leonard Kennedy (1972-1975); Norbert Ruth (1975-1979); David Heath (1979-1991); Ulysse Paré (1991-). For a description of the changes occurring during the 1950s, see L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, pp. 289-290; see also "Signing of Affiliation Agreement between Assumption University of Windsor and Canterbury College," in Alumni Times: Quarterly Publication of Assumption University of Windsor, 2(1957), No. 5, pp. 3-11; for a discussion concerning the separation of the high school and college, see "Minutes of the Meetings of the General Council, August 14, 1954," in Minutes of the Meetings of the General Council, December 30, 1949 to December 28, 1960, Archives of the Secretary General of the Basilian Fathers, Toronto, pp. 82-83.

⁷³See "Minutes of the Meetings of the General Council December 12-14, 1962," in Minutes of the Meetings of the General Council January 17, 1961 to December 15, 1966, Archives of the Secretary General of the Basilian Fathers, Toronto, p. 84. The petitioners for the new University of Windsor were the boards of governors and regents of the former Assumption University of Windsor and the board of directors of Essex College. The first board of governors of the new University of Windsor was named by the new act with thirteen of them coming from the then existing board of directors of Essex College and the board of regents of Assumption University. This new board had 30 members, six of whom were to be named by the board of governors of the continuing Assumption University. See L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, p. 290; see also N. RUTH, "Assumption University and the University of Windsor," in The Basilian Teacher, 8 (1964), pp. 155-168; N. RUTH, "The University of Windsor," in Journal of Higher Education, 38 (1967), pp. 90-95. Similar changes were

University of Windsor Bill in the Ontario Legislature, the University of Windsor came into existence as a non-denominational university while Assumption University of Windsor remained in existence as a Catholic university.⁷⁴ Further, in November 1963, Assumption University of Windsor became federated with the newly-created University of Windsor.⁷⁵ The most recent *University of Windsor Act* was passed in the spring of 1969. Its main purpose was to increase the number of seats on the board of governors to 32.⁷⁶

In the early years under the new arrangement, the Assumption faculty engaged in teaching in the provincially-supported University of Windsor, where it found a broader constituency than any denominational institution could ever provide. With its certain material resources and its dedication to Catholic higher education, Assumption grew into its own, as a place of teaching and learning. Above all, it was able to assume a special concern for the study of theology. So, with the structural changes in place and the long-range objectives laid out, Assumption seemed in a position to help rescue the Church from the excessive and perhaps impossible burden of supporting mass education at the post-secondary level.⁷⁷

also occurring in the United States during this period; in many cases American Catholic colleges and universities were undergoing major shifts in governance structures. For details, see M. STANN, "Report on the Governance of American Catholic Higher Education Institutions in 1992," in Current Issues in Catholic Higher Education, 14(Summer 1993), pp. 10-16. See also J. CONN, Catholic Universities in the United States and Ecclesiastical Authority, Analecta Gregoriana, Volume 259, Series Facultatis Iuris Canonici: sectio B, n. 51, Roma, Gregorian University Press, 1991, pp. 9-243.

⁷⁴An Act to Incorporate the University of Windsor, The University of Windsor Act, 1962-63, Statutes of the Province of Ontario, 1962-63, Chapter 194.

⁷⁵An Act Respecting Assumption University, The Assumption University Act, 1964, Statutes of the Province of Ontario, 1964, Chapter 125. With this Act, Assumption University of Windsor dropped the phrase "of Windsor" and held for its corporate title, Assumption University.

⁷⁶An Act Respecting the University of Windsor, The Assumption University Act, Statutes of the Province of Ontario, 1969, Chapter 169.

⁷⁷See L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, 291-292.

However, given a number of circumstances, over the course of the period starting in the early 1960s through to the late 1980s, faculty members, both lay and Basilian were simply not replaced upon retirement or transfer. Consequently, over some 25 years, attrition reduced the number of Assumption faculty members teaching on the campus of the University of Windsor to near zero. Moreover, just as the numbers of faculty dwindled, so too did the tasks of the presidents of Assumption University. Safeguarding the endowment fund and exercising custody over the buildings became their predominant administrative duties.⁷⁸ However, with the 1990s creeping in, new initiatives awakened Assumption from this rather dormant position.

E. Assumption University: The Present Situation

Under the administration of Ulysses Paré, former Superior General, it appears that a new day has dawned on the campus of Assumption University.⁷⁹ Like O'Connor and Forster before him, Paré is poised to revive the university and introduce it to a new era of higher education. From all indications, his efforts, at least for the time, combine a return to the original intention of the Basilians, that is, the study of theology and related disciplines with a movement of the university into the broader community. Accordingly, in 1992, the new vision focused on the establishment of The Institute of Pastoral and

⁷⁸Circa 1965, the assets and property of Assumption University held under the direction of the Board of Governors since 1953 were sold to the University of Windsor.

⁷⁹Since the final change to the charter in 1969 (see footnote 76), there have been no major amendments save a few minor protocol additions *vis-à-vis* The University of Windsor. The complexion of the Board also remains the same with seven Basilians. According to the Charter, the board is composed of the local superior of the Basilians, two local Basilian councillors, the treasurer of the local Basilian community, the president of Assumption University (presently the office of president and local superior reside in the same person), three elected Basilians from the local community, and others, lay or religious (unspecified number) from various community and university constituencies. To date, the last possibility has not been realized.

Education Ministry (IPEM) in which Assumption has, once again, begun to grant degrees and certificates to successful candidates.⁸⁰ Further, the Christianity and Culture Lecture Series has resumed. Conceived in the MacDonald administration, the series highlights Assumption as a centre of teaching and learning by inviting various scholars to present a lecture on specific theological or Church-related topics. So, with the founding of the institute, an active campus chaplaincy program, and the reappearance of the lecture series, Assumption has signalled an active return, albeit very specialized, to the Basilian apostolate of higher education in Windsor.⁸¹

While tightly focused, the narrow scope of such a specialization in higher education remains quite desirable. That is, while the essence of a Catholic university directs its operations toward the realization of Catholic values, each individual university possesses its own needs and potential; consequently, each should have the right to shape

⁸⁰The majority of students enrolled at Assumption University are future pastoral workers, coming from a variety of settings. Presently, the Institute is corresponding with the Ontario English Catholic Teachers' Association and the Ontario Secondary Schools Teachers' Association in order to develop programs that will facilitate the formation of Catholic teachers by encouraging their study in Religious Education at the graduate level. There are two tracks that a student may follow: Pastoral Ministry and Religious Education. Students can obtain a Certificate in Pastoral Ministry, a Master of Arts in Pastoral Ministry, or a Masters of Religious Education, depending upon the candidate's entrance qualifications and his or her interests. The Certificate program requires ten core courses and 30 credit hours in Scripture, Christology, Ecclesiology, Moral Theology, Pastoral Counselling, Spirituality, Sacraments, and Liturgy. The graduate degrees require 36 credit hours within a combination of core courses and electives. The Diocese of London has exhibited great support for the work at Assumption University. In 1994, the Senate of the Diocese of London approved 2 key policy statements. The first is that "no new Pastoral Ministers will be mandated until they have completed the course requirements for either track at the Institute." Second, "all presently mandated Pastoral Ministers will be strongly advised to meet an advisor at I.P.E.H. to ascertain how the Institute can enable the enrichment of their formation for ministry." These policy statements are quoted in the handbook of Assumption University, *In lumine Tuo*, 1994, p. 13.

⁸¹Assumption University has remained a full, federated university with the University of Windsor. It has the power to grant both graduate and undergraduate degrees. However, since its degree-granting powers are held in abeyance as a requisite to federation, in order to grant degrees in the natural, engineering, or social sciences, Assumption must notify the University of Windsor of its intention at least one year prior to conferring the degrees. Currently, under the terms of the federation agreement, Assumption is free to grant only theology and religious education degrees at any time without the required notification.

its own life and destiny as it pursues the truth within a particular living Church and a concrete community. For Assumption, not unlike most Catholic universities, charting a course in concert with the Church and the secular world becomes a difficult venture. In short, strong relationships among the constitutive members are needed, characterized by collaboration and influence and based on a sound understanding of the vision for the institution. In this view, what emerges then are certain fundamental relationships among people and institutions (both canonical and civil) that best capture and express the freedom and autonomy needed on the campus, while maintaining the Catholicity of the institution. Indeed, the Church is neither irrelevant nor silent on this point. Accordingly, the next section focuses on the apostolate of Assumption University in light of these relationships, with particular reference to recent Church documents.

III. Assumption University in the light of *Ex corde Ecclesiae*

The Apostolic Constitution, *Ex corde Ecclesiae*, described by John Paul II as a *magna carta* for all Catholic universities, attempts to highlight some of the perennial principles which serve not only to address the nature and Catholic identity of such institutions but also to clarify their mission within the universal Church.⁸² Unquestionably, the document relates the call of the Second Vatican Council's teaching on *communio* to the university *milieu*. For instance, within a multiplicity of constituent relationships found on and off the campuses, John Paul II asserts that the future of Catholic universities depends to a large extent on the constant and dedicated service of lay Catholics whose

⁸²JOHN PAUL II, Apostolic Constitution, *Ex corde Ecclesiae*, 25 September 1990, in *Acta Apostolicae Sedis*, 82 (1990), pp. 1475-1504 (English translation in *Origins*, 20 (1990-1991), pp. 265-276. [Hereafter=*Ex corde Ecclesiae*].

developing presence in these institutions signals hope in and confirmation of their vocation in the Church and in the world.⁸³

However, because the document must necessarily focus on universal norms, it neither handles the issues and the complexities of Catholic higher education in particular countries and in concrete situations nor exhibits an awareness of them. To that end, while the generalizations and universal guidelines tend to be less comprehensive in content; they are more notably authoritative in tone. For example, the Apostolic Constitution assigns the responsibility for maintaining and strengthening the Catholic identity of the university to the university itself. On the other hand, it links the university authorities with the diocesan bishop in a way that is unclear and unworkable. Again, while *Ex corde Ecclesiae* affirms academic freedom and recognizes the autonomy of the university's internal government, it retains the requirement of a mandate and insists on some form of juridical accountability of Catholic universities to Church authorities.⁸⁴ Through it all, Church-connectedness remains a nagging problem for most Catholic universities and colleges.

In any event, based on a variety of relationships, *Ex corde Ecclesiae* sets in place its vision of the nature and the purpose of a Catholic university and college from which its distinctly Catholic character emerges. It leaves the application of the seven articles

⁸³*Ex corde Ecclesiae*, paragraph 17, p. 269. "Paragraph" denotes material that is contained in the main text of *Ex corde Ecclesiae*. In subsequent footnotes, "Article" denotes material that is contained in the section entitled "General Norms."

⁸⁴See D. O'BRIEN, "Conversations on Jesuit (And Catholic?) Higher Education: Jesuit Si, Catholic...Not So Sure," in *Conversations on Jesuit Higher Education*, 6 (1994), pp. 4-12. In this article O'Brien expounds the question of catholic identity and catholic higher education in the light of *Ex corde Ecclesiae*. He also offers some insights into the future of such institutions with particular emphasis on the need to become highly-specialized institutions of teaching and researching. *Ex corde Ecclesiae*, Article 6 mentions the requirement of the mandate to teach theology. Article 125, §3 requests that officers of universities periodically submit relevant information regarding the activities of the university to the competent church authority or diocesan bishop, depending upon the category of the university as directed in Article 3, §1 and §2.

listed in the general norms section to the episcopal conferences and other assemblies of Catholic hierarchy in conformity with the 1983 *Code of Canon Law* and complementary Church legislation. To that end, the following parts focus on four themes within the document and discusses them in the light of the 1983 *Code of Canon Law*⁸⁵, namely, the nature and objectives of a Catholic university together with the concept of *communio* which gives rise to its Catholic identity.

A. The Nature and Objectives

The section of *Ex corde Ecclesiae* that discusses the nature and objectives of Catholic universities asserts from the outset that every Catholic university is first and foremost a human institution wherein the members critically assist in the on-going promotion of human dignity and cultural heritage through the three-fold activities of teaching, researching, and providing various services offered to the local, national, and international communities. In short, the institution marks the confluence of two streams within a Catholic academic environment -- culture and religion. Second, because the university is Catholic, the members perform the three tasks, imbued with the Christian spirit and inspired with the Gospel values in order to "assure in an institutional manner a Christian presence in the university world confronting the great problems of society and culture."⁸⁶ Hence, taking these two realities together, the Catholic institution therefore serves as a living organism wherein the on-going academic works of researching and teaching, coupled with the pastoral activities, orient themselves toward a common end -

⁸⁵Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus, Libreria editrice Vaticana, 1983, xxx, 317p. American version of the English-language translation: Code of Canon Law, Latin-English ed., translation prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 1983, xlii, 668p.

⁸⁶Ex corde Ecclesiae, paragraph 13, p. 268.

- the realization and transmission of Catholic values.⁸⁷ To put it differently, faith and reason converge to help endorse and advance human culture.⁸⁸

To help further explicate his understanding of the nature and objectives of a Catholic university, John Paul II returns to the 1972 document, *The Catholic University in the Modern World*, which is a product of the Second International Congress of Delegates of Catholic Universities in Rome, and he recalls the four essential characteristics of such institutions:

1. A Christian inspiration not only of individuals but of the university community as such.
2. A continuing reflection in the light of the Catholic faith upon the growing treasury of human knowledge, to which it seeks to contribute by its own research.
3. Fidelity to the Christian message as it comes to us through the Church.
4. An institutional commitment to the service of the people of God and of the human family in their pilgrimage to the transcendent goal which gives meaning to life.⁸⁹

In making the point that these attributes emerge only when a Catholic university takes to its task the light of the Christian message, he underscores the importance of a firm

⁸⁷Orsy writes: "In scholastic terms: the correct definition of university comes from its causa finalis, not from its causa materialis or formalis. This is not mere playing with words; it touches the heart of the matter. It follows that if the question 'What is the essence of a Catholic university' refers to a mysterious substance in the institution, it is a misconceived and misdirected question. If it refers to the purpose of the university, it is a good question that leads to the correct answer; such as: it is of the essence of a Catholic university that its operations are directed toward the realization of Catholic values." L. ORSY, *The Church: Learning and Teaching*, Wilmington, DE, Michael Glazier, Inc., 1987, p. 123, note 9.

⁸⁸"In promoting this integration of knowledge, a specific part of a Catholic university's task is to promote dialogue between faith and reason, so that it can be seen more profoundly how faith and reason bear harmonious witness to the unity of all truth." *Ex corde Ecclesiae*, paragraph 17, p. 269.

⁸⁹*Ex corde Ecclesiae*, paragraph 13, p. 268-269. In the document, *The Catholic University in the Modern World*, this list is presented at page 628. See SECOND CONGRESS OF DELEGATES OF THE CATHOLIC UNIVERSITIES, "The Catholic University in the Modern World," in *Periodica de re morali canonica liturgica*, 62 (1973), pp. 625-657.

institutional commitment to Catholic ideals, attitudes, and principles on the part of the institution.

As mentioned, along with the teaching and researching offices of a university, a strong commitment to pastoral care must also constitute an essential element of its work. "As a natural expression of the Catholic identity of the university, the university community should give a practical demonstration of its faith in its daily activity."⁹⁰ This ministry provides, as *Ex corde Ecclesiae* points out, moments to assimilate Catholic teaching and practice. In particular, it encourages the members of the academic community to participate in the Church's sacramental system, especially the Eucharist. On this point, in accordance with Article 6 of the general norms, all pastoral care is carried out in cooperation with the pastoral activities of the local Church under the guidance or with the approval of the diocesan bishop.⁹¹

All in all, the university as an academic institution stands as a place wherein the members vigorously strive to integrate and synthesize knowledge from a number of disciplines, respecting the methods of inquiry proper to each discipline. As a Catholic community, it brings to these functions of teaching and researching the Christian message. Together, strong intellectual pursuits interact with Christian values to witness to the world the one truth who is the person of Jesus Christ.

⁹⁰*Ex corde Ecclesiae*, paragraph 38, p. 272.

⁹¹*Ex corde Ecclesiae*, Article 6. This advice contextually relates to *CIC 1983*, c. 394, §1: "Varias apostolatus rationes in dioecesi fovet Episcopus, atque curet ut in universa dioecesi, vel in eiusdem particularibus districtibus, omnia apostolatus opera, servata uniuscuiusque propria indole, sub suo moderamine coordinentur." At Assumption University a full-time, salaried Basilian priest-chaplain is hired through the Office of the President.

B. The Catholic university as an instance of *Communio*

What type of bond grounds a unity among the people on the campus of the university and motivates a number of constituencies to achieve its purposes and goals, always in reference to the particular living Church? Section 14 in the doctrinal part of *Ex corde Ecclesiae* suggests one answer. "In a word, being both a university and Catholic, it must be both a community of scholars representing various branches of human knowledge and an academic institution in which Catholicism is vitally present and operative."⁹² Reiterating a statement from the 1972 document, John Paul II frames the university within the context of a Catholic community and explicitly places before these institutions the responsibility of bringing the inspiration of the Christian message to their many and various pursuits of knowledge. Needless to say, his reminder carries a challenge to the officers of Catholic universities, to their faculty members, and to the diocesan bishops to excel at becoming academically excellent and profoundly Catholic.

In a slightly more descriptive tone, John Paul II remarks that a Catholic university has to be a "living union of individual organisms dedicated to the search for truth."⁹³ Further on, he refers to a university as a place wherein students and scholars pursue their works in an authentic human community animated by Christ's spirit of freedom and char-

⁹²In 1971, the International Federation of Catholic Universities cooperated with the Congregation of Catholic Education in sponsoring several regional meetings which were held throughout the world. The purpose of the assemblies was to investigate the nature of the modern Catholic university and its role in the church and the world. The Grottaferrata Statement was the result of these gatherings which went on to serve as the basis for a discussion at the 1972 Second Congress of Delegates of the Catholic Universities. A second statement, The Catholic University in the Modern World, was unanimously approved at the congress. In it, the four principal characteristics of a Catholic university were enumerated. This statement was published in Periodica de re morali canonica liturgica, 62 (1973), pp. 625-657. The quote in the body of dissertation is found at page 628.

⁹³Ex corde Ecclesiae, paragraph 16, p. 269.

ity.⁹⁴ While in a later elaboration, he points to this communal aspect that is the source of its unity and from which "springs a common dedication to the truth, a common visage of the dignity of the human person, and ultimately the person and message of Jesus Christ."⁹⁵ Moreover, this common dedication to truth and unity fosters a climate of mutual respect, sincere dialogue, and concern for the protection of the rights of individuals.⁹⁶ In all, the concept of *communio*, advanced at the Second Vatican Council, serves as a strategic building-block for the Catholic university as it engages itself in the three-fold tasks of teaching, researching, and providing Catholic pastoral services to its members.⁹⁷

The bond of communion and the ideals that it purports resonate well within the academy. In fact, in an earlier work titled, *The Church: Learning and Teaching*, Örsy offers a similar description. In this work, he declares that the university is a human

⁹⁴Ex corde Ecclesiae, paragraph 21, p. 270.

⁹⁵Ex corde Ecclesiae, paragraph 21, p. 270.

⁹⁶Here, John Paul II alludes to the thoughts of Cardinal Newman in his work, The Idea of a University. In it, Newman observes that a university "professes to assign to each study which it receives its proper place and its just boundaries; to define the rights, to establish the mutual relations and to effect the intercommunion of one and all." J. NEWMAN, The Idea of a University, p. 457.

⁹⁷A number of authors have written extensive texts on communio as it relates to specific topics in theology and canon law. For example, see R. KASLYN, "Communio with the Church" and the Code of Canon Law, Roman Catholic Studies, vol. 5, Lewiston, Edwin Mellon Press, 1994; G. GHIRLANDA, Il diritto nella Chiesa misterio di comunione; compendio di diritto ecclesiale, Milano, Ed. Paoline; Roma, Editrice Pontificia Università Gregoriana, 1990, 711p.; J. HAMER, "Dix thèses sur l'Eglise comme communion," in Nova et vetera, 59 (1984), pp. 160-184; CONGREGATION FOR THE DOCTRINE OF THE FAITH, "Letter to the Bishops of the Catholic Church on Some Aspects of the Church Understood as Communion," in Origins, 28 May 1992, 22(1992-1993), pp. 108-112. In a recent article, Kaslyn claims "that theologians and canonists have yet to reach a consensus on the exact meaning and implications of a communio ecclesiology. Consequently, any examination of church documents which utilize this concept must result in the question, 'What does the reality communio signify?'" See R. KASLYN, "The Value Underlying the Law: A Foundational Analysis of Canon 209, §1," in Studia canonica, 29 (1995), p. 7-28. For the purposes of this dissertation, this A. answers Kaslyn's question in the body of the text by citing Örsy's understanding of the nature of the university as a well-integrated community of believers pursuing a strong intellectual life in order to animate the world with the Gospel message.

institution which is the product of a long and complex cultural evolution marked by the particular traditions and customs of the nation and, in many cases, of the founding religious congregation. In short, it is a "house of intellect."⁹⁸ However, in a more recent article, he improves on this description, referring to the university as "the house of the human spirit."⁹⁹

This newer and more appropriate designation conjures up images of the university as a meeting-place, wherein the memory of the human family is realized in the on-going activities of teaching and learning. Indeed, this definition places a strong emphasis on developing and fostering relationships among people and between institutions (religious and educational), whereby over time, a firm dedication to unity characterizes the campus and becomes identifiable in various constituencies. For Assumption, most important are the values, dynamic forces, and customs living within the particular educational and local Basilian community which collaboratively create and shape the law to reflect a process of commitment to the Church and to the academy.

By subscribing to the language of the Second Vatican Council, Örsy aptly relates the theological concept of *communio* to Catholic universities, claiming that it helps to articulate and to advance the self-understanding of the Catholic university by recognizing and affirming its humanity, its cultural identity, its history, its particular circumstances within the universal Church, and its freedom to reach out and establish different levels of association or union. Moreover, describing *communio* as a firm dedication to unity which inspires actions on the part of all, he claims that *communio* not only holds or bonds

⁹⁸See L. ÖRSY, *The Church: Learning and Teaching*, pp. 110-121; Cf. J. BARZUN, *The House of Intellect*, New York, Harper and Row, 1959, pp. 57-78; D. HASSEL, *City of Wisdom: A Christian Vision of the American University*, Chicago, Loyola University Press, 1983, pp. 57-69; L. HERTLING, *Communio: Church and Papacy in Early Christianity*, translated by J. WICKS from the German text (ed. 1962), Chicago, Loyola University Press, 1972, pp. 136-157.

⁹⁹L. ÖRSY, "Bishops and Universities: Dominion and Communion," in *America*, 20 November 1993, p. 11.

the university and the religious community together, but more specifically, this bond of communion relates the Catholic institution to the Church both locally and universally.¹⁰⁰

In like manner, steeped in this understanding of communion, section 27 of the Apostolic Constitution confirms the fact that an ecclesial relationship exists between the institution and the local Church. At the same time, since the academic institution exists within the larger community of international scholarship, each university also participates in and contributes to the life and mission of the universal Church, "assuming consequently a special bond with the Holy See by reason of the service to unity which it is called to render to the whole Church."¹⁰¹ More importantly, this union, it asserts, becomes essential to the institutional identity of the university as Catholic.¹⁰²

It is true that the well-integrated communal aspect of the university sets up two dimensions which concurrently operate to cultivate a Catholic identity for the institution in which the members make it visible both internally and externally. First, from within the constituent relationships, a recognition is gained when constituent members pursue their intellectual works in the light of faith and reason. Second, the institutional identity is externalized through the transmission of the gospel values into the broader relationships with the local and universal Church and the secular world. Accordingly, while one dimension looks inward to Christian values; the other refers to the university's outward activities and its public expression.

¹⁰⁰See L. ŌRSY, *The Church: Learning and Teaching*, pp. 130-133. Ōrsy warns that if the religious dimension of an institution is not sustained by the doctrine of communion, then "a reference to its catholicity can be described with Paul's words only: it will sound like a noisy gong or a clanging cymbal."

¹⁰¹*Ex corde Ecclesiae*, paragraph 27, p. 271.

¹⁰²*Ex corde Ecclesiae*, paragraph 27, page 271.

C. Catholic Identity

One of the important developments emerging from within this series of connected relationships is the Catholic identity of the institution. Conceived in the internal forum and borne of a relational unity, the fundamental reality of being Catholic is brought to life by the people who connect themselves with the university.¹⁰³ Moreover, the Catholic identity of a university is realized in process, not once-and-for-all. That is, resting on a bond of communion with the Church, the identity is fostered and authenticated in the continuing influence which the various relationships on and off the campus exert.¹⁰⁴

Though Catholic identity acts like a polysemous concept, broadly understood, it seems to relate more to a certain perception on the part of the public than to jurisdictional ties or legal incorporations. To derive this identity, people look, more often than not, for some kind of connection or association between a university and a Catholic community or sponsoring religious congregation. However, because much depends on what is understood by "Catholic", "Church", and other associated terms, an individual or group perception can describe a great number of particular situations, all of which can be valid and true.

Indeed, in the recent past, numerous canonists have sought to answer this rather neuralgic and abstract question concerning what makes such institutions Catholic, including hospitals. One approach argues deductively that certain external elements are

¹⁰³From a study on catholic identity at DePaul University, the collaborators have generally agreed upon and accepted that the internal component is absolutely integral to the definition of catholic identity. It comprises those values with which the Catholic Church is identified. See J. MURPHY, Values in Catholic Higher Education, Chicago, DePaul University, 1990, 195p. See also A. GALLIN, "On the Road Toward a Definition of a Catholic University," in The Jurist, 48 (1988), pp. 536-558.

¹⁰⁴See L. ÓRSY, The Church: Learning and Teaching, pp. 132-133.

integral to this identity.¹⁰⁵ A second interpretation lays out three types of Catholic universities based on the presentation in *L'université catholique dans le monde moderne*.¹⁰⁶ Finally, a third approach, inductively illustrates how Catholic identity can be externalized in various forms depending upon the specific circumstances of the institution. According to this position, canonical structures are not necessary for some institutions, communion alone suffices.¹⁰⁷ In short, this third approach seems to subscribe to a broader and more developed ecclesiology, leaving juridical ties and the external dimension of Catholicity secondary to the foundational reality that the internal dimension truly fosters the Catholic character. As a consequence of focusing more intently on the inner dimension, the responsibility of maintaining its Catholic nature properly rests upon that vital mass of serious-minded Catholics who teach and research at the required depth of faith and scholarship in all matters as they relate to the disciplines

¹⁰⁵See F. MORISSEY, "What Makes an Institution Catholic?", in *The Jurist*, 46 (1987), pp. 531-544; F. MORISSEY, *Catholic Identity in Institutions*, (ms), San Antonio, 12 March 1993, 9p. In consideration of the catholicity of an institution, Morrisey lists five elements which must be present: (1) internal Catholic values, (2) some reference to Church authorities, (3) canonically established, (4) bound by canon law, (5) subject to visitation by the local bishop.

¹⁰⁶See P. VALDRINI, "Les universités catholiques: exercice d'un droit et contrôle de son exercice (canons 807-814)," in *Studia canonica*, 23(1989), pp. 445-458. In this article, Valdrini identifies three categories of Catholic universities: (1) those universities established by competent church authorities or approved by them and thereby possessing a full, statutory bond; (2) those universities not erected by a competent church authority or approved by them but, nevertheless, hold an agreement with Church officials or a formal public commitment regarding its catholicity; (3) those universities which maintain an informal link to the Church through an implicit tradition of fidelity to Catholicism together with social and cultural influence.

¹⁰⁷See L. ŌRSY, *The Church: Learning and Teaching*, pp. 113-121. Ōrsy lists six types of institutions to which the descriptor of "catholic" may apply. He then proceeds to argue how each is or is not considered "catholic" based on the particular situation of the institution. Specifically, he presents: (1) secular universities in a Catholic environment; (2) secular universities integrated with a Catholic academic unit; (3) universities nourished by Catholic tradition but with no formal institutional commitment; (4) universities with an institutional commitment to Catholic ideals but without an ecclesiastical charter; (5) universities established by the Church with a canonical charter; (6) ecclesiastical universities established by the Apostolic See.

of theology, ethics, and scripture as well as to the natural and physical sciences, the arts and the humanities.¹⁰⁸

Though the four characteristics cited above are insufficient to qualify a university as being Catholic, they do, nonetheless, appropriately highlight the intra-relational dynamic at work in the university community and rightfully suggest that the Catholic institution fundamentally functions within a multiplicity of connected relationships for the good of the Church, giving rise to its institutional identity as Catholic. The idea of a university as both an intra- and inter-relational community wherein the members develop and foster the specific Catholic identity unique to a particular institution is not new to John Paul II. In 1979, while speaking to the presidents of the Catholic universities and colleges in the United States, he concluded that:

to be what it ought to be, a Catholic college or university must set up, among its faculty and students, a real community which bears witness to a living and operative Christianity, a community where sincere commitment to scientific research and study goes together with a deep commitment to authentic Christian living. This is your identity. This is your vocation. Every university is qualified by a specific mode of being....¹⁰⁹

Moreover, while the 1983 *Code of Canon Law* does not supply a definition of a Catholic university, canon 809, offers a further insight into what the Church considers them to be:

¹⁰⁸Quoting from J. KOMONCHAK, "The Catholic University in the Church," in *Catholic Universities in Church and Society*, Washington, DC, 1993, p.38, John Beal relates the catholicity question of the universities to the hospitals and rightly points out that "catholic health care facilities do not exist in the world with merely extrinsic links to the Church. They live and move and have being in the Church, 'the whole vast body of people that once arose out of the event of Christ and lives still to bring him to the world for its redemption.'" J. BEAL, "Catholic Hospitals: How Catholic Will They Be?" in *Concilium*, 1994/5, p. 85. "Regardless of the juridic form a health care facility's relationship with hierarchical authority takes, neither civil nor canon law can guarantee its Catholic identity. Catholicity hinges critically on the commitment of its personnel to health care as a ministry." J. BEAL, "Catholic Hospitals: How Catholic Will They Be?" p. 88. This comment appears to beg the question: Why establish a university as a juridic person or as an association of the faithful?

¹⁰⁹JOHN PAUL II, *Pilgrim of Peace*, United States Catholic Conference, 7 October 1979, pp. 164-165. See also a later address by John Paul II to the Third International Meeting of Catholic Universities and Institutions of Higher Learning in which he expounds on the nature and place of the Catholic university. JOHN PAUL II, "Mi è particolarmente," in *The Pope Speaks*, 25 April 1989, pp. 261-268.

If it is possible and advantageous the conferences of bishops are to see to it that universities or at least faculties are established, suitably distributed throughout the territory, in which the various disciplines are to be investigated and taught with due regard for their academic autonomy, and with due consideration for Catholic doctrine.¹¹⁰

Thus, the words of John Paul II in the address, *Pilgrim of Peace* and the Apostolic Constitution, *Ex corde Ecclesiae* together with canon 809 advance the Church's understanding of the nature of Catholic universities, and hence, their identity.

At the same time, while *Ex corde Ecclesiae* acknowledges that "the identity of a Catholic university is essentially linked to the quality of its teachers,"¹¹¹ the Constitution makes clear that this internal dimension is not sufficient. Instead, the document points out that the university must also recognize its institutional linkage to the Church. Consequently, the interplay between an internal and external dimension serves to qualify an institution as Catholic. Accordingly, *Ex corde Ecclesiae* presents details about the external dimension in particular areas regarding the types of bonds established with the Church, the establishment of new Catholic universities, and the nature of the relationship that existing universities enjoy with the Church, *vis-à-vis*, the norms of the Apostolic Constitution.¹¹²

With regard to this issue and the 1983 Code, on the one hand, Provost contends that the 1983 *Code of Canon Law* really does not spell out what in fact constitutes the

¹¹⁰CIC 1983, c. 809. This canon is largely drawn from *Gravissimum educationis* 10. See SECOND VATICAN COUNCIL, Declaration on Christian Education, *Gravissimum educationis*, 28 October 1965, in A. FLANNERY (ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents* (=FLANNERY), 1992 rev. ed., Grand Rapids, MI, William B. Eerdmans Publishing Co., 1992, pp. 735-736.

¹¹¹*Ex corde Ecclesiae*, Article 4, §1.

¹¹²In Articles 9 and 10 of the Transitional Norms found in *Ex corde Ecclesiae*, the Roman Pontiff grants competence to the Congregation of Catholic Education. It is to apply the Constitution and to propose changes to be made in order that it may adapt to the needs of the Catholic universities. However, on several occasions, Provost points out that The Directives to Assist in the Formulation of the Ordinations issued by the Congregation of Catholic Education on 21 January 1991 often fail to take these various distinctions into account, so that some of its provisions are contrary to *Ex corde Ecclesiae*.

external dimension of Catholic identity for universities and colleges. Therefore, canonists must draw on several sources in the law together with sound canonical interpretation. On the other hand, suggesting that the legislation is clearly adequate to see that the emphasis is placed on the formal or external aspect of the Catholic identity, Pagé refers to canon 810 regarding the statutes required of a university and canon 809 concerning the authority of the conference of bishops who are to see to the establishment of universities in which various disciplines are taught with due regard for Catholic doctrine. He contends that the canons undoubtedly indicate overall that Catholic universities are those "which have bonds of an indeterminate nature with the competent ecclesiastical authority and which give to the said authority rights and duties including vigilance."¹¹³ In any event, both opinions require that the internal dimension must give some public expression of an institute's relationship to the Church.

In accordance with the prescription of canon 807 of the 1983 Code, the Apostolic Constitution approaches the topic of external Catholic identity by delineating, in various places throughout the document, five categories of Catholic universities.¹¹⁴ The classification is based on the three possible ways in which each is established:

¹¹³R. PAGÉ, "From the University which is really Catholic to the University which is legally Catholic," in *Concilium*, 1994/5, p. 92-93. See J. PROVOST, "The Canonical Aspects of Catholic Identity in the Light of *Ex corde Ecclesiae*," in *Studia canonica*, 25 (1991), pp. 155-191. The point mentioned in the body of the text sets up an interesting debate among canonists. With particular reference to Catholic universities and public juridic persons, Provost points out in the same article that Orsy seems to hold in *The Church: Learning and Teaching*, that those universities that are not public juridic persons are not bound to the canon laws on Catholic universities, claiming that it is possible to have a Catholic identity without being bound by all the laws of the Church, and that unless the institution acts in the name of the Church as a public juridic person, it is not bound by the canons on Catholic universities. Morrisey, on the other hand, appears to hold that if a college or university is to be considered as Catholic, it is bound to these laws by that very fact since one of his criteria for Catholic identity is that the university is canonically established in one of three ways.

¹¹⁴CIC 1983, c. 807: "Ius est Ecclesiae erigendi et moderandi studiorum universitates, quae quidem ad altiorem hominum culturam et plenioram personae humanae promotionem necnon ad ipsius Ecclesiae munus docendi impleendum conferant."

1. Universities which were founded or approved by competent Church authorities in the past, or will be in the future.
2. Universities which are established by religious institutes or by other public or private juridic persons.
3. New Catholic universities being founded by religious institutes or other public juridical persons.
4. New or existing universities founded by individuals, which request to bear the name "Catholic" in their name.
5. New or existing universities founded by individuals which are *reapse* Catholic but decide not to seek any special bond with the hierarchy or to include the word "Catholic" in their name.¹¹⁵

Thus, Catholic universities are erected or approved by an ecclesiastical authority (including, the Holy See, an episcopal conference, another assembly of Catholic hierarchy, or by a diocesan bishop)¹¹⁶, a public juridic person (including a religious institute)¹¹⁷, or other ecclesiastical persons including the laity.¹¹⁸

As previously explained, *Ex corde Ecclesiae* admits that each of these types of Catholic universities maintains an essential bond to the Catholic Church. Consequently, linking the institution to the Church occurs in one of two ways, either through a specific constitutive bond or an institutional commitment made by its sponsors. The first

¹¹⁵This list is enumerated in J. PROVOST, "Canonical Aspects of Catholic Identity and *Ex corde Ecclesiae*," in *Studia canonica*, 25(1991), pp. 183-184. As for Assumption University, the results of the canonical investigation carried out in subsequent chapters will place it into one of the five categories.

¹¹⁶*Ex corde Ecclesiae*, Article 3, §1. These universities are required to incorporate the norms of the Constitution into their statutes, to have them approved by the competent ecclesiastical authority, and to submit regular reports to that authority.

¹¹⁷*Ex corde Ecclesiae*, Article 3, §2. New universities established by public juridic persons other than a religious institute are required to obtain consent from the competent ecclesiastical authority, to include the norms of the Constitution in their statutes, and to submit regular reports to that authority.

¹¹⁸*Ex corde Ecclesiae*, Article 3, §3. This norm prescribes that new universities erected by the laity can only be considered Catholic universities with the approval of the competent ecclesiastical authority, according to specific agreed-upon conditions. In Provost's opinion, the competent ecclesiastical authority is generally held to be the authorities listed in *CIC 1983*, c. 312 for associations of the faithful, though *Ex Corde Ecclesiae* does not seem to grant particular roles to each level of authority as does canon 312. See J. PROVOST, "Canonical Aspects of Catholic Identity and *Ex Corde Ecclesiae*," pp. 173-174.

establishes a formal and recognizably legal tie acknowledged between the university and Church authorities, while the second, which may be expressed in different ways, entails a less conventional bond in which the Church returns no formal commitment.¹¹⁹ As a consequence of this ecclesial relationship, the papal document lists three attendant norms critical to the identity of the university:

1. the public declaration of its character in an appropriate document
2. all of the activities of the university must be inspired by Catholic teaching and doctrine, while respecting the freedom of conscience of each person
3. every official act of the university must be in accord with its Catholic character.¹²⁰

All of the norms cited above relate to all Catholic universities at the time of the issuance of the Apostolic Constitution.

Article 5 of *Ex corde Ecclesiae* places the Catholic university within the Church, exhorting such institutions to maintain close communion with the Holy See. More precisely, it centers the locus of responsibility to oversee such institutions in the office of the diocesan bishop.¹²¹ Through the institutional commitment or constitutive bond,

¹¹⁹In accordance with *Ex corde Ecclesiae* Article 2, §2, the university is bonded to the Church either "by a constitutive bond and formal statute or by reason of an institutional commitment undertaken by its authorities."

¹²⁰*Ex corde Ecclesiae*, Article 2, §2. With regard to the first norm, Article 3 directs that a competent ecclesiastical authority may dispense from this prescription.

¹²¹*Ex corde Ecclesiae*, Article 5, §1: "Every Catholic university is to maintain communion with the universal church and the Holy See; it is to be in close communion with the local church and in particular with the diocesan bishops of the region or nation in which it is located..."

Article 5, §2: "Each bishop has a responsibility to promote the welfare of Catholic universities in his diocese and has the right to watch over the preservation and strengthening of their Catholic character. If problems should arise concerning this Catholic character, the local bishop is to take the initiatives necessary to resolve the matter..."

Article 5, §3: "Periodically, each Catholic university...is to communicate relevant information about the university and its activities to the competent ecclesiastical authority. Other Catholic universities are to communicate this information to the diocesan bishop..."

Bishop Malone of the United States responds to this norm: "The relationship of the bishop to the Catholic college or university is one of communion and not control. Ordinances, therefore, are in service to communion. Communion, we know, does not simply happen but needs some structure. Proper structure can enhance communion. That is the elusive but desired goal of ordinances. The fact that

the document entreats him to participate actively as the chief pastoral leader of the particular Catholic university community, entering into the life of the university in order to promote and assist in the preservation and the building-up of its Catholic identity.

In all, Catholic identity does not have as much to do with juridical ties and ecclesiastical control as it has to do with the Catholic intellectual life guided by the principles and methods of inquiry proper to each discipline, illuminated by faith and reason and freed of outside monitoring. The real question regarding what makes an institution Catholic seems to turn on the participation of those people who are most directly associated with the actual mission. At the outset of this section in the dissertation, the question regarding Catholic identity centered around specific concerns as to what makes an institution Catholic. Given the importance of the internal dimension, perhaps a better formulation of the question reads: How do serious-minded Catholics who are engaged in a higher education ministry help to realize and to promote the Christian values within a specific academic *milieu* as they dialogue across disciplines and within faculties?

Posed in this fashion, the responsibility of answering the question is placed more appropriately on the persons immediately involved in the work, calling them to a deeper appropriation of their own faith in the light of their academic disciplines and their fields

ordinances have a legal nature need not be seen in a negative light." *Origins*, "The Bishop, the University and *Ex corde Ecclesiae*," 23 (1993-1994), p. 607. When officers of universities take these norms in connection with the norms regarding mandates to teach theology, these prescriptions have met with some dissatisfaction. David O'Brien points out that before the issuance of *Ex corde Ecclesiae*, many bishops in the United States allowed the institutions themselves to carry out their works in dialogue with church authorities and without the need for direct episcopal control and universal norms. In fact, a standing committee of bishops and presidents played a major role in ensuring open communication, building trust, and working to explain the American practices to the Vatican. However, he concludes that "the American arrangement...now endangered by the Apostolic Constitution and the growing power of a few less sympathetic bishops, depends not only upon episcopal self-restraint but also on the willingness of boards of trustees to guarantee that there is what *Ex corde Ecclesiae* calls an institutional commitment to Catholicism, that orthodox faith is taught and dissent is kept within acceptable, and unembarrassing boundaries. The source of the discontention lies in the perception that an otherwise hortatory and encouraging tone of *Ex corde Ecclesiae* is jolted by juridical intervention into the academic community." D. O'BRIEN, "Conversations on Jesuit (And Catholic?) Higher Education," pp. 6-7.

of inquiry. What ultimately makes an institution Catholic is the on-going articulation of a modern Christian vision for a particular institution within a specific cultural setting. This dialogue is prompted by free and internally dynamic questioning, completed in an honest exchange with all disciplines, including theology. In short, a true Catholic identity emerges by pursuing a strong, Catholic intellectual life imbued with Christian principles and values.¹²² And, a strong Catholic intellectual life prospers in universities characterized by institutional autonomy and academic freedom properly understood.

While this disseration does not intend to exhaust all of the possible understandings of Catholic identity, both internally and externally, suffice to say that since there are very few real restrictions in the law of the Church on this matter, much of its definition will properly depend on the persons working in particular university situations. But, in and through it all, how they go about their work is the critical factor, for therein emerges its Catholic character. Weak scholarship and research means weak Catholic identity.¹²³

¹²²In a 1955 essay, J. Ellis suggested that Catholic universities had uncritically attempted to imitate the scholarly standards of their secular counterparts. The result was that Catholic universities had lost sight of what made them different, and by their own requirements, superior. See J. ELLIS, American Catholics and the Intellectual Life, Chicago, Heritage Foundation, 1956, 63p. This A. believes that deductive lists which enumerate the key elements needed for Catholicity do not in any way compensate for long hours not spent in the library. The Catholic university must strive above and beyond the intellectual pursuits found in any secular institute of higher education.

¹²³T. Hesburgh has recently edited a collection of essays written by a number of scholars representing different disciplines that address a variety of topics concerning higher education, including the catholic identity of universities and colleges. In it, Hesburgh claims that "the modern university defines the nature of the university for our time and for the future." Moreover, the catholicity of the university becomes identifiable in a setting wherein there exists a vital presence and centrality of philosophy "in living dialogue with all the other disciplines in the university." These disciplines, he holds, as does Ex corde Ecclesiae, completes the field of inquiry...and moves every scholar to look beyond immediate questions to the total landscape of God." More importantly, however, several of the contributing authors reject John Paul II's efforts to bring the Catholic university within some form of jurisdictional ties, or even to be held accountable for its catholic nature. T. HESBURGH, (ed.), The Challenge and Promise of a Catholic University, Notre Dame, University of Notre Dame Press, 1994, 394p. In a critical review of the book, Sasseen disagrees with Hesburgh's understanding of the modern university and claims that a modern university does not define its nature of a university for our time or for the future. A university can not be both Catholic and modern if such radical freedom from the Church constitutes its soul. Sasseen contends that Hesburgh's vision subscribes to nihilistic and relativistic tendencies and calls for a newer model that "unites faith and reason at the core of

Hence, a critical mass of competent and highly qualified faculty members is essential to compete with, rather than buy into, the secular system. Answering the question in this light will serve to assure, as *Ex corde Ecclesiae* exhorts, that Catholic institutions will preserve their identity and meet their objectives proper to their nature.

D. Some Observations regarding Assumption University

A modern Catholic university is first and foremost an academic community which was not born, *ex corde Ecclesiae* like many of the medieval institutes of higher learning.¹²⁴ Rather, the contemporary Catholic university stands as a much different institution from those in past centuries, wherein the teaching function inherited from the British model, the research and graduate functions of the German university system, and a continuing function of pastoral service to humankind, combine to seek the truth in faith and reason within a vast number of faculties and disciplines. Simply put, most universities are the products of the cultures in which they stand; consequently, the description of a Catholic university must also be broad enough to encompass this awareness, in a similar way that "Church" can describe a variety of equally valid understandings. In short, *Ex corde Ecclesiae* represents only one such mode of perception.

the university, perfecting it in the manner that grace perfects nature and illumines reason in its quest for truth and wisdom." R. SASSEEN, "What Makes a University Catholic," in *Crisis*, January 1995, pp. 49-50.

¹²⁴Thus, in the modern world, the Church does not so much create as find universities as cultural products, much as it finds the civil institutions of a nation. In the Middle Ages the case was different: In the West, the culture belonged to the Church, and it could create the structures and determine the operations of the educational institutions. Today, its power to do so is mostly restricted to schools for the training of the clergy, a legitimate right that comes with freedom of religion." L. ŌRSY, "Bishops and Universities: Dominion or Communion," in *America*, 20 November 1993, p. 11. Unlike other Catholic universities in various parts of the world, in Canada, the majority of the Catholic universities and colleges were established by religious congregations or dioceses. It is true that they were born *ex corde Ecclesiae*.

Moreover, in recent times, universities manifest a large variance in the way in which they structure themselves to achieve their proper ends. With the advent of lay boards of governors, Catholic universities have radically changed the way in which they internally structure their levels of power and relate to civil governments, adjusting themselves to the particular times and places in which they seek to carry out their three-fold mission of teaching, researching, and ministering. At Assumption, the federative model endures as a prime example of how a Canadian Catholic university or college has adapted in order to secure government funds for its educational work and continued viability.¹²⁵ Therefore, since the rise of the ecclesial institutions of medieval times, new and existing university systems in North America have taken root under a variety of governance models in which the state directly or indirectly participates in the work for a number of legal and financial reasons.

Further, though these institutions are "in the Church," and are therefore necessarily in communion with the Church's hierarchy in varying degrees of belonging, the fact remains that the identity and mission of a Catholic university is constantly changing and evolving so that timeless principles together with juridical ties do not suffice to maintain their autonomy. In some instances, while the law of the Church assists in maintaining the Catholic identities of these institutes, ultimately, their nature, identity, mission, and operation depend primarily on the firm and qualified direction, inventive

¹²⁵Ex corde Ecclesiae fails to demonstrate an understanding of and appreciation for the various histories and circumstances of Catholic higher education throughout the world. With respect to Canada, it does not discuss the model of the publicly-funded federation agreements that exist between host universities and Catholic universities and colleges. In all cases, this model was necessary to obtain needed governmental funds for the operation of Catholic facilities in Canada. Further, in the United States, special arrangements, both legal and academic, are in place in many Catholic universities and colleges which not only protect the institutions from civil liabilities but also permit such facilities to obtain public funding. Failure to recognize these many arrangements makes the Articles of the Apostolic Constitution appear vague and out of touch with present realities. Moreover, it places a difficult burden upon those charged with drafting precise norms for its implementation.

minds, and faithful devotion of those working together in the education apostolate within a particular and concrete situation.

Moreover, since the 1983 Code quietly introduced universities that are Catholic in fact, though not in law, the distinct Catholic spirit at each institution must be kept alive by the people who are closest to that institution: the students, the faculty, the administrators, and the board of governors.¹²⁶ This commitment also extends to the local Church and the diocesan bishop. Accordingly, to meet its ends, as university and as Catholic, the institution requires not only a commitment from those responsible for upholding the academic ideals, it also requires a commitment from those same individuals to the ideals known by faith alone. In the final analysis, people bring into life the university or college by the values which they transmit.

To put it differently, rooted in a fundamental understanding of the university both as an academic community and as an instance of *communio* and dependent upon the needs of a particular institution, the civil and canonical structures become the contingent expressions of the unity which exists within the various bodies, on and off the campus. In some cases, these structures are ways to safeguard the institution. To that end, if properly chosen and applied, they compromise neither the purpose nor the identity of the institution nor the sensitive relationships that drive it.

Throughout the decades, individual institutional histories have indicated a great diversity in narrating how Catholic institutions of higher education were established or have developed.¹²⁷ For some universities and colleges, the internal dimension of

¹²⁶Canon 808 speaks about Catholic universities which are either Catholic by name or reapse Catholic, that is, Catholic by fact in which no constitutive bond or institutional commitment or Catholic name characterizes the institution.

¹²⁷Presently, under Article 3 of the Apostolic Constitution, the Holy See, an episcopal conference, another assembly of Catholic hierarchy, or the diocesan bishop retain the power to establish or approve a catholic university.

Catholicity, alone, brought about the bonds of communion that have proven just as strong as if they rested on legal incorporations or jurisdictional ties. Still, at other religiously-sponsored institutions, canonical structures together with civil incorporations combine to enhance the bonds of communion while clarifying their identity and protecting the interests of the religious institution and the university community.¹²⁸

While *Ex corde Ecclesiae* does not require Catholic universities to juridicize the ecclesial relationship, some institutions have juridic personality by virtue of the way in which they were founded. With particular reference to Assumption University, because it was founded by the Jesuit Fathers upon the approval of the diocesan bishop then later alienated to the Basilian Fathers as part of their apostolic works, it has its identity in canon law, and therefore it is subject to a number of legal principles stated in the 1983 *Code of Canon Law* over which the local bishop is involved directly.¹²⁹ To cite a few examples, as an existing university approved by the diocesan bishop, it must incorporate the norms of the constitution into its statutes. Second, in order for the apostolate of the Basilian Fathers to receive recognition, it must be in communion with the diocesan bishop. While this norm does not necessarily imply direct approval by the diocesan bishop, an indirect approval suffices.¹³⁰ Also, religious are subject to the authority of

¹²⁸Orsy poses the question in this way. "There is little experience to guide us. Is it too much to say that the church must learn how to define it and guide its institutions in a climate of virtually unlimited freedom?" Cf. L. ORSY, *The Church: Learning and Teaching*, p. 127-128, note 14.

¹²⁹"Permission given by a diocesan bishop to a religious community to establish a college, hospital, or other institution within the diocese is not tantamount to establishment of the institution by the bishop himself." R. KENNEDY, "Maida, McGrath, Michiels: Introduction to a Study of the Canonical and Civil-Law Status of Church-related Institutions in the United States," [hereafter="Maida, McGrath, Michiels, "] in *The Jurist*, 50 (1990), pp. 351-401.

¹³⁰CIC 1983, c. 394, §1: "Varias apostolatus rationes in dioecesi foveat Episcopus, atque curet ut in universa dioecesi, vel in eiusdem particularibus districtibus, omnia apostolatus opera, servata uniuscuiusque propria indole, sub suo moderamine coordinentur.

§2: Urgeant officium, quo tenentur fideles ad apostolatam pro sua cuiusque condicione et aptitudine exercendum, atque ipsos adhortetur ut varia opera apostolatus, secundum necessitates loci et temporis, participant et iuvent."

the diocesan bishop in all matters relating to the apostolate.¹³¹ And finally, throughout the diocese, the bishop has the responsibility over all apostolates and activities to coordinate them in accordance with diocesan needs.¹³²

Because of the juridical nature of the relationship that Assumption University enjoys with the local Church, the governing officers have several points to consider in their administration, ranging from the perception of its Catholic identity, the implementation of the norms of *Ex corde Ecclesiae*, through the ownership and the administration of temporal goods, into questions dealing with civil and canonical liabilities. But, the way in which the university presently relates to Church and civil authorities can change. However, through it all, placed at the heart of the issue lies the problem of canonical status. More precisely, the canonical status of Assumption University determines the relevance of canon law to it and the identification of which canon laws, if any, apply to the institution. Once determined, that particular canonical status directs an operational policy for the institution in accordance with certain legal prescriptions. Consequently, contemplating a change to that canonical status under the 1983 Code not only presumes knowledge of the history of the institute under study but also accurate knowledge of the precise status the alteration of which is being considered. Thus, Chapter 2 undertakes the investigation into the institute's canonical history in order to ascertain its present status before deciding whether a change to that status is both advisable and practical.

¹³¹CIC 1983, c. 678, §1: "Religiosi subsunt potestati Episcoporum, quos devoto obsequio ac reverentia prosequi tenentur, in iis quae curam animarum, exercitium publicum cultus divini et alia apostolatus opera respiciunt."

¹³²CIC 1983, c. 394, §1, supra, note 130.

Conclusion

All in all, looking back at the successes and failures, the history notes offer gentle reminders that difficulties and courageous responses to those difficulties provide the real stuff of human and Christian life in any age. Though the start appeared tentative and the course not so well-charted, the archives testify that the Basilians -- as they came to be known -- have recorded an impressive and colourful list of accomplishments. Today, that same pioneering spirit of teaching and preaching animates many members of the Congregation and involves them in a number of pastoral and educative ministries spread across Canada, the United States, France, Colombia, Mexico, and St. Lucia.

In particular, Assumption University, as a religiously-owned Catholic institution, stands out as one establishment engaged in actively searching for creative ways to serve both the local Church and the local academic community in Catholic higher education. With changes to the Basilian administration, innovative ideas now motivate attempts to meet the needs of the various constituencies. Through it all, Assumption remains in relationship to the Church through the ownership of the Basilian Fathers. In the meantime, in order to arrive at a sound judgment concerning exactly how that relationship is played out in the future, the process of altering canonical status will begin with an examination into its status from the time of its inception to the present.

CHAPTER TWO

The Civil and Canonical Situation of Assumption University at the time of the 1917 *Code of Canon Law*

At the heart of this dissertation lies the issue of canonical status. In short, the canonical status, or lack thereof, of Church-related educational institutions determines the relevance of which canon laws, if any, apply to them. For instance, not only does the status shed light on the Catholicity of the institution, as prescribed in the law, but it also affects the autonomy and organizational policy of the university or college, especially as regards temporal goods. Accordingly, an investigation into the canonical status of a university or college serves not only to clarify its present standing under the law, but also to facilitate the possibility of altering that status according to the 1983 *Code of Canon Law*.

As outlined in Chapter One, the many and various apostolic works of the Basilian Fathers in Canada and France had their foundation in the late nineteenth century. In particular, some of the Basilian colleges and universities, such as Assumption, have spanned three periods of canonical history: (1) prior to 1917; (2) from 1917-1983; and (3) since the promulgation of the 1983 *Code of Canon Law*. Thus, with Assumption University, the investigation must take in the three major time periods.

A number of possible options existed under the 1917 Code, for canonical status of a religiously-owned or sponsored university or college. In fact, it allows for three possibilities. With respect to Canada, since religious communities or dioceses founded several of the colleges and universities, these institutions, as apostolic works of the sponsor, possibly shared in the canonical status of its sponsor. In other situations, the university could have changed its original status and would thereafter have the independent canonical status of a juridic person in its own right.¹ So, too, a university or college which had shared the canonical status of its sponsor could have been secularized by the removal of its status from the institution itself.

In addition, many universities also hold legal personality at civil law. Since the universities and colleges were considered as charitable entities, many were created not-for-profit corporations by an act of the government. For many institutions this action did not create a difficulty as regards canonical status. However, for other institutions, putting deeds to property in the name of the separately incorporated charitable institution became a canonically ambiguous action. In other words, this endeavour may have altered the original status of the institution. Baldly put, the fact that at one time a separately incorporated institution and its property were part of the apostolate and assets of the sponsoring religious body may, but need not, be determinative of the present canonical status of the institution and its property. Overall then, such scenarios, more often than not, significantly complicate the process of determining the present status of the institution.

¹The 1917 Code of Canon Law generally referred to juridic persons as "moral persons." The 1983 Code of Canon Law restricts the term "moral person" to the Catholic Church and the Apostolic See (c. 113, §1), and uses the term "juridic person" in all other instances. To avoid confusion, the terminology presented in the 1983 Code will be used throughout this dissertation, except in passages quoted from the commentators who wrote under the 1917 Code.

Accordingly, as a prelude to deciding whether a change in the canonical status of an institution under the 1983 Code is both viable and commendable, a circumspect and thorough investigation of archival materials and Church documents must ascertain the precise status whose alteration is being considered. As part of that inquiry, the investigation must examine the actions and motivations of the sponsoring religious body when they transferred property titles to the charitable institution. To assume, without careful study, that no canonical transfer was intended or effected when property was conveyed from the sponsoring religious body to the civilly-incorporated charitable institution, oversimplifies the problem.²

Therefore, given the history of Assumption University as a background to the main focus of the dissertation, the next step in the process investigates its canonical history from the time of inception to the promulgation of the 1983 Code. To that end, in four parts Chapter Two examines the canonical situation of Assumption in the light the 1917 legislation. While Part I addresses the canonical situation of Assumption prior to the 1917 Code, Part II presents a general overview of the law as regards charitable institutions under the 1917 *Code of Canon Law* and provides a contemporary analysis of two important theses which raised and explored issues relevant to this dissertation. Based on this analysis, Part III looks beyond the juridic nature of the charitable institution as well as the acts of civil incorporation into the conveyance of titles to properties up to the 1983 *Code of Canon Law*. Thereupon, by applying the laws, concepts, and results of the investigation, Part IV determines the canonical and civil situation at Assumption University at the time of the 1917 Code.

²The first step in this process necessitates a clarification as to which came first, the charitable institution or the religious house.

I. Prior to the 1917 *Code of Canon Law*

Assumption University stands on a portion of property which was inherited by the Diocese of London from the Diocese of Toronto. Initially, this land was part of a grant given to the Church in Canada on behalf of the Crown. In 1830, however, when the grant was given, the laws prescribed, pursuant to *An Act for the Relief of the Religious Societies Therein Mentioned*, that the Church had no alternative but to acquire and hold land in the name of individual members in trust for the local congregation. In 1845, when the Bishops of Upper Canada were given the legal right to own and administer Church property, they made great efforts to attempt to obtain from the trustees certain properties. Because the Diocese of London had not been established at this time, Point recounts a rather colourful story of how the Bishop of Toronto managed to obtain the titles to the property upon which Assumption University now stands. The Bishop refused to grant permission for the building of the school unless the Jesuits built it on Church property, forcing the trustee to place the title deeds into his hands. From 1854 until the time Bishop Cody donated the Assumption property to the Basilian Fathers, the episcopal corporation under the direction of the various bishops retained the titles to deeds and managed the properties under their office.

II. The 1917 *Code of Canon Law*

The *Pio-Benedictine Code* which remained in effect until the promulgation of the 1983 *Code of Canon Law* did not specifically address such entities as charitable institutions; it did however treat them under other related topics: pious works of a religious institute, juridic personality, and ownership of Church property. In this chapter, two of the three are considered: the juridic personality of charitable institutions as

expressed in cc. 1489-1494, and the ownership and alienation of ecclesiastical goods as provided for in cc. 1495-1551 and cc. 531-537.

A. Juridic nature

In 1940, a Roman Rotal decision presented four possible juridic states for charitable institutions, based on the manner and the juridic effects of their initial establishment. Though the document specifically made reference to hospitals and orphanages, by extension and in accordance with c. 1489, §1, it also included, *aliaque similia instituta*.

A hospital which cares for the sick and a retreat house can acquire their different juridic status by certain circumstances, for example, according to the things that they properly do according to their stated purpose: they can acquire the nature of 1 a secular work; or 2 of a pious institute; 3 of an ecclesiastical institute; 4 of a pious foundation.³

This schema suggested only possible categories for juridic states.

Briefly, into category one (*res profanae*) were placed those institutions which had been established apart from the action of the Church for other than religious purposes, such as public hospitals. Accordingly, these entities remained untouched by the laws of the Church. Further, while many such institutions may have been given over to religious congregations to direct their operations or provide Catholic services, this did not affect the juridic relationship of this institution to the Church.⁴ In the case presented before

³"Hospitale in quo infirmi recipiuntur, et domus in qua exercitia spiritualia peraguntur, statum iuridicum sortiri possunt pro adiunctis diversum, ut puta, iuxta ea quae ad speciem illam declarandam propius faciunt, possunt induere naturam: 1° rei profanae; 2° institutum seu loci pii; 3° instituti ecclesiastici; 4° piae foundationis." Decision c. JULLIEN, 11 July 1940, in *Sacrae Romanae Rotae Decisiones seu sententiae* (hereafter= *SRR Dec.*), 32 (1940), p. 533.

⁴When such services were provided, the law granted to the diocesan bishop the right of visitation and vigilance over the institution. See *CIC 1917*, c. 336, §2: "Advigilent ne abusus in ecclesiasticam disciplinam irrepant, praesertim circa administrationem Sacramentorum at Sacramentalium, cultum Dei et Sanctorum, praedicationem verbi Dei, sacras indulgentias, implementum piarum voluntatum; curentque ut

Jullien, he argues that because the hospital had no juridic personality even though the sisters were serving, the place remained *bona profana*.

Category two (*institutum seu loci pii*) was similar to category one in that these institutions fell outside the realm of laws. However, unlike the secular institutions, the distinguishing feature was that an individual or group of Catholics founded the institution for certain religious purposes. But, remaining as the private endeavour of the lay pious faithful, the entity received no ecclesiastical erection, approbation, or juridic personality. Nevertheless, even though the work was not subject to Church legislation, the law did grant the bishop the right to visit the institution and to exercise vigilance over the work. Jullien's second category addressed such places which were usually run by the laity but lacked the special intervention of the Church whereby they would be erected into ecclesiastical institutions. Consequently, the Church did not consider their goods to be *bona ecclesiastica*.⁵

Category three (*institutum ecclesiasticum*) required the action of a competent ecclesiastical authority either to establish or to approve the institute. Once the appropriate canonical steps were taken, the work became an ecclesiastical institution. So, more often than not, when the diocesan bishop gave ecclesiastical approval to a religious congregation for the establishment of a religious house in accordance with c. 497, §1, the approbation for the institution was also granted, however implicit. But, under c. 1489, the local Ordinary was not to grant approval to an institution unless the purpose of its foundation was really useful, the endowment was sufficient, and the institute was in a

puritas fidei ac morum in clero et populo conservetur, ut fidelibus, praecipue pueris ac rudibus, pabulum doctrinae christianae praebatur, ut in scholis puerorum ac juvenum institutio secundum catholicae religionis principia tradatur."

⁵Cf. Decision c. JULLIEN, 11 July 1940, in *SRR Dec.*, 32 (1940) p. 534.

position to realize its purpose. Furthermore, the approval did not grant separate juridic personality to the entity. Rather, a separate decree was needed.⁶

In many instances, the above scenario describes the founding of many universities or colleges in Canada which had originated simply as an apostolic work of a group of religious living together in a canonically established house of their religious community (see Appendix A). In addition, this arrangement placed certain conditions upon the administration and alienation of the property of the institution. As a general rule, under the 1917 Code, each house of a religious order or congregation was by law, a juridic person and, as such, was capable of owning property. Consequently, charitable institutions owned by a religious congregation or some other Church entity became ecclesiastical property subject to the canonical legislation prescribed in cc. 1495-1551 and cc. 531-537.⁷ With regard to this third category, Jullien's opinion reads:

These places canonically erected...differ from merely pious places, even those approved or recommended by the local ordinaries; so in cc. 684, 707, 708, approval or commendation is distinguished from canonical erection. Moreover, institutes can 'by a *decretum formale*' of the ordinary of the place be designated as a juridic person in the Church (c. 1489, §1 in conjunction with c. 100, §1). By particular concession institutes are raised to the dignity of a moral person in the Church and according to the norms of the canons, they have the right to acquire, retain, administer temporal goods, which by that very fact are goods and therefore subject to all the laws of the Church concerning ecclesiastical goods (cc. 1495, §2; 14907, §1). This concession of juridic personality truly occurs, which therefore is not presumed but ought to be proved. By the law of the Code of Canon Law an institute does not obtain the formality of a

⁶CIC 1917, c. 497, §1: "Ad erigendam domum religiosam exemptam, sive formatam sive non formatam, aut monasterium monialium, aut in locis Sacrae Congregationi de Prop. Fide subjectis quamlibet religiosam domum, requiritur beneplacitum Sedis Apostolicae et Ordinarii consensus in scriptis datus; secus, satis est Ordinarii venia."

⁷CIC 1917, c. 531: "Non modo religio, sed etiam provincia et domus sunt capaces acquirendi et possidendi bona temporalia cum redditibus stabilibus seu fundatis, nisi earum capacitas in regulis et constitutionibus excludatur aut coarctetur."

CIC 1917, c. 1495, §2: "Etiam ecclesiis singularibus aliisque personis moralibus quae ab ecclesiastica auctoritate in iuridicam personam erectae sint, ius est, ad normam sacrorum canonum, bona temporalia acquirendi, retinendi et administrandi."

moral person by a simple approval or commendation, nor by canonical erection alone, but by a formal decree whereby the Ordinary of the place actually concedes personality either in proper terms or their equivalent. ...Therefore, a so-called 'equivalent' concession does not suffice, namely even if an institute through repeated acts over the course of many years would have been considered as a juridic person by the Ordinary (emphasis added).⁸

Demonstrating the consistency between theory and practice, which is something the Maida theses fail to achieve, Jullien concludes this section of his opinion by saying that because of laws not-friendly to the Church within particular places, pious works such as hospitals are not usually erected into institutes.⁹

Into the fourth category (*pia fundatio*) of Jullien's typology were listed those institutions which were considered juridic persons in the Church. Though the 1917 Code did not define a juridic person, it was generally understood to be a legal fiction, equivalent in ecclesiastical law to the civil-law corporation.¹⁰ Abbo-Hanna describes it in this way:

A moral person... may be defined 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

⁸Decision c. JULLIEN, 11 July 1940, in SRR Dec., 32 (1940), pp. 535-536.

⁹Here, Jullien cites an earlier decision c. Many, 27 May 1913, in SRR Dec., 5 (1913), Decision 30, no. 12, p. 343.

¹⁰Since an exact definition of "moral person" or "juridic person" under the 1917 Code was not found in the law, many commentators, including Michiels, attempted to compose various definitions by combining ideas found in related canons: "A moral person is anything in the Church, distinct from a physical person (material cause: c. 99), which, for a religious or charitable purpose (final cause: c. 100, §1) has been constituted by public authority (efficient cause: c. 99) into a subject capable of rights and obligations (formal cause: c. 99 together with c. 87)." See G. MICHIELS, Principia generalia de personis in Ecclesia: commentarius libri II Codicis juris canonici, canones praeliminares 87-106, ed. alt., Tornaci, Desclée, 1955, p. 347 in J. DOYLE, Civil Incorporation of Ecclesiastical Institutions: A Canonical Perspective, JCD dissertation, Ottawa, Saint Paul University, 1989, p. 3. Matthaeus Conte a Coronata proposed an alternative, yet simpler definition: "Persona iuridica seu moralis est quidquid iurium et obligationum capax est, praeter personas physicas." M. CORONATA, "Normae generales, de clericis, de religiosis, de laicis," in Institutiones iuris canonici: ad usum utriusque cleri et scholarum, ed. alt., Taurini, Marietti, 1933, Vol. 1, p. 157.

contracting obligations, by the means and to the extent determined by the competent authority.¹¹

Generally, the rights and responsibilities of a juridic person included the ability to enter into contracts, to own and administrate property, and to bring action before a civil court. While more will be said on this point, suffice to say, for the moment that an entity acquired juridic personality either by the operation of the law itself or by a decree from a competent Church authority.

To sum up, in accordance with the 1917 Code, charitable institutions, such as universities and colleges, could differ in their juridic standing. In general, there existed three options. First, corresponding to category three of the typology, an institute could be founded as part of the apostolate of a religious community, thereby sharing in the canonical status of the founding religious body. Second, following category four, an institution may be given either, at the time of its founding or later, juridic personality of its own. Third, in keeping with categories one and four, an institution may have been established as a secular institution with no canonical status or, subsequent to its establishment with canonical status, that status may have been removed. In any event, as a consequence of its juridic standing, each entity possessed different rights and obligations under the law, depending on the circumstances of its founding. In all cases, appropriate canonical steps were required to effect conferral of or change in the status of the institution.

¹¹See J. ABBO and D. HANNAN, The Sacred Canons: A Concise Presentation of the Current Disciplinary Norms of the Church, 2nd rev. ed., St. Louis, Herder, 1957, Vol. I, p. 144. For an alternate definition, see R. KENNEDY, "Maida, McGrath and Michiels," p. 353: "It is an artificial person, distinct from the natural persons who constitute it, administer it, or for those whose benefit it exists, established by competent ecclesiastical authority for an apostolic purpose, with rights and obligations determined by the law of the Church, to which it is fully accountable."

B. Effecting Conferral of Juridic Personality

Along with physical persons in the Church, c. 99 states that moral persons also existed, but only when constituted by public authority. Canon 100, however, views these moral persons as inferior to the moral persons of the Catholic Church and Apostolic See, which have their nature by divine ordinance. In any event, the 1917 Code distinguished two categories of moral persons according to their establishment. Using the terminology of the 1917 Code, a "collegial" juridic person was one whose foundation in reality was a group of natural persons; a "non-collegial" juridic person had its foundation in property.¹²

While c. 99 prescribed that a positive, constitutive act on the part of a competent ecclesiastical authority created a juridic person, c. 100, §1 provided two alternative ways by which juridic persons could be lawfully constituted: either by a provision of the law itself (*a iure* constitution) or by a special concession of a competent Church authority given by formal decree (*ab homine* constitution):

The Catholic Church and Apostolic See have the nature of moral personality by divine institution itself; other inferior moral persons in the Church acquire it either by prescription of the law itself or by special concession

¹²CIC 1917, c. 99: "In Ecclesia, praeter personas físicas, sunt etiam personae morales, publica auctoritate constitutae, quae distinguuntur in personas morales collegiales et non-collegiales, ut ecclesiae, seminaria, beneficia, et cetera..." With regard to the exact sense of the distinction between collegial and non-collegial juridical persons, opinions were rather diverse. Some juridic persons were considered to be a combination of both types. See G. MICHIELS, Principia generalia de personis in Ecclesia, p. 355-359; 377-387. In 1968, W. Onclin proposed to use the distinction universitates personarum/universitates rerum. He subdivided universitates personarum into collegiales and non-collegiales according to their structure. Thus, the collegiales are recognized as an association of equals, while the non-collegiales would be an association not made up of equals and therefore not truly a collegium. This division would recognize that the distinction should be based on the juridical tradition of using the term collegium to refer to the decision-making power of a particular institution's members. W. ONCLIN, "De personalitate morali vel canonica," in Pontificia Commissio Codici Iuris Canonici Recognoscendo, Acta Conventus Internationalis Canonistarum: Romae diebus 20-25 mai 1968 celebrati, Vaticanum, Typis polyglottis Vaticanis, 1970, pp. 1139-1146 in A. GAUTHIER, "Juridical Persons in the Code of Canon Law," in Studia canonica, 25 (1991), pp. 84-87.

from a competent superior given by formal decree for a religious or charitable purpose.¹³

So, while some institutions received juridic personality by the operation of the law, others received it only by the formal decree of a competent public Church authority.¹⁴

The law itself conferred juridic personality on a number of ecclesiastical entities.¹⁵ Granted, the particular institution had been established by action of a competent authority; but, coincident with the act of its establishment, it also acquired juridic personality and became the subject of rights and obligations in the Church. In short, no additional action on the part of the public authority was required. Under this provision, neither the local ordinary nor the religious superior was the source of the juridic personality; it was created by the sole operation of the law.¹⁶

More germane to this dissertation were cases in which the operation of the law itself did not confer the juridic personality on the institution. Rather, in accord with c. 100, §1, specific establishments needed a special concession from a competent ecclesiastical superior given by a "formal decree." In this category, the legislator placed such charitable entities as educational institutions, health-care facilities, and child-care centres. So, unlike dioceses and religious congregations, mere establishment of the

¹³CIC 1917, c. 100, §1: "Catholica Ecclesia et Apostolica Sedes moralis personae rationem habent ex ipsa ordinatione divina; ceterae inferiores personae morales in Ecclesia eam sortiuntur sive ex ipso iuris praescripto sive ex speciali competentis Superioris ecclesiastici concessione data per formale decretum ad finem religiosum vel caritativum."

¹⁴With regard to the first issue, under c. 1489, §1 of the 1917 Code, competency was accorded explicitly to local Ordinaries. No religious superiors qualified as a local Ordinary. See CIC 1917, c. 198, §2: "Nominem autem Ordinarii loci seu locorum veniunt omnes recensiti, exceptis Superioribus religiosis." Under the 1983 Code, the same provision is found in c. 134, §2: "By the title of local ordinary are understood all those mentioned in §1, except Superiors of religious institutes..."

¹⁵Such entities included: dioceses (CIC 1917, c. 1557, §2, 2°), parishes (c. 1209, §1), seminaries (c. 99), provinces and houses of religious orders and congregations (c. 536, §1) as well as the order and congregations themselves (c. 536, §1).

¹⁶Cf. R. KENNEDY, "Maida, McGrath, Michiels", p. 378-379.

institution did not carry with it a conferral, by law, of juridic personality. For these institutions, the canonical opinion of the day was that the law clearly required a decree issued by a competent Church authority.

On this point, R. Kennedy follows closely the writings of Ciprotti and the earlier position held by Michiels, asserting that conferring juridic personality by mere establishment of the charitable institution, apart from any additional action on the part of a competent ecclesiastical authority, appeared on the surface at least, to negate the two alternative methods of constituting juridic persons within the Church as provided for in c. 100, §1. Moreover, when religious institutes and dioceses established non-collegial charitable institutes in accordance with c. 1489, §1, the law made clear the necessity for a positive act of a competent Church authority formally constituting a juridic person.

Hospitals, orphanages, and other similar institutions dedicated to the works of religion or charity whether spiritual or temporal, can be erected by the local Ordinary and by his decree constituted a juridic person in the Church.¹⁷

This positive act was either implicitly known, by attributing to an entity a quality found only with juridic persons, such as the capacity to own property, or explicitly mentioned, usually in the decree of erection or in a separate decree.¹⁸

Was the issuance of a decree constitutive to the act of creating a juridic person? By replying in the affirmative, the rotal decision of 1940 confirms the intent of canon

¹⁷CIC 1917, c. 1489, §1: "Hospitalia, orphanotrophia aliaque similia instituta, ad opera religionis vel caritatis sive spiritualis sive temporalis destinata, possunt ab Ordinario loci erigi et per eius decretum persona iuridica in Ecclesia constitui."

¹⁸Cf. R. KENNEDY, "Maida, McGrath, Michiels," p. 390-391. There was an overwhelming majority of canonists who supported the view of either explicit or implicit mention of the conferral of juridic personality on charitable institutions. Among them were listed: Berutti, Brown, Cappello, Chelodi, Ciprotti, Coronata, Regatillo, Porchielli, Naz, and Wernz-Vidal. Following Ciprotti and strongly denying the decree of erection as sufficient to confer juridic personality was Ioannes Chelodi: "Non sufficit decretum erectionis; sed requiritur decretum quo expresse vel aequivalenter concedatur personalitas iuridica." I. CHELODI, Ius canonicum de personis, 3rd ed., Trent, Libreria Moderna A. Ardesi, 1942, p. 163.

1489, §1 on this point. The decision, which supported the earlier positions of Ciprotti and others, stated with clarity that while a local Ordinary could establish a charitable institution as a juridic person in accordance with c. 1489, §1, the law required that he issue a decree that specifically granted the juridic personality to the non-collegial institution.¹⁹ The decision went on to say that even if the bishop acted as though the institution possessed juridic personality through repeated acts, for however many years, such would not suffice to confer it.²⁰ Once created as a juridic person, the charitable institute was obliged to draw up a charter in conformity with c. 1490, §1.²¹ Finally, the bishop exercised the right of visitation to the institution and vigilance in the area of faith and morals.

Overall, in conformity with c. 100, §1, juridic persons were constituted by the Church specifically for religious or charitable purposes. Accordingly, the ecclesiastical

¹⁹See P. CIPROTTI, "De formali decreto quo persona juridica constituitur," in *Apollinaris*, 10 (1937), p. 270.

²⁰"Institutum ecclesiasticum. - Sub lib III Cod. I. C. titulo XXVI de aliis institutis ecclesiasticis non collegialibus, can. 1489, §1, disponit: Hospitalia, orphanotrophia aliaque similia instituta..., id est constitui in instituta seu loca ecclesiastica. Haec loca canonice erecta (cfr. ex. gr. can. 1525, §1) differunt a locis mere piis, etiam ab Ordinario approbatis seu commendatis: ita in cann. 684, 707, 708, distinguitur approbatio seu commendatio ab erectione canonica. Praetera instituta ecclesiastica possunt per Ordinarii loci decretum formale persona iuridica in Ecclesia constitui, cit. cann. 1489, §1, iuncto canone 100, §1. Qua peculiari concessione instituta ecclesiastica evehuntur ad dignitatem personae moralis in Ecclesia, atque ad normam sacrorum Canonum habent acquirendi, retinendi, administrandi, bona temporalis, quae eo ipso sunt bona ecclesiastica ideoque subiecta legibus ab Ecclesia latis de bonis ecclesiasticis (can. 1495, §2; 1497, §1). Verum concessio personalitatis iuridicae est factum, quod igitur non praesumitur, sed probari debet. Iure enim Codicis (cit. cann. 1489; 100, §1) institutum ecclesiasticum non obtinet rationem personae moralis per simplicem approbationem seu commendationem, nec per solam erectionem in ecclesiasticum institutum, sed per formale decretum, quo Ordinarius loci personalitatem reapse concedit, sive terminis propriis, sive aequivalentibus (puta si in concessione, tacita qualitate personae moralis, enumerantur iura et officia personalium moralium). Non sufficit igitur concessio s. d. aequipollens, si nempe institutum per repetitos actus, plurium annorum decursu, ab Ordinario tanquam persona iuridica habitum fuerit (emphasis added)." Decision c. JULLIEN, 11 July 1940, in *SRR Dec.*, 32(1940), pp. 534-535.

²¹CIC 1917, c. 1490, §1: "In tabulis foundationis pius fundator accurate describat totam instituti constitutionem, finem, dotationem, administrationem, et regimen, usum reddituum et successionem in bona, casu extinctionis ipsius instituti."

property owned by such juridic persons supplied the "necessary means for conducting divine worship, for the decent maintenance of the clergy and other ministers, and for her other proper purposes."²² Therefore, any actions that disposed of ecclesiastical or stable property required permissions from various authorities depending on the value of the goods.²³

C. Ownership and Conveyance of Church Property

In regard to ownership of Church property, the 1917 Code handled charitable institutions under cc. 1495-1551 together with cc. 531-537 for religious communities. In general, property belonging to juridic persons, not private persons, was considered "ecclesiastical property" or "ecclesiastical goods."²⁴ As a consequence, since juridic persons enjoyed the capacity to own Church property, only such goods were then subject to canonical norms governing acquisition, administration, and alienation.²⁵ Religious

²²See CIC 1917, c. 100 §1, n. 11, p. 8. See CIC 1917, c. 1496: "...quae ad cultum divinum, ad honestam clericorum aliorumque ministrorum sustentationem et ad reliquos fines sibi proprios sint necessaria."

²³Stable or preservable property included land and buildings, goods of historical value, works of art, and fixed capital as opposed to free capital. Fixed capital: "...money which is not being used primarily as a medium of barter or exchange, but which has been invested in property or holdings of some kind...in the form of corporeal or noncorporeal, either movable or immovable." See W. DOHENY, Practical Problems in Church Finance: A Study of the Alienation of Church Resources and of the Canonical Restrictions on Church Debt, Milwaukee, Bruce Publishing Co., 1941, p. 43.

²⁴CIC 1917, c. 1497, §1: "Bona temporalia, sive corporalia, tum immobilia tum mobilia, sive incorporalia, quae vel ad Ecclesiam universam et ad Apostolicam Sedem vel ad aliam in Ecclesia personam moralem pertineant, sunt bona ecclesiastica."

²⁵CIC 1917, c. 1495, §1: "Ecclesia catholica et Apostolica Sedes ius habet libere et independenter a civili potestate acquirendi, retinendi et administrandi bona temporalia ad fines sibi proprios prosequendos.

§2: Etiam ecclesiis singularibus aliisque personis moralibus quae ab ecclesiastica auctoritate in iuridicam personam erectae sint, ius est, ad normam sacrorum canonum, bona temporalia acquirendi, retinendi et administrandi." General norms governing the alienation of church property were found in cc. 1529-1543, while specific norms governing the alienation of church property of religious institutes

communities were no exception to this norm. Since they were established as juridic persons by the law itself, in conformity with c. 531, the community itself was capable of acquiring and possessing temporal goods, together with fixed revenues and endowments. Moreover, provinces and local houses were also capable of owning ecclesiastical property so long as the constitutions did not restrict or exclude such activity.²⁶

As mentioned, most religious communities in Canada secured their ecclesiastical property through civil incorporation. In fact, while canonical ownership did not hinge on civil law recognition, the 1917 Code did counsel administrators to observe the prescriptions in both spheres. As a result, many communities held dual legal personalities at civil and canon law.²⁷

With regard to the sponsored works of the religious community, such as the hospitals or the universities, the canonical situation becomes more complex. As previously mentioned, in most cases, the charitable institutions, though not a juridic person in its own right, had acquired canonical status. In short, the university or college existed as the apostolic work of a juridic person in the Church, thereby sharing in the canonical status of the sponsoring religious community. Further, in most cases, while perpetuating their original canonical status, these charitable institutions were subsequently created legal persons in the civil sphere as well.²⁸

was found in c. 534.

²⁶See CIC 1917, c. 531; 536 §1. In particular, the proper law of the Congregation of the Priests of Saint Basil reflects the norm of the 1917 Code in the constitutional document, The Basilian Way of Life, art. 140 at page 67: "Not only the Congregation as such but also individual houses have the right to acquire, possess and administer temporal goods, whether these be movable or immovable."

²⁷CIC 1917, c. 1523, 2°: "Debent praescripta servare iuris tam canonici quam civilis..."

²⁸"Where necessary or useful, civil incorporations should be established to secure the right-to-hold property." The Basilian Government, art. 103. Basilian directed institutions that obtained civil legal personality included: St. Mark's College, Vancouver, British Columbia, established by the local diocese 1956/civil incorporation 1956; St. Joseph's College, Edmonton, Alberta, established by the local diocese in 1926, taken over by the Basilian Fathers 1963/civil incorporation; Assumption Univer-

However, the fact that at one time a separately incorporated institution and its property were part of the apostolate and assets of the sponsoring religious body may, but need not, be determinative of the present canonical status of the institution and its property. Herein lie the complication and the ambiguity, especially when one looks beyond the act of civil incorporation to the placement of deeds to property. In brief, conveyance of property from the sponsoring religious body to a separately incorporated institution has considerable significance in that the action can greatly complicate the canonical status of the charitable institution.

Consider the case where the deeds to the land and buildings of the university or college remain with the sponsoring body. In this instance, the canonical status remains, generally, quite straightforward. There appears no intention on the part of the religious community to alter the canonical status or to transfer ownership of land and buildings to the separately incorporated university or college. Thus, the canonical status of the separate, civilly-incorporated institution stays that of an apostolic work of the sponsor which, even at civil law, retains ownership of the property.²⁹

In another situation, when the deeds to the real property are placed in the name of the civil corporation of the charitable institution, rather than in the name of sponsoring religious community, then the canonical situation becomes equivocal. On this point, R. Kennedy comments:

sity, Windsor, Ontario, established by the local diocese 1857, taken over by the Basilian Fathers 1870/civil incorporation 1858; St. Thomas More College, Saskatoon, Saskatchewan, established by the Basilian Fathers 1936/civil incorporation 1943; The University of Saint Michael's College, established by in 1852/civil incorporation 1912 .

²⁹See S. EUART, Church-State Implications in the United States of canon 812 of the 1983 Code of Canon Law, JCD dissertation, Washington, DC, The Catholic University of America, 1989, p. 65: "...the canonical status of the institutions may not have been altered merely by civil incorporation or by changes in the composition of the board of governors. The act of civil incorporation, alone, does not alter the canonical status of a college or university... canonical status can only be altered by valid canonical action." The liability risks to the religious community in the charitable institution sharing the canonical status of the sponsoring body are assessed and discussed in Chapter Four.

It [the transfer] may be intended as nothing more than putting title to property "in the name of" a separate civil corporation as a device to secure civil-law separateness, with the hoped-for insulation of the sponsor from the civil-law liability for the actions of the sponsored institution, but with no intention "truly" to transfer ownership or to alter canonical status of the institution and its property as belonging, according to the law of the Church, to the sponsoring religious body.³⁰

In short, on the one hand, the action of transferring the deeds may, in fact, signify a genuine attempt at a true transfer (alienation) of the property from the religious sponsor to the civil corporation of the charitable institute. On the other hand, the transaction may point to an attempt to secure ecclesiastical properties through the operation of the civil-law corporation while intending to remain, at canon law, the property of the sponsor.

Indeed, putting the deeds to real property in the name of the separately incorporated charitable institution may very well have been intended to be a true conveyance of ownership from the sponsor to the separately incorporated institute. Accordingly, since the act of alienating the property could have effected a change in the canonical status of the institution, such a transfer requires a canonical interpretation based on documentary evidence and on the intentionality of the sponsoring religious community.³¹ To that end, R. Kennedy lists specific questions that need to be addressed.

Was the conveyance intended to be nothing more than a changing of title for civil-law purposes, or was it intended to be a true alienation of

³⁰R. KENNEDY, "Maida, McGrath, Michiels," p. 371.

³¹See CIC 1917, cc. 1530-1532. For validity, acts of alienation required at least two expert appraisals, a just cause for disposing the goods, and the permission of competent church authorities, including the Holy See for goods exceeding particular limits.

CIC 1917, c. 1530, §1: "...ad alienandas res ecclesiasticas immobiles aut mobiles, quae servando servari possunt, requiritur.

3°: Licentia legitimi Superioris, sine qua alienatio invalida est."

CIC 1917, c. 1532, §1: "Legitimus Superior de quo in can, 1530, §1, n. 3, est Sedes Apostolica, si agatur:

1°: De rebus pretiosis;

2°: De rebus quae valorem excedunt triginta libellarum seu francorum."

For one interpretation of the prescriptions of law regarding alienation and related concepts under the 1917 Code of Canon Law, see P. MORRISEY, "The Conveyance of Ecclesiastical Goods," in Proceedings of the Canon Law Society of America, Washington, DC, 38 (1976), pp. 123-137.

property according to canon law concomitant with an intention to alter the canonical status of the separately incorporated institution? If intended to be a true alienation, were the requirements for valid alienation of Church property fulfilled? Where such requirements were not fulfilled, was nonfulfillment due to the absence of an intention truly to alienate, or rather, given such an institution, was nonfulfillment due to ignorance, neglect, or wilful disregard of the canonical requirements? If the requirements for valid alienation were not met, have the requisite conditions for the application of prescription been fulfilled so as to result in a canonically recognized transfer of ownership despite a canonically invalid act of conveyance?³²

In other words, where conveyances of property occur between the charitable institute and the sponsoring religious body, careful investigation must be made in each case to determine whether or not a change in canonical status was intended and, if so, whether or not such a change was validly effected. Without valid canonical action, many Catholic colleges and universities may well still be canonically a part of the original founding, and still sponsoring juridic person.³³ To assume that there was no intention of a canonical transfer nor was a canonical transfer effected by the conveyance oversimplifies the action. All in all, in applying the laws on property, the investigation must focus on the important elements of the transaction, such as transfer of title in order that the transaction be properly characterized.³⁴

The canonical norms for the valid alienation of ecclesiastical property would ordinarily apply with such transactions. Neglecting to follow the laws would invalidate

³²R. KENNEDY, "Maida, McGrath, Michiels," p. 374.

³³"Catholic healthcare must be free to question many of the assumptions that have been taken for granted over the past years...Another factor that will have to be considered very carefully is whether certain properties constitute by legitimate assignment part of the stable patrimony of a juridic person. Perhaps some religious communities have taken for granted that buildings and lands owned by a religious community are part of the stable patrimony. Or, perhaps they have simply taken for granted that funds and properties received necessarily became ecclesiastical goods. This is not always the case." See J. AMOS et al., The Search for Identity: Canonical Sponsorship of Catholic Healthcare, Collegeville, MN, Liturgical Press, 1993, pp. 77-78.

³⁴J. HITE, "Property Issues for Religious," in Proceedings of the Canon Law Society of America, Washington, DC, 31 (1969), p. 139.

the purported transfer canonically, resulting in the retained ownership by the sponsoring body. If, however, the investigation in Part II reveals such invalid attempts at transferring property, then prescription, which has long been a remedy under the law, can result in a canonically recognized transfer of property. Canons 1508-1512 of the 1917 Code address this legal institute whereby, when certain conditions are satisfied, legal title is granted.

D. Canonical Literature at the time of the 1917 Code

Thus far, the above discussion has attempted to examine two topics relating to the canonical status of charitable institutions, namely: (1) juridic personality; (2) ownership and conveyance of Church goods in the light of the 1917 legislation. However, throughout the period of the 1917 Code, issues of ownership, conveyance, and juridic personality were often left to suffer a rather protracted history of neglect. Consequently, in many situations and for a number reasons (most of which are administrative), determining the original canonical status of an entity becomes nearly impossible.³⁵ In fact, the canonical literature reveals the recency of the debate on the subject of canonical status, motivated by overriding concepts of ownership and control of ecclesiastical property. Moreover, the literature focuses that debate on whether or not charitable institutions actually acquired canonical status as juridic persons under the 1917 Code. For instance, in 1968, John McGrath published his work, *Catholic Institutions in the*

³⁵There are at least three reasons for the present ambiguous condition of canon law on church property: "(1) Certain key provisions of the Code have not been consistently observed in the United States, e.g., the regulations for the conveyance of church property including the permission of the 'legitimate superior'...and this non-observance has been known and at least tolerated for decades; (2) There is virtually no available jurisprudence in this area; (3) A new set of canons on church property has been formulated...but has not been promulgated." See P. HOOTS and E. GAFFNEY, eds., Church and Campus: Legal Issues in Religiously Affiliated Higher Education, Notre Dame, IN, University of Notre Dame Press, 1979, pp. 145-146.

United States: Canonical and Civil Law Status while, in 1975, Adam Maida responded with *Ownership, Control and Sponsorship of Catholic Institutions*. In both works the crux of the issue was the juridic nature of charitable institutions; the singular concern was the ownership and control of ecclesiastical property. Notwithstanding their many flaws and oversights, the discourses, though divergent, did attempt to explore these long-neglected canonical issues.³⁶

Granted, today the debate has become somewhat more complex. Admittedly, while there is a need for much more inquiry into these topics, these treatises do provide a suitable point of departure for any on-going, present-day exchanges. Moreover, contemporary analyses of these same works continue to cast more light on the issue of canonical status, its effects on the institution, and its relationship to the civil status of charitable institutions. To that end, before examining the canonical situation of Assumption University, a review of each monograph seems necessary. The points which emerge from the analysis of these works will provide the rationale for the process employed in Part II while, at the same time, lay the foundation for the topics of Chapter Four.³⁷

J. McGrath began his work with an observation. He noted the rapid changes being made in the governance of charitable institutions in the United States since the close

³⁶Cf. J. McGRATH, Catholic Institutions in the United States: Canonical and Civil Law Status, Washington, DC, The Catholic University of America Press, 1968, ix, 48p. Cf. A. MAIDA, Ownership, Control, and Sponsorship of Catholic Institutions, Harrisburg, Pennsylvania, Pennsylvania Catholic Conference, 1975, xi, 67p.

³⁷Over the years a number of commentators have critiqued the McGrath and Maida theses. Cf. R. KENNEDY, "Maida, McGrath, Michiels," pp. 351-401; P. MOOTS and E. GAFFNEY, Church and Campus: Legal Issues in Religiously Affiliated Higher Education, pp. 145-146; A. MAIDA, "Canonical and Legal Fallacies of the McGrath Thesis on Reorganization of Church Entities," in Catholic Lawyer, 19 (1973), pp. 275-289; A. MAIDA, "Sponsoring Congregations' Answer to McGrath Thesis: Corporate Control," in Hospital Progress, (1980), pp. 66-84; A. MAIDA, "Canon Law/Civil Law Status of Catholic Hospitals," in Hospital Progress, (August 1973), pp. 54-61; J. DONOHUE, "Catholic Universities Define Themselves: A Progress Report," in America, 128 (1973), p. 357.

of the Second Vatican Council. With these changes, a certain amount of confusion reigned, particularly with regard to the ownership of ecclesiastical property and the precise legal and canonical status of these entities. By addressing a late nineteenth-century assumption that sponsoring religious bodies, under whose influence and control universities and colleges were conducted, "owned" the property of such institutions, McGrath attempted to show that Church-related universities which have been civilly-incorporated in the United States were juridically separate and distinct from the Church and from the particular religious body under whose auspices they were conducted. In other words, educational institutions were not identified juridically with the sponsoring religious or diocesan body. While McGrath denied dual legal personality for the charitable institution simply because they were not properly constituted juridic persons according to Church law, he did maintain that the institution remained related to the Church in a real and pastoral way. For McGrath, the Catholicity of an institution was more perceived and influential than juridical in nature. All in all, he tended to favour the provisions at civil law and to accept *de facto* the loss of Church control over the institutions.³⁸

Maida, on the other hand, concerned with the loss of control of the charitable institutions on the part of the sponsoring religious bodies, reacted to the McGrath thesis. First, he viewed that the civilly-incorporated educational institution was "part of the assets and apostolate" of the founding religious body, despite its separate incorporation at civil

³⁸Cf. J. McGRATH, Catholic Institutions in the United States: Canonical and Civil Law Status, Washington, DC, The Catholic University of America Press, 1968, pp. iii-47. Citing several references, R. Kennedy observes that several institutions in the United States were attracted to the thesis. It exerted considerable influence on their operational and organizational policies. "It [McGrath thesis] was perceived by many as affording canonical justification for structural changes thought to be ecclesiologically or economically desirable." Cf. R. KENNEDY, "Maida, McGrath, Michiels," p. 362.

law.³⁹ Unlike McGrath, Maida correctly interpreted c. 100, §1, claiming that the educational institution acquired canonical status as an apostolic work of the sponsoring body.⁴⁰ However, in his second theory, he erroneously extended his interpretation of the law, submitting that civilly-incorporated educational institutions sponsored by a diocese or religious body were, in fact, canonical juridic persons in their own right, separate and distinct from the juridic person of the sponsoring religious body. He based this second opinion on a questionable conclusion reached by Michiels in 1955 that "establishment alone" of a charitable institution was sufficient in itself to confer juridic personality.⁴¹

As expected, over the years both theses met with favourable and not so favourable reviews. When first presented, evidence suggests that the McGrath position was accepted without serious critique. In fact, many of the universities and colleges applauded the effort and used the thesis to adopt certain structural changes to the boards of governors, to justify requests to the government for funding, to manage Church property apart from the prescriptions and provisions of Church law, and to disclaim any civil liabilities against the sponsoring religious body. Others, however, who were more concerned about the erosion of Church control and the loss of ecclesiastical property through invalid acts of

³⁹"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 from the beginning." A. MAIDA, Ownership, Control, and Sponsorship of Catholic Institutions, p. 37.

⁴⁰McGrath erroneously reasoned that once an institution had acquired civil-law status it could not, without violating the canons on acquired rights, obtain canonical status. However, he overlooked the possibility of a charitable institution acquiring ecclesiastical status prior to acquiring civil status. See J. McGRATH, Catholic Institutions in the United States, pp. 14-17.

⁴¹In 1955, Michiels reversed his earlier position that juridic personality was not acquired by an institution unless it was conferred *a iure*, or formally and specially granted in the decree of erection itself or in separate decree. In his later position, he concluded that canonical establishment alone was sufficient to confer juridic personality on associations of the faithful as well as charitable institutions. G. MICHELIS, Principia Generalia de Personis in Ecclesia, pp. 353-355. For a detailed study of the earlier and later positions, see R. KENNEDY, "Maida, McGrath, Michiels," pp. 382-390.

alienation, prophesied that such a thesis will lead to the secularization of Church-related institutions.⁴²

In any event, R. Kennedy presents the most recent preliminary study of both theses. After evaluating each in the light of the 1917 legislation, he points to several errors and oversimplifications made on the part of both commentators. Unfortunately, these critical mistakes have found their way, however implicit, into post-1917 canonical thought.

For instance, Maida's monograph is pre-occupied with attempting to effect tight control over all concerns of an institution through the ownership of ecclesiastical property. Even after the promulgation of the 1983 *Code of Canon Law*, such a view continued to suffuse the pages of his later work, including the writings of other commentators.⁴³ The greatest difficulty with this position is that Maida does not realize that in many situations, particularly in the institutions of higher education, ownership is not always imperative or even necessary in order to control, or even better, to influence, its educational philosophy, spiritual direction, or moral commitments.⁴⁴ Second, by

⁴²This concern occasioned the issuance of a joint letter on 7 October 1974 from Cardinal Garrone, Prefect of the Congregation of Catholic Education and Cardinal Tabera, Prefect of the Congregation for Religious and for Secular Institutes which was sent to Cardinal Krol then President of the National Conference of Catholic Bishops stating: "We wish to make it clear that this thesis [McGrath Thesis] has never been considered valid by our Congregations and has never been accepted." The letter went on to suggest that an "in depth" study take place in order to review the thesis. Kennedy's reading of this suggestion is that in calling for such a review the Congregation stopped short of a definitive rejection of the McGrath position, and left open the possibility of accepting certain or all elements of the thesis together with certain modifications. At any rate, the Joint Commission on Ownership of Catholic Institutions met only once during which time one of the recommendations was to commission a comprehensive, quality study on ownership of church property. Cf. R. KENNEDY, "Maida, McGrath, Michiels," pp. 366-367.

⁴³See also 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, xvii, 339p.

⁴⁴Basilian institutions such as The University of Saint Michael's College at Toronto and St. Thomas More College at Saskatoon are under the direction of the Basilian Fathers who neither own nor have titles to College property.

establishing a relationship between the charitable institution and the sponsor that is rooted in canonical control and ownership of ecclesiastical property, the sponsor is put at great risk. Under such an arrangement, the sponsor has reason to fear that it will remain liable in both civil and Church courts for all charges of professional misconduct and negligence incurred by the charitable institution. Thus, the hoped-for control which is brought about by a lack of canonical and civil separateness of the institution and the religious body, greatly increases the risks of liability incurred by the sponsoring body *vis-à-vis* the charitable institution.⁴⁵

To that end, Maida seems to set up a schizophrenic situation with regard to the charitable institute and the sponsoring religious body. In his attempt to control all premises of the charitable institution through the ownership of ecclesiastical property, the resulting canonical and civil vulnerability of the sponsoring religious body is seriously compromised.⁴⁶ In short, the religious body is placed at a severe disadvantage. Put another way, without such canonical separateness of the charitable institution to match its separateness at civil law, the civil courts are enabled under certain conditions to pierce

⁴⁵This issue is explored in greater detail in Chapter Four. However, as a general rule, if a civil court is convinced that a functional unity exists between the sponsor and charitable institution, in spite of the institute's apparent structural separateness, then the civil courts are in a position to pierce the corporate veil of the sponsoring body.

⁴⁶In an unpublished address entitled "Sponsorship, Catholicity, and Church Law" delivered at a seminar sponsored by the Association of Catholic Colleges and Universities, March 15, 1988, Robert Kennedy noted the likelihood that the original canonical status of many Catholic colleges and universities in the United States has been unaltered. Unlike Maida, however, who considers it advantageous to perpetuate the original canonical status, Kennedy regards the resulting canonical and civil vulnerability of the sponsoring religious body as seriously disadvantageous, and he urges the taking of appropriate steps to alter the original canonical status of these institutions. Cf. S. EUART, Church-state Implications in the United States of Canon 812 of the 1983 Code of Canon Law, footnote 40, p. 66.

the corporate veil of the religious body in order to access its assets, which were, ironically, made secure under the Maida thesis.⁴⁷

All in all, while McGrath and Maida attempted to move juridic personality and ownership of Church property into the fore, they oversimplified the issues. On the one hand, McGrath, who misread canons 100, §1 and §4, failed to recognize the fact that institutions that are sponsored by a religious body share in the canonical status of the body according to the law of the Church. On the other hand, as several commentators have pointed out, in Maida's effort to regain some ground lost when the McGrath thesis took hold in the United States, he countered with a work far too oriented toward control of the charitable institutions through ownership of property.

Issues of canonical and civil liabilities, ownership of ecclesiastical goods, government funding for federated and affiliated colleges, and Catholicity are all very much related to the canonical status of the institution. Furthermore, these issues are still very much a part of the contemporary scene. Of course, while old problems have intensified, new ones have emerged. Suffice to say, Chapter Four attempts a detailed discussion on these matters in the light of the options presented for canonical status under

⁴⁷Piercing the corporate veil is a "judicial process whereby court will disregard usual immunity of corporate officers or entities from liability for wrongful corporate activities." See, H. BLACK, Black's Law Dictionary, 6th ed., St. Paul, MN, West Publishing Co., 1991, p. 795. For a Canadian law perspective, see D. BOURGEOIS, The Law of Charitable and Nonprofit Organizations, Toronto, Butterworth Canada Ltd., 1990, xviii, 256p; see also J. ZIEGEL, R. DANIELS, D. JOHNSTON, and J. MacINTOSH, Cases and Materials on Partnerships and Canadian Business Corporations, 2nd ed., Toronto, The Carswell Company Limited, 1989, Vol. 1, pp. 158-199; M. WALDON, "The Choice of a Structure: Non Profit Organizations," in Charities and Non Profit Organizations, Vancouver, The Continuing Legal Education Society of British Columbia, 1993, pp. 35-49; for an American review, see E. GAFFNEY and P. SORENSEN, Ascending Liability in Religious and Other Nonprofit Organizations, Macon, GA, Mercer University Press, 1984. See also J. SCHLICHT, "Piercing the Nonprofit Corporate Veil," in Marquette Law Review, 66 (1982), pp. 134-158

the 1983 *Code of Canon Law* as well as the present common laws of Canada regarding charitable corporations.⁴⁸

As mentioned at the outset of the Chapter, at the heart of the issue lies canonical status. Indeed, the present canonical status of institutions established before or during the 1917 Code seems much more complicated than either McGrath or Maida appeared to realize, and requires, in each case, detailed study of the facts surrounding the establishment and continued governance of the institution. For instance, Maida assumes that all institutions partake of canonical juridic personality through the juridic personality of the sponsor. Quite simply, he overlooks the possibility of a religious body taking appropriate canonical steps to alter the original status, especially when properties were conveyed. The fact that at one time a separately incorporated institution and its property were part of the apostolate and assets of the sponsoring religious body may, but need not, be determinative of its present status of the institution and its property. On this point, Kennedy suggests that for a true indicator of the canonical status, the conveyance of properties must be investigated. The action of putting deeds to property in the name of the separately incorporated charitable institution may have altered the canonical status of the institution, intentionally or not. Moreover, Maida assumes in his second theory that such institutions become public juridic persons without any formal decree granted by the competent authority. In this way, he denies the importance of the *decretum formale*, and by that fact, canonical tradition as well. To that end, Part III begins the investigation into the deeds to property over the period marked with the 1917 Code. Then, Part IV

⁴⁸The federated college actually had its roots in the college system at Oxford, England and in particular in the efforts of Cardinal Newman. The federated Catholic college model which was developed in Toronto by the Basilian Fathers at The University of Saint Michael's College was later duplicated, with local variations, in a number of other universities in Canada. Presently, ten of the fifteen Catholic colleges and universities in Canada are federated or affiliated with a constituent university. Chapter III handles this topic in detail.

completes the study, determining precisely the present canonical status of Assumption University.

III. Tracing the Titles to Property of Assumption University

A. Before the erection of the Diocese of London

One of the most important Acts passed in the history of Assumption University dates to 1845. Desiring to have Church property listed under the name of an episcopal corporation, the Right Reverend Michael Power, Bishop of Toronto, and the Right Reverend Patrick Phelan, Bishop of Carrhae and Administrator of the Diocese of Kingston, petitioned the Legislative Assembly of the Province of Canada to pass an Act incorporating the Roman Catholic Bishops of Kingston and Toronto, severally, and enabling each to hold and acquire real estate in the Province of Canada for religious purposes. In large measure, this desire was motivated by the action of the Crown in which a large parcel of land was granted to the Roman Catholic Church in Upper Canada.⁴⁹ After receiving royal assent, such an Act was passed on 29 March 1845. This action paved the way to transfer the land from the Bishop of Upper Canada to the new episcopal corporation of Toronto on 4 April 1856.⁵⁰

⁴⁹The land in question was a grant from the Crown to the Right Reverend Alexander McDonell, first Bishop of Upper Canada, under date of December 29th, 1830. It was deeded to the Roman Catholic Episcopal Corporation of the Diocese of Toronto on April 4, 1856 and was still in the legal possession of the Diocese of Toronto in 1869." This quote is taken from a letter issued by Bishop Fallon to Joseph Grivetti, Chargé d'affaires, Apostolic Delegation, dated 16 August 1923. The original letter is filed in the General Archives of the Diocese of London.

⁵⁰See "An Act to Incorporate the Roman Catholic Bishops of Toronto and Kingston, in Canada, in each Diocese" 8 Victoria, Chapter 82 (1845). A copy of the Act remains in the General Archives of the Diocese of London in Ontario. Hereafter referred to as "the Act of 1845" or "the 1845 Act." The corporate titles for each diocese were styled as follows: "Roman Catholic Episcopal Corporation for

The Act invested the new corporations with the usual powers, including perpetual succession, the right to alter and renew or change the common seal, and the right to sue and be sued. The corporations were also able and capable of having, holding, purchasing, acquiring, possessing, and enjoying property for either general or ecclesiastical use. Furthermore, the Act granted the corporation the right to sell or exchange, alienate, and lease real estate.⁵¹

Article III called for the registration of all deeds and wills of property in favour of the corporation, while Article IV provided an opportunity for the faithful to convey, assign, or transfer by deed to the bishop of all properties then held in trust for the Church's benefit. In all cases of alienation, lease, or assignment of lands, for liceity, the bishop was required to obtain the written consent of the coadjutor and senior vicar general.⁵²

Article IX sparked one of the most long-lasting and heated debates between Bishop Fallon and the Basilian Fathers at Assumption University and Toronto.⁵³ It read:

And be it enacted, That whenever it may be deemed expedient to erect any new Diocese or Dioceses in that part of the Province formerly called Upper Canada, the Bishop or Bishops of such new Diocese or Dioceses, and his or their successor or successors for the time being, shall have the same powers as are by this Act conferred upon the said Bishops of Kingston and Toronto respectively.⁵⁴

the Diocese of Toronto" and "Roman Catholic Episcopal Corporation for the Diocese of Kingston, in Canada."

⁵¹See Article I of "the Act of 1845."

⁵²In dioceses where there were no such appointments then two clergymen were selected or named by the bishop as the proper functionaries to execute the legal action.

⁵³Michael Francis Fallon, O.M.I. was the fifth bishop of the Diocese of London from 1909-1931.

⁵⁴See Art. IX of "the 1845 Act."

Eventually, Pius IX did sever from the Diocese of Toronto certain counties and erected the Diocese of London on 21 February 1856.⁵⁵ Pierre-Adolphe Pinsonneault was named the first bishop.

B. At the time of Bishop Pinsonneault (1856-1866)

As mentioned in Chapter One, under the Pinsonneault administration, Pierre Point began construction of the College at Sandwich. Situated on the property conveyed to the new episcopal corporation of Toronto, the College opened its doors on 10 February 1857. In fact, this land was part of the original Crown patent given the Roman Catholic Church of Upper Canada.⁵⁶

⁵⁵ "...ac matura deliberatione Nostra, deque plenitudine apostolicae potestatis a memorata Dioecesis Trontinae, sequentia territoria ose jungimus, ac dimembramus videlicet Middlesex, Elgin, Kent, Essex, Lambton, Huron, Perth, Oxford, Norfolk; ea porro territoria sic per nos e Dioecesi Torontina separata ac disjuncta in peculiarem, ac proprie dictam Dioecesim erigimus, ejusque Episcopalem Sedem in civitatem Londinensi constituimus...eundemque Londinensem Episcopum Suffraganeum esse volumus Archiepiscopo Quebecensis." This quote was taken from a photocopy of the original apostolic brief which is presently filed in the General Archives of the Diocese of London.

⁵⁶ "...the land in question had been a royal grant of King William IV of England, given under the Great Seal at York on December 29, 1830, IN TRUST, for the purpose of a Roman Catholic Church, the residence of a clergyman and for a burial ground." See "Correspondence with Rome (various), Forster to Di Maria," General Archives of the Basilian Fathers (=GABF), C.312 (1923-1926). "As requested in your letter of the 21st instant, I beg to transmit to you herewith certified copy of the record of the original patent from the Crown to the Right Reverend Alexander McDonnell, et al of farm lot 63, in the First, Second and Third Concessions (L'Assomption) of the Township of Sandwich. The departmental fees are \$2.50." This quote is the content of a letter dated 26 April 1922, written to Bishop Fallon's civil lawyers, Messrs. Kennin and Cleary, Barristers and Solicitors of Windsor by the Deputy Provincial Registrar of Ontario. The letter is located in the General Archives of the Diocese of London.

C. At the time of Bishop Walsh (1867-1889)

Correspondence and documentary evidence from Walsh's files indicate three moments relevant to the legal history of Assumption: the incorporation of the Diocese of London; the conveyance of the Crown patent from Toronto to the newly-formed London episcopal corporation; the drafting of a lease between the Basilian Fathers and the Diocese of London.

First, on 29 March 1873, John Walsh, the second Bishop of London succeeding Pierre Pinsonneault, had the 1845 *Act to Incorporate the Roman Catholic Bishops of Toronto and Kingston in Canada in each Diocese* amended to incorporate the recently established London Diocese.⁵⁷ The amendment declared the Bishop to be a body corporate under the name "The Roman Catholic Episcopal Corporation of the Diocese of London in Ontario" and entitled him, as sole director of the corporation, to all the rights and privileges contained therein. Specifically, the episcopal corporation obtained all lands, tenements, hereditaments, burial grounds, Churches, and chapels held in the name of or conveyed to the corporations of London and Sandwich, as it was formerly known.

The second moment concerned the Assumption property. Until now, the land was still vested in the episcopal corporation of Toronto. So, following the creation of the episcopal corporation of London, Walsh had the title to the properties, once granted by the Crown then later listed with the Roman Catholic Episcopal Corporation of the Diocese of Toronto, conveyed to the Episcopal Corporation of the Diocese of London in Ontario on 21 May 1874. This action was registered on 11 June of the same year. Thus,

⁵⁷In 1856, the Diocese of London was established. Later, the first bishop, Pinsonneault petitioned to move the See. Subsequently, the name of the diocese was changed to the Diocese of Sandwich. Under John Walsh, the See returned to London. Hence, the name also reverted to Diocese of London. These changes were recorded in the 1873 Act to amend the Act of 1845.

as a consequence of the amendment and the conveyance, the Diocese of London now legally listed all Church properties under the new episcopal corporation.⁵⁸

The third moment involved the signing of a Concordat as a precursor to the Assumption Lease of 1875. Wishing to restore the College of Sandwich in a more stable manner, on 27 September 1869, John Walsh and Jean-Matthieu Soulerin, Superior General of the Basilian Fathers signed a Concordat in which approximately eighty acres of land and the buildings, upon which the college sat, were leased to the Congregation. This real estate was part of the three hundred and fifty acre tract once granted by the Crown but now held under the corporation sole. According to the terms of the Concordat, the land and building were leased rent free for an indefinite term, provided that the Basilians undertake the operation of the College and admit, without cost to the diocese, two students per academic year. If such an undertaking became too costly, then Article 8 left the Basilian Fathers free to withdraw.⁵⁹

With the passage of time, two problems surfaced in the early 1870's. First, the original college building became quite expensive to maintain. Second, the original location placed the college too far from the main road. Accordingly, Denis O'Connor, then the Basilian Superior at the College sought help from Walsh. He obliged by drafting

⁵⁸"Our investigation of title has disclosed that The Roman Catholic Episcopal Corporation of the Diocese of Toronto by a conveyance dated May 21st, 1874 and registered on June 11th, 1874 as Number 1170 conveyed to The Roman Catholic Episcopal Corporation of the Diocese of London in Ontario Lot Number Sixty-three in the First, Second, and Third Concessions of the Township of Sandwich in the County of Essex, having an area of approximately Three hundred and fifty acres..." This quote is taken from a letter filed in the General Archives of the Diocese of London. Written on behalf of the law firm, Murphy and Durdin of London, it was addressed to the Right Reverend J. A. Roney of the London Chancery. The letter is a response to a request by Roney to have the titles to property investigated between the London episcopal corporation and the Basilian Fathers and Assumption College. The property described herein is the same property granted by the Crown and subsequently conveyed to the Episcopal Corporation of London under Bishop Walsh.

⁵⁹Under the terms of the Concordat, the Basilian Fathers were also given the adjoining parish church [Assumption Church]. A copy of the Concordat is reprinted in M. POWER, *The O'Connor Years*, pp. 26-27.

a legal lease on the land needed for the new building. Thereupon, pursuant to the 1873 Act establishing the Diocese of London as a corporate sole, Bishop Walsh and Charles Vincent (Basilian Provincial in Canada) and Denis O'Connor (Superior of Assumption College at Sandwich) formally signed the Assumption Lease on 13 August 1875. With this action, the Concordat of 1869 was abrogated so that over the years the lease became the norm determining the relations between the Basilian Fathers and the Roman Catholic Episcopal Corporation of the Diocese of London.⁶⁰

In addition, on 25 February 1878, Walsh leased another thirteen acres of land to the Basilian Fathers. This real estate, destined for cultivation as a produce farm to help offset the food costs at the College, was leased according to the same terms as the Assumption Lease of 1875. With the signing of the leases, the hoped-for stability had been achieved although, in time, these documents became the source of much tension between Bishop Fallon and the Basilian Fathers.⁶¹

⁶⁰The terms of the lease were as follows: "Bishop Walsh leases the land* to the Superiors of the Basilian Fathers and their successors for a term of 500 years beginning August 30, 1875. It is to be held IN TRUST for the use and benefit of the Basilian Fathers and Assumption College. The Basilian Fathers are to pay one dollar a year rent on the first day of January in each year. They are also to pay all taxes, duties and assessments whatsoever, municipal, parliamentary or otherwise, now charged or hereafter to be charged on the said lands. They will not assign, transfer or sublease any part of the said lands unto any person or corporation for any term exceeding 25 years without the consent in writing of the Bishop of London. This lease is to be absolutely void in the event the Basilian Fathers ceasing to be and to remain in peace, favour, and communion with the Pope as head of the Roman Catholic Church. The Basilian Fathers are at liberty to raise any money by way of mortgage or other wise upon the lands and any improvements thereon to the extent of one-fifth of the value of the lands and improvements, the said money to be applied exclusively in improving or erecting buildings on the said lands. All improvements made shall at the expiration of the lease become the property of the Roman Catholic Episcopal Corporation of the Diocese of London. Failure to observe the conditions set forth shall entail the cessation and forfeiture of this lease and authorize the Diocese of London to re-enter upon the possession of its property." The lease was registered in the Township of Sandwich on 11 October 1875 as Number 1302. The above text was taken from a copy of the lease agreement currently filed in the General Archives of the Diocese of London.

*The land referred to in the lease was part of Lot Number 63 in the first concession containing approximately seventy-six acres.

⁶¹In 1878, His Lordship, Bishop Walsh, leased to Sandwich College for its benefit, and for a period of five hundred years, a tract of land situated about two and one half kilometres from the present Sandwich Church. This land has been used as a farm for the benefit of the College. No rent

D. At the time of Bishop Fallon (1910-1931)

Some fifty years later, when John Muckle, Superior at Assumption, decided to pursue an offer to sell the thirteen acre farm land, Bishop Fallon refused to give his permission, claiming that the lease made clear the intention of the episcopal corporation. He pointed out that under the agreement, Bishop Walsh had no intention of alienating any corporate property nor had the Basilian Fathers any leave that under any circumstances they would have the right to dispose of it by sale or otherwise. Moreover, Fallon doubted the validity of a lease at civil law granted for five hundred years. So, in short order, the issue was put to rest.⁶²

has ever been paid for it to the Episcopal Corporation of London..." The text is taken from a letter written by Bishop Fallon on 11 January 1923 to Cardinal Sbarretti, Prefect of the Sacred Congregation of the Council. "On Feb. 25, 1878, His Lordship, Bishop Walsh leased to us for 500 years a piece of land, 13 acres more or less, out on the Huron Line about two miles from the college..." Text is taken from a copy of letter dated 28 November 1921 written by Joseph Muckle, CSB to Bishop Fallon. "Fathers Cushing, Semande and several other of the older priests whom I have questioned say that Bishop Walsh sold the land intervening between the farm and this piece but could not secure a purchaser for this and not wishing to be bothered with it asked Father O'Connor to accept it on the same terms as those on which the college property proper were leased. The offer was accepted..." A portion of letter from Muckle to Fallon, dated 1 December 1921. The three letters are filed in the General Archives of the Diocese of London.

⁶²"...For many years it [the farm] lay idle; for several years previous to 1919, it was rented for \$50 a year; for the past two years it has been rented for \$100 a year. We have an offer to purchase at \$1125 an acre. The authorities of the college, with the approval of the Provincial and Superior-General, desire to accept this offer. Will you as head of the Episcopal Corporation sign the deed? The money derived from the sale would be spent entirely for Assumption College purposes." This excerpt is a portion of the letter written to Fallon from Muckle on 28 Nov. 1921. "I have carefully considered your letters...and likewise the copy of the lease. My opinion, which is supported by legal advice, is that the lease in question contains conditions which make it clear that the intention of the Episcopal Corporation was to retain the ownership of the land which the lease covers. This is the civil aspect of the lease, and supposes a validity which I personally doubt. A far more important consideration concerns the power of the Episcopal Corporation to alienate in such a way ecclesiastical property without the consent of the Holy See. This consent may have been obtained but I can find no record of it. I could not, under the circumstances, consent to a sale. I understand that it is not pleasant for the College Authorities to carry this property at a loss. There is nothing, however, to prevent it from being turned back to the Episcopal Corporation..." A reply sent by Fallon to Muckle on 16 Dec 1921. "We referred your letter of some time ago regarding the sale of property here to the Provincial Council and they decided that we should not press the matter any further." A memo sent from Muckle to Fallon dated 3 April 1922. The three letters are filed in the General Archives of the Diocese of

Some two years later, beginning in 1922, the Basilian Fathers wrote to Fallon requesting a policy-making forum to discuss matters relating to the alienation of the Sandwich property.⁶³ Fallon responded:

From my point of view the situation is very clear. The Episcopal Corporation retains full proprietary rights in the land under discussion. Under a form of lease this land is held by the Basilian Fathers. The original intention of the Episcopal Corporation was, of course, that it should be a benefit to the lease-holders. If and when such benefit ceases it is within the discretion of the tenants to surrender the lease...⁶⁴

Having set down his position, the Bishop refused to entertain any contrary suggestion.

Since Fallon remained steadfast in his opinion that the title deeds to the buildings and property belonged exclusively to the episcopal corporation, when the opportunity arose to sell some of the acreage of the leased land for the benefit of Assumption College, Forster decided to petition the Sacred Congregation of Religious for the necessary permission.⁶⁵ At this point, Fallon attempted a compromise. In return for his

London. Regarding the civil validity of the lease, Forster requested an opinion from the Toronto law firm of Knox, Monahan, Keogh and Middleton: "The law governing the duration of the term of a Lease of Freehold Land in the Province of Ontario is fully set out in the laws of England, by the Earl of Halsbury, in volume 18, at Chapter 928 as follows:

'The term of a lease may be for any length of time however great.'

The original letter, dated 11 August 1924, is filed in "Correspondence with Rome (various) And Others," GABF, C. 312.

⁶³Francis Forster, now Superior General, wrote to Fallon to discuss the matter of the properties at Sandwich: "My council agrees with me that some conclusion has to be reached and some policy adopted that can be pursued when profitable offers for portions of the land are made. We have the conviction, which I know at one time you shared, that this property cannot be held intact for an indefinite period of time. Public opinion will compel the sale or conditions will arise that will make the continued holding of the land financially impossible..." This quote was taken from a letter written by Forster to Fallon in 17 December 1922. The original is filed in the General Archives of the Diocese of London.

⁶⁴This is an excerpt from a letter dated 20 December 1922, written by Fallon to Forster in reply to his request.

⁶⁵"...We feel that conditions are such that the status quo cannot be indefinitely maintained. Your attitude is manifestly that status must be maintained unless your viewpoint is accepted. Our viewpoint is quite different. The two cannot be reconciled....Therefore we propose to lay the matter

authorization to sell the land, he demanded a 50 % share of the equity. On the contrary, the Basilian Fathers held that the bishop of a diocese of Canada was not the owner of this particular tract of land since the Crown originally gave it to the parish of Sandwich. The Basilian Fathers argued that, in this case, the Bishop was merely the trustee under civil law; the real owner of such property was the parish Church.⁶⁶ As a consequence, they

before the Sacred Congregation of Religious and ask for a ruling. I intend to sail early next month for France and Rome..." This excerpt is taken from a letter written to Fallon from Forster, dated 31 December 1922. This problem is inexorably linked to issues raised in Chapter One regarding Forster's relationship to Fallon, see n. 62, p. 28-9. In the petition to the Holy See, the following points support the claim: "I have before me the application sent by the Superior General of the Basilians to the Holy See; from this document it would appear that this land is the property of the Parish of Sandwich and that the late Bishop Walsh granted for 500 years to the Basilians: a) the income derived from the 80 acres, and b) the administration of the Parish of Sandwich, stating specifically that, after deducting the income from the pew rent to be used for the repairs of the sacred edifice and for the service of the Church, 'le reste des revenus de l'Eglise quels qu'ils soient, appartiendront aux Directeurs du Collège [emphasis added]'. Now, according to the Basilian Fathers, this clause gives them the right to dispose of the acres in order to realize a better income for their College..." This excerpt is taken from a letter written by Grivetti to Fallon dated 16 July 1923, No. 19395. A copy is filed in the General Archives of the Diocese of London.

⁶⁶The Basilians based their opinion on three sources: (1) CIC, cc. 1495, §2; 216 together with the Plenary Council of Quebec, No. 623, a, at page 444 declaring that a parish in Canada is a persona moralis and has the right to acquire and to possess property for the very reason that it is a member of the true Church; (2) The III Plenary Council of Baltimore at page cv and the Plenary Council of Quebec at page 235: "Nam quaevis oblatio parochi aut alteri Ecclesiae rectori data piae cujusdam causae intuitu, ipsinet piae causae acquiritur. Ex quo fit, ut qui rem pecuniamve oblatum accepit, administratoris loco sit, cujus est illam erogare juxta mentem et consilium largitoris." Further, in Titulus IX, Chapter II, No. 267 the bishop is not the owner but a mere agent or procurator: "...ex sacrorum canonum monitu, dominum earum non esse sed mere procuratorem [emphasis added]." (3) at civil law, they cite the case of the Bishop of Galveston versus the Basilian Fathers (1919) in a suit tried in the district court of McLennan County at Waco, Texas where the Bishop claimed that as a corporation sole, was the owner of all parish property in the diocese of Galveston. The decision of the trial judge ruled against the contention citing the CIC and the Second and Third Plenary Councils of Baltimore. The Supreme Court of the State of Texas, on 21 November 1921, upheld the decision of the trial judge and the Court of Appeal: "It is undisputed that the title was so taken (in the name of the Bishop of Galveston) in trust for the Catholic parish of Waco." See the original letter to Di Maria, Apostolic Delegate to Canada from Forster, 19 February 1924, "Correspondence with Rome," GABF, C. 312 (1923-1926). See "Ownership and Administration of Parish Property," GABF, C. 312 (1923-1926).

declined to accede to the bishop's demands and submitted the matter to the Holy See. The Bishop retaliated with a number of questionable decisions.⁶⁷

Subsequently, Fallon was requested to supply all information regarding the entire matter to the Sacred Consistorial Congregation, as well as furnish replies to two questions. "What is your opinion about the contract or 'Concordat' which the Basilians affirm that it was agreed upon in 1869 between your predecessor Mgr. Walsh and their congregation? What is your opinion on the proposed alienation of the above mentioned 80 acres?"⁶⁸

⁶⁷Forster submitted a 78 page brief outlining the history of the land, furnished copies of the lease agreements, and supplied evidence of Bishop Fallon's alleged injustices against the Basilian Fathers: (1) the revocation of faculties; (2) the taxation of the parish of Amherstburg, of which the Basilians were in charge, for the support of the infirm of the diocese; (3) the assurances to the City of London that costly institutions of learning would be built by the Basilian Fathers (together with the Ursuline Sisters) at their own expense; (4) forbidding students of his diocese (seminarians) to attend Assumption College under penalty of being excluded from the clergy of the diocese. See "Rt. Reverend M. F. Fallon, Bishop of London versus The Basilian Fathers of Toronto, re: Revocation of the Faculties of the Basilian Priests engaged in the Diocese of London," GABF, C. 3122. See also, "Correspondence with Rome (various), Bishop of London vs. Basilian Fathers," GABF, C. 312, (1923-1926).

⁶⁸Before replying to Grivetti on 13 August 1923, Fallon met with his council to discuss the subject. The following motion was carried: "That, in the opinion of the Bishop's Council of the Diocese of London, the Basilian Fathers have neither civilly nor canonically any other rights in the property in question than those of leaseholders as set forth in the lease dated August 30, 1875, and registered October 11th of the same year." This motion is taken from the minutes of the Bishop's Council meeting on 9 August 1923. The minutes are filed in the General Archives of the Diocese of London. On 13 August 1923, Fallon responded to the two questions put forth by Cardinal De Lai of the Sacred Consistorial Congregation. With respect to the first question, Fallon answers: "I have not in my possession, nor as far as my memory serves me have I ever seen, the original or a copy of this contract or Concordat. I do not mean for an instant to question its existence,...I am convinced that the contract of 1869 is of no present effect either civilly or canonically, but that, whatever was its meaning or intent, it has been absolutely abrogated by a subsequent agreement. My opinion is that this contract [Assumption Lease of 1875] is canonically null and void unless my predecessor, Mgr. Walsh, had the permission of the Holy See to issue so lengthy a lease of property. But I shall show subsequently that neither Mgr. Walsh nor the Basilian fathers had the least intention of executing a contract subject to the interpretation which the Basilian Fathers now attempt to place upon it..." On page 5 of the letter, Fallon addresses the second question: "I am strongly of the opinion that the alienation of this property would be gravely injurious to the best interests of the Catholic Church in the Diocese of London. In the thirteen years that I have been Bishop of London I have not asked permission to alienate a single piece of ecclesiastical property... The land will be necessary for Catholic schools, hospitals. If this land were sold today, some other sites would inevitably have to be provided later on...These lands came originally as grants from the Crown,...it is unfortunate that the greater part

On 10 December 1924, Cardinal De Lai of the Sacred Consistorial Congregation responded to the matter of the land sale in the negative:

- I. An fundus, de quo agitur, canonicè pertineat ad Congregationem presbyterorum a S. Basilio; ita ut iidem illum alienare eiusque pretium in favorem Collegii ab Assumptione in Sandwich investire possint;
Et quatenus affirmative
- II. An de facto ipsis concedenda sit implorata facultas alienandi memoratum fundum et quibusnam conditionibus;
Emi Patres, re mature perpensa, responderunt:
Ad. I. *Negative*
Ad. II. *Provisum in I*⁶⁹

As regards the other matters of the revocation of the faculties, the taxation to support the infirm of the diocese, and the withdrawal of the parish at Amherstburg from the Basilians, the Holy See (Sacred Congregation of Religious) responded in support of the Basilian Fathers.⁷⁰ During the remainder of Fallon's reign, he never considered a sale

of the Crown grants has passed from our possession. The last of the Crown grants remaining to us is the property in Sandwich which the Basilian Fathers now desire to alienate. Further, this land never belonged to the parish of Sandwich. But, if it did, then the parishes erected from the original territory since 1869 have a right to their equitable share of the proceeds of the sale. They [Basilian Fathers] are now passing through a grave crisis [only 45 priests in Canada]. It is scarcely the moment to confide to this community the proceeds of the sale of 80 acres of valuable land. I have no difficulty in obtaining another teaching community to do the work with at least equal efficiency if the Basilian Fathers find Assumption College too heavy a burden....In brief, the granting of the petition of the Basilian Fathers would result in considerable financial advantage to them; but it would work to the detriment of every other Catholic interest in the Diocese of London." This is an excerpt of the reply issued on 16 August 1923 to Grivetti and forwarded to the Holy See. The original text is filed in the General Archives of the Diocese of London.

⁶⁹The original decision, PROT. NO. 488/23, is filed in "Correspondence with Rome (various)," GABF, C. 312.

⁷⁰On 25 February 1925, convinced that they had not properly presented their case to the Sacred Consistorial Congregation, the Basilian Fathers attempted to re-open the property case. However, after some thought, Forster decided not to pursue the appeal. In a letter to the Procurator in Rome, Rt. Rev. Monsignor Benedetti, dated 30 June 1925, Forster writes: "I think it will be difficult to secure permission to sell the farm at Sandwich...The difficulty is that Rome sustains Bishops in a way that seems to us quite unfair and accepts their statements at their face value when nobody else who knows men of the character of Bishop Fallon places the least confidence in any declaration they make. It is enough for Rome that Bishop Fallon says that he does not advocate the sale...we must throw up our hands. The Bishop is infallible and we are deceivers. Frankly stated that seems to be the position of Rome..." See Forster to Benedetti, "Correspondence with Rome (various)," GABF, C. 312.

of the property to help the College. Knowing his mind on this matter, and more importantly, that of the Holy See, the Basilian Fathers never pursued the question.

E. At the time of Bishop Cody (1950-1963)

As reported in Chapter One, the affiliation agreement between Assumption College and the University of Western Ontario continued from 1919-1953. However, early in the 1950's, knowing that a move toward de-affiliation and incorporation would place the newly-independent Assumption in a rather precarious financial position, LeBel nevertheless began the process. Understandably, a number of uncertainties prevailed; two of which included: Windsor's perception of the new college and the accessibility of a denominational university to provincial funding which it so desperately needed to survive.⁷¹ Forecasting his debts against his contributions, LeBel chose to offset a projected deficit by calling on prominent businessmen to launch a fund drive. Bishop Cody, one of the first to support the idea, committed the diocese to approximately \$1,000,000.

At any rate, while the struggle to finance the new College presents a crisis-laden history that involved the four affiliates to Assumption (Holy Names College, Essex College, Canterbury College, Holy Redeemer College) and the provincial government, those specific events are not germane to this dissertation.⁷² Rather, what is crucial is that over time Bishop Cody decided to support the campaign by donating the properties

⁷¹LeBel had forecasted that approximately \$26,500,000 was needed for capital expansion. He hoped that the provincial government under Premier Frost would grant some \$20,000,000 to the University while Basilian contributed salaries, amounting to \$1,500,000, would further offset the debt. This left a shortfall of approximately \$6,000,000.

⁷²For a thorough presentation, see P. MEEHAN, From College to University: The Basilian Fathers and Assumption, 1950-1963, MA dissertation, Windsor, ON, The University of Windsor, 1991, ix, 185p.

and buildings of Assumption University, then held under the Roman Catholic Episcopal Corporation of the Diocese of London in Ontario to the Basilian Fathers of Sandwich in Ontario.⁷³ Indeed, this gesture marked a new relationship with the Basilian Fathers and the episcopacy of London.

The earliest correspondence between the Basilian Fathers and Cody indicates that on 30 November 1953 he had negotiated the diocesan gift of land to the Basilian Fathers of Sandwich. The transfer of the lands from the Roman Catholic Episcopal Corporation of the Diocese of London in Ontario to the Basilian Fathers of Sandwich in Ontario was officially completed and documented on 12 July 1954.⁷⁴

At the meeting of the General Council of the Basilian Fathers on 14 August 1954, the members outlined to LeBel the procedure for holding the property. It directed: (1) that all property be held in the name of the civil corporation, the Basilian Fathers of Sandwich in Ontario; (2) that the Basilian Fathers grant to the University of Windsor the use of the land and buildings north of the Bridge entrance in return for a fixed sum; (3) that a new corporation, the Basilian High School of Windsor be formed and the Basilian Fathers of Sandwich in Ontario provide for this new corporation, land and buildings to replace those taken over by the University of Windsor; (4) that the officers of the Basilian Fathers of Sandwich in Ontario would be the Superiors and local councils of the University of Windsor and the Basilian High School with the treasurer and two senior

⁷³The non-profit Basilian corporation was styled, The Basilian Fathers of Sandwich in Ontario. It was created on 22 March 1927 by Letters Patent of the Province of Ontario.

⁷⁴By conveyance dated the 12 day of July 1954, The Roman Catholic Episcopal Corporation of the Diocese of London in Ontario conveyed to the Basilian Fathers of Sandwich in Ontario the greater part of the lands so leased..." This excerpt is taken from a letter issued by H. McTague of the law firm, McTague, Dezel, Clark, Holland, Oulette and Gray of Windsor, dated 12 September 1961. It is filed in the General Archives of the Diocese of London. Bishop Cody's correspondence to Father LeBel confirms the transfer as a donation: "It [the Diocese of London] has donated several tracts of valuable land...[to the Basilian Fathers]...officially estimated at \$160,185.00." This letter was sent to LeBel from Cody, dated 19 January 1955 and is filed in the General Archives of the Diocese of London.

priests from each house; (5) that the Basilian high school have one-third of the property to the south of the Bridge entrance, approximately 20-25 acres.⁷⁵

Almost immediately, in order to alleviate the overcrowding and facilitate the separation of the high school from the College, a portion of the land was used by the Basilian Fathers of Sandwich to build Assumption High School.⁷⁶ Another very small tract was leased to a businessman who wished to construct a shopping centre. The remainder was held under the corporation of the Basilian Fathers of Sandwich in Ontario.

In 1964, an agreement between the newly-established University of Windsor and Assumption University forced the sale of the land and buildings to the University of Windsor. Under the terms of the offer, the Basilians sold nearly \$3,000,000 in real estate to the University of Windsor. Along with the sale, Assumption University received maintenance services for their building and lands that had not been sold as well as guaranteed payment of salaries by the University of Windsor to the thirty Basilians teaching at Assumption University and the University of Windsor. The financial arrangements, including the federation agreement for Assumption, were presented in "An Act Respecting the University of Windsor." Further, the Sacred Congregation of Religious granted to the Basilian Fathers of Sandwich the necessary rescript to alienate the real estate.⁷⁷

⁷⁵See "Minutes of the Meetings of the General Council, 14 August 1954," in Minutes of the Meetings of the General Council, December 30, 1949 to December 28, 1960, pp. 82-83, Archives of the Secretary General of the Basilian Fathers, Curia, Toronto.

⁷⁶In 1956, The Basilian Fathers of Sandwich in Ontario negotiated a loan of \$580,000 to help finance the set-up of Assumption High School. This debt was slowly liquidated by annual payments from the high school. Permission to contract the loan was received from the Holy See, PROT. NO. 16139/56.

⁷⁷"During the year the following property has been transferred by deed of sale to the University of Windsor:

Houses and properties on Patricia and Sunset	\$181,972.83
Chattels, furniture, Bookstore, etc.	\$756,677.93
Buildings: Dillion Hall, St. Denis Hall	
University Centre, Heating Plant	

F. At the time of Bishop Carter (1964-1978)

Under the agreement, the Basilians retained the ownership and control of the men's and women's dormitories, Cody Hall and Electa Hall, respectively. However, in 1967, they wanted to focus their presence on the campus in the area of academics. So, they decided to sell these lands and buildings to the University of Windsor. The land value was appraised at \$230,325 while the buildings were valued at \$439,000. So, on 19 June 1967 at the meeting of the Board of Governors of the University of Windsor two resolutions were passed: The first resolved to accept the Basilian offer and the conditions of sale to purchase the land and buildings. The second resolved to appoint a committee for the purpose of undertaking discussions with the Basilian Fathers on matters relating to the purchase of the remaining Basilian lands and buildings and the re-location of Assumption University on the main campus of the University of Windsor.⁷⁸

To sum up, when the property was donated to the Basilian Fathers of Sandwich in Ontario by the episcopal corporation of London, it was divided accordingly: (1) approximately one-third of the lands and buildings were sold to the University of Windsor -- the initial sale in 1964 and the sale of the residences and land in 1967; (2) approximately one-third was sold to the Basilian Fathers of Assumption High School; (3)

and Lands incl. debt on Centre \$2,209,886.00."
Cf. "Report of the Second Councillor - 'Transfer and Sale of Property' April 20, 1964", GABF, C. 3135 1870(1).42. See "Correspondence, etc., Basilian Contracts with the University of Windsor," Record Group 1, Box, 13, File 201, Assumption University Archives, Windsor, Ontario. The rescript to sell the land and buildings was granted by the Sacred Congregation of Religious on 4 April 1964, PROT. NO. 8454/64.

⁷⁸As condition of the sale of the listed properties the University of Windsor was to set aside for Assumption University a tract of land. See "Assumption University, Windsor Correspondence, 1961-1964," GABF, C 3135 1870.32. For a copy of the resolutions, see "Assumption University, Windsor Correspondence, 1961-1964, Whiteside to Malley," GABF, C 3135 1870.32.

approximately one-sixth was sold to an area businessman; (4) the remaining portion was retained by the Basilian Fathers of Sandwich in Ontario.

On 1 May 1977, a legal document was drafted between Assumption University (of the first part) and The Basilian Fathers of Sandwich in Ontario (of the second part) and Basilian Fathers of O'Connor House (of the third part). The document identified and separated the ownership of assets as well as legal titles to property between the two civil corporations. All lands listed in Schedule A (See Appendix B) of the Agreement were held *in trust* for and are the absolute property of Assumption University. But, *in the case of sale*, since the legal titles of the properties annexed in Schedule A were held in the name of the Basilian Fathers of Sandwich in Ontario, this corporation would act on behalf of Assumption University. Needless to say, this action demands civil and canonical interpretation.⁷⁹

IV. The Canonical and Civil Situation of Assumption University to 1983

With the investigation of the titles to deeds of property completed, the purpose of this section is to analyze the data and to present the canonical and civil situation of Assumption University during the period of 1917-1983. Therefore, this final part brings together the applicable canons of the 1917 Code and the contemporary analyses of the 1917 literature with the documentary evidence outlined in Part III. Subsequently, Chapter Three will continue the investigation into the period marked from 1983 to the present in order to ascertain the present canonical and civil situation at Assumption.

⁷⁹The agreement referred to was styled "AGREEMENT made as of the 1st day of May, 1977," (hereafter referred to as the 1977 Agreement). It was drafted by Mr. Doug Lawson of the Windsor law firm, MacTague, Deziel, Clark, Holland, Oulettes and Gray. The original agreement is filed in the Office of the President of Assumption University, Windsor, Ontario.

First, because the College began under the sponsorship of the Diocese of London, the institution belonged, according to canon law, to the sponsoring diocese. As such, the institution had already acquired a canonical status; the institution was the apostolic work of a juridic person in the Church. The subsequent civil corporation of Assumption College did not alter that original status.

Second, in 1870, at the invitation of Bishop Walsh, the Basilian Fathers of Toronto established a religious house at Assumption College in order to carry on the educational work begun there in 1857. There was no conveyance of properties during this time from the episcopal corporation to the Basilian Fathers. Rather, the Bishop leased land to the Basilian Fathers for the purpose of expanding and operating the College. The decision of the Holy See made clear the fact that this land belonged to the episcopal see, held under civil incorporation.

With regard to O'Connor House, in 1974, the religious house was transferred to new premises and re-named the Basilian Fathers of O'Connor House. It was never created a civil corporation. In fact, according to Article 5 of the 1977 Agreement, it was treated as an ancillary enterprise of the corporation, The Basilian Fathers of Sandwich in Ontario.⁸⁰

In any event, the question regarding the proposed sale of the leased property from the episcopal corporation of London generated a much heated debate, not to mention a flurry of correspondence written over a four year period. However, the mind of the Holy See was made clear in the decision from the Sacred Consistorial Congregation. That decision was an important one since it pointed out that the diocesan bishop was not, in

⁸⁰O'Connor House is under the management of the local council. Statements are neither audited nor approved by the Board of Directors of The Basilian Fathers of Sandwich in Ontario; they are simply submitted. By virtue of the 1977 Agreement, the property on which O'Connor House sits is the absolute property of the Basilian Fathers of Sandwich in Ontario (Schedule "B" of the Agreement). Any surplus funds are directed to the Basilian Fathers of Sandwich in Ontario.

this case, as the Basilian Fathers argued, merely the trustee at civil law of the property in Sandwich. Rather, the Diocese of London, created a corporate sole at civil law and a juridic person in accordance with c. 100, *rightfully obtained and held the property in a just manner*, exercising dominion over it, under the authority of the Apostolic See. In short, the Holy See ruled that the properties were validly alienated to the episcopal corporation of the London diocese and not to the parish at Sandwich. Subsequently, the lands were leased *in trust* to the Basilian Fathers. Further, while the 1917 Code did encourage administrators to observe the civil law in order to safeguard property rights, c. 1495, §1 indicated that canonical ownership did not depend on civil authority since the Church owned property independently of any outside power.⁸¹

Third, throughout the period 1927-1953, the civil corporation known as The Basilian Fathers of Sandwich in Ontario managed the affairs of the College. During this time, under canon law, the College still shared in the canonical status of the Diocese of London. However, in 1954, with the valid conveyance of the property titles to the Basilian Fathers of Sandwich from the episcopal corporation of London; the Basilian Fathers became the rightful owners of the lands and buildings. As a result, the titles were held in trust by the civil corporation. In fact, up to 1983, the Basilian Fathers of Sandwich in Ontario held in trust all titles to properties for The Basilian Fathers of O'Connor House and the corporation of Assumption University.

However, one question emerges. Since the lands and buildings were intentionally donated by a valid conveyance to the Assumption College fund drive campaign, why were the deeds to the real property not properly placed in the name of the civil corpor-

⁸¹See *CIC 1917*, c. 1495, §1, n. 23, p. 13.

CIC 1917, c. 1499, §1: "Ecclesia acquirere bona temporalia potest omnibus iustis modis iuris sive naturalis sive positivi, quibus id aliis licet.

§2: "Dominium bonorum, sub suprema auctoritate Sedis Apostolicae, ad eam pertinet moralem personam, quae eadem bona legitime acquisiverit."

ation of the charitable institution, rather than placed in the name of The Basilian Fathers of Sandwich in Ontario? Apparently, according to the 1977 Agreement, at the time when the gift was given, it had not been known that Assumption College had been already incorporated by Act of the Legislature of The Province of Ontario in 1858. As a consequence, the titles were placed in the name of the Basilian Fathers of Sandwich.

But, realizing the error that had been made in overlooking the corporation of Assumption University, an application was made by Supplemental Letters Patent to change the objects of the Basilian Fathers of Sandwich in Ontario to read: "to carry on charitable, religious, and educational work" rather than "for the purpose of taking over the educational institution known as Assumption College and to continue to carry on as heretofore its educational work." This action corrected the redundancy found in the objects of the corporation of Assumption University and the Basilian Fathers of Sandwich in Ontario. While ownership of certain lands was then transferred to Assumption University, the titles to the properties were retained by the Basilian Fathers of Sandwich in Ontario.⁸²

Fourth, at no time did the Basilian Fathers transfer the titles to the buildings and the lands placed in the name of the corporation of the Basilian Fathers of Sandwich in Ontario to the civilly-incorporated charitable institution. In short, the titles to deeds were continually retained by the civil corporation. Moreover, voluminous correspondence indicates that all transactions, especially ones involving an alienation, were validly executed in conformity with the canon and civil laws.

Fifth, Assumption University never was created a juridic person at the time of the 1917 Code. As mentioned earlier, according to cc. 100 §1 and 1489, §1 as well as the canonical literature of the day, the university clearly required a decree issued by a

⁸²See "Notes Re: Division of Assets - Change of Objects, Number 6 (a)," in the 1977 Agreement at page 3.

competent Church authority in order to grant juridic personality to that charitable institution. This reasoning, of course, is contrary to the Maida position.⁸³ At any rate, a search of the General Archives of the Basilian Fathers, the Archives of Assumption University, and the General Archives of the Diocese of London, has revealed that no such request for a decree was presented on behalf of the Basilian Fathers of Toronto or Sandwich or the episcopacy of London during this time period, nor was such a decree received. Further, there is no documentary evidence to suggest that the Basilian Fathers of Sandwich ever operated Assumption University as though that institution possessed juridic personality. After 1954, it was controlled and administered by the Basilian Fathers of Sandwich in Ontario. Finally, the investigation has shown that at no time did the Basilian Fathers or the Diocese of London attempt to alter the canonical status of Assumption University under the 1917 Code.

To that end, after the transfer of the titles to property in 1954, the canonical status of the separate, civilly-incorporated Assumption University remained that of an apostolic work of the Basilian Fathers, which, even at civil law -- as proved by the documentary evidence -- retained the title to the properties.

Conclusion

The assessment of whether an alteration to the canonical status of a charitable institution is both advisable and feasible demands that the present juridic standing of that institution be precisely known. In short, at the heart of the matter lies canonical status. In the past two treatises were presented on this issue with markedly divergent conclusions. In brief, McGrath favoured the civil law provisions governing charitable

⁸³See nn. 11, 15, and 16, pp. 8 and 10.

institutions; Maida opted for tight ecclesiastical control. As mentioned, while each work was fraught with limitations and mistaken interpretations of law, both in substance and procedure, the treatises, nevertheless, served to advance the debate about issues surrounding canonical status.

One assumption that stands out among the rest in the Maida work is the statement that "there can be no doubt that the property of the charitable institution was part and parcel of the apostolate and assets of the sponsoring religious body." On this claim, he asserts that the canonical status of a charitable institution is determinative. In general, Maida seems not to have adequately taken into account the canonical significance of a conveyance of property from the sponsoring corporation (Diocese of London) to the institution (Assumption University) or to the religious community (Basilian Fathers of Sandwich). This conveyance often considerably complicates the issues of canonical status. Following Maida's reasoning, without undertaking an investigation into titles to property, Assumption University would have appeared to share in the canonical status of the Diocese of London with the Basilian Fathers as directors. Indeed, an examination of the facts in each case is crucial in ascertaining the precise status.

That examination was undertaken in Part III. Against a backdrop of the pertinent canons found in the 1917 Code as well as selected canonical literature, the titles to deeds were traced. Archival material was introduced in the form of various Church and civil-related documents, personal correspondence, and decrees. The relevant canons, together with the literature, then aided an analysis of the canonical and civil situation at Assumption University. The investigation concluded that up to the promulgation of the 1983 *Code of Canon Law*, the separately incorporated Assumption University shared in the canonical status of its sponsor, the Basilian Fathers of Sandwich. Now, in an effort to determine its present canonical status with a view to possibly altering that status under the 1983 Code, Chapter Three continues the investigation.

CHAPTER THREE

The Civil and Canonical Situation of Assumption University from 1983 to the Present

As mentioned earlier, Catholic charitable institutions existing under the 1917 *Code of Canon Law* were limited to three principal options for canonical status. Generally, an institution could be founded as part of the apostolate of a religious community or diocese and thereby share in the canonical status of the founding body. Or, a university or college may have been granted separate juridic personality either at the time of its founding or later. Still, other universities and colleges may have been established as secular institutions with no canonical status or, following their establishment with canonical status, that status may have been removed. So, depending upon the circumstances of their establishment and their consequent canonical history, Catholic universities and colleges differed in their juridic standing. In all cases, the appropriate canonical steps were required to effect conferral of or change in the status of the institution.

Acknowledging that new problems and situations have developed since the old Code, the legislator has introduced new categories for canonical status. Under the 1983 *Code of Canon Law*, an assortment of juridic forms was made available to Catholic charitable institutions. For example, the private juridic person as well as the private association of the faithful with or without juridic personality emerged as two such canonical

structures among the many other principal options. All in all, these juridic forms provide a rather neat legal framework in which to recognize and differentiate the associations of the faithful from other persons in the Church, namely juridic persons, that together with physical persons, are also engaged in service for the sake of the Gospel. By offering new structures that canonically recognize particular activities in Church life, the legislator has provided both charitable institutes and members of the Christian faithful greater opportunity to adapt Church related-works to new situations emerging in the world.

Deciding whether to change an institute's canonical status presupposes not only an accurate understanding of the available alternatives, but also an awareness of the disadvantages and advantages of each juridic form. Accordingly, this chapter presents a detailed, canonical review of each. Afterwards, Chapter Four examines the benefits and drawbacks.

Of course, the officers of a university cannot properly take a decision to alter canonical status unless they are in possession of precise knowledge regarding the present canonical status of the institution. Based on the presumption that the original canonical status of an institution is not necessarily indicative of its present status, canonists and suitable experts must, therefore, undertake a detailed investigation which focuses on the conveyances of properties. In short, for reasons already discussed, tracing the alienation of property and determining the present holders of titles to properties stand as the truest indicators of an institute's present juridic status. Accordingly, Chapter Two engaged the first phase in the alteration process - the determination of an institute's original juridic stature.

Methodologically, by looking beyond the juridic nature of the institute as well as the acts of civil incorporation into the conveyance of titles to properties, that chapter attempted to ascertain whether or not canonical transfer was intended or effected when property was conveyed from a specific sponsoring religious body to a Catholic institution

namely, Assumption University. Overall, an examination of this type provided documentary evidence as to the actions and motivations of the sponsoring body that conveyed ecclesiastical properties. Subsequently, these evidentiary texts aided in a canonical interpretation as to whether or not the conveyances resulted in an alteration to the institute's original juridic status. In like manner, but with the 1983 *Code of Canon Law* as guide, the investigation into the canonical situation of Assumption University continues into Chapter Three, covering the period from the time of the promulgation of the 1983 *Code to Canon Law* to the present.

In all, this chapter is divided into four parts. While Part I presents a general overview of the canon law on public and private juridic persons, including their nature, their establishment, and their operation, Part II provides a commentary on the various recognized associations of the faithful, both public and private. Thereupon, Part III completes the investigation into the canonical status of Assumption University by determining, thus far, if the University has chosen any of the available options. The same methodology employed in the previous chapter is once again utilised.

Finally, up to this point, the dissertation has considered only one legal system as operative - the canonical. But, Assumption University exists as a federated institution within a provincially-supported educational system. As a result, many and various civil legal provisions also apply. Consequently, this dissertation also considers, however obliquely, pertinent considerations at civil law. Thus, by departing from the canon law and addressing the civil situation of Catholic universities and colleges - nationally and provincially - Part IV highlights issues of provincial funding and general governance in the light of the principle of federation with particular reference to Assumption University.

I. Juridic Persons in the 1983 *Code of Canon Law*

In the past, the terms "moral person" and "juridic person" were used equivalently.¹ However, reflecting the conciliar mind on the nature of Church legislation together with the ten principles which guided the revision of Church law, the 1983 Code discarded this counterpart terminology and chose to advance a doctrinal distinction between the moral and the juridic person.² In effect, the juridic person is a creation or fiction of law in which an aggregate of persons or things becomes the subject of rights and obligations in accordance with its character. On the contrary, a moral person, *viz.* the Catholic Church or Apostolic See, enjoys juridic personality because of its divine foundation.³ For the purposes of this dissertation, the following discussion focuses solely on the juridic person, both public and private, with reference to cc. 113- 123 and the relevant canons in Book V. Specific matters relating to each form of juridic person are considered such as, their nature, their establishment, and the management of their temporal goods.

Alongside the baptized, who are identified as physical persons under the law, the 1983 Code also recognizes juridic persons.⁴ Defined by c. 115, §1, juridic persons are

¹G. LO CASTRO, *Personalità morale e soggettività giuridica nel diritto canonico*, Milano, A. Guiffre, 1974, pp. 28-29, note 15. For a more comprehensive study of the development of juridic persons in the 1983 *Code of Canon Law*, see also A. GAUTHIER, "Juridical Persons in the *Code of Canon Law*," in *Studia canonica*, 25 (1991), pp. 77-92.

²See A. GAUTHIER, "Juridical Persons in the *Code of Canon Law*," p.82. See also W. ONCLIN, "De personalitate morali vel canonica," in *Acta conventus internationis canonistarum, Romae diebus 20-25 maii, 1968 celebrati*, Vaticanum Typis polyglottis Vaticanis, 1970, p. 131.

³CIC 1983, c. 113, §1: "Catholica Ecclesia et Apostolica Sedes, moralis personae rationem habent ex ipsa ordinatione divina."

⁴CIC 1983, c. 96: "Baptismo homo Ecclesiae Christi incorporatur et in eadem constituitur persona, cum officiis et iuribus quae christianis, attenda quidem eorum condicione, sunt propria, quatenus in ecclesiastica sunt communione et nisi obstet lata legitime sanctio." Gauthier points out that the concept of juridical person as a subject of rights and obligations dates to the 19th century during which time it was employed in the juridical teachings in Germany and Italy. As a result, the term "juridic person" seems to have been used for the first time by a German jurist, A. Heise (d.1851).

aggregates of persons or objects. Specifically, c. 115, §2 requires a minimum of three physical persons to form an aggregate of persons, while c. 115, §3 orders that at least one physical person administrate an aggregate of objects. In any event, a juridic person, whether comprised of persons or things becomes, by virtue of c. 113, §2, the subjects of rights and obligations which correspond to their nature.⁵ As Gauthier points out, like so many other concepts and institutions found in the 1983 Code, c. 113 reflects, somewhat obliquely, another instance of the Roman law affecting the development of canonical doctrine. Howsoever steeped in the Roman legal tradition, a modern appraisal of the juridic person represents the progress of canonical science and related disciplines.⁶

Further, during this time, a number of canonists also used the term, though sparingly and quite unsystematically. It found its way into the 1917 Code largely as a result of an attempt to unify and present the law of the church, in a orderly way. The concept provided a much needed framework in which to write the legislation governing collegia and fundationes. Its wide use in French doctrine played an important role in its being adopted by the drafters of the 1917 Code. See A. GAUTHIER, "Juridical Persons in the Code of Canon Law," pp. 80-81. See also G. LO CASTRO, Personalità morale e soqgettività giuridica nel diritto canonico, pp. 29-31.

⁵CIC 1983, c. 113, §1: "Catholica Ecclesia et Apostolica Sedes, moralis personae rationem habent ex ipsa ordinatione divina.

§2: Sunt etiam in Ecclesia, praeter personas physicas, personae iuridicae, subiecta scilicet in iure canonico obligationum et iurium quae ipsarum indoli congruunt."

CIC 1983, c. 115, §1: "Personae iuridicae in Ecclesia sunt aut universitates personarum aut universitates rerum.

§2: Universitas personarum quae quidem nonnisi ex tribus saltem personis constituti potest, est collegialis, si eius actionem determinant membra, in decisionibus ferendis concurrentia, sive aequali iure sive non, ad normam iuris et statutorum; secus est non collegialis.

§3: Universitas rerum seu fundatio autonoma constat bonis seu rebus, sive spiritualibus sive materialibus, eaque, ad normam iuris et statutorum, moderantur sive una vel plures personae physicae sive collegium." For a discussion on the nature and theories of the juridic person, see L. CHIAPETTA, Il Codice di diritto canonico: commento giuridico-pastorale, Napoli, Edizioni Dehoniane, 1988, p. 137. In the same work on page 139, Chiapetta posits the College of Bishops as a moral person too.

⁶See A. GAUTHIER, "Juridical Persons in the Code of Canon Law," p. 78-80.

A. Essential Elements of Juridic Persons

Standing as critical norms, cc. 114, §1-§2 and 120 outline the integral elements of such an entity. For the moment, leaving aside the formal element (the constitution of juridic persons in the Church), c. 114, §1 and §2 legislate that as aggregates of persons or things, juridic persons must engage in pious activities, religious or charitable, which harmonize with and are suited to the overall missionary purposes of the Church. Moreover, the general purpose for which the entity was constituted is never identified with any individual member of the juridic person. Furthermore, with regard to c. 120, §1, the nature of a juridic person is perpetual; it endures well beyond the life of any individual member or its material goods.⁷ Thus, when taken together, these two canons bring to light the three constitutive elements recognized in the definition of a juridic person: It is a group of persons or things pursuing a purpose consonant with the work of the Church and independent of the individuals who constitute or administrate the entity.⁸

Though c. 114, §3 does not reflect an essential element in the formation of a juridic person, it does underscore a particular concern of the legislator that such juridic persons possess sufficient means together with a clear apostolic or ministerial direction

⁷CIC 1983, c. 114, §1: "Personae iuridicae constituuntur aut ex ipso iuris praescripto aut ex speciali competentis auctoritatis concessione per decretum data, universitates sive personarum sive rerum in finem missioni Ecclesiae congruentem, qui singulorum finem transcendit, ordinatae.

§2: Fines, de quibus in §1, intelleguntur qui ad opera pietatis, apostolatus vel caritatis sive spiritualis sive temporalis attinent."

CIC 1983, c. 120, §1: "Persona iuridica natura sua perpetua est; extinguitur tamen si a competenti auctoritate legitime supprimatur aut per centum annorum agere desierit; persona iuridica privata insuper extinguitur, si ipsa consociatio ad normam statutorum dissolvatur, aut si, de iudicio auctoritatis competentis, ipsa fundatio ad normam statutorum esse desierit." So, in conformity with c. 120, §1, the juridic person is perpetual and continues unless it is properly dissolved or has ceased all activity for 100 years.

⁸For an elaboration on the material elements of a juridic person, see L. CHIAPETTA, Il codice di diritto canonico: commento giuridico-pastorale, pp. 139-140.

in order to respond effectively to the Gospel's mandate. This norm counsels the competent Church authority not to establish juridic entities which do not undertake activities proper to the Church or which lack sufficient means to carry out those projects. In effect, the juridic person must undertake a commitment to an on-going evaluation of its stated objectives and goals in order to judge whether the work of the entity has remained compatible with the mission of the Gospel. At the same time, administrators who are charged with making responsible decisions for the entity are reminded to safeguard prudentially its resources in order that these goals and purposes may be effected within the world. In that vein, this law implicitly encourages juridic persons to seek civil incorporation, where appropriate, in order to protect the goods and rights of those involved in the work.⁹

B. A Distinction between the "Public" and "Private"

Presently, juridic persons are recognized in the law as either public or private. By introducing this second form of juridic personality, namely the private juridic person, the 1983 *Code of Canon Law* broadened the alternatives for canonical status. Unlike the *Pio-Benedictine Code* which only spoke of the public juridic person, the private juridic person was quickly recognized as one of the more creative innovations contained in the revised legislation.

As mentioned, the *raison d'être* of any juridic person, whether private or public, is rooted in the need to pursue effectively and actualize collectively the interests and goals which are beyond the sphere of individual persons in pursuing works of piety of the

⁹CIC 1983, c. 114, §3: "Auctoritas Ecclesiae competens personalitatem iuridicam ne conferat nisi iis personarum aut rerum universitatibus, quae finem persequuntur reapse utilem atque, omnibus perpensis, mediis gaudent quae sufficere posse praevidentur ad finem praestitutum assequendum."

apostolate or charity. This is clear. However, while the ends remain essentially the same for both juridic forms, the "public" differs from the "private" in its respective relationship to Church authority and the manner in which that relationship is effected. For example, in the case of a public juridic person, the canon law regulates the administration and alienation of the institute's temporal goods; yet, in the case of a private juridic person, the administration of temporal goods is governed generally by the proper statutes of the private juridic person. In other words, the difference in the manner of relationship is realized in matters primarily concerned with temporal administration and establishment.

Linguistically, this relationship is differentiated by two rather curious expressions. While the public juridic person seeks to further the mission of the Gospel "in the name of the Church," the private juridic person, on the other hand, fulfills similar activities "in its own name."¹⁰ Suffice to say that while these phrases attempt to articulate the difference between the "public" and the "private" domain, they remain, like the boundary itself, somewhat vague.

Since all juridic persons, in some way, whether private or public do represent the Church and contribute to its common good, trying to extract a precise meaning from the particular phrase, *nomine Ecclesiae*, raises some difficulty.¹¹ Gauthier points out that early on in the revision process, the study group agreed that when applied to the public

¹⁰CIC 1983, c. 116, §1: "Personae iuridicae publicae sunt universitates personarum aut rerum, quae ab ecclesiastica auctoritate competenti constituuntur ut intra fines sibi praestitutos nomine Ecclesiae, ad normam praescriptorum iuris, munus proprium intuitu boni publici ipsis commissum expleant; ceterae personae iuridicae sunt privatae."

¹¹During the preparation of the revised Code, Gauthier points out that a difficulty concerning the meaning of this expression, "to act in the name of the Church," was often raised. See A. GAUTHIER, "Juridical Persons in the Code of Canon Law," p.90. In footnote 32 on the same page, he cites Communications, 21 (1989), p, 143: "Rev.mi Secretarius Ad. et octavus Consultor, Ill.mus sextus Consultor et alii denuo quaerunt quid significet expressio 'nomine Ecclesiae' [...]. Confundenda enim non sunt, uti iam dicebatur missio totius Ecclesiae atque munera hierarchica Sacrorum Pastorum proptis."

juridic person, the phrase "to act in the name of the Church" specifically meant "to act in the name of the hierarchy." Likewise, others, such as Giuliani, argued that the expression means "to act in the name of the ecclesiastical authority." Pursuing this thought, he notes that whoever acts "in the name of the Church" always involves "the ecclesiastical authority, participating in the proper mission of the hierarchy and within the institutional structure of the Church."¹² In the end, in spite of the discussion, the study group did not enunciate a clear definition.¹³

Needless to say, a certain amount of controversy emanated from this lack of clarity. Following Giuliani's observation, when a public juridic person acts "in the name of the Church," the law attributes to this juridic form a particular intentionality with which it acts so that its mission is more direct, limited, and qualified. In other words, the public juridic person conducts its activities more integrally in the Church's name. Arguably, could not the same be said, more or less, for any juridic person, private or public, established in the Church for some spiritual end? Indeed, the Code Commission recognized the difficulty. Once debated, the study group secured the difference, albeit rather loosely, in the right of association. In the end, the 1983 Code retained the distinction.¹⁴

¹²See P. GIULIANI, La distinzione fra associazioni pubbliche e associazioni private dei fedeli nel nuovo Codice di diritto canonico, Quaderni di Apollinaris, 6, Roma, Pontificia Università Lateranense, 1986, p. 49-50. This text is cited in A. GAUTHIER, "Juridical Persons in the Code of Canon Law," p. 90, footnote 33.

¹³Gauthier points out that an effort was made to try to temper the expression nomine Ecclesiae, by adding "within the limits set for them they fulfil in the name of the Church a proper function entrusted to them in view of the common good, in accord with the prescripts of law." See A. GAUTHIER, "Juridical Persons in the Code of Canon Law," p. 91.

¹⁴Gauthier attributes this difficulty to the nature of canon law claiming that "the frontier between the public and the private is not quite clear." See A. GAUTHIER, "Juridic Persons in the Code of Canon Law," p. 91.

In fact, Onclin was one of the first canonists to suggest that the location of the difference between the private and the public turned on this right of association within the Church.¹⁵ In brief, he asserted that when a group of Christian faithful gives rise to an association, they create a "moral" person. He insisted that the Church should recognize this personality, and, inasmuch as this type of association is active in the spiritual sphere, the Church would seem to do well to confirm its existence, inserting it in the canonical order. It could do so by recognizing a "private" juridic person.¹⁶ In contrast, the public juridic person, through the initiative of the competent Church authority, obtains its status and realizes its mission "in the name of the Church."

At any rate, accepting this rationale led to the drafting of legislation that acknowledged and permitted the Christian faithful to initiate a particular work of piety within the world and to claim responsibility "in its own name" for the missionary efforts of the private juridic person. In simpler terms, while the private juridic person possesses a corporate character within the Church, the hierarchy is not involved to a great extent. Of course, this does not preclude the possibility of a private juridic person altering its status, for certain reasons, and becoming a public juridic person. In either case, public or private, the 1983 Code upholds the right of association. From a practical vantage, the

¹⁵For another interpretation, see J. DOYLE, Civil Incorporation of Ecclesiastical Institutions: A Canonical Perspective, JCD diss., Ottawa, Saint Paul University, 1989, x, 245p. On page 48 of this work, Doyle locates the difference between the private and the public in the nature and scope of the entity, claiming that a public juridic person possesses its "public" character by the very fact that it fulfils its purpose within the general public, whereas a private juridic person is considered as such because it fulfils its ends in a limited constituency. This author believes that his analysis is premature, suggesting that even the public juridic person operates within a certain limited constituency.

¹⁶See W. ONCLIN, "De personalitate morali vel canonica," in Acta Conventus Internationalis Canonistarum: Romae diebus 20-25 mai 1968 celebrati, Vaticanum, Typis polyglottis Vaticanis, 1970, pp. 153-157. Gauthier concurs with Onclin's observation. See A. GAUTHIER, "Juridical Persons in the Code of Canon Law," p. 91: "...one can admit that the use of the distinction in the area of juridical persons, and particularly in the area of associations, has the advantage of bringing to light the right of association."

broadening of the categories for canonical status under the new Code yields more flexibility within the law and thereby encourages involvement in works of piety within particular situations. In short, the exercise of this right is made more canonically recognizable and accessible according to particular need. Herein lies the real progress made in the science of canon law.¹⁷

C. The Establishment of Juridic Persons

Private and public juridic persons acquire their canonical status by the way in which each is constituted. This act is a formal constitutive element. Thereupon, certain consequences ensue in matters relating to the temporal goods, the general operation, the dissolution of the juridic person, and the disposition of ecclesiastical property. All in all, universal and particular laws, together with the approved statutes of the public juridic person direct its operations. On the contrary, for private juridic persons the statutes alone direct the activities.

On this point, a good illustration of the different types of laws operating to manage the activities of a public juridic person, as opposed to a private juridic person, is clearly seen upon the extinction of a public juridic person - either by the law itself or at the initiative of a competent ecclesial authority - and the subsequent disposal of

¹⁷This A. agrees with the interpretation of Onlcin who claims that the difference is linked to the right of association. As mentioned previously, the private juridic person is an innovation in the 1983 Code, placed between an association of the faithful de facto and a public juridic person. The distinction between the private and the public, though unconvincing to some, nevertheless, puts in place yet another possibility for the faithful to establish a canonical relationship to the Church. By admitting various degrees of appurtenance within the canon law, vis-à-vis apostolic and charitable works, this A. believes that such innovations not only encourage the faithful to render service to the Gospel, but they also permit the faithful to shape their activity as they see fit and in accordance with particular circumstances. These degrees of belonging serve to enhance the scope of the law while offering practical alternatives. The law serves, then, as a contingent expression of the different forms of relationship that juridic persons may enjoy in the Church.

its property.¹⁸ In this case, c. 123 prescribes that the general and the statutory laws direct the allocation of goods and obligations. Yet, in accordance with the same canon (c. 123), upon the dissolution of a private juridic person, either by the two modes mentioned above or in accordance with the norm of its statutes, the disposition of goods is solely regulated by its own ordinances.¹⁹

In any event, canon 114, §1 legislates that juridic persons come into existence either by the operation of the law itself (*ex ipso iuris praescripto*) or by a special decree issued by a competent ecclesiastical authority (*speciali competentis auctoritatis concessione per decretum data*). Specifically, c. 116, §2 directs that public juridic persons are conferred their juridic stature either through the law itself, such as religious institutes (c. 634, §1) and the conferences of bishops (c. 449, §2), or by a special decree of a competent authority expressly granting it. For example, an ecclesiastical region may seek public juridic personality (c. 433, §2). On the other hand, the private juridic person which forms at the initiative of the Christian faithful, receives its personality only through

¹⁸The competent authority recognized in the law to suppress, fuse, or unite legitimately juridic persons is the same authority which conferred the juridic personality as cited in c. 312, §1.

¹⁹CIC 1983, c. 120, §1: "Persona iuridica natura sua perpetua est; extinguitur tamen si a competenti auctoritate legitime supprimatur aut per centum annorum spatium agere desierit; persona iuridica privata insuper extinguitur, si ipsa consociatio ad normam statutorum dissolvatur, aut si, de iudicio auctoritatis competentis, ipsa fundatio ad normam statutorum esse desierit."

CIC 1983, c. 123: "Extincta persona iuridica publica, destinatio eiusdem bonorum iuriumque patrimonialium itemque onerum regitur iure et statutis, quae, si sileant, obveniunt personae iuridicae immediate superiori, salvis semper fundatorum vel oblatorum voluntate necnon iuribus quaesitis; extincta persona iuridica privata, eiusdem bonorum et onerum destinatio propriis statutis regitur." In the event that the universal or statutory laws give no indication as to the distribution of ecclesiastical goods of a dissolved public juridic person, then c. 123 directs that the goods are allocated to the juridic person immediately superior with due consideration given to the will of the founders and donors and for acquired rights.

a special decree.²⁰ Again, this personality must be expressly granted by a competent ecclesiastical authority.²¹

Who is canonically competent to grant juridic personality, either public or private? The collection of canons found in Book I of the 1983 Code have remained silent on this question. While the 1917 Code specifically identified the local ordinary as competent (c. 1498, §1 in accordance with c. 100 for juridic persons; c. 687 together with c. 1498, §1 for associations of the faithful), the new legislation does not precisely mention any particular ecclesiastical authority. Needless to say, this obvious silence does create some questions.

In these situations, where the law does not clearly determine such an authority, canon 312 of Book II, dealing with associations of the faithful, provides a sort of guiding norm. As background, when a public association of the faithful is erected by a competent ecclesiastical authority, the association also is constituted, through the operation of the law itself, a public juridic person.²² Canon 312, §1 refers to three distinct competent ecclesiastical authorities. By identifying those authorities who are competent to establish public associations of the faithful, an act which further creates a public juridic person *ipso iure*, this canon sets up a rather useful analogue for juridic persons. As a consequence,

²⁰CIC 1983, c. 215: "Integrum est christifidelibus, ut libere condant atque moderentur consociationes ad fines caritatis vel pietatis, aut ad vocationem christianam in mundo fovendam, utque conventus habeant ad eosdem fines in communi persequendos."

CIC 1983, c. 299, §1: "Integrum est christifidelibus, privata inter se conventionem inita, consociationes constituere ad fines de quibus in can. 298, §1 persequendos, firma praescripto can. 301, §1."

²¹CIC 1983, c. 116, §2: "Personae iuridicae publicae hac personalitate donantur sive ipso iure sive speciali competentis auctoritatis decreto eandem expresse concedenti; personae iuridicae privatae hac personalitate donantur tantum per speciale competentis auctoritatis decretum eandem personalitatem expresse concedens."

²²CIC 1983, c. 313: "Consociatio publica itemque consociationum publicarum confederatio, ipso decreto quo ab auctoritate ecclesiastica ad normam can. 312 competenti erigitur, persona iuridica constituitur et missionem recipit, quatenus requiritur, ad fines quos ipsa sibi nomine Ecclesiae persequendos proponit."

for public associations of the faithful (and juridic persons) that are universal or international, the competent authority is the Apostolic See. Similarly, for associations (and juridic persons) with a national foundation, the law grants competency to the conference of bishops. Finally, for public associations (and juridic persons) formed within a local diocese, the individual bishops are competent.²³

Admittedly, appealing to this canon as a norm for determining which ecclesiastical authorities are competent to grant public and private juridic personality poses some questions. For example, are superiors of religious institutes competent to grant public and private juridic personality for works carried out under their direction?²⁴ Is a diocesan bishop competent to grant juridic personality to charitable institutions originally established on the diocesan level but now working in several dioceses? Unfortunately,

²³CIC 1983, c. 312, §1: "Ad erigendas consociationes publicas auctoritas competens est:

1°: pro consociationibus universalibus atque internationalibus, Sancta Sedes;

2°: pro consociationibus nationalibus, quae scilicet ex ipsa erectione destinantur ad actionem in tota natione exercendam, Episcoporum conferentia in suo territorio;

3°: pro consociationibus dioecesanis, Episcopus dioecesanus in suo cuiusque territorio, non vero Administrator dioecesanus, iis tamen consociationibus exceptis quarum erigendarum ius ex apostolico privilegio aliis reservatum est.

§2: Ad validam erectionem consociationis aut sectionis consociationis in dioecesi, etiamsi id vi privilegii apostolici fiat, requiritur consensus Episcopi dioecesani scripto datus; consensus tamen ab Episcopo dioecesano praestitus pro erectione domus instituti religiosi valet etiam ad erigendam in eadem domo vel ecclesia ei adnexa consociationem quae illius instituti sit propria."

²⁴While it is true, according to the 1917 Code, that major religious superiors established religious houses, and therefore moral persons in the Church, it is not true that the major superior was the source of that juridic personality. Rather, the juridic personality was conferred by the operation of the law. Logically, it does not follow that just because the major superior could establish a religious house with juridic personality, then he or she could also establish a college or hospital that enjoyed juridic personality. The law of the 1917 Code did not confer juridic personality upon these institutions. Instead, the religious superior required a special concession by formal decree. See R. KENNEDY, "McGrath, Maida, Michiels," p. 381. As for the 1983 Code, canons 312 and 313 make clear that only three authorities are competent to erect public associations of the faithful and thereby grant juridic personality by the decree by which it is erected. Moreover, canon 312 provides a guiding norm for the conferral of public and private juridic personality by concession. A canonical interpretation of these canons suggests that the legislator did not have in mind to grant competency to major religious superiors to establish charitable works that enjoyed juridic personality.

exploring the answers to these and related questions is beyond the purview of this dissertation.

As a last note, before granting juridic personality to an aggregate of persons or things, either public or private, whether international, national, or diocesan, c. 117 legislates that the proper authority must first approve the statutes or ordinances of the prospective juridic person.²⁵ This approval stands as an essential condition for conferral of juridic personality. The statutes, according to c. 94, §1, must clearly and concisely detail "the purposes, the organic structure, the government, and the program of activities of the juridic person."²⁶ As a part of the approval process, in compliance with c. 114, §3, the competent authority should be satisfied that the juridic person enjoys sufficient resources that enable it to carry out a particular charitable or spiritual work.²⁷

D. Temporal Goods

Due to the fundamental difference between the nature of the public and private juridic person, different laws dictate the handling of temporal goods. Unlike the provisions of the 1917 Code which designated all temporal goods belonging to a "moral" person as ecclesiastical goods, the new legislation (c. 1257, §1) directs that only the property belonging to a public juridic person is considered to be "ecclesiastical property" or "ecclesiastical goods." Following on this foundational law, specific canonical norms governing acquisition, administration, and alienation of property belonging to a public

²⁵CIC 1983, c. 117: "Nulla personarum vel rerum universitas personalitatem iuridicam obtinere intendens, eandem consequi valet nisi ipsius statuta a competenti auctoritate sint probata."

²⁶CIC 1983, c. 94, §1: "Statuta, sensu proprio, sunt ordinationes quae in universitatibus sive personarum sive rerum ad normam iuris conduntur, et quibus definiuntur earundem finis, constitutio, regimen atque agendi rationes." See J. CORIDEN, T. GREEN, and D. HEINTSCHEL, The Code of Canon Law: A Text and Commentary, New York, NY, Paulist Press, 1985, p. 68.

²⁷See c. 114, §3, *supra*, note 9.

juridic person are presented in cc. 1257-1310 and c. 638 for religious institutes. At the same time, the temporal goods of a private juridic person are not considered to be *bona ecclesiastica* (c. 1257, §2).

Generally speaking, then, the 1983 canonical norms governing acquisition, administration, and alienation apply only to the ecclesiastical goods of public juridic persons. Some laws, however, are also applicable to the temporal goods of the private juridic person, namely, c. 1257, §2 which classifies goods as not ecclesiastical unless express provision is made to the contrary; c. 1263 which allows for the imposition of a tax by the diocesan bishop; c. 1265, §1 which prohibits fund-raising; and c. 1267, §1 which presumes that offerings given to superiors are given to that juridic person. Accordingly, given a few exceptions, the proper statutes of the private juridic person regulate the management of its temporalities.²⁸

II. Associations of the Christian Faithful in the 1983 *Code of Canon Law*

For the most part, the Church has always recognized the civil liberty of persons to form associations within society for religious purposes.²⁹ With the advent of the 1983 *Code of Canon Law*, the legislator reaffirmed this right and gave it canonical recognition

²⁸CIC 1983, c. 1257, §1: "Bona temporalia omnia quae ad Ecclesiam universam, Apostolicam Sedem aliasve in Ecclesia personas iuridicas publicas pertinent, sunt bona ecclesiastica et reguntur canonibus qui sequuntur, necnon propriis statutis."

CIC 1983, c. 1257, §2: "Bona temporalia personae iuridicae privatae reguntur propriis statutis, non autem hisce canonibus, nisi expresse aliud caveatur."

²⁹"The history of associations in the Church is as old as the Church itself." A detailed review of the history of associations in the Church is beyond the scope of this dissertation. See J. AMOS, Associations of the Christian Faithful in the 1983 Code of Canon Law: A Canonical Analysis and Evaluation, JCD dissertation, Washington, DC, The Catholic University of America, 1986, p. 23; see also J. AMOS, "A Legal History of Associations of the Christian Faithful," in Studia canonica, 21 (1987), pp. 271-297 from which the above quote was taken; see also E. QUINN, Archconfraternities, Archsodalities, and Primary Unions with a Supplement on the Archconfraternity of Christian Mothers, JCD dissertation, Washington, DC, The Catholic University of America, 1962.

within the Church's legislation.³⁰ However, it was a right addressed to the laity. In fact, various associations, all of which were comprised of lay members, were appropriately handled under the rubric, *De laicis*.³¹

By remaining neither silent nor irrelevant on the matter, Vatican Council II repeated the past teaching of the Church and exhorted all the faithful, including the clergy and the religious, to form associations to promote a faith-filled unity among themselves so as to render service to the Church's mission in the world:

Great variety is to be found in apostolic associations. Some look to the general apostolic end of the Church; others aim specifically at evangelization and sanctification; others work for the permeation of the temporal order by the Christian spirit; and others engage in works of mercy and of charity as their special way of bearing witness to Christ... While preserving intact the necessary link with ecclesiastical authority, the laity have the right to establish and direct associations.³²

³⁰John XXIII reiterates the teaching of the Church: "From the fact that human beings are by nature social, there arises the right of assembly and association...it is most necessary that a wide variety of societies or intermediate bodies be established, equal to the task of accomplishing what the individual cannot achieve by himself efficiently. These societies or intermediate bodies are to be regarded as an indispensable means in safeguarding the dignity and liberty of the human person, without harm to his sense of responsibility." See JOHN XXIII, encyclical *Pacem in terris*, nn. 23-24, 11 April 1963, in *Acta Apostolicae Sedis*, 55 (1963), pp. 257-304 (English translation in M. WALSH and B. DAVIES, *Proclaiming Justice and Peace*, revised and expanded, Mystic, CT, Twenty-Third Publications, 1991, p. 131, n. 23)

³¹See R. PAGE, "Associations of the Faithful in the Church," in *The Jurist*, 47 (1987), pp. 165-167.

³²See SECOND VATICAN COUNCIL, Decree on the Apostolate of Lay People, *Apostolicam actuositatem*, 19, 18 November 1965, in A. FLANNERY (ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents* (=FLANNERY), 1992 rev. ed., Grand Rapids, MI, William B. Eerdmans Publishing Co., 1992, pp. 786-787. (See also SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, 25, 7 December 1965, in FLANNERY, p. 926-927: "The social nature of the human person shows that there is an interdependence between personal (*humanae personae*) betterment and the improvement of society...Nowadays for various reasons mutual relationships and interdependence increase from day to day and give rise to a variety of associations and organizations, both public and private. Socialization, as it is called, is not without its dangers, but it brings with it many advantages for the strengthening and betterment of human qualities and for the protection of human rights."

Concerning the right of clergy to associate, the exhortation is found in *Presbyterorum ordinis*.³³

Thereupon, the 1983 *Code of Canon Law* reflected the awareness of and appreciation for this conciliar vision and sought to broaden its understanding. It placed such associations under the title, *De Christifidelibus*. Effectively, the legislator has recognized this right as fundamental for all the faithful, including clergy and religious.³⁴

This reorganization of the legislation acknowledges that the right to associate has its founding not in human nature alone but in the individual's call to holiness and participation in the life of the Church.³⁵ In his post synodal apostolic exhortation, *Christifideles laici*, the present Holy Father echoes past thoughts on the importance of associations and encourages their establishment from both a sociological and sacramental perspective:

The actual formation of groups of the lay faithful for spiritual purposes and for apostolic work comes from various sources and corresponds to different demands. In fact, their formation itself expresses the social nature of the person and for this reason leads to a more extensive and incisive effectiveness in work. In reality, a "cultural" effect can be accomplished through work done not so much by an individual alone but by an individual as "a social being," that is, as a member of a group, of a community, of an association, or of a movement....

First of all, the freedom for lay people in the Church to form such groups is to be acknowledged. Such liberty is a true and proper right that is not derived from any kind of "concession" by authority, but flows from the

³³See SECOND VATICAN COUNCIL, Decree on the Ministry and Life of Priests, *Presbyterorum ordinis*, 8, 7 December 1965, in FLANNERY, p. 879: "Moreover, in order to enable priests to find mutual help in cultivating the intellectual and spiritual life, to promote better cooperation amongst them in ministry....associations of priests are also to be highly esteemed and diligently promoted..."

³⁴For example, see *CIC 1983*, c. 302 which speaks of associations that are *de iure* clerical and c. 303 that addresses associations of third orders. These forms of association are not discussed in this dissertation.

³⁵*CIC 1983*, c. 204, §1: "Christifideles sunt qui, utpote per baptismum Christo incorporati, in populum Dei sunt constituti, atque hac ratione munus Christi sacerdotalis, prophetici et regalis suo modo participes facti, secundum propriam cuiusque condicionem, ad missionem exercendam vocantur, quam Deus Ecclesiae in mundo adimplendam concredidit."

Sacrament of Baptism, which calls the lay faithful to participate actively in the Church's communion and mission.³⁶

In short, the capacity for association is grounded both in a human right, which stems from the nature of the person, and in an ecclesial right, which is founded in the individual's baptismal call (cc. 215 and 216).³⁷

A. Common Norms

Indeed, the new legislation created much potential for the faithful to exercise their right to associate and to undertake a variety of works within the Church. To that end, canons 298-311 attempt to apply general norms for all associations established either at the initiative of a Church authority or at the initiative of the faithful.³⁸

Specifically, with regard to the types of activity, canon 298, §1 defines three broad, overriding purposes of an association. These include: promoting a more perfect life, fostering public worship or Christian doctrine, and exercising other apostolic labours such as, works of piety or charity. Admittedly, while c. 298, §1 is designed as a

³⁶JOHN PAUL II, post synodal Apostolic Exhortation, *Christifideles laici*, 30 December 1988, in *AAS*, 81 (1989), pp. 393-521, no. 29 (English translation in *Origins*, 18 (1988-1989), p. 595).

³⁷*CIC 1983*, c. 215: "Integrum est christifidelibus, ut libere condant atque moderentur consociationes ad fines caritatis vel pietatis, aut ad vocationem christianam in mundo fovendam, utque conventus habeant ad eosdem fines in communi persequendos."

CIC 1983, c. 216: "Christifideles cuncti, quippe qui Ecclesiae missionem participant, ius habent ut propriis quoque inceptis, secundum suum quisque statum et condicionem, apostolicam actionem promoveant vel sustineant; nullum tamen inceptum nomen catholicum sibi vindicet, nisi consensus accesserit competentis auctoritatis ecclesiasticae." R. Pagé points out that c. 215 must be read in the light of c. 216, which bears, as he claims on the right of initiative of the faithful. See R. PAGÉ, "Associations of the Faithful in the Church," p. 169.

³⁸The 1992 Plenary Meeting of The Canadian Conference of Catholic Bishops unanimously accepted and approved a study of associations of the faithful. The organizational procedure for forming such associations as well as the current Canadian norms are published in *Recognition of National Catholic Associations, Guidelines for the CCCB and Associations of the Faithful*, Ottawa, Publication Service, 1993, 48p.

guideline, the ambit of this norm is much broader than the list enumerates. In fact, it is vague enough to coax an unimaginable number of associations into existence. At the same time, c. 298, §2 exhorts the faithful to seek out and to enrol first in associations which are erected, praised, or recommended by the Church authorities.³⁹ In any event, given the wide range of activity permissible under c. 298, §1, subsequent norms attempt to draw certain limits.

In fact, an immediate limitation comes with the use of the word "Catholic." Quite simply, c. 300 directs that consent from a competent Church authority (c. 312) must be obtained before the name "Catholic" be used in any title describing the association.⁴⁰ This law applies equally to public as well as to private associations.⁴¹

Canon 301, §1 presents a third stipulation in that it reserves certain areas of competence in spiritual matters to specific ecclesiastical authorities. In particular, this canon safeguards doctrinal teaching and public worship by assigning to ecclesiastical authorities the sole right to erect such associations. By law, these associations are established as public associations in accord with c. 301, §3.⁴²

³⁹CIC 1983, c. 298, §1: "In Ecclesia habentur consociationes distinctae ab institutis vitae consecratae et societatibus vitae apostolicae, in quibus christifideles, sive clerici sive laici sive laici simul, communi opera contendunt ad perfectiorem vitam fovendam, aut ad cultum publicum vel doctrinam christianam promovendam, aut ad alia apostolatus opera, scilicet ad evangelizationis incepta, ad pietatis vel caritatis opera exercenda et ad ordinem temporalem christiano spiritu animandum.

§2: Christifideles sua nomina dent iis praesertim consociatibus, quae a competenti auctoritate ecclesiastica aut erectae aut laudatae vel commendatae sint."

⁴⁰As mentioned in Chapter I, with regard to Catholic universities and colleges, canon 808 prescribes that no such institution may bear the name "Catholic" without the consent of the competent church authority.

⁴¹CIC 1983, c. 300: "Nulla consociatio nomen <catholica> sibi assumat, nisi de consensu competentis auctoritatis ecclesiasticae, ad normam can. 312."

⁴²CIC 1983, c. 301, §1: "Unius auctoritatis ecclesiasticae competentis est erigere christifidelium consociationes, quae sibi proponant doctrinam christianam nomine Ecclesiae tradere aut cultum publicum promovere, vel quae alios intendant fines, quorum prosecutio natura sua eidem auctoritati ecclesiasticae reservatur."

Fourth, all associations are to draft statutes, with due regard for c. 94. They are to outline the ends, the internal organization, including the locale of government, the conditions of membership, and the determiner of policies. Further, following the directives of the same canon, a suitable name must be chosen which befits the organization and properly characterizes the activities.⁴³

Fifth, the right and obligation of a competent authority to exercise vigilance and governance over all associations within the Church is granted by c. 305, §1 and §2. In particular, the authority is to preserve the integrity of faith and morals and to verify that there is no abuse of ecclesiastical discipline. Practically, in order to carry out this right and duty, the competent authority is given the right to visit the various associations in accordance with their statutes. While all associations, be they international, national, or diocesan, whether public or private, remain under the vigilance of the Holy See; diocesan associations, in particular, are under the care of the local ordinary.⁴⁴

While Church authorities exercise vigilance and governance, c. 309 instantiates an autonomy found in associations. But, in accord with the law, this autonomy is limited and realized only in associations which possess juridic personality. Specifically, the

CIC 1983, c. 301, §3: "Christifidelium consociationes quae a competenti auctoritate ecclesiastica eriguntur, consociationes publicae vocantur."

⁴³CIC 1983, c. 304, §1: "Omnes christifidelium consociationes, sive publicae sive privatae, quocumque titulo seu nomine vocantur, sua habeant statuta, quibus definiantur consociationis finis seu obiectum sociale, sedes, regimen et condiciones ad partem in iisdem habendam requisitae, quibusque determinantur agendi rationes, attentis quidem temporis et loci necessitate vel utilitate."

CIC 1983, c. 304, §2: "Titulum seu nomen sibi eligant, temporis et loci usibus accommodatum, maxime ab ipso fine, quem intendunt, selectum."

⁴⁴CIC 1983, c. 305, §1: "Omnes christifidelium consociationes subsunt vigilantiae auctoritatis ecclesiasticae competentis, cuius est curare ut in iisdem integritas fidei ac morum servetur, et invigilare ne in disciplinam ecclesiasticam abusus irrepant, cui itaque officium et ius competunt ad normam iuris et statutorum easdem invisendi; subsunt etiam eiusdem auctoritatis regimini secundum praescripta canonum, qui sequuntur."

CIC 1983, c. 305, §2: "Vigilantiae Sancta Sedis subsunt consociationes cuiuslibet generis; vigilantiae Ordinarii loci subsunt consociationes dioecesanae necnon aliae consociationes, quatenus in dioecesi operam exercent."

issuance of norms, the scheduling of meetings, the designation or election of officers, and the administration of temporal goods are specific rights and obligations attached to public or private associations which possess, simultaneously, juridic personality in the Church. Those associations not constituted as juridic persons, such as associations *de facto*, and private associations which have not requested juridic personality, either private or public, are not in possession of such rights and obligations. It is true that a provision in the law (c. 310) enables members to contract, in a joint way, particular obligations, to acquire rights and possess goods as co-owners or co-possessors, and to exercise their rights and obligations by means of a proxy or agent.⁴⁵ Generally, under the 1983 *Code of Canon Law*, associations of the faithful have five principal forms.⁴⁶ They include: the association *de facto*, the private association without juridic personality, the private association with public or private juridic personality, and the public association with public juridic personality. A brief description of each follows.

B. The Association of the Faithful *de facto*

As c. 299, §1 outlines, this species of an association, often without written statutes, is formed at the initiative of the faithful by means of private agreement made among the prospective members. More often than not, the association acts in the name of its members or with their consent, informally recognized by the Church. In short, it is a private grouping of individuals pursuing a specific work. Though not an ecclesi-

⁴⁵CIC 1983, c. 310: "Consociatio privata quae persona iuridica non fuerit constituta, qua talis subiectum esse non potest obligationum et iurium; christifideles tamen in ea consociati coniunctim obligationes contrahere atque uti condomini et compossessores iura et bona acquirere et possidere possunt; quae iura et obligationes per mandatarium seu procuratorem exercere valent."

⁴⁶For a learned commentary on the common norms, see R. PAGÉ, "Associations of the Faithful in the Church," pp. 170-191.

astical juridic person, it may, however, be endorsed, recommended, or praised by a competent ecclesiastical authority in accordance with c. 299, §2 and with due regard for c. 301, §1. Moreover, it may use the word "Catholic" so long so as the prescriptions of c. 300 are followed. Furthermore, the temporal goods of the association belong to the individual members. Therefore, upon dissolution, the goods are simply distributed according to the statutes. As noted earlier, for all forms of association, c. 312 determines the competent ecclesiastical authority for any action required on behalf of the Church.⁴⁷

C. The Private Association of the Faithful

As previously mentioned, the private association of the faithful is an innovation of the 1983 Code. Private associations are all associations not formally established or erected by a competent Church authority, but which come into existence at the initiative of the faithful. Reducing ecclesiastical supervision to a minimum, the fundamental principle is that private associations have their own autonomy and are governed by their proper statutes. For this reason, this form of association has great appeal to many.⁴⁸ While public associations, like public juridic persons, act in the name of the Church, and thereby follow more closely the governing canons, especially as regards temporal goods,

⁴⁷Canon 299, §1 uses the word "private" to describe the nature of the agreement among the individuals who participate in the de facto association. Such an association is not considered to be a "private association" in the canonical sense. Rather, the descriptor, "private", simply refers to an agreed-upon arrangement reached by the members. Further, Pagé points out that "any de facto association, or one formed by a private agreement, which wishes to obtain the status of a 'private association' in the Church, such as this is understood in canons 321-326, must have its statutes reviewed by the competent authority. Thus a de facto association is neither irregular nor illegal. Rather, a de facto association would be illegal if it pretended to have the status of 'private association' without its status having been recognized." See R. PAGÉ, "Associations of the Faithful in the Church," p. 172-174.

⁴⁸The advantages of such an association, vis-à-vis autonomy, are discussed in Chapter Four and in relation to juridic persons and associations of the faithful.

private associations enjoy great freedom in the law. But, it is not absolute.⁴⁹ Canons 312-326 direct their establishment, pastoral vigilance, administration of property, and dissolution.

A private association can seek varying degrees of recognition and approval within the Church. In fact, it may also request conferral of juridic personality. In each case, however, the association gradually diminishes portions of its autonomy, shifting itself more directly under the purview of the Code.

Canon 299, §3 directs that in order to be recognized as a private association of the faithful, a competent Church authority must review its statutes.⁵⁰ Once completed, the recognized association is considered praised, recommended, or endorsed by the Church. It, however, does not possess rights and obligations within the Church. Still, a private association may choose, for whatever reasons, to request obtainment of juridic personality (c. 322, §1), either public or private.⁵¹ This status is granted only by a formal decree issued by a competent ecclesiastical authority, and only after the approval of its statutes by the same authority (c.322, §2).⁵² Upon erection, the private association

⁴⁹For instance, c. 326 empowers a competent authority to suppress any association when he discovers abuse, scandal, or harm to doctrine (386, §1), public worship (c. 392, §2), or discipline (c. 392, §1).

CIC 326: "Extinguitur christifidelium consociatione privata ad normam statutorum; supprimi etiam potest a competenti auctoritate, si eius actio in grave damnum cedit doctrinae vel disciplinae ecclesiasticae, aut scandalo est fidelium."

⁵⁰CIC 1983, c. 299, §3: "Nulla christifidelium consociatio privata in Ecclesia agnoscitur, nisi eius statuta ab auctoritate competenti recognoscatur."

⁵¹"An association which asks for juridic personality receives a private juridic personality. But there is nothing against the possibility that a special decree of the competent authority might expressly grant it a public juridic personality." See R. PAGÉ, "Associations of the Faithful in the Church," p. 192. CIC 1983, c. 322, §1: "Consociatio christifidelium privata personalitatem iuridicam acquirere potest per decretum formale auctoritatis ecclesiasticae competentis, de qua in can. 312."

⁵²As pointed out in c. 322, §2, the nature of the private association does not change with the approval of the statutes. It still acts "in the name of the association" and not "in the name of the Church." CIC 1983, c. 322, §2: "Nulla christifidelium consociatio privata personalitatem iuridicam acquirere potest, nisi eius statuta ab auctoritate ecclesiastica, de qua in can. 312, §1, sint probata; statutorum vero probatio consociationis naturam privatam non immutat."

with juridic personality, like the private or public juridic person, becomes the subject of rights and obligations in conformity with c. 113, §2.

The statutes of a private association outline the requirements for membership, the free selection of its officers, and the choice of a priest-advisor from among those ministering within the diocese. Further, should the association dissolve, the statutes direct the disposition of the temporal goods with due regard for acquired rights and the will of the founders and donors (c. 326, §2).⁵³

In all, the norms provide ample opportunity for a variety of private associations. Nonetheless, three principal forms seem to emerge as most common: one with reviewed statutes, one with approved statutes, and still, one with both approved statutes and juridic personality, either public or private. In each case, the competent authority retains the right to visit according to the association's ordinances and to exercise ecclesiastical vigilance (c. 305).⁵⁴

One of the current issues raised concerns the difference between the private association of the faithful and the private juridic person. Since these distinctions are new options under the 1983 Code, few institutions have made use of them. Accordingly, data are limited as to their overall effectiveness. Certainly, the Catholic colleges and universities in Canada, unlike the hospitals in the United States, have not employed any of these

⁵³CIC 1983, c. 326, §2: "Destinatio bonorum consociationis extinctae ad normam statutorum determinanda est, salvis iuribus quaesitis atque oblatores voluntate."

⁵⁴All associations remain under the vigilance and supervision of the competent church authority, especially in matters regarding faith, morals, and discipline (cc. 305; 386). For private associations of the faithful, c. 323, §1 and §2 defines the limits of its exercise.

CIC 1983, c. 323, §1: "Licet christifidelium consociationes privatae autonomia gaudeant ad normam can 312, subsunt vigilantiae auctoritatis ecclesiasticae ad normam can 305, itemque eiusdem auctoritatis regimini."

§2: "Ad auctoritatem ecclesiasticam etiam spectat, servata quidem autonomia consociationibus privatis propria, invigilare et curare ut virium dispersio vitetur, earumque apostolatus exercitium ad bonum commune ordinetur."

canonical options. Nevertheless, it seems that one observation that can be drawn is that private associations of the faithful rely much more on the personal qualities and characteristics of the individuals comprising the association in order to achieve its proper ends. On the other hand, endowed with a juridic personality, the private juridic person manages to accomplish its purposes with the force and momentum of a corporate body. Generally, these purposes have a greater scope.⁵⁵ In any event, both stand as two very different ways of responding to the Gospel in two very different degrees of relationship to the Church. The final chapter contains more discussion on this matter.

D. The Public Association of the Faithful

Along with the common norms, cc. 312-320 delineate public associations of the faithful with respect to their nature (cc.312-315), their membership (c. 316), the administration of goods (c. 319), the appointment of a moderator (c. 317), and their suppression (c. 320). In general, the statutes, which must be approved by the Church authority, form the basic document for governing the association. Any revisions or changes made to the approved statutes require authoritative approbation.⁵⁶

Public associations are erected in one of two ways, either a competent authority may establish an association through his own initiative (cc. 301, §2; 313)⁵⁷, or the same

⁵⁵Cf. F. MORRISEY, "Juridic Status: Canonical Provisions, Possible Applications," in Health Progress, September 1986, vol. 67, n.7, pp.42-43.

⁵⁶CIC 1983, c. 314: "Cuiuslibet consociationis publicae statuta, eorumque recognitio vel mutatio, approbatione indigent auctoritatis ecclesiasticae cui competit consociationis erectio ad normam can. 312, §1."

⁵⁷CIC 1983, c. 301, §2: "Auctoritas ecclesiastica competens, si id expedire iudicaverit, christifidelium consociationes quoque erigere potest ad alios fines spirituales directe vel indirecte prosequendos, quorum consecutioni per privatorum incepta non satis provisum sit."

CIC 1983, c. 313: "Consociatio publica itemque consociationum publicarum confoederatio, ipso decreto quo ab auctoritate ecclesiastica ad normam can. 312 competenti erigitur, persona iuridica

authority may grant that status by decree to associations which were created through private initiative (cc. 301, §3; 313).⁵⁸ The decree establishing a public association also confers upon the association, public juridic personality *ipso iure*.⁵⁹ This single act by which juridic personality is conferred at the time of establishment stands as a main feature, distinguishing the public association from the private association. Furthermore, because a public association is constituted a public juridic person, it receives a canonical mission to pursue, "in the name of the Church," those ends for which it is established (c.313).⁶⁰

Finally, c. 320, §1 reflects the guiding principle that any authority who is competent to erect an association is equally competent to suppress it. For various reasons, public and private associations with juridic personality may be suppressed, such as, inactivity for one hundred years (c. 120, §1) or any abuse in the area of faith and morals. In the latter, as long as the moderator and major officials have been consulted, the competent authority may proceed with the suppression; otherwise the action may be invalid.⁶¹

constituitur et missionem recipit. quatenus requiritur, ad fines quos ipsa sibi nomine Ecclesiae persequendos proponit."

⁵⁸For CIC 1983, cc. 301, §3; 313, supra, note 42.

⁵⁹For cc. 301, §3, and 313 see notes 42 and 58, respectively, above.

⁶⁰See also A. LONGHITANO, "Le associazioni dei fedeli (cc. 298-329)," in Il diritto nel mistero della Chiesa, Quaderni do Apolinaris, no. 9, Rome, Pontificia Universita Lateranese, 1990, pp.46-49. Longhitano states that "mission" here means a particular form of guarantee and responsibility which the ecclesiastical authority assumes concerning the nature and the ends of the association.

⁶¹CIC 1983, c. 320, §3: "Consociatio publica ab auctoritate competenti ne supprimatur, nisi auditis eius moderatore aliisque officialibus maioribus." See J. CORIDEN, T. GREEN, and D. HEINTSCHEL., eds., The Code of Canon Law: A Text and Commentary, p. 254.

E. Temporal Goods

The temporal goods of an association *de facto* belong exclusively to the members who comprise it. While the same is true for a private association **without** juridic personality, for a private association **with** juridic personality, the goods belong to the association. But, they are not *bona ecclesiastica*. Therefore, the universal legislation of the Church does not regulate their administration or alienation. Rather, in accordance with the statutes, the members of the association direct the administration and alienation of the goods. The situation is quite different for public associations either founded privately and subsequently established by Church authority or by public establishment through the initiative of the authority. Under these forms of association, the temporal goods belong to the association. The Church considers them to be ecclesiastical goods. As a consequence, their overall supervision is governed by cc. 1254-1310 of Book V of the 1983 *Code of Canon Law*. In day-to-day affairs, however, the association administers its temporal goods in accordance with its proper statutes.⁶²

In all, the new legislation has provided a number of possibilities for canonical status. In general, the law outlines five principal options: the public juridic person, the private juridic person, the private association of the faithful, the public association of the faithful, and the association *de facto*. As pointed out, in some cases, there are further possibilities. In all cases, the association receives its canonical status, depending upon the decision of the members, *vis-à-vis* juridic personality together with the review or approval of the statutes by the competent Church authority. In turn, this effects the degree to which that particular association falls within the Code.

⁶²CIC 1983, c. 319, §1: "Consociatio publica legitime erecta, nisi aliud cautum sit, bona quae possidet ad normam statutorum administrat sub superiore directione auctoritatis ecclesiasticae de qua in can. 312, §1, cui quotannis administrationis rationem reddere debet."

There are numerous examples in which Catholic institutions have assumed a variety of juridic forms as they seek to advance the missionary work of the Church. For example, in the United States, some religious institutes who sponsor hospitals, have decided in favour of alternative forms of sponsorship and opted for private juridic status of the hospital or more creatively, they have taken advantage of the recent innovations of the new Code and sought status for the hospital as a private association of the faithful.⁶³ In any event, changing forms of sponsorship or altering canonical status demands precise knowledge of the present status of the institution.

To that end, the investigation continues under the 1983 *Code of Canon Law*. The next section determines which, if any, of the above options were chosen, thus far, by the administrators of the University. Again, the inquiry looks into the archival material and other documentary evidence as regards the conveyance of titles to property in order to ascertain the university's present canonical situation. Upon determination of its current canonical status, an alteration to that status is possible. Thereupon, Chapter Four returns to the juridic options, as previously outlined, and discusses the advantages and disadvantages of each with a view to altering the present canonical status of Assumption University.

⁶³See also The Catholic Health Association Alternative Sponsorship: Two Options, Private Juridic Persons and Private Association of the Christian Faithful, St. Louis, MO, The Catholic Health Association of the United States, Division of Member Services, 1991, 24p; See also H. MODDE, "Private Association: Opportunity for Laity," in Health Progress, 67, (1986), pp. 46-50; See also J. HOWARTH, "Juridic Person or Private Association: Choosing a Canonical Structure," in Health Progress, 67, (1986), p. 51; See also H. SCHROEDER and J. MANSFIELD, "Creating a Private Association: The St. Francis Experience," in Health Progress, 67 (1986), no. 7, pp. 52-54.

III. Tracing the Titles to Deeds of the Property of Assumption University

Relative to Assumption University, the majority of the conveyances of property took place well before the promulgation of the 1983 *Code of Canon Law*. In fact, the documents show that aside from the sale of two pieces of property, one located to the north of Assumption Church and sold in 1989 by the Basilian Fathers of Sandwich to the Corporation of the City of Windsor for approximately \$600,000.00 and the other measuring seventeen feet and sold in 1993 for approximately \$115,000.00, no other transactions have taken place with respect to alienations of property or conveyances of titles. The property agreement drafted in 1977 and referred to in the previous chapter represents, more or less, the present situation at Assumption University.⁶⁴ Moreover, a search of the archives at Assumption University as well as the General Archives of the Basilian Fathers in Toronto and the General Archives of the Diocese of London found no documentation in the form of a decree from the diocesan Bishop of London conferring separate juridic personality on Assumption University, either public or private. Further, the investigation found no decree erecting Assumption University as a public association of the faithful. Furthermore, from 1983 to the present there is no documentary evidence or actions that suggests that Assumption ever operated, or is currently operating, as a private association of the faithful, with or without juridic personality.⁶⁵

⁶⁴In a telephone conversation in March 1994 with Doug Lawson, the chief attorney retained by Assumption University for property matters assured me that the Agreement of 1977 and the property holdings listed in Schedules A, B, and C of the Agreement are current.

⁶⁵This was also confirmed in a telephone conversation in early April 1994 with the Very Reverend Ulysse Paré, CSB, former Superior General of the Basilian Fathers and currently the President of Assumption University. He can recall at no time during his term as Superior General (1981-1989) did Assumption University even raise the question of altering its canonical status. Further, he confirmed the sale of the property in 1989 and reported it as the only conveyance. Moreover, since his tenure as President which began in 1990, the issue of the canonical status of Assumption University has not been considered. Reverend David Heath, CSB, former President of Assumption University and the current Treasurer General of the Basilian Fathers verifies Reverend Paré's recollections.

Since all of the titles to the deeds of property are in the name of the corporation of the Basilian Fathers of Sandwich in Ontario (The Basilian Fathers Corporation), the diocesan bishop could not even implicitly bestow juridic personality through attributing to the institution a quality found in juridic persons. This quality must be attributed to the institution itself, not to the religious institute or house.⁶⁶ In all the transactions regarding the properties listed in Schedule "A" of the 1977 Agreement, Assumption University has always acted under the Basilian Fathers of Sandwich since the ownership of these properties had been assigned by virtue of the Agreement to Assumption University; but once legal titles to the properties were transferred to the Basilian Fathers of Sandwich by the Bishop of London, the legal titles had been left, up to the present day, in the name of The Basilian Fathers Corporation.⁶⁷ As a result, it seems clear that in this situation there has been no intention to alter canonical status or to transfer ownership of land and buildings to the civil-law corporation; the canonical status remains that of an apostolic work of the sponsor which, even at civil law, retains ownership of the real estate.⁶⁸

Up to this point, Assumption University has been described according to one system of law - the canonical. Realizing that the Ontario university participates within several legal frameworks, Part IV draws an outline of Assumption's standing in the light of the civil law.

⁶⁶The 1940 rotal decision rendered by Jullien listed two basic criteria for ascertaining proof of juridic personality for a charitable institution. Since this decision represents the most recent thought on the issue in regard to temporal goods and juridic persons, the criteria are accepted until more recent rotal jurisprudence is made available. The criteria include: (1) documentary proof that juridic personality was conferred, (2) documents or actions demonstrating that the bishop had conferred juridic personality implicitly by attributing to the institution particular qualities that are common to juridic persons, namely, ownership of property and the right to be heard in ecclesiastical court. See note 18, Chapter Two, pp. 69-70, *supra*.

⁶⁷See note 77, Chapter Two, p. 98, *supra*. This information was taken from the 1977 Agreement, Article 7, "Title to Properties" at p. 3.

⁶⁸See R. KENNEDY, "Maida, McGrath, Michiels," pp. 370-371.

IV. The Civil Status of Catholic Universities and Colleges in Canada

Perhaps one of the best depictions concerning the interplay between the distinctively individual federated universities and colleges (usually denominational) in Canada and the various provincial governments, comes from J. Hanham, an English historian, who, after reading L. Shook's history of post-secondary education in Canada, comments:

The colleges and universities whose story he [Shook] tells are a wonderfully varied lot, ranging from the cosmopolitan Pontifical Institute to the bizarre Notre Dame of Wilcox, Saskatchewan, with its devotion to "God and Canada" and to "freest action under divine law."⁶⁹

He pointed out that few of these institutions had equivalent forms in other countries; their variety of institutional structure too was remarkable as was the capacity of provincial governments "to adapt themselves to this diversity and to encourage it by casting the mantle of government approval over the Church-related institutions."⁷⁰ Concluding the article, he writes: "There was a freshness about the story which arises from the fact that the Canadian Constitution gives free reign to the provinces to work out their own destinies over a wide range of activities."⁷¹ Indeed, since the writing, some fifteen years ago, his observations have remained partially valid.

In any event, as Hanham points out, under the Canadian Constitution, education in Canada falls within the jurisdiction of the provinces. In effect, the Canadian university system is predominantly a provincialized educational system; there are few private Catholic colleges and universities in any of the provinces. In short, it is a public-sector

⁶⁹J. HANHAM, "Canadian History in the 1970's," in Canadian Historical Review, vol. 57, (1977), pp. 2-22. See also L. SHOOK, Catholic Post-secondary Education in English-Speaking in Canada: A History, Toronto, University of Toronto Press, 1971, 256p.

⁷⁰J. HANHAM, "Canadian History in the 1970's," in Canadian Historical Review, 57 (1977), p. 18.

⁷¹J. HANHAM, "Canadian History in the 1970's," p. 22.

enterprise.⁷² Specifically, with respect to the province of Ontario, the provincial government recognizes only those universities and colleges that are constituted as civil corporations.⁷³ The jurisdictional power granted to the provincial government enables it to control the number and kinds of universities established. To that end, the province accomplishes this task by issuing charters, determining the essentials of the acts of incorporation, and providing the bulk of public funding to the denominational colleges and universities.⁷⁴

A. The Catholic University and the Provincial Government

In all, there exist sixteen Catholic colleges and universities in Canada, four of which are free-standing institutions with three out of the four having no formal relationship with a secular provincial university.⁷⁵ Presently, ten of the sixteen Catholic

⁷²The Commonwealth University Yearbook, 1994, p. 342 reports that: "Interestingly, there are recent indications that at least some provincial governments may no longer be adverse to the emergence of private post-secondary institutions. Alberta in 1987 amended its Universities Act to allow private colleges to receive degree-granting status, with three now in the province: Augustana (previously Camrose Lutheran), Concordia, and King's. A similar but secular initiative is under discussion in Ontario. Presently, British Columbia has established legislation to regulate and accredit private postsecondary education."

⁷³See Commonwealth Universities Yearbook, 1994, p. 341.: "Apart from provincial incorporation required for degree-granting power, the academy recognizes institutions of higher education by virtue of membership in the Association of Universities and Colleges of Canada (AUCC). This association is a national body of approximately 89 member institutions, 69 of which have full degree-granting authority. The remaining institutions have federated, affiliated, or constituent relationships with parent universities. The AUCC, established in 1911, has no legislative authority but operates as a powerful lobby, allowing the university community to act and speak with solidarity."

⁷⁴Degree-granting colleges may range from the equivalent of a university to a specialized teaching unit within a university, or a small part of a larger university.

⁷⁵In Canada, there are sixty-eight degree-granting universities, twelve of which are in federation with a parent university. In Ontario, there are twenty-two free-standing university-level institutions and twenty-three federated and affiliated universities and colleges. Report from the Ontario Council on University Affairs, "Sustaining Quality In Changing Times - Funding Ontario Universities, Media Backgrounder," 12 August 1994, p. 1.

colleges and universities, including Assumption University, are federated or affiliated with a parent or host university. All of the parent universities are part of a provincial university system and are subject to the provincial and federal regulations. Of the Catholic colleges within the federation system, there are six institutions established by various religious institutes and ten established by the local dioceses.⁷⁶

The terms "parent" or "host" are used to describe the provincially-funded, state university to which a confessional college or university may be related. Universities in Canada are made up of a number of these related institutions which are associated to the parent university in one of three ways: federated, affiliated, or constituent. The general distinction between a federated or affiliated institution is that the former is viewed as a partner of the institution with which it has an agreement, while the latter has more of a parent-subsidiary relationship with the state university.

Typically, a federated institution has a high degree of independence and is responsible for its own administration. Federated colleges and universities may grant degrees, but they hold this power in abeyance while the federation exists. Some federated colleges and universities suspend only part of their degree-granting powers, retaining, for example, the right to grant degrees in theology, but not in the arts and sciences.⁷⁷

Affiliated institutions, like federated colleges, are also responsible for their own administration. However, in conformity with the affiliation agreements, the parent university supervises the teaching of subjects, confers the degrees, and makes faculty

⁷⁶Newman Theological College is a privately incorporated institution which does not receive public funds.

⁷⁷This type of arrangement is in effect at Victoria University, which is federated with the University of Toronto as is Assumption University which is federated to the University of Windsor. As of 1963, by virtue of the federation agreement, Assumption agreed to hold its degree-granting powers in abeyance except for degrees in the Faculty of Theology.

appointments. The principle of affiliation really grew out of an historical reluctance on the part of the provincial government to fund private institutions, or to empower them to grant degrees other than in theology. Therefore, affiliation allowed students enrolled at private colleges to work towards degrees granted by the state university, while the colleges placed themselves, in varying degrees, under the academic authority of the parent university. By this arrangement, the individual colleges meet their special purposes in terms of mission and direction. At the same time, they satisfy the requirements in order to receive provincial funding by protecting the academic integrity of the provincially empowered degrees. The *consortium* of affiliated institutions at the University of Toronto is the good example of such an agreement as is Huron College on the campus of the University of Western Ontario and Laurentian University's affiliation with Algoma and Hearst Colleges.⁷⁸

Finally, a constituent institution is an integral part of the parent university. In all areas, particularly administrative and academic, the host university oversees the affairs of the constituent college. For example, the Colleges of Law and Agriculture offer full programs in their respective fields under the immediate supervision of the University of Saskatchewan.

At any rate, given these three forms of association, this dissertation focuses on the federated college or university.

⁷⁸See Ontario Council on University Affairs, Nineteenth Annual Report March 1, 1992 to February 28, 1993, "The Allocation of Government's Operating Support for the University System in 1993-1994," Advisory Memorandum 92-XI, p. 218.

B. The Federated College or University

Historically, in spite of some of the drawbacks, the principle of federation took hold very soundly in parts of Canada, especially in the early 1960s following the postwar educational boom.⁷⁹ Shook observes that this success was due in large part to the different emphasis that Canadian institutions placed on education as opposed to their American counterparts. While the Canadian institutions tended to stress higher education for Catholics under public auspices, the American idea of a Catholic university emphasized higher Catholic education in the absolute sense.

As a consequence of this American thought, in 1884, the bishops commenced an action to erect a national, Catholic university, intended primarily for the needs of the clergy, and only secondarily for the general public. When the financial crises hit The Catholic University, the officers, quick to broaden their constituency, entered other academic fields, including undergraduate studies, in 1905. In the meantime, those in Canada who were experimenting with federation were eager to point out the many advantages, such as, the financial, ecumenical, and disciplinary, that a system of integrated collaboration with secular universities offered over segregated and autonomous systems.⁸⁰

⁷⁹See J. McCONICA, "The Catholic University and Canadian Society," in Present and Future Challenges Facing Catholic Universities, Saint Paul University International Centennial Conference Proceedings, Ottawa, Tri-Graphic Ltd., 1990, p. 51.

⁸⁰Shook reports that Bishop Spalding of Peoria and Isaac Hecker, the founder of the Paulists, vigorously pushed the idea of a national Catholic university. However, ruggedly opposing the idea were Bishops McQuaid of Rochester and Corrigan of New York. In eastern Canada, the only notable opposition came from Bishop Fallon of London who took issue with articles appearing in The Catholic Register which were very much in favour of the federation system over the American systems. Suffice to say, Fallon wanted a national, Catholic university in Canada. Given his personality, he most probably wanted it established in his own diocese. In any event, he wrote to the Register and castigated it for its "pernicious campaign to delude its readers into accepting a college federated with the University of Toronto as meeting the needs of the Catholic people in the matter of higher education." Needless to say, the faithful gave his letter the attention it deserved. In western Canada, however, the Canadian

Not surprisingly, the practice of federating colleges and universities did not spread evenly across Canada. As McConica writes:

I believe that it is true to say, however, and subject to correction, that the principle of federation is still almost unknown east of the Ottawa River with St. Thomas University of Fredericton being the sole exception.⁸¹

For the most part, the principle of federation has primarily served western and central Canada. In certain regions, it was just not feasible. In Québec, for instance, unique sets of circumstances frustrate its application, stemming from the fact that there are no forms of institution outside Québec that equated with *les collèges classiques*, nor were there Anglophone counterparts which parallel the Catholic universities in Québec. Suffice to say, while their provincial origins were similar in so many ways, for other and much more searching reasons, Francophone colleges and universities remain quite different.⁸² A discussion of that sort falls outside the scope of this dissertation.

The federated college actually had its roots in the college system at Oxford, England and in particular in the efforts of Cardinal Newman. In Canada, however, The University of St. Michael's College, which remains the Catholic component of the University of Toronto, was the first confessional college to federate with the larger,

Redemptorist, George Daly fought hard to establish a Catholic University of Western Canada. For a recount of that particular campaign, see G. DALY, Catholic Problems in Western Canada, Toronto, MacMillan Press, 1921, pp. 219-239. Shook claims that Daly's "idea was not especially realistic given the situation of higher education in Canada." See L. SHOOK, Catholic Post-Secondary Education, pp. 28-30.

⁸¹J. McCONICA, "The Catholic University and Canadian Society," p. 45.

⁸²J. McCONICA, "The Catholic University and Canadian Society," pp. 43-46. See also C. GALARNEAU, Les collèges classiques au Canada français, 1620-1970, Bibliothèque canadienne-française: histoire et documents, Montréal, Fides, 1978. Galarneau's book is intended as a counterpart to Shook's volume, Catholic Post-Secondary Education in English-speaking Canada. See also R. MAGNUSSON, A Brief History of Quebec Education, Montreal, Harvest House, 1980.

nonconfessional and publicly-funded institution.⁸³ This move helped to pioneer an association which was later duplicated, with local variations, in a number of other universities in Canada.⁸⁴ In the words of Basilian Father Laurence Shook, federation provided "an entirely new and ingenious arrangement which has since become a mark of the structure of higher education in all parts of Canada."⁸⁵

Indeed, some years later, Assumption University traced similar footsteps laid by The University of St. Michael's College. On 19 December 1962, an Act of the Ontario Legislature incorporated the University of Windsor. Shortly thereafter, in November 1963, Assumption University entered into federation with this newly-created institution. This decision was taken in order that Assumption University continue to achieve, on a secular campus, an academic presence which was professedly Catholic and in which the now broader constituency may find a distinctive intellectual and spiritual inheritance.

Legally, federation is an arrangement whereby Church-related colleges become a part of a provincial university system. To put it differently, upon civil incorporation, it is a principle by which the provincial governments recognize the separate, publicly-supported confessional colleges and universities. As a tangible sign of this recognition, the provincial government controls and distributes grants to the qualifying denominational

⁸³The University of Saint Michael's College was federated in 1910 with the University of Toronto. See L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, p. 194.

⁸⁴Cf. M. SANCHE, Heartwood: A History of St. Thomas More College and Newman Centre at the University of Saskatchewan, Münster, SK, St. Peter's Press, 1986, xi, 223p;

⁸⁵For a historical review of the development of federation at The University of St. Michael's College under President Henry Carr, CSB, see L. SHOOK, Catholic Post-Secondary Education in English-Speaking Canada: A History, pp. 149-157. The above quote is taken from the same work, p. 141.

colleges and universities.⁸⁶ However, consistent with this public support, the federated institutions must adopt the generally accepted standards for present university practice in Canada, thereby surrendering portions of their institutional and academic autonomy to the parent university.

The relationship is concretized in a formal federation agreement drafted between the officers representing the host university and the officers of the confessional institution. Of course, because it adapts to the prevailing circumstances on particular campuses, each agreement tends to differ. Nevertheless, the objects of the different agreements find common ground in permitting the parent university to exercise its powers over the college in the areas of teaching and non-teaching appointments, approbation of courses, curricula, and programmes, and student admissions.

Depending upon the formulation of the agreement, some Catholic colleges and universities offer extensive programs over a range of disciplines. Among others, they include, St. Mary's University at Halifax (1838), The University of Saint Michael's College at Toronto (1852), and St. Francis Xavier University at Antigonish (1855). Specialized programs also exist at several of the Catholic colleges and universities in Canada. For example, Assumption University offers graduate studies in Pastoral and

⁸⁶The Ontario Council on University Affairs (OCUA), established in 1974 by Order-in-Council advises the Minister of Education and Training and the Lieutenant-Governor-in Council. Acting as an intermediary between the provincial government and the twenty-two provincially assisted universities and related institutions, and the Ontario Institution for Studies in Education (OISE), the OCUA counsels officials on the requirements for funding, the allocation of funds, the approvals for graduate and professional programmes, the funding of the Ontario Graduate Scholarship, and any other matters pertaining to the university system. The OCUA is comprised of a full-time chair, a part-time vice-chair, and nineteen part-time members. For a complete list of information concerning the activities of this body as well as the types of records and manuals available to the general public, see The Government of the Province of Ontario, "Ministry of Education and Training (MET)," in The Dictionary of Records, Freedom of Information and Protection of Privacy (1994-1995), Toronto, p. 202-205; See also The Government of the Province of Ontario, Manuals/Guidelines governing the distribution of operating and capital grants to colleges and universities in Ontario, Toronto, 1994.

Theological Studies; Saint Paul University in Ottawa specializes in Theology, Mission Studies, and Canon Law while The University of Saint Michael's College at Toronto grants not only a variety of undergraduate degrees through the University of Toronto but also graduate degrees in Theology and related disciplines. On the other hand, St. Joseph's College at Edmonton focuses largely on Ethics. Still some, like St. Mark's College at Vancouver find the bulk of their work in chaplaincy and in non-credit adult education courses.

C. Funding

For many years, beginning in 1951, the federal government made available financial aid to sectarian universities through its grants program. In part, this action was a response to its recognition of the changing conditions in Canada, *vis-à-vis* higher education.⁸⁷ Understandably, the institutions grew to depend on this public-support. At the 1966 General Meeting of the Association of Universities and Colleges (AUCC), the Sub-committee on Church-related colleges reported:

For some years now, institutions approved by AUCC have been receiving their share of grants from the federal government. Relying on this assistance, Church-related institutions have continued to build up their facilities and to plan for the future.⁸⁸

This comment prefaced a recorded discussion on the AUCC's anticipated response to the possibility of the discontinuance of federal funding. In fact, one year later, in 1967, the provinces assumed the lion's share of the funding responsibility, but with the aid of the

⁸⁷cf. L. SHOOK, Catholic Post-Secondary Education in English-Speaking Canada, pp. 184-185.

⁸⁸Association of Universities and Colleges, "Sub-committee Report on Church-Related Colleges in Canada," in Minutes of the Meeting of the Association of Universities and Colleges (AUCC), May 22-24, 1967, p. 56.

federal government. Again, regional circumstances differed as to the allocation and the distribution of the funds.

Presently, the federal government assists the provinces in financial supporting postsecondary education in two ways. First, it makes block contributions of cash and tax points to provincial governments for Established Programmes Financing (EPF) and Official Languages In Education (OLE).⁸⁹ Second, it provides direct assistance to postsecondary education through the operation of three granting councils: the Medical Research Council, the Social Sciences and Humanities Research Council, and the Natural Sciences and Engineering Research Council. Other direct support is provided through the Canada Student Loans Program. As mentioned earlier, the provincial governments distribute the funds to the parent universities who in turn distribute approved allotments to the federated or affiliated institutes.⁹⁰ Through all of this, the governing body that mediates the distribution is the Ontario Council on University Affairs.

In recent years, there has been a desperate attempt on the part of provincial governments to maintain their financial commitments to institutes of higher learning with ever-dwindling federal and provincial treasuries. With specific reference to religiously-sponsored or conducted, federated universities and colleges, the problems experienced in their board rooms not only involve the attenuated government contributions but also the

⁸⁹See also Ontario Council on University Affairs, "The Allocation of Government's Operating Support for the University System in 1993-1994," in The Nineteenth Annual Report March 1, 1992 to February 28, 1993, Advisory Memorandum 92-XI, p. 32. For instance, under the OLE program, Saint Paul University received approximately \$1.764 million dollars in bilinguism grants for the 1993-1994 fiscal year.

⁹⁰One exception is Hearst College, an affiliate of Laurentian University. In 1993, the OCUA recommended to the Minister of Education and Training for the Province of Ontario that funds which had previously flowed indirectly to the College through Laurentian cease and that the College be directly funded. See Ontario Council on University Affairs, "The Allocation of Government's Operating Support for the University System in 1993-94," in The Nineteenth Annual Report March 1, 1992 to February 28, 1993, Advisory Memorandum 92-XI, p. 218.

difficulties inherent in the rise of lay leadership and the loss of clerical sponsorship.⁹¹ While lay leadership is progressing favourably, no longer can these colleges and universities rely on the "contributed services" of the religious to keep costs at a minimum. Further, as a result of lay headship, the federated institutions must pay competitive and fair salaries to the lay administrators. Both funding and lay leadership have cost some colleges dearly.

In any event, the effects produced by a cash-strapped Ministry of Education and Training are being felt not only in the board rooms, but also in the university classrooms. Certainly, as public funds paid to the parent universities dramatically decrease, the allowances to federated colleges also diminish.⁹² In fact, as of October 1994, in anticipation of major provincial and federal budget cuts due to economic pressures resulting in lower transfer payments from the federal government to the provinces, the Ontario Council on University Affairs (OCUA) began a comprehensive review of the present funding formula for the twenty-two Ontario universities and colleges in

⁹¹With respect to the Basilian universities and colleges, both in Canada and the United States, four of the seven are administered by lay presidents: The University of St. Thomas at Houston, Texas (privately operated by the Basilian Fathers); St. John Fisher College at Rochester, New York (privately operated by the Basilian Fathers); The University of Saint Michael's College at Toronto (federated with the University of Toronto and Basilian sponsored); and Saint Thomas College at Saskatoon (federated with the University of Saskatchewan and Basilian sponsored).

⁹²Cf. Ontario Council on University Affairs, press release, 8 August 1994. The chair, J. Cohnstaedt, writes: "Faced with mounting fiscal, economic, social, and cultural pressures, OCUA is examining how the university funding system can best respond to the challenges of declining public funds and increase demand. The question for universities is: 'Can the existing funding system meet these challenges or does the system have to be fundamentally changed?'" Cf. Memorandum from the Honourable Richard Allen, Minister of Colleges and Universities to Executive Heads, in Operating Support, 26 November 1992, (1993-1994), p. 1: "For the 1993-1994 funding year, the total operating base of funds available for distribution to the university system was capped at the 1992-1993 level of \$1.972 billion."

Ontario.⁹³ Basilian Father James McConica, former President of The University of Saint Michael's College which received its first grant in February 1952, reports in 1989 that:

In Ontario, with more English Catholic postsecondary foundations than in all the rest of the country, the situation is grave. All successive Ontario governments have refused flatly to supply public money either for operating or capital grants, although some funding is attracted by the teaching of arts and science. Access to this is governed in turn by the attitude of the secular, federated university through which such funding is channelled. Since the Province of Ontario has regularly ranked at the low end of Canadian provinces in grants to postsecondary education ever since 1970, the secular federated partners have been understandably jealous of their particular share of the financial pie.⁹⁴

The fall-out of this financial crisis poses a very real threat to the existence of some Catholic federated colleges and universities.⁹⁵

⁹³For a detailed presentation of the present funding formula now under review, see the information contained in the report from the Council on University Affairs, "The Allocation of Government's Operating Support for the University System in 1993-94," in The Nineteenth Annual Report March 1, 1992 to February 28, 1993, Advisory Memorandum 92-XI, pp. 311-336. The OCUA funding review has fomented considerable debate over the past several months, claiming that universities will become nothing more than "glorified high schools" if the Ontario government tries to accommodate thousands more students without thousands more dollars. Several campus newspapers throughout Ontario have launched stinging criticisms at the OCUA's proposed models for funding. For instance, referring to the discussion paper on funding, Provost Thomas Collins (Vice-President, Academic at The University of Western Ontario) comments: "It is a very dangerous document, which could, if enacted, destroy the university system in five years." See "Provost slams OCUA paper," in Western News, 18 August 1994, pp. 1 and 4.

⁹⁴J. McCONICA, "The Catholic University and Canadian Society," p. 51-52.

⁹⁵In many ways, the control of the institution is held in the hands of the provincial government, whatever the canonical status of the university or college. Like it or not, it seems that the provincial government does not differentiate institutional identity and autonomy from finances. In short, because the system is a public system, the provinces have turned a blind eye to confessionality. As a legal way to avoid the recognition of a separate provincially supported university, all grants flow directly to the provincial parent university and only then are they disbursed to the affiliated or federated college. This arrangement, however, may not last, given the troubled provincial and federal economies and coupled with the relatively successful advent of private colleges and universities in recent years.

D. Academic Appointments

With respect to the appointments made to a faculty or faculties within the federated colleges and universities, the norms listed in the federation agreement are followed. However, each agreement is unique. Accordingly, while some confessional colleges are not granted the right to make appointments, others are granted it. The advantages are clear. Consonant with the academic, spiritual, and philosophical mission of the college, the right to make appointments enables the officers of the federated college to attract and hire qualified candidates. Moreover, this right grants the college a further right to oppose, with due regard for provincial laws and human rights legislation, the initial hiring of faculty members who are unwilling to maintain their contractual obligations with respect to the Catholic identity of the college.

E. Governing Bodies

Briefly, the governance structure of most Canadian universities is a two-tiered system consisting of a senate and a board of governors. This bicameral system of university government was influenced by the provincial University of Toronto Act of 1906 which developed this structure as a means to guard against government interference. Generally, the senate, comprised of faculty members, is responsible for the academic affairs of the institution, including policy and programme development. The board of governors, comprised mainly of citizens, exercises exclusive control over financial policy and holds formal authority in all other matters. At several universities and colleges the two-tier system has remained in effect; however, the composition has changed dramatically. While the members of the faculty still hold the majority of seats of the various faculty councils and senate, a shift in the membership to a broader constituency

is noticeable. Likewise, the boards of governors at many institutions have also expanded their latitude.⁹⁶

In keeping to the general shema, Assumption University operates directly under two major governing and administrative bodies: the Board of Governors and the Board of Regents of Assumption University. A third body is comprised of the appointees of Assumption University to the Board of Governors of the University of Windsor. In conformity to Assumption University's Charter, the board of governors is composed of the local superior of the Basilian Fathers, two local Basilian councillors, the treasurer of the local Basilian community (O'Connor House), the president of Assumption University (presently the office of president and that of local superior reside in the same person), three elected Basilians from the local community, and others, lay or religious (unspecified number) from various community and university constituencies. To date, the last possibility has not been realized.

On the other hand, the Board of Regents is comprised of ten lay persons, most of whom are business persons or attorneys. In all, these administrative and governing bodies, especially the board of governors whose seats are all occupied by Basilian Fathers, garner and maintain, for various reasons, much control over the institution. Suffice to say, a critique of the make-up of these institutional bodies and their relationship to one another and to the parent university is presented in Chapter Four.

⁹⁶Laval, University of Toronto, and Athabasca University have incorporated the powers of board of governors and senate. See P. ANISEP and J. LENNARDS, "University," in *The Canadian Encyclopedia*, Vol. III, Edmonton, Hurtzig Publishers, 1985, p. 2219.

F. The Role of Ecclesiastical Authorities

The challenge facing federated colleges, operating within a public university system, is to remain institutionally Catholic.⁹⁷ In this light, the competent ecclesiastical authority plays an important pastoral role that claims an authority both in ministry⁹⁸ and in regard to issues concerning the Catholic identity of the college or universities.⁹⁹ In some cases this role is also an administrative one, provided that the particular charter or statutes accord such a function to the Church authority.

On its part, the Canadian Conference of Catholic Bishops acknowledges its right and duty to promote Catholic universities and colleges and to foster their excellence through pastoral leadership and public signs of support. Unfortunately, the provincial civil law precludes the possibility of establishing general norms concerning the rights and duties of ecclesiastical authorities other than those which are pastoral in orientation. Accordingly, legal responsibility for maintaining and enhancing the Catholic character and identity of postsecondary educational institutions, falls to a great extent on the university or college authorities. Indeed, this is the situation at Assumption University in which the

⁹⁷*Ex corde Ecclesiae*, paragraph 14, p. 267: "In the light of these four characteristics, it is evident that besides the teaching, research, and services common to all universities, a Catholic university, by institutional commitment, brings to its task the inspiration and light of the Christian message. In a Catholic university, therefore, Catholic ideals, attitudes, and principles penetrate and inform university activities in accordance with the proper nature and autonomy of these activities. In a word, being both a university and Catholic, it must be both a community of scholars representing various branches of human knowledge and an academic institution in which Catholicism is vitally present and operative."

⁹⁸*CIC 1983*, c. 813: "Episcopus dioecesanus impensam habeat curam partoralem studentium, etiam per paroeciae erectionem, vel saltem per sacerdotes ad hoc stabiliter deputatos, et provideat ut apud universitates, etiam non catholicas, centra habeantur universitaria catholica, quae iuventuti adiutorio sint, praesertim."

⁹⁹*CIC 1983*, c. 810, §2: "Episcoporum conferentiae et Episcopi dioecesani, quorum interest, officium habent et ius invigilandi, ut in iisdem universitatibus principia doctrinae catholicae fideliter serventur."

Basilian Fathers primarily direct the operation of the University through the Board of Governors.¹⁰⁰

To that end, in order to fulfill his pastoral role and to ensure that the institution preserves its Catholic identity, the diocesan bishop or other competent ecclesiastical authority encourages the foundation of various bodies, in consultation and cooperation with the appropriate university and college authorities, responsible for ongoing dialogue and collaboration. With the establishment, in 1985, of the Association of Catholic Colleges and Universities in Canada (ACCUC), the officers of the Catholic universities and colleges in Canada secured one such appropriate and manageable forum.

Conclusion

In all, Assumption University participates within a provincially-funded educational system as a federated, civilly-incorporated Catholic university. Funded in large part by the province, Assumption acts as a trustee of Catholic education on behalf of the common good. Notwithstanding its public support, Assumption University stands as a professedly Catholic institution of higher learning wherein the laity have beneficial access to a rich academic and spiritual heritage. For this reason alone, Catholic universities and colleges make a distinctive contribution to the good of the state.

Federation serves as one of the major legal principles whereby intricate relationships between a denominational college and a secular university are established and maintained. The federative model, adopted by other Canadian universities in the

¹⁰⁰J. Sherlock, the Bishop of the Diocese of London, is the Chancellor of Assumption University.

course of their development, really represents a Canadian solution to the problem of reconciling religiosity and secularism, diversity and economic pragmatism. Understandably, regional differences prevail. In the same way, subordinating itself to a parent university which forms the operational and academic policy-making body, Assumption University participates in a multifarious set of highly complex organizational and legal relationships within a diffuse cultural milieu.

Indeed, any discussion of the canonical and civil situation at Assumption University not only involves the issue of federation but also extends into the claims of two legal systems, the canonical and the Canadian common law, as well as the different legal provisions of two Codes of canon law (1917 and 1983) together with the numerous federal, provincial, and human rights regulations and laws. This chapter attempted to outline both systems separately. By providing some alternative solutions to a problem played out in the canonical and civil investigation, Chapter Four will illustrate their interaction.

With respect to the canon law, before consideration can be given to altering an institute's canonical status, its present status must be carefully determined. Further, deciding whether to change an institute's canonical status presupposes not only an accurate understanding of the available alternatives together with an awareness of the disadvantages and advantages of each juridic form, but also a clear understanding of the precise status whose alteration is being considered. To that end, the inquiry into the present canonical status began by ascertaining the status of the institution at the time of founding and then tracing that original status to the present day.

The results of this short analysis concluded that Assumption University has not chosen, thus far, any of the principal options listed in the new Code but has remained an institution without juridic personality, founded as part of the apostolate of the Basilian Fathers. Herein, however, lies the crux of the problem. Because there is no canonical

juridic personality to match its civil corporate personality, for a number of reasons, this situation puts the university at great risk within the civil and ecclesiastical fora. To that end, Chapter Four examines this problem and recommends appropriate solutions in the light of the canon and civil law.

CHAPTER FOUR

Altering Canonical Status

As mentioned at the outset of the dissertation, among other considerations, deciding upon a change in canonical status for an incorporated apostolate demands a great deal of knowledge about the civil status of the institution, its corporate structure, the history of its foundation, and most important, its present canonical status. Previous chapters examined most of these areas, including an extensive canonical investigation into Assumption's present status at canon law. By looking beyond the acts of incorporation and into the titles to deeds to property, the examination uncovered that Assumption University has remained an apostolic work of the Basilian Fathers who retain the titles to the properties. Before contemplating any alteration to that status, however, further information about the institution seems both necessary and beneficial. For instance, assessing the liability risks to the religious body which holds titles to properties may provide sound reasons for corporate re-structuring. Moreover, accurate knowledge of the advantages and disadvantages of the principal options for canonical status also proves helpful. And finally, noting the interaction of both legal systems which are operative at the educational institution serves to clarify the present legal arrangement.

Therefore, in seven parts, this final chapter continues to collect the data that are needed in order to complete the legal profile of Assumption University. This information inevitably leads to an informed judgment regarding the feasibility of an alteration to the canonical status. Therefore, Part I presents a general overview of the charitable corporation in the light of the civil law, highlighting the various common and statute laws that direct its operation. Part II focuses more closely on statutory liabilities and attempts to illustrate how this body of law touches all corporations, whether non-profit or for-profit. While focusing on the present corporate arrangement of Assumption University, particular attention is paid to the sets of circumstances in which vicarious and third-party liability may attach. Parts III and IV highlight two other bodies of law which influence the operation of charitable corporations, namely fiduciary law and the Ontario Human Rights Legislation. Under fiduciary law, specific obligations regarding the operational management rest with the board members of charitable corporations while the *Ontario Human Rights Legislation* imposes strict liabilities, especially in the areas of discrimination and harassment. Violations of either types of law carry onerous consequences, mostly in the form of large compensatory court awards. Part V completes the discussion on liabilities by looking at the norms of the 1983 Code that attach liability to injurious juridic and non-juridic acts posited by either physical or juridic persons or both. In preparation for Part VII which completes the method started in Chapter I and suggests a feasible alteration to the canonical status of Assumption University and a re-organization of the present legal arrangement, Part VI considers ways of avoiding such liabilities at canon and civil law, investigates the disadvantages and advantages of each of the principal options for canonical status, and introduces the declaration of intent.

I. The Charitable Organization

To encourage the continuance of the many and varied educational works and activities taking place throughout Canada, the amended *Income Tax Act* of 1985 grants to qualified institutions and associations the legal status of a charity.¹ Currently, Revenue Canada lists between 70,000 and 75,000 registered charities in Canada in a number of legal configurations.² Among those registered are the many Catholic universities and colleges in Ontario which have taken advantage of this legislation and now exist as charitable civil corporations as opposed to charitable trusts or unincorporated associations.

According to the legislation, no clause directs that a charity exist as an incorporated body. However, Section 62 of the Act states that all of the resources of the organization must be devoted to its activities in pursuit of charitable purposes.³ On this point, delineated within the Act are four specific activities which serve, severally or jointly, to describe an eleemosynary organization at common law. In like manner, Ontario statute law has adopted a similar definition of a charity in the form of the *Charities Accounting Act*. Briefly, the qualifying organization must fall into at least one

¹The major reason for seeking charitable status is the tax exemption privileges for the organization together with the right to issue receipts for tax relief to donors. The Charities Division of Revenue Canada grants the charitable status to qualifying applicants following the approval of the organization's by-laws and constitution by the Office of the Public Trustee in accordance with Section 149 of the *Income Tax Act*.

²See J. BURKE-ROBERTSON and A. DRACHE, *Non-Share Capital Corporations*, Toronto, Thompson Canada Limited, 1992, p. 1.

³For a more complete definition, especially what concerns income and tax implications for charities, see, *Income Tax Act*, R.S.C. 1985 (5th Supp) c. 1, Section 62 (1)(2). In this regard, *The Assumption College Act 1953*, Chapter III Article 8 at page 3 reads: "The property, and the income, revenues, issues and profits of all property of the College shall be applied solely to achieving the objects and purposes of the College."

of the four classifications. They include: (1) the relief of poverty, (2) the advancement of religion, (3) the advancement of education, (4) any other purpose of a charitable nature and beneficial to the community as a whole.⁴ Clearly then, a Catholic university or college is accepted as a charity in Ontario under both the common law as well the statute law by virtue of being organized for the purpose of the advancement of education and religion.⁵

A. Alternative Forms of Existence for Charitable Organizations

Presently, the legal status of a charitable organization varies according to one of three forms: (1) a charitable trust, (2) an unincorporated association, (3) a corporation. Choosing a proper structure for a charity is crucial to its operational effectiveness. Hence, the members of the organization must weigh several components in order to make the best possible choice. Accordingly, Burke-Robertson enumerates a short list of considerations, including: (1) whether the proposed objectives will be of short or long duration; (2) whether the organization will be national or local in scope; (3) whether it

⁴The common law meaning of charitable purposes has been developed through British statute and case law. In fact, the Canadian courts adopted the above four broad classifications of charitable purposes from a British court ruling in the case of Commissioners for Special Purposes Income Tax Act v. Pemsel (1891), A.C. 531 at p. 583. Recently, the statute law of Ontario followed suit and adopted a similar definition and description for a charity as found in the Income Tax Act of 1985 and located in the Charities Accounting Act, R.S.O., 1990, c. C10. See H. BLACK, Black's Law Dictionary, p. 160: "Term [charitable] as used for purpose of tax exemption has as its common element the accomplishment of objectives which are beneficial to community or area, and usually recognized charitable purposes, not otherwise limited by statute, are generally classified as: relief of poverty; advancement of education; advancement of religion; protection of health; governmental or municipal purposes; and other varied purposes the accomplishment of which is beneficial to community."

⁵For Assumption University, the objects and purposes are detailed in The Assumption College Act 1953, Chapter III, Article 3, at page 2: "The College shall have university powers, including: (a) The power to establish and maintain such faculties, schools, institutes, departments, chairs and courses of instruction as may be determined by the Board; (b) The power to confer university degrees and honorary degrees and awards in any and all branches of learning."

will be called upon to enter into contracts or to hold real property; (4) whether it will incur debts for which the contracting members or directors may be personally liable; (5) whether the tax implications for the organization are agreeable; and (6) whether registration as a charity is desired.⁶

It is true that the canon law legislates a number of principal options for canonical status. Similarly, the civil law grants to charities a variety of forms for legal stature, depending upon its purpose and scope of work. Briefly, the use of a charitable trust under the *Income Tax Act* is frequently restricted to charities that involve a circumscribed number of people who conduct their affairs outside of the public. Further, to avoid expensive and lengthy government filing requirements associated with a charitable corporation, the charitable trust serves as a more expeditious way to arrange the charitable organization. As a general rule, a charitable trust is inappropriate if the charity is going to be carrying on activities which may expose its members to potential third-party liability.⁷

An unincorporated association, though not a legal entity at law, exists as a compilation of members who have voluntarily decided to associate for a very specific purpose. Quite often, this group exists for only a relatively short duration.⁸ Within the canonical forum, an unincorporated association resembles, more or less, the establishment and status of a private association *de facto*. Under present federal law, with the exception

⁶See J. BURKE-ROBERTSON, Non-Share Capital Corporations, p. 3. For information regarding the tax implications for charities and non-profit organizations under federal tax legislation, see A. DRACHE, Canadian Taxation of Charities and Donations, Toronto, Richard De Boo Limited, 1989, 110p.

⁷See T. CARTER, To Be Or Not To Be: Incorporation Issues for Charities with an Emphasis on Autonomous Churches, (hereafter= To Be Or Not To Be), Chapter A, (ms), Toronto, 10 November 1994, p. 3; see also J. BURKE-ROBERTSON, Non-Share Capital Corporations, pp. 3-6.

⁸See J. BURKE-ROBERTSON, Non-Share Capital Corporations, pp. 5-6.

of Churches, unincorporated associations cannot obtain charitable status with Revenue Canada.⁹

At any rate, the legal entity of most interest to this dissertation is the third form -- the corporation. H. Black supplies a general definition, stating that a corporation is:

an artificial person or legal entity created by or under the authority of the laws of a state. Such an entity subsists as a body politic under a special denomination, which is regarded in law as having a personality and existence distinct from that of its several members, and which is, by the same authority, vested with the capacity of continuous succession, irrespective of changes in its membership, either in perpetuity or for a limited term of years, and of acting as a unit or single individual in matters relating to the common purpose of the association, within the scope of the powers and authorities conferred upon such bodies by law.¹⁰

Futhermore, to sue and to be sued, to act as a distinct entity within the law apart from the individuals who comprise it, and to survive the death of its investors or members stand as the chief characteristics enjoined by law upon any corporate personality.¹¹ In short, a corporation which is created under the authority of law becomes a separate legal entity endowed with certain rights and obligations.

Within the sphere of the Canadian corporate world exist three distinct forms of a corporation: (1) the share capital profit making corporation;¹² (2) the not-for-profit,

⁹See T. CARTER, To Be Or Not To Be, p. 3.

¹⁰Cf. H. BLACK, Black's Law Dictionary, p. 237.

¹¹Cf. H. BLACK, Black's Law Dictionary, p. 237.

¹²Examples of share capital profit making corporations include Esso, General Foods, and other multi-nationals. In Canada, these corporations are legislated by the Canada Business Corporations Act. See Canada Business Corporations Act and Regulations 1994, 13th edition, Scarborough, ON, Carswell Publishing, 1993, v-xv, 199p. In Ontario, the statutory law further regulates profit making corporations under the Ontario Business Corporations Act, Business Names Act, and Regulations. See Ontario Business Corporations Act, Business Names Act, and Regulations, 16th edition, Scarborough, ON, Carswell Publishing, 1992, v-vii, 211p.

non-share capital corporation that does not have charitable objects;¹³ (3) the not-for-profit, non-share capital corporation with charitable status granted by Revenue Canada under authority of the *Income Tax Act*. To that end, this third form of civil incorporation, "the not-for-profit, non-share capital corporation with charitable status," properly describes Assumption University at both common and statute law. Likewise, the Corporation of the Basilian Fathers of Sandwich also has a designation similar to that of Assumption University.

B. The Mechanics of Incorporation of Charitable Organizations

The issue of whether or not a charitable organization ought to incorporate remains one of the most fundamental decisions that a board of a charity needs to discuss. It is true that the consequences of deciding to incorporate or not will have significant ramifications upon the future operations of the charity.¹⁴ Still, that the Catholic Church, in fact, makes use of the legal device of incorporation for those institutions already subject to the canon law of the Church adds a degree of complexity to the decision-making process. The difficulty lies in the way in which the two separate legal systems, the canonical and the civil, must operate to ensure that, whatever corporate structure is adopted, provisions are made for proper canonical administration.¹⁵ Here, the

¹³A "not-for-profit" or "non-profit" corporation are terms often used interchangeably to describe a corporation whose profits are not passed on to the members. A more narrow, legal definition is found in the *Income Tax Act*, R.S.C. 1952, c. 148, as amended.

Examples of not-for-profit, non-share capital corporations include various social clubs, golf clubs, museums, trade associations, or a service club existing under the *Canada Corporations Act*, R.S.C., 1970, c. C-32 and in Ontario under the *Corporations Act*, R.S.O., 1990, c. C-38.

¹⁴See T. CARTER, *To Be Or Not To Be*, p. 1.

¹⁵See J. DOYLE, *Civil Incorporation of Ecclesiastical Institutions: A Canonical Perspective*, p. 210.

overriding principle is that incorporation is to be used as a legal instrument to safeguard, among other things, the ownership of ecclesiastical goods "through civilly valid means."¹⁶

In Ontario, charities can incorporate provincially either by applying for the issuance of Letters Patent under the *Corporations Act* or by receiving authorization from the Legislature of the Province of Ontario. Since special legislation is often very time-consuming and expensive, it is normally only pursued if there is a mitigating reason, such as the obtaining of a degree granting status for a college or other educational institution. In fact, Assumption University followed this route.¹⁷ Within Canada, a charity can incorporate federally either by the issuance of Letters Patent under the *Canada Corporations Act*, or, though rarely done, by special legislation through the Parliament of Canada. Again, a decision whether to incorporate federally or provincially is based upon the objectives of the charity and the scope of its work.¹⁸

¹⁶CRC 1983, c. 1284, §2, 2': "curare ut proprietates bonorum ecclesiasticorum modis civiliter validis in tuto ponatur."

¹⁷A special act of Parliament was the most commonly used method of incorporation up to 1953. Assumption College was incorporated on 16 August 1858, An Act to Incorporate Assumption College, Sandwich, in the Diocese of London, Chapter 136 of the Statutes of the Province of Canada. In 1953, the Act of Incorporation was varied by an Act entitled The Assumption College Act 1953, Chapter III of the Statutes of Ontario 1953.

¹⁸For a thorough treatment of the mechanics of incorporation, the pros and cons of provincial as opposed to federal corporation, and the Ontario corporate statutory and Canadian common laws, see D. BOURGEOIS, The Law of Charitable and Non-Profit Organizations, Toronto, Butterworths Canada Ltd., 1990, xviii, 256p; M. OGILVIE, "Ecclesiastical Law and the Civil Courts," in Canadian Bar Review, 72(1993), pp. 238-245; M. OGILVIE, "The Legal Status of Ecclesiastical Corporations," in Canadian Business Law Journal, 74(1989), pp. 89-97; A. OOSTERHOFF, "Religious Institutions and the Law in Ontario, An Historical Study of the Law Enabling Religious Organizations to Hold Land," in Ottawa Law Review, 13(1981), pp. 441-455. The Canadian Bar Association has also published several reference materials. Non-Share Capital Corporation, A Guide to Securing Letters Patent, Toronto, 19 April 1991, 25p.; Charities and the Tax Man and More, Toronto, 16 October 1990.

The Law Society of Upper Canada published an information booklet entitled, Non-Profit Organizations and Charities: Issues for the 90's, Toronto, 6 May 1993, 27p.

C. Advantages and Disadvantages of Not-For-Profit Incorporation

As mentioned earlier, a variety of Church groups, parishes, dioceses, and other ecclesiastical entities makes use of civil not-for-profit incorporation, including religious communities involved in education and health care. Indeed, the advantages of incorporation are clear and in most situations outweigh the disadvantages. First, a corporation of this nature receives perpetual existence and therefore is not dependent upon individuals as either trustees or members in order to maintain its legal status. As a result, appointing successor trustees to maintain ownership of lands and thereby avoid a court application for directions under the provisions of the *Religious Organization Lands Act* presents a financial advantage.¹⁹ In simpler terms, the entity sustains continued viability. Second, maintaining and defending legal actions in the name of the corporate entity without having to involve either trustees or members of the institution is judicially advantageous. Third, mortgaging, owning, and leasing land and all other assets in its own name without having to rely upon trustees to act on behalf of the institution provides a good operational motive for incorporation. And fourth, the prospects of limited liability protection not only for directors and officers of an incorporated institution, but under most circumstances, for the members as well affords a particular security to all. In fact, the Ontario *Corporations Act* legislates that:

a member shall not, as such, be held answerable or responsible for any act, default, obligations or liability of the corporation or for any engagement, claim, payment, loss, injury, transaction, matter or thing related to or connected with the corporation.²⁰

¹⁹See *Religious Organization Lands Act*, R.S.O., 1990, c. R23. This legislation was first proclaimed in 1828 and has survived to the present time through numerous amendments.

²⁰See Ontario *Corporations Act*, Section 122.

Admittedly, for most Church organizations this is the primary reason why such institutions seek incorporation.²¹

On the other hand, there exist five disadvantages with incorporation. First, from a financial point, incorporation is more costly than organizing an unincorporated organization. For instance, there are numerous expenses to be paid including the retainer fees for legal counsel as well as the government filing fees. Second, the Board must complete corporate filings and notices whenever changes to the directorship or in corporate office-holders occurs. Third, meticulously recording and preserving the corporate minutes of meetings for auditing purposes become burdensome. Fourth, drafting the corporate by-laws entails a costly and tedious procedure in that they must comply with both corporate law requirements while, at the same time, reflect the character and organizational structure of the institution. More often than not, before government approval is given, the by-laws are sent back numerous times to the applicant for further revisions and clarifications. In many instances, this process occurs over a rather long duration. Finally, in Canada, incorporated organizations are restricted under the *Religious Organization Lands Act* from leasing land for up to forty years.²²

Having compared the unincorporated Church associations with that of the incorporated associations, many legalists in Canada advise various constituencies involved in charitable works that incorporation is a practical option to help organizations best attain their charitable objectives.²³ In particular, one legal commentator has stated that:

many religious organizations still choose to incorporate...the advantages of limited liability, having a separate legal entity with permanent succession

²¹For a more detailed discussion of the advantages, see T.CARTER, *To Be Or Not To Be*, pp. 22-28; J. BURKE-ROBERTSON, *Non-Share Capital Corporations*, pp. 4-7.

²²See T. CARTER, *To Be Or Not To Be*, p. 29.

²³See T. CARTER, *To Be Or Not To Be*, p. 29.

and a formalized structure within which to operate, often tip the balance in favour of incorporating.²⁴

In addition to these benefits, a final one, slightly less salient, yet highly motivational, comes from the desks of the same legalists who have concluded, with a reasonable degree of experience, that one notable agency -- Revenue Canada -- prefers and looks much more favourably upon a tightly structured form of charitable organization.²⁵

All in all, given the disadvantages and advantages of non-profit incorporation either federally or provincially, the issue of whether or not to incorporate a charitable work as a non-profit corporation remains a decision left to the board of a charity. Consideration must be given to the objectives of the charity and the scope of its work. Hence, consulting sound legal practitioners who are experienced in non-profit corporate law is crucial in choosing the best structure for the organization.

Simply put, through non-profit incorporation, a charitable institution becomes a corporate citizen. While there are many advantages to this legal arrangement, like any other citizen in society, it too must act responsibly and avoid legal delinquency. To that end, Part II continues the discussion of non-profit corporations in the light of the liability risks facing such organizations.

II. Civil Liabilities

Respect for and adherence to a vast code of common and criminal laws together with quasi-judicial regulations, corporate by-laws, and various federal and provincial

²⁴Cf. J. BURKE-ROBERTSON and A. DRACHE, Non-Share Corporations, p. 8. In the United States, the advice generally given is to proceed with incorporation: "unless theological considerations or the law of the state prohibits incorporation, it is generally advisable for churches to be incorporated." See J. GAMMON and P. GRANGE, Non-Profit Alert, (ms), Washington DC, November 1991, p. 1.

²⁵See T. CARTER, To Be Or Not To Be, p. 4.

non-profit business acts ensure the protection of its resources and its autonomy so that its mission may be constantly and effectively realized. As with any corporation, however, negotiating a safe route through a legal labyrinth that exists within a ever-growing confrontational and litigious society poses an immediate problem for the charitable institution. For example, in Ontario alone, well-over 100 provincial statutes impose specific statutory liabilities on directors of eleemosynary corporations. Indeed, compliance with all the regulations makes corporate life quite intricate. The key is vigilance. Meanwhile, mounting Church-related court cases filed against the many charitable institutions continue to pressure the religious institutes into developing strict policies, procedures, and corporate-management techniques that help to minimize the risk of exposure.²⁶ On this matter, one Canadian legalist sceptically reports that:

It is becoming increasingly complex to advise a director of all potential statutory liability and even if safeguards and controls are adopted, such safeguards and controls may not be sufficient or effective to establish the appropriate due diligence and avoid liability.²⁷

Accordingly, one issue of both current and pragmatic interest for directors of non-share capital corporations, especially those involved in education and health-care, lies in the area of liability, whether individual, vicarious, or third-party. For many institutions, the question baldly reads: "How can Churches protect their resources, their autonomy, and their mission in the face of increasing judicial scrutiny?"²⁸

²⁶See A. WOLFE, Specific Statutory Liabilities of Directors: Corporate Finance Liabilities, Wages, Workplace Liabilities, Taxes and Other Source Deduction Liabilities and Environment and Public Welfare Liabilities, (ms), Toronto, May 1994, 135p.; see also I. OUTERBRIDGE, Ecclesiastical Minefields, Toronto, Or Emet Publishing, 1994, p. 3: "Increasingly confrontation within the organized church has resulted in a recourse to the civil courts. Those confrontations, in the context of employment law and wrongful dismissal, have attracted the most attention although there have as well been disputes over property."

²⁷Cf. A. WOLFE, "Liability of Directors and Officers of Non-Share Corporations," p. 28.

²⁸Debating whether or not it is desirable and worthwhile for the faithful to use civil courts to resolve Church disputes is not what is central to this dissertation. Cf. W. BASSETT, "Christian Rights in Civil Litigation: Translating Religion into Justiciable Categories," in The Jurist, 46

To answer this question, in the light of the present corporate structure of its given institution, a religious body must first undertake an analysis and assessment of the liability risks to which it may expose itself while engaging in the particular institutional work. The results will generate sound reasons from both a canonical and civil perspective for considering new methods to diminish litigation. For instance, from a civil law standpoint, in an effort to avoid third-party liability, submitting evidence in the form of policy and procedure manuals that direct employees to attend sponsored seminars on sexual harassment, abuse, or related issues lessens the breach of an institution's duty to provide adequate training or education. In some cases, this breach may also transfer to the religious body. On the other hand, from a canonical perspective, the religious body may seek to alter the canonical status of the institution to identify more precisely its work as a *separate* juridical entity not only for the purpose of mission but also for the protection of its own resources. An even greater urgency to reduce these risks and to

(1986), p. 230. Rather, finding appropriate ways both in civil and canon law to reduce liabilities and thereby avoid canonical and civil court action is the thrust of this section. However, as an aside, this A. believes that when principles of natural justice and procedural fairness have been violated within the Church's judicial system, then civil recourse may be necessary. C. Burke of the Roman Rota addresses this issue in a decree dated 15 November 1990 and reprinted in *Studia canonica* in which he quotes an earlier decree of STANKIEWICZ, 20 January 1983, no. 17, in *Monitor ecclesiasticus*, 109 (1984), p.256: "The Church has always maintained that ecclesiastical courts are not subject to their civil counterparts...However, apart from the fact that the party having recourse to the civil courts is usually unaware of the canonical dispositions on this matter, it must be remembered that theirs might be an understandable, if not completely excusable, response to an obvious, and deplorable violation of their ecclesial and human rights perpetrated by personnel of a Church tribunal." Burke continues with his own thoughts: "If this were to occur, who could then say that a party is not justified in having recourse to a civil court, to seek redress against a canonical decision; and who could be surprised if the civil court upholds their claim? The conditions of modern society - both civil and ecclesial - make the possibility of this happening more likely than before." Cf. C. BURKE, in *Studia canonica*, 25 (1990), pp. 512-513. The present practice of the civil courts is "to intervene in matters involving property, civil rights, employment and procedural matters, the courts will not become enmeshed in matters involving purely questions of church doctrine." Further, The Supreme Court of Canada in the 1940 decision of Ukrainian Greek Orthodox Church et al. v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary's the Protectess et al. recognized that the law has stated over decades that unless property or denial of procedure is affected, the civil courts will not allow the process to be used for enforcement of purely ecclesiastical decrees or orders. For both quotes, cf. T. CARTER, "A Legal Analysis of Church Discipline in Canada," in Canadian Council of Christian Charities Bulletin, no. 2 (25 May 1992), pp. 120-124.

effect, if feasible and advisable, an appropriate change in the operational and legal status of the corporation at civil and canon law resides in particular situations in which a religious body or diocese has retained titles to real estate used by a separately incorporated educational or health-care facility. As shown in the analysis of Chapters Two and Three, Assumption University falls into this category.

At any rate, delving into a vast body of substantive and case law in order to facilitate a lengthy legal exchange on the ramifications of particular civil laws on not-for-profit corporations is well-beyond the scope of this dissertation. Hence, in an endeavour to be practical and pertinent, the discussion concentrates on specific areas of tort liability, fiduciary law, and human rights legislation with respect to Assumption. These three areas alone constitute important sets of circumstances that carry the potential for vicarious and third-party liability attachment, leading inevitably to the heart of the matter - victim compensation and the "deep pocket" doctrine.

To end, in order to begin formulating an answer to the question, in three sections this portion of the dissertation will provide a somewhat detailed assessment of the different causes of action that represent the types of lawsuits a religious body or diocese is most likely to experience while sponsoring educational facilities. They include: (1) occupier's liability; (2) vicarious liability; and (3) negligence. In all three instances, liability involving a third-party may also attach. In the second section, examining the fiduciary duties imposed on not-for-profit corporations becomes the locus of attention with further consideration given to third-party liability. Finally, with the judiciary's approval of the *Ontario Human Rights Code*, another area of liability was created. Thereupon, this legislation is briefly addressed in the last section.

An overriding consideration in this section is third-party liability which potentiates simultaneous attachment to the liabilities mentioned above, including fiduciary duties and human rights legislation. To highlight the necessity for the transference of

titles to property and the possible recommendation of separate juridic status of charitable institutions to match its corporate status at civil law, this part of the dissertation both begins and ends with a discussion about third-party liability in concert with the "deep pocket" doctrine. To effect a further reduction in the exposure to liabilities and thus to protect the monetary resources of the third-party, namely, the Congregation of Priests of Saint Basil become the primary objective.

A. Third-Party Liability

Where appropriate, when a person is found either criminally or civilly liable or both for wrongful actions against another, the courts have not hesitated to hold a third-party liable for the injury. The case law indicates that a third party may include a non-abusive parent²⁹, a landlord³⁰, a school board³¹, a hospital, police officials³², child welfare agencies,³³ or a religious body.³⁴ Granted, while the above mentioned cases refer to instances of sexual abuse, other injurious acts, such as, sexual harassment, sexual exploitation, pastoral sexual misconduct, and sexual assault are also judged as serious issues to which third party liability is potentially joined. More precisely, litigation

²⁹J.(L.A.) v. J.(H.) (1993), 13 O.R. (3d) 306 (Gen. Div.)

³⁰Q. v. Minto Management Ltd. (1986), 57 O.R. (2d) 781; 34 D.L.R. (4th) 767 (Ont.C.A.)

³¹Lyth v. Daqq (1988), 46 C.C.L.T. 25 (B.C.S.C.); Aleck v. Canada (1991) B.C.J. No. 3058 (S.C.) (QL)

³²Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1990), 74 O.R. (2d) 225; 72 D.L.R. (4th) 580 (Gen. Div.) leave to appeal denied (1991) 1 O.R. (3d) 416 (C.A)

³³H.H. v. K.K. (1987) 39 C.C.L.T. 81; 35 D.L.R. (4th) 222 (B.C.S.C.), also cited as Madalena v. Kunn

³⁴H.T. v. Poirier (1994) O.J. No. 1046 (Gen. Div.) (QL)

involving the liability of third parties arises more frequently in occurrences pertaining to human rights violations or tort liability.³⁵

Generally, within the law, three usual sets of circumstances emerge to which liability of a third party is attached:

1. where the injury occurs on premises owned or controlled by the third party, for example, inside a school, place of worship, or hospital. This is commonly referred to as occupier's liability.
2. where the direct perpetrator was acting under the authority of or within the scope of his employment with the third party. This is referred to as vicarious liability and includes a more recent legal development in the United States known as ostensible agency.³⁶
3. through the violation of a common law duty of care owed directly by the third party to the plaintiff. This is commonly referred to as negligence.³⁷

In any event, whatever the perpetration, plaintiffs are generally motivated to name a third-party for two reasons. First, many simply seek damages from the deepest pocket. Second, many believe that the respective third party might be instrumental in providing a healing alternative for them, while at the same time, ensuring that similar injurious actions never occur again.

³⁵Cf. J. HAMILTON, Sexual Abuse, (ms), Toronto, 10 November 1994, p. 4-6: "Because of the abuse of power and/or the abuse of trust, a perpetrator and a third party could be held to a higher standard of care than what is normally evident in personal injury cases. A third party may be required to screen, supervise and educate persons who may be placed in circumstances where temptation to sexually exploit a vulnerable party may occur."

³⁶See also N. JEDELOH, "The Ostensible Agency Doctrine: More to the Point than Darling," in Hospital Law, 20(1987), pp. 49-54. Ostensible agency is "an implied or presumptive agency, which exists where one, either intentionally or from want of ordinary care, induces another to believe that a third person is his agent, though he never in fact employed him. It is strictly speaking, no agency at all, but is in reality based entirely upon estoppel." Cf. H. BLACK, Black's Law Dictionary, p. 760. In Canada, a court hearing a liability case makes use of an "ostensible authority test" which is one of four tests applied under common law to determine the scope of employment of a worker.

³⁷Cf. J. HAMILTON, Sexual Abuse, p. 6.

B. Negligence

In its most broad definition, Black defines negligence as:

the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do....The term refers to that legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit, whether it be slight, ordinary, or great. It is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like.³⁸

Founded on reasonable conduct, the law of negligence places a legal responsibility upon every person to exercise due care in conduct toward others, especially during times when injury may result.³⁹ Even in circumstances where a person may be acting with good intentions or incentives, the law does not relieve the person of the liability for the foreseeable consequences of the person's actions. With reference to religious bodies and issues related to sexual misconduct, Hamilton contends that given the nature of the vocation of its members, the courts will hold the clergy to a fairly high standard. So, they must exercise extreme caution and take reasonable steps to minimize or eliminate sexual offenses.

Determining whether or not a duty of care existed in a particular case, the court generally asks two questions:

³⁸Cf. H. BLACK, Black's Law Dictionary, p. 716.

³⁹See H. BLACK, Black's Law Dictionary, p. 977: Standard of care or duty refers to the amount of care or level of care that a reasonable person would use in similar circumstances to ensure that no harm is caused to another person. See H. BLACK, Black's Law Dictionary, p. 349: "Duty of care is an obligation imposed by law on an individual or institution to comport to a particular standard of care toward neighbours." See H. BLACK, Black's Law Dictionary, p. 720: "In law, neighbours are defined as persons that are so closely and directly affected by any act that I ought reasonably to have them in contemplation, as being so affected when I am directing my mind to the acts or omissions called into question."

(1) Is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness in its part might cause damage to that person and if so, (2) are there any considerations which ought to negate or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?⁴⁰

In an action sounding in negligence, while the focus is on the duty of the defendant, the burden of proof falls to the plaintiff who must prove four specific elements, namely, (1) that a duty of care is owed; (2) that the defendant breached that duty of care; (3) that the breach resulted in damage to the plaintiff; and (4) that the damage was reasonably foreseeable.⁴¹

Currently, the precise claims in negligence upon which these cases are presented to the courts are based on one or more of the following allegations:

(a) failure to screen properly potential employees as part of the hiring process; (b) failure to supervise and monitor employees (it is generally argued that there is a higher standard for employees in a position of trust or power such as, the clergy); (c) failure to respond to information or allegations that an employee is committing sexual offenses; (d) failure to warn potential victims; (e) failure to train or educate staff and others involved with the institution about appropriate and inappropriate behaviour; (f) failure to have a system in place which supports disclosure and responds effectively.⁴²

That is, the courts will hold liable any person or body, even a third party, whose conduct falls below the standard established by the law for the protection of others against unreasonable risk of harm. To determine, in ordinary negligence the standard of care, the courts look to jurisprudence, statutory law, and the common law standards of what the "reasonable person" in similar circumstances would know and do. In addition, any person of authority working within an institution, whether religious or secular, is lawfully

⁴⁰Cf. J. HAMILTON, *Sexual Abuse*, p. 12.

⁴¹See J. HAMILTON, *Sexual Abuse*, p. 14.

⁴²Cf. J. HAMILTON, *Sexual Abuse*, p. 14.

required to undertake special training and to provide educational programmes for personnel that outline their obligations before the law. Again, failure to educate constitutes a breach of duty.⁴³

C. Occupier's Liability

A good example of one area of negligence law is the liability placed upon the owners of property and buildings. The *Occupier's Liability Act* establishes a common duty of care owed to all entrants to the occupier's premises.⁴⁴ As a general principle, this duty is defined as a statutory responsibility to foresee and to ensure that all persons entering the premises are reasonably safe while on the property and in the buildings.⁴⁵ In cases heard under this Act, the guiding question for the Court is located in Section 3(1) of the Act which simply asks, "Did the Defendant take reasonable care in all the

⁴³See J. HAMILTON, *Sexual Abuse*, p. 15.

⁴⁴Unlike the English Occupier's Liability Act, the Canadian Occupier's Liability Act offers a definition of occupier based on the decision of *Wheaton v. Lacos (E) & Co.* 1966 Ac 552 at page 578 (H.L.): "Wherever a person has a sufficient degree of control over premises that he ought to realize that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an 'occupier' and the person lawfully there is his visitor: and the occupier is under a duty to his visitor to use reasonable care." J. Di CASTRI, *Occupier's Liability*, Toronto, ON, Carswell Publishing, 1980, pp. 33-67.

⁴⁵See *Szczepaniak v. Roman Catholic Episcopal Corporation of Sault Ste. Marie* (1992) O.J. No. 2632 (Ontario Court of Justice - Gen. Div.). In this case a plaintiff alleged that he suffered injury because of an icy patch concealed by a covering of snow left untreated by sand or salt in a church parking lot. He argued that the church's failure to sand or salt the icy patch constituted a breach of the standard of care required by the Occupier's Liability Act. The jury awarded damages. However, Justice Stach's charge to the jury is noteworthy: "In this case a Church Corporation is involved as defendant. This case must nevertheless be considered and decided by you as an action between persons of equal standing in the community. Of equal worth, holding similar stations in life...As a Church Corporation you must not extend to it any particular favour...All persons, individuals, corporations...stand equal before the law and are to be dealt with as equals in a court of justice."

circumstances to ensure that persons were reasonably safe on the premises both in respect to their conditions and regarding the activities carried on therein?"⁴⁶

Further, occupier's liability does not just encompass property and buildings, it also extends to the actions of third persons who are lawfully on the premises, but about whom the occupier knows or ought to have known may constitute a danger to invitees. For example, the definitions of "occupier" and "premises" are sufficiently broad so that if a sexual assault or another form of sexual abuse occurs on the premises of a religious institution, the religious body could be liable under tort law.⁴⁷ In all, the occupier has a real duty to discover or ascertain by reasonable inspection the existence of a danger, be it a person or thing, and to take proactive measures against these potential hazards.⁴⁸ Undoubtedly, this Act issues a special caution to religious institutions which sponsor summer camps, senior citizen homes, half-way houses, and shelters for the needy.⁴⁹ Here, the key elements are duty and standard of care.

⁴⁶See Occupier's Liability Act, R.S.O. 1990, c. O.2, section 3(1).

⁴⁷See Allison v. Rank City Wall Canada Limited (1984), 45 O.J. (2d) 141 in which a tenant was attacked in an apartment building parking lot. In its ruling the court applied section 3(1) of the Act to rule in favour of the plaintiff. Presently, all cases heard under the Occupier's Liability Act are answered according to this section.

⁴⁸For example, a dangerous person on the premises can qualify as making the premises unsafe for the purpose of determining occupier's liability. See McGinty v. Cook, (1989) 68 O.R. (2d) 650 in which a conservation authority officer was found liable for injuries caused to a camper by others on the authority's lands. See J. HAMILTON, Sexual Abuse, p. 6-7. A higher duty of care is imposed on the occupier when children and other members of vulnerable groups are on the premises. See also S. VELLA, "Sexual Abuse: The Civil Remedy," (ms), The Law Society of Upper Canada Seminar, Toronto, 1993.

⁴⁹See B. THOMAS and R. LINDEN, "Potential Areas of Liability for Charities and Religious Institutions," (ms), The Law Society of Upper Canada Seminar, Toronto, 10 November 1994, p. K, 1-5. In this manuscript, Thomas notes specifically that a religious institute which has voluntarily undertaken to care for needy persons cannot suddenly discontinue those essential services. In fact, the institute has an obligation under law to continue providing these services until those who have come for help are capable of caring for themselves. He claims that in exceptional circumstances the religious institute is exposed to potential liability.

D. Vicarious Liability

Generally, one person is not held liable for the intentional torts of another.⁵⁰ Under the *Child and Family Services Act* of 1990, however, vicarious liability imposes a liability on one person for the actionable conduct of another in certain situations. Based solely on the relationship between the two persons, this principle of law holds an employer culpable for the actions of his or her employees when the conduct and injurious consequences are foreseeable within the nature and scope of the activity done in the name of an institution. Thus, the courts apply the test of *foreseeability* to ascertain culpability.

More specifically, vicarious liability, imputed negligence, or the common law doctrine of *respondeat superior*, as the Canadian courts recognize it, holds that "the master is responsible for want of care on the servant's part toward those to whom a master owes duty to use care."⁵¹ In other words, in accordance with this traditional theory of liability, a school, university, hospital, religious body, or diocese may become liable for injury to persons or property of another proximately resulting from the acts,

⁵⁰Intentional torts are those acts in which, at the time of commission, the actor desires to effect the consequences of the act. Some examples of intentional torts affecting persons are assault and battery, defamation of character, fraud, contracts,..." See M. DIPIETRO, "Canonical and Civil Liability for Lay Ministers," in Proceedings of the Forty-Sixth Annual Convention, Canon Law Society of America, Washington, DC, 1985, p. 170. For a comprehensive review of Canadian tort law, see C. WRIGHT, A. LINDEN, and L. KLAR, Canadian Tort Law, 9th ed., Butterworth, Toronto, 1990, 710p.

⁵¹Cf. H. BLACK, Black's Law Dictionary, p. 909. The two other theories which fall under the heading of vicarious liability include corporate negligence and the most recent theory, ostensible agency, which is currently applied in the majority of hospital liability cases in the United States. Ostensible agency seeks to impose liability on the hospital for the acts and omissions of someone whom it empowers to work on its premises, regardless of any technical classification as an employee or independent contractor or the hospital's ability to control his or her actions. See also N. JEDDELOH, "The Ostensible Agency Doctrine: More to the Point than Darling," p. 49-54. See also M. DIPIETRO, "Canonical and Civil Liability for Lay Ministers," p. 176-177.

omissions, or errors of an employee when such actions are committed within the course of employment or within the scope of the employer's authority.⁵²

Under Ontario law, the *Child and Family Services Act* imposes a duty upon a third party member of the clergy or administrator of a religious body to assume direct or imputed legal responsibility for any one member's actions.⁵³ For example, as part of a chaplaincy programme offered at a Catholic university or college, a priest counsels students in a variety of topics. The administrators have an obligation before the law to ensure that the priest is properly trained and supervised; otherwise they may be liable for any breach of duty. In this scenario, it is quite possible that in the event of a civil action against the priest, both vicarious liability, under the doctrine of *respondeat superior* and third party liability may hold.

In addition, third-party member of the clergy or an administrator of a religious body who has knowledge of such acts perpetrated by a colleague or a member of the clergy is required at law to report the action to the competent civil authority. Failure to disclose this information can also result in a violation of duty. Accordingly, in response to this law, several dioceses and religious institutes not only have developed policy and procedural manuals to deal with the processing of such complaints, but they have also attempted to secure a means for insulating their corporate assets and properties.

⁵²Presently, there are four primary tests under the common law for determining vicarious liability: (1) the class of act or plainly outside bounds tests; (2) the close connections or "ostensible authority" test; (3) the motive or personal benefit test; (4) the "reasonable foreseeability" or "state of knowledge" test. See J. HAMILTON, *Sexual Abuse*, p. 11. See also P. LOPEZ-GALLO, "Vicarious Liability for Bishops and Dioceses," in *Monitor Ecclesiasticus*, 119 (1994), pp. 241-268.

⁵³In the questionable case of *Hilla v. Tamay* 232 CAL.RPT.685, the California Court of Appeal ruled, after applying the doctrine of *respondeat superior*, "that the archbishop was not liable to a 16 year old who was raped by a number of priests because sexual activity between a priest and a parishioner was uncharacteristic of the church and thus such acts were not foreseeable." Interestingly enough, a prominent Canadian legalist, John Hamilton, disagreed with the opinion of the California court and suggested that, after applying four primary tests for liability under common law, a Canadian court would not have reached the same decision. See *Hilla v. Tamay* 232 CAL.RPT.685 (California appeal 1986). For Hamilton's comments, see J. HAMILTON, *Sexual Abuse*, p. 8-9.

To sum up, officers of non-profit corporations face numerous statute and liability laws. Protecting the charitable organization from a rise in the frequency of litigation becomes one of the most important responsibilities of any board of trustees. Consequently, informed and current directors coupled with well-written policy and procedural manuals are crucial in legally safeguarding the interests and monetary resources of the charitable institution. Still, other legal prescriptions and codes, viz., fiduciary duties and human rights laws place a different set of obligations before the same officers. In like manner, adhering to these particular sets of laws also requires due diligence and care.

III. Fiduciary Law and Public Charities

Fundamentally, a fiduciary duty is "an obligation to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law."⁵⁴ The Supreme Court of Canada has discussed this legislation at great length. To date, deciding cases placed before this judicial body on arguments based on fiduciary duty has not been the court's practice. Rather, the preference among the majority of the justices is to rule under the more traditional negligence or contract principles.⁵⁵ In many ways, fiduciary law has not yet come of age. Nonetheless, if it is advantageous, then a plaintiff may still enter a claim before a court under fiduciary law either concurrently or alternatively, either in contract or in negligence. Entering a claim under fiduciary law has definite procedural advantages over a

⁵⁴H. BLACK, Black's Law Dictionary, p. 432.

⁵⁵See J. HAMILTON, Sexual Abuse, p. 16.

claim in tort or breach of contract.⁵⁶ Since a fiduciary duty is the highest standard of care implied by the law, the courts have not hesitated to remedy a violation with a generous compensation.⁵⁷ Indeed, by breaching this law, onerous consequences ensue. Consequently, the number of cases litigated under fiduciary law has been increasing over the last ten years. In fact, the recent decisions of the lower courts indicate that they have not been reluctant to find a fiduciary duty where appropriate and however novel.⁵⁸

Essentially, this law acts to protect the vulnerability that results from a trusting relationship. Accordingly, at the heart of fiduciary law lie the two key components of power and discretion. As Justice Wilson makes clear: "It is the fact that the power or discretion may be used to affect the beneficiary in a damaging way that makes the imposition of fiduciary duty necessary."⁵⁹ In the cases of Norberg v. Wynrib and K.(M) v. H.(M),⁶⁰ the Supreme Court of Canada confirmed that fiduciary relationships potentially include parent-child, teacher-student, doctor-patient, and clergy-parishioner.

⁵⁶See also I. DAVIDSON, "The Equitable Remedy of Compensation," in Melbourne University Law Review, 13 (1982), pp. 98-115. See also Jacks v. Davis 12 C.C.L.T. 298 (1980); Nocton v. Lord Ashburton (1914) A.C. 932.

⁵⁷See J. HAMILTON, Sexual Abuse, p. 19: "Tort damages are designed to put the plaintiff in the same position as before the injury as far as money will afford...The liability for 'fiduciary' damages does not depend on some actual damage to the victim nor is it necessary to show unjust enrichment of the fiduciary; it is preventative in that it is designed to deter temptation. Because in tort it is rare for punitive damages to be awarded, particularly in a civil sexual abuse case that follows a criminal proceeding, there may be an incentive for a plaintiff to bring a claim for restitution as the award may be higher."

⁵⁸See J. HAMILTON, Sexual Abuse, p. 17.

⁵⁹See the minority judgments of Frame v. Smith (1987) 2 S.C.R. 99 and Lac Minerals Ltd. v. International Corona Resources Ltd. (1989) 2 S.C.R. 574. In particular, the Lac Minerals Ltd. ruling is noteworthy since the Court of Appeal found a fiduciary duty on the part of Lac Minerals Ltd. even though both parties were national corporations. Thus, a fiduciary relationship would not be limited to a religious body and a child or a member of a vulnerable societal group but could equally exist between the institution and a sophisticated adult. The key remains power and discretion.

⁶⁰See the minority judgment in Norberg v. Wynrib (1992) 2S S.C.R. 226 and H.(K) v. H.(H) (1992) 3 S.C.R. 6.

By comparison, unlike the duty of care in tort which admonishes persons to act reasonably toward others so as to avoid harm or injury, a fiduciary duty is much more relational in nature. That is, it seeks to safeguard from the abuse of power and to maintain the trust within particular relationships, whether corporate, individual, or both.

In all, it is arguable that a religious body is particularly susceptible to an allegation of a breach of fiduciary duty, especially in corporate apostolates wherein trusting relationships develop between priest-chaplain and student, priest-counsellor and student or faculty member. As mentioned, the remedies that are available in equity for violations are quite costly. And, more often than not, the plaintiff's finger points to the deepest pocket.

Finally, the *Charities Accounting Act of Ontario* considers directors and officers of charitable corporations to be "settlers" or trustees of the monies and other property of the corporation. Consequently, a fiduciary duty also rests with such persons to comply with other specific statutory and federal laws. Though this obligation is pointed more towards the director of the corporation, nevertheless, if monies or properties are mismanaged, in whatever way, a board member of a charitable corporation may also incur a lawsuit through negligence. It is true that he or she does not own the property of the corporation. Nonetheless, failing to fulfil his or her fiduciary role as a trustee in not implementing proper policy contained within the many provincial or federal Acts can, in some situations, induce personal culpability.⁶¹

⁶¹Most of the Acts which hold trustees to fiduciary obligations include: the Ontario Pay Equity Act, Ontario Occupational Health and Safety Act, Income Tax of Canada, Canada Pension Plan Act, Unemployment Act of Canada, Ontario Health Insurance Act, Employer Health Tax Act, Ontario Corporations Act, Excise Tax Act of Canada, Ontario Retail Sales Tax Act, Ontario Environmental Protection Act, Canadian Environmental Protection Act, Ontario Pension Benefits Act, Competition Act of Canada, and the Ontario Business Practices Act. For a detailed summary of these Acts and an expert opinion on how to avoid liabilities, see also A. WOLFE, "Liability of Directors and Officers of Non-Share Corporations," pp. 6-29.

IV. Human Rights Legislation

In the decade of the 1990s, advocating and defending claims under the *Ontario Human Rights Code* is one of the prevailing areas of growth for a legal practitioner. As the title suggests, this Code legislates proper conduct in matters appertaining to human rights, especially in questions of discrimination and harassment. Without a doubt, 15 years previous, few legalists paid little attention to its latent force within the civil arena. Now, the public, alive over debates and Charter of Rights challenges concerning issues related to the law and to human rights, turns for a direction and a civil remedy from any wrongdoing. In the meantime, charitable organizations, religious or otherwise, also seek counsel on how to minimize the risk of such claims while safeguarding their corporate interests.⁶²

The *Ontario Anti-Discrimination Commission Act* of 1958 both dates and founds *The Ontario Human Rights Code*.⁶³ Over the years, revising the legislation was left to the rulings of the courts and to the earlier Bill of Rights, and later, Charter of Rights challenges of various pressure groups. Now, 48 sections together with supporting regulations, policies, procedures, and directives comprise the *Ontario Human Rights Code*. The law, which was given quasi-Constitutional status, is enforced by a present

⁶²See D. THWAITES, "Human Rights in Ontario - The Code's Impact on Churches and Charitable Organizations [hereafter = Human Rights in Ontario," (ms), Department of Continuing Legal Education, The Law Society of Upper Canada, November 1994, pp.1-3. See also J. KEENE, *Human Rights in Ontario*, 2nd ed., Toronto, Carswell Publishing, 1992, 210p.

⁶³See *The Ontario Anti-Discrimination Commission Act*, S.O. 1958, c. 70.
For a more complete historical overview of the work of the 1958 commission, see also D. THWAITE, "Human Rights in Ontario," p. 3-7: "The Commission was established to advise, make recommendations, and to develop or conduct education programs designed to eliminate discriminatory practices primarily in the area of employment. This legislation, as enacted, did not make specific reference to the types of discrimination."

commission whose tasks are bifurcated.⁶⁴ That is, educational and investigative components serve to decrease and to remedy practices of discrimination and harassment.

A. Discrimination

Court precedents have established four principles upon which the allegations of discrimination are ruled. They include: (1) that the consequence of the act and not the intention to commit the act is the basis for determining contravention; (2) that it matters not that there may be several reasons behind the act complained of, if one of the reasons is a prohibited ground, it is discriminatory; (3) that the onus or burden falls to the complainant unless the respondent chooses to use an exemption clause in the Code to justify a discriminatory violation; (4) that it is not possible to exclude the operation of the *Ontario Human Rights Code* in any sector of society.⁶⁵

More specifically, the legislation contains several provisos in the form of exemptive clauses that permit special interest employers to engage in otherwise discriminatory practices, assuming that the test of "reasonable and *bona fide* qualification" (Etobicoke Test) is met, both subjectively and objectively.⁶⁶ The sections of the Code

⁶⁴The quasi-Constitutional status was effected in a decision of Mr. Justice McIntyre in the case Re: Ontario Human Rights Commission and Simpson Sears at page 328: "The accepted rules of construction are flexible enough to enable the court to recognize in the construction of a Human Rights Code the special nature and purpose of the enactment...and give to it interpretation which will advance its broad purpose. Legislation of this type is of a special nature, not quite constitutional but certainly more than ordinary -- and it is for the Courts to seek out its purpose and give it effect." See 2 S.C.R. 536 (1985); 23 D.L.R. (1986) (4th) 321, 7 C.H.R.R. - D.3102.

⁶⁵See D. THWAITE, "Human Rights in Ontario," p. 9.

⁶⁶See Sections 11 (1) (a) of the Code which explains in detail the use of the test and Section 18 which directs exemptions to special interest organizations in the area of services and facilities. The "reasonable and *bona fide*" test received its name, the Etobicoke Test, from a ruling in which the court was asked to interpret the phrase, "*bona fide* occupational qualification and requirements for the position or employment," wherein Mr. Justice McIntyre introduced the subjective and objective elements

which exculpate a certain respondent of this practice refer to citizenship, affirmative actions campaigns, and benefit programmes, and in some circumstances to the sex, record of offenses, age, and marital status of a complainant.⁶⁷

B. Harassment

The Ontario Human Rights Code defines harassment as an activity whereby an individual "engages in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome,"⁶⁸ is the definition of harassment as accorded in the Code. As with discrimination, the consequences of the action and not the intentions are most crucial in determining liability and remedy. In reflecting the mind of the legislators, the norms of law tolerate no justification for sexual solicitation, exploitation, or other forms of sexual misconduct.⁶⁹ However, the verbal mood of the definition suggests that the harassing activity requires more than one incident in order to fall within the purview of this law. Still, if only one incident occurs, especially within

of the two-tailed test. See also Ontario Human Rights Commission v. Borough of Etobicoke, 132 D.L.R. (1982) (3d) 14 at 19; 3 C.H.R.R. -D.781.

⁶⁷An interesting case which may have an impact on the developments in Ontario is currently on appeal to the Alberta court from the Alberta Human Rights Commission. In Vriend and King's College a teacher was dismissed from his employment at a Christian college for reasons related to his sexual orientation. The Human Rights Commission ruled that his employer discriminated against him. Presently, Alberta law does not specifically incorporate protection in the area of sexual orientation. Vriend and King's College (1994) Alta H.R.C. - unreported. This case is cited in D. THWAITE, "Human Rights in Ontario," p. 14.

⁶⁸Ontario Human Rights Code, Section 10 (1) (f).

⁶⁹See Chapter 7, "Special Considerations for Civil Sexual Assault Cases," in G. ROCCAMO, P. CRONYN, K. d'ARTOIS et al., Ontario Practice Guide, Civil Litigation, Personal Injury Action, Toronto, Carswell Publishing, 1995, pp. 131-164.

the context of the workplace, then an allegation of discrimination rather than harassment becomes possible.⁷⁰

Overall, since the investigating Board of Inquiry has power to grant restitution, including monetary compensation together with damages for mental anguish, the Ontario Human Rights legislation has far-reaching ramifications for charitable corporations. As for findings of discrimination, under Section 45, a corporation is deemed involved in the contravention regardless of the level of management that violated the Code. As for findings of harassment, generally, the corporation is exempt from liability provided that the person committing the actions was not part of the "directing mind" of the corporation and that the corporation had no knowledge of the offenses. Further, the court will exonerate a corporation provided that it proves that it took immediate steps to report the complaint. Finally, apart from the remedies imposed by the Board of Inquiry, the *Human Rights Code* also permits, with the Attorney General's consent, the filing of criminal charges against any wrongdoer.⁷¹

Prudent administration and a well-informed staff more often than not mitigate liability exposure. Fortunately, for charitable institutions working within the Church, there exist several other legal arrangements at canon and civil law which help to further safeguard the charitable institution. Having said that, Part V highlights some of the canonical liabilities attached to a charitable, Church-related institution, while Part VI examines how an organization curtails liability exposure at canon and civil law.

⁷⁰See D. THWAITE, "Human Rights in Ontario," pp. 22-23.

⁷¹See D. THWAITE, "Human Rights in Ontario," p. 24-25.

V. Canonical Liabilities

Canon 128 of the 1983 Code stands as one of the critical norms under this heading. In 1943, Ciprotti, who later acted as a lay consultor to the Pontifical Commission for the Revision of the Code of Canon Law, raised the question of victim compensation for damages incurred through a wrong inflicted by an intentional tort or by negligence.⁷² While only one canon in the 1917 Code addressed this problem in a limited fashion,⁷³ as early as 1974, Onclin, formally reintroduced this topic to the Commission and began to draft the necessary legislation in response to an obvious need.⁷⁴ Accordingly, after several revisions, canon 128 was promulgated in the revised Code:

Anyone who unlawfully inflicts damages upon someone by a juridic act, or indeed any other act placed with malice or culpability, is obliged to compensate for the damage inflicted.⁷⁵

⁷²See J. FOLMER, "The Law of Personal Injury," in Canon Law Society of America Proceedings of the Forty-Sixth Annual Convention, 1984, p. 47.

⁷³CIC 1917, c. 1681: "Qui actum posuit nullitatis vitio infectum, tenetur de damnis et expensis erga partem laesam."

⁷⁴Onclin's concern was the preservation of what he called canonical subjective rights. In his 1952 essay on this topic, he systematically explains the concept and nature of such rights which are derived solely from the norms of canon law. See also W. ONCLIN, "Considerationes de iurium subiectivorum in ecclesia fundamento ac natura," in Ephemerides iuris canonici, 8 (1952), pp. 9-23. Later, in 1974, he wrote: "The obligation of making amends for the infliction of damage caused by a juridic act or indeed by any other act is affirmed in the proposed revised law. Such a prescription is lacking in the law of the Code on juridic acts, and it seemed to the consultors to be definitely necessary." Communicationes, 6 (1974), p. 103.

⁷⁵CIC 1983, c. 128: "Quicumque illegitime actu iuridico, immo quovis alio actu dolo vel culpa posito, alteri damnum infert, obligatione tenetur damnum illatum reparandi." The obligation to compensate for damages caused through malice and culpability is a longstanding principle of natural law which is discussed in the writings of various legalists. For example, see also L. CHIAPETTA, Il codice di diritto canonico: commento giuridico-pastorale, Napoli, Edizioni Dehoniane, 1988, p. 169.; F. URRUTIA, De normis generalibus, Romae, Pontificia Universitas Gregoriana, 1983, p. 88. See also F. URRUTIA, Les normes générales: Commentaire des canons 1-203, Paris, Éditions Tardy, 1994, pp. 209-210.

With the addition of the words, malice and culpability, the canon seems to embrace a wider area of tortious acts for which compensation may attach to an injured party. In conjunction with this legal prescription, canon 221 guarantees a right to full procedural and substantive due process in conducting litigation before an ecclesiastical court.⁷⁶

Referring to the placement of administrative acts, canon 128 distinguishes between illegitimate juridic acts and non-juridic acts committed against another with malice and culpability. In the former case, the manner of the juridic act is irrelevant: The damages arise from the illegitimately placed administrative act itself. That is, rendering an act without justification may violate one or several rights of an individual and thereby result in a cause for the reparation of damages. This norm also seems to cover, in accordance with canon 57, §3, the omission of a juridic act which may also give rise to injury.⁷⁷ Further, Krukowski holds that in the absence of Church legislation on vicarious liability, canon 1281, §3 attaches such liability to a juridic person for illegitimate, though valid, administrative acts posited by its administrators.⁷⁸ Hence, the subject of responsibility

⁷⁶CIC 1983, c. 221: "Christifidelibus competit ut iura, quibus in Ecclesia gaudent, legitime vindicent atque defendant in foro competenti ecclesiastico ad normam iuris." There are number of rights codified in the 1983 legislation. Canons 208-223 outline several rights common to all the faithful. Canons 224-231 speak of the rights of the laity. There are also rights proper to clerics and religious.

⁷⁷In this case, CIC 1983, c. 57, §3 seems to hold: "Responsum negativum praesumptum non eximit competentem auctoritatem ab obligatione decretum ferendi, immo et damnum forte illatum, ad normam can. 128, reparandi."

⁷⁸CIC 1983, c. 1281, §3: "Nisi quando et quatenus in rem suam versum sit, persona iuridica non tenetur respondere de actibus ab administratoribus invalide positis; de actibus autem ab administratoribus illegitime sed valide positis respondebit ipsa persona iuridica, salva eius actione seu recursu adversus administratores qui damna eidem intulerint." Pushing this canon further, Kennedy also remarks that without canonical separateness of the charitable institution, the sponsoring religious body may also "remain liable for all malfeasance or culpable negligence on the part of the educational or charitable institution." R. KENNEDY, "Maida, McGrath, Michiels," p. 373.; see also J. KRUKOWSKI, "Responsibility for Damage Resulting from Illegal Administrative Acts in the Code of Canon Law of 1983," in M. Thériault-J. Thorn (eds.), The New Code of Canon Law, Proceedings of the 5th International Congress of Canon Law, Ottawa, Saint Paul University, 1986, Vol.1, p. 231.

for the damage resulting from unlawful juridic acts may be a juridic or physical person or both.⁷⁹

The 1983 Code handles the remedies for the reparation of damages in a number of ways, for example, contentious trials and administrative processes. While canons 1732-1734 encourage the injured party to reach a settlement based on a process of conciliation and mediation techniques, cc. 1729-1731 provide norms regarding penal trials. Finally, the remaining canons 1734-1739 address hierarchical recourse against administrative acts.

VI. Avoiding Liabilities

Incorporating an institution creates an artificial legal person. In the area of liability, a presumption of law holds that any legal person is liable for its own acts. With regard to charitable institutions, notwithstanding the protection offered under the statutory and common laws of not-for-profit corporations, there are, as discussed, some limited instances where religious bodies who sponsor such facilities are still exposed to liabilities, whether third-party or otherwise. As a result, a plaintiff may take action against them either in tort or criminal court or both, as the human rights legislation indicates. In certain tortious or contractual activities where a charitable institution is linked in some way to a separate civil corporation, the transference of liability from one corporation to

⁷⁹The obligation for the reparation of damages is listed in the following examples: canon 982, for a false denunciation of a confessor; canon 1062, for an illegitimate break in a promise to marry; canon 1457, §§1-2, for malicious and negligent acts of a judge or other tribunal personnel; canon 1649, §1, 4°, for the recovery of damages against one who rashly engaged in litigation and lost.

another corporation is possible. This transference is referred to as ascending liability and is usually applied with respect to the legal theories of agency.⁸⁰

Under this doctrine, a civil court applies a fact analysis to separately incorporated structural entities, such as a religious body and a university. If it points to a functional unity that exists in the lived relationship between the two bodies, then it can assign liability to the religious body for the actions perpetrated by the university. Generally, the relationship is founded on canonical control, ownership of property, and status.⁸¹

Herein lies one of the potential problems for Assumption. The Basilian Fathers of Sandwich is styled as a typical membership corporation comprised of all the priest-members of O'Connor House, including the Superior who is also President of Assumption University. Having obtained charitable status, it is recognized as a civil, not-for-profit corporation. The member's duties are defined in the corporate document, and they exercise certain powers within the corporation.

Generally, the Corporation has three tasks. The first is to hold the property of Assumption as well as its assets, in the form of scholarships and trust funds. Second, it oversees the financial operation at O'Connor House and on occasion, it deposits monies from the Corporation into O'Connor house in order to help alleviate its ever-growing deficit. Further, it treats O'Connor House as an ancillary enterprise of the Corporation. It technically receives pension and other community benefits from the General Treasury and manages those funds for the members at O'Connor House.⁸² Finally, as part of the 1977 Agreement, the Corporation of the Basilian Fathers attempts

⁸⁰See H. BLACK, Black's Law Dictionary, p. 287: A deep pocket is "a person or corporation of substantial wealth and resources from which a claim or judgment may be made."

⁸¹See E. GAFFNEY and P. SORENSON, Ascending Liability in Religious and Other Nonprofit Organizations, Macon, GA, Mercer University Press, 1984, p. 52.

⁸²The Basilian Fathers canonically erected the domus religiosa (O'Connor House) in the Diocese of London on 27 May 1870.

to meet its charitable objectives through contributions to Assumption University based on 50% of the net remuneration received from the Basilian priests on the Assumption University staff. This money is donated as contributed services. It is true that there is an intermixture of administrative tasks and interests further combined with an uncertainty about a clear delineation of funds and assets belonging to the Corporation itself, the Assumption University Corporation, and the enterprise known as O'Connor House. In short, all members control all entities with the exception of the operating funds obtained from enrolments and specified donations.⁸³

As discussed in previous chapters, the 1977 Agreement recognized the Basilian Fathers of Sandwich as the corporation which holds the titles to the property for the civil corporation of Assumption University. The Basilians enjoy trustee status as directors, retaining the legal title to the assets, while the equitable title or interest resides in the passive beneficial owner, namely Assumption University. So, the agreement, in effect, combines trust law and corporate law concepts.

A trustee status for directors, however, presents some problems. In short, this division of interest is seen as inconsistent with the corporate form, and general confusion results from perpetuating the application of outdated trust law to non-profit corporations. Moreover, the trust standard also subjects the directors to the highest standard of care and fiduciary conduct.

Because charitable immunity doctrines and judicial practice that once favoured charitable corporations have all but vanished in the United States and Canada and were replaced with new formulations of statutory liability, such as corporate negligence, the non-profit organizations no longer enjoy the privileged protections they once may have had. Accordingly, in matters of liability and in the assessment of damages, they are

⁸³While Assumption University, as a federated college, is entitled to the government transfer payments, the administrators of Assumption have decided not to accept such monies.

equally exposed.⁸⁴ Consequently, owing to their non-profit nature, caution must be used in defining the powers and duties of their officers, directors, and members. Granted, the intricacies of corporate and statutory law do not make this an easy task.

As mentioned in this chapter, there are numerous liabilities to which a not-for-profit corporation is subject. Given the amount of control that the Basilians exercise over Assumption, it makes them particularly vulnerable to ascending liabilities. To handle these claims, enunciating clear standards which deal with the absence of ownership, interest, and the presence of public interest is essential.⁸⁵

Admittedly, since the principles of agency and ascending liability perform in concert with particular federal laws and provincial statutes, this area becomes necessarily intricate and thus demands a proficiency that falls outside the range of this dissertation. As stated in Chapter One, any attempt to apply such laws and theories in an extensive way tends to oversimplify the issue and leads to generalizations which are evasive. To that end, some observations about Assumption University will conclude this section, focusing on strategies at civil and canon law which may further help to limit exposure.

First, in 1984, speaking before the Canon Law Society of America, M. DiPietro proposed that "affirmative responsibility primarily by a theological standard and by canonical standards is the only integral way to handle potential liability."⁸⁶ In short, her basic belief is that the primary focus for religious bodies and charitable institutions must be on ministry from a theological and canonical perspective and not on the seemingly frightening laws of liability that may induce some sort of "ministerial paralysis." Alto-

⁸⁴There are numerous works on ascending liability and "piercing the corporate veil." See J. SCHLICHT, "Piercing the Non-profit Corporate Veil," in *Marquette Law Review*, 66(1982), pp. 134-158.

⁸⁵Canonical ownership also potentiates problems for the Basilian Fathers, especially when two of the links investigated in a fact analysis is the title to land and the canonical control exercised over the corporated apostolate by the religious body.

⁸⁶Cf. M. DiPIETRO, "Canonical and Civil Liability for Lay Ministers," p. 186.

gether, vigilance, supervision, diligence, and social responsibility emerge as the principal elements; elements found in the Code and in the civil laws.⁸⁷

Against a backdrop of Canon 209, she enumerates thirteen norms which parallel several civil theories that exhort proper conduct and practices within the secular forum.⁸⁸ For example, she relates canons 216, 300, 305, 323, and 394 which speak of authorization of, vigilance of, and pastoral supervision of ministry to theories of vicarious liability which also turn on authorization, deputation, and endorsement. In this illustration, she makes the point that if the person authorizing the ministry or charitable corporation combines significantly the training and formation of the members or employees together with vigilance and supervision, it is conceivable to believe that the civil standards of reasonable care or professionalism will also be met. All in all, armed with a convincing tone, DiPietro admonishes her audience that a whole-hearted, conscious adherence to the canonical norms and the conciliar literature not only shapes and directs rich apostolic works, but at the same time, meets the minimal standards of civil law.⁸⁹

Second, it is imperative that all charitable corporations develop policies and procedures to deal with very specific potential liability risks, for instance, sexual harassment and sexual abuse. These policies need to acknowledge the possibility of these violations occurring on the property while offering a supportive response to victims and perpetrators along with a statement concerning opportunities for medical and psychological treatment. Further, proactive measures are also advocated, such as, educational programmes, proper supervision of the premises and the employees, and up-to-date, sound

⁸⁷See H. DiPIETRO, "Canonical and Civil Liabilities for Lay Ministers," pp. 184-185.

⁸⁸CIC 1983, c. 209, §1: "Christifideles obligatione adstringuntur, sua quoque ipsorum agendi ratione, ad communionem semper servandam cum Ecclesia.

§2: Magna cum diligentia officia adimpleant, quibus tenentur erga Ecclesiam tuam universam, tuam particularem ad quam, secundum iuris praescripta, pertinent."

⁸⁹See H. DiPIETRO, "Canonical and Civil Liabilities for Lay Ministers," pp. 184-186.

legal advice regarding new liability and employment laws, court interpretations, and not-for-profit financial practices, which include taxation, indemnity for directors, and proper compliance with a host of other federal and provincial Acts.

Third, in a situation in which religious bodies have held titles to deeds to property used by the charitable institution, the liability risks for the religious body are greatly increased. Now, in most charitable corporations the properties are titled to the corporation itself. However, as the analysis of Chapters Two and Three indicates, by virtue of the 1977 Agreement,⁹⁰ The Corporation of the Basilian Fathers of Sandwich retains all of the legal titles to the properties of Assumption University with the exception of one piece of land and a house which the corporation of Assumption University purchased from the Christian Brothers in 1994.

Given this present situation, in the light of the statutory liabilities, there are several points to consider. First, in days past, assigning the titles to properties in the name of the charitable institution testified to a religious body's unwritten obligation to safeguard ecclesiastical property through a valid civil means. Now, such a duty is obligatory.⁹¹ As regards Assumption, this obligation appears to be, on the surface at least, the motivation behind placing the titles to real property in the name of the separate, civil corporation known as the Basilian Fathers of Sandwich whose sole purpose is to direct the educational and charitable work of Assumption University. However, upon closer examination, this action, occurring in 1958, represents an exercise in imprudent administration, even though many Basilians today believe very differently.

⁹⁰The 1977 Agreement was entered into between the Corporations of Assumption University, The Basilian Fathers of Sandwich, and the unincorporated Basilian Fathers of O'Connor House. See Chapter Two, note 77, *supra*.

⁹¹See *CIC 1983*, c. 1284, §2, 2°

In any event, the major difficulty with this legal arrangement, however well-intentioned, is that the hoped-for insulation is not at all realized. From the beginning, the Basilian Fathers ought to have assigned the titles to property in the name of the civil corporation of Assumption University rather than in the name of the Corporation of the Basilian Fathers of Sandwich.⁹² Why? To place the titles to property to a charitable corporation composed of the same Basilian priests, who not only work at Assumption University and live at O'Connor House, but who also exclusively direct the Corporation of the Basilian Fathers of Sandwich, hardly creates the desired protection from the institution's actions. What it does accomplish, however, is the retention of canonical ownership. In more recent times, this link is precisely the type that attracts exposure to risks. Accordingly, curtailing liability is more fully realized with the placement of the property titles in the name of the separately incorporated Assumption University.

To that end, depending upon the canonical motivations of the religious body, the conveyance of the titles to Assumption is accomplished in either of two ways. On the one hand, the deeds may be simply transferred from the Basilian Fathers of Sandwich and placed in the name of Assumption University without any intention to alienate the property canonically from the religious body. Such a transfer of title is intended to be nothing more than conveying the title to a separate civil corporation as a device to secure civil-law separateness. Admittedly, under this option, there is no intention truly to transfer ownership or to alter the canonical status of the charitable institution, but it does insure, albeit minimally, that a greater distance is placed between the religious body and the university.⁹³

⁹²Part of the difficulty with this legal arrangement is that it creates a paper trail to the Basilian Fathers.

⁹³See R. KENNEDY, "Maida, McGrath, Michiels," p. 371.

On the other hand, transferring the titles from one corporation to another, as distinguished from merely putting title to property for civil-law purposes, represents a true conveyance of ownership. In terms of liabilities, this route guarantees a more convincing shield from civil law theories and court practices. As discussed in the previous chapter, in order that a canonically recognized transfer of ownership from one corporation to another takes place, the canonical norms for the valid alienation of ecclesiastical property are followed.⁹⁴

From a canonical position, without separateness in terms of canonical status of Assumption University, liability may be further assessed in ecclesiastical courts for all tort malfeasance and negligence on the part of the educational institution. In certain situations, this liability potentially attaches to the Basilian Fathers.⁹⁵ As mentioned above, while canon 221 of the 1983 *Code of Canon Law* suggests remedies for violations of rights, canon 128 (including c. 57, §3), based in natural justice, lays out a general norm of compensation to parties suffering from injury or harm through abusive exercises of ecclesiastical authority or other such acts intentionally committed.⁹⁶ "Anyone who unlawfully inflicts damage upon someone by a juridic act, or indeed by any other act

⁹⁴As evidenced in the canonical investigation which was completed in the previous chapters of this dissertation, the legal history of the properties in question are considered ecclesiastical goods and constitute part of the stable patrimony of the Basilian Fathers of Sandwich. The properties were legitimately assigned by act to the Corporation of the Basilian Fathers from the Episcopal Corporation of the Diocese of London. Since that time, the Basilian Fathers of Sandwich have always maintained a commitment to this work, as indicated in its past and present administrative practice.

⁹⁵See R. KENNEDY, "Maida, McGrath, Michiels," p. 372. In particular, see CIC 1983, canon 1281, §3.

⁹⁶Other such acts can include violations of 1983 CIC, c. 1395, §2: "Clericus qui aliter contra sextum Decalogi praeceptum deliquerit, si quidem delictum vi vel iniuria vel publice vel cum minore infra aetatem sedecim annorum patratum sit, iustis poenis puniatur, non exclusa, si casus ferat, dimissione e statu clericali."

placed with malice or culpability, is obliged to compensate for the damages inflicted."⁹⁷ Therefore, to help further limit liability for the charitable institution by achieving a canonical status to match its civil-law separateness, the above alienation is concomitant with an intention to alter the canonical status of Assumption University.

The canonical investigation in Chapters Two and Three indicated that the status of the university has remained an apostolic work of the Basilian Fathers. Indeed, from the time of the promulgation of the 1983 Code up to the present, the Basilian Fathers have not undertaken any initiative to alter that status in accordance with the principal options offered in the 1983 Code. As previously shown, each option has its own conformities, *vis-à-vis*, the 1983 Code of Canon Law along with several advantages and disadvantages. Hence, suggesting an exact alteration for this unique situation requires some general knowledge of the prevailing pros and cons.

⁹⁷Cf. CIC 1983, c. 128: "Quicumque illegitime actu iuridico, immo quovis alio actu dolo vel culpa posito, alteri damnum infert, obligatione tenetur damnum illatum reparandi."

CIC 1983, c. 221, §1: "Christifidelibus competit ut iura, quibus in Ecclesia gaudent, legitime vindicent atque defendant in foro competenti ecclesiastico ad normam iuris."

With regard to parties believing that injury has resulted from a specific juridic act, such as a decree, CIC 1983, c. 1733, §1 allows for recourse and equitable solutions: "Valde optandum est ut, quoties quis gravatum se decreto putet, vitetur inter ipsum et decreti auctorem contentio atque inter eos de aequa solutione quaerenda communi consilio curetur, gravibus quoque personis ad mediationem et studium forte adhibitis, ita ut per idoneam viam controversia praecaveatur vel dirimatur." See c. LOPEZ-GALLO, 12 January 1988, (Vancouver), in The Jurist, 49(1989), pp. 286-302: "Summing up, church law decrees that 'no one may unlawfully harm the good reputation which a person enjoys, or violate the right of every person to protect his or her privacy' (c. 220). To accomplish the above, church law adopts the legislation of the country in which slander was committed. In doing so the Church applies the teaching of the Second Vatican Council." In this case, the plaintiff, who was not looking for monetary compensation, fortunately decided to drop the civil action in favour of a ruling from the ecclesiastical court. The respondent, Father George, was sentenced to write an apology. The plaintiff, however, had ample evidence to litigate further in civil court. The point of this illustration is that far more heinous crimes such as abuse could be prosecuted under both systems with compensatory packages paid out according to the principle of the deep-pocket. While the present practice of the church is to await the ruling of the civil court on such matters, the law of church, nevertheless, also permits action on the part of the victim. Fortunately, to date, few victims of violations against CIC 1983, c. 1395, §1, including abuse, rape, harassment, and sexual assault have appeared before the ecclesiastical courts seeking further compensation in accordance with CIC 1983, c. 1729, §1: "Pars laesa potest actionem contentiosam ad damna reparanda ex delicto sibi illata in ipso poenali iudicio exercere, ad normam can. 1596."

A. The Advantages and Disadvantages of Each Option

The educational work accomplished at Assumption University is considered the apostolic work of the Basilian Fathers. Consequently, a number of advantages accrues for the Basilians in the areas of Catholicity of the institution, clarity of mission, sponsor involvement, and corporate control. On the other hand, disadvantages to this type of organizational structure are also evident, namely, minimized autonomy, canonical and civil liabilities of the sponsor, and strict conformity to the *Code of Canon Law*. This section will examine the advantages and disadvantages to the sponsor in altering status.

Clearly, when people publicly observe some kind of connection between a university and a Catholic religious institute, such as the Basilian Fathers, they form a general perception about the Catholicity of the educational institution. This perception points to a relationship that exists not only between the sponsor and the institution but also with the Catholic Church in general. In short, the institution is Church-related in a concrete and visibly important way. This perceived Catholicity is maintained and verified in the continuing influence which the sponsoring body exerts over the institution through mission statements, programmes, course curricula, board membership, and hiring and firing practices. More importantly, the presence of clergy and other religious in administrative and faculty positions enhances this realisation. Accenting this perception at Assumption University may be the past academic and pastoral records of the Basilians who, in their time, brought a strong commitment to education and pastoral works that inspired the foundation of the institution. Moreover, the spirit of the sponsoring body quite often permeates and touches the many people who carry on the charitable work.⁹⁸

⁹⁸See J. McGRATH, Catholic Institutions in the United States: Canonical and Civil Law Status, p. 35.

The second and third advantages stem from the first. With the sponsor actively involved, the clarity of the mission is better realized, and future objectives are more easily brought to fruition. Admittedly, a fairly tight organizational structure maintains this clarity. In some situations, the Board is composed of members only from the sponsoring body. This is the case at Assumption University. Still, in other situations, by-laws may direct the Board to choose principal officers from among the religious body. As a consequence, the religious institute is much better positioned to conduct the affairs of the university in accord with the spiritual patrimony of the congregation.

And finally, such ecclesiastical control pays dividends. That is, if people see that the work is tied to the Church through a serious-minded religious community, then they generally are more willing to become personally involved in the educational, pastoral, and cultural life of the university. In the same way, financially supporting the orientation of the institution in order that the religious and educational works continue to enrich their lives and the life of their community becomes a priority.

Notwithstanding the many advantages, drawbacks are equally evident. Surfacing on the side of the disadvantages are minimized autonomy, conformity to the *Code of Canon Law*, and direct exposure to canonical and civil liabilities. Preceding sections in this dissertation discussed the latter two.

Because the institution functions rather narrowly under the governance of the sponsoring body, it does not benefit from a varied input of ideas and suggestions that is imaginable from a heterogeneous Board of Governors. Consequently, while the mission of the institution may very well be clear and concise, little room is left to entertain matters that are not consonant with the overall directed vision. This limitation may cause problems and difficulties within the operation and management of the university. In brief, the members of the educational community possess a limited role in shaping its own life and destiny. Along this same line, the sponsoring body must also conform to

specific legal formalities within the Church, the directories and traditions of the Congregation of Priests of Saint Basil, and the Catholic population as a whole.

Further, since the religious body, which is also a public juridic person, owns, controls, and, sponsors the institution, then the institution is subject to the prescriptions of the 1983 *Code of Canon Law*. Therefore, in accordance with the Code, certain formalities must be followed in the administration and alienation of the ecclesiastical goods of the sponsored work. The difficulty in functioning under the Code is located in many areas. However, one example concerns the section on alienation. Overall, it needs to undergo a process of revision that would encourage flexibility and clarity. "It would be better if the conference of bishops in exercising its responsibility of defining extraordinary administration and establishing the minimum and maximum limits in alienating goods would actually set down guidelines and definitions which would, in effect, create the flexible, workable notions which are badly needed."⁹⁹ Consequently, at times, compliance with the Code becomes cumbersome and restrictive. In the meantime, according to the types of juridic personalities allowed under the present legislation, most of the current prescriptions and formalities are outlined in the previous chapter.

In terms of the advantages and disadvantages, what happens when the university seeks a separate public juridic personality?¹⁰⁰ On the advantage side, all remain intact. That is, perceived Catholicity, clarity of mission, sponsor involvement, and ecclesiastical control are not jeopardized. However, on the side of the disadvantages, since the

⁹⁹Cf. J. MEYERS, "The Temporal Goods of the Church [cc. 1254-1310], in The Code of Canon Law: A Text and Commentary, p. 880.

¹⁰⁰Orsy advises that "it may not be wise to compel Catholic universities which operate freely and vigorously in a secular society to enter into a legal bond with the church if by this act they become so disadvantaged civilly that they lose their position and must reduce their service to the community." L. ÖRSY, The Church: Learning and Teaching, p. 121.

responsibilities at canon law now fall to the public juridic person, canonical liability is maximally reduced depending upon the degree to which the sponsor becomes entangled in the operation of the newly-created juridic person. The same holds for the civil liabilities. Here again, the liabilities of the sponsor at civil law are determined by the degree of control which the sponsor attempts to maintain. For example, as is the case with Assumption, the superior of the local community is also the President of the Board of Governors. Moreover, the Superior General of the Congregation appoints the President of the University as well as the local Superior of the Basilian community and technically deposits pension and other benefits for retired confrères into the Corporation of the Basilian Fathers of Sandwich. Ordinarily, as a separate juridic person, the religious institute that established the public juridic person would not be civilly liable as would have been the case had the university remained an apostolic work.

What happens when an institution is created as a private juridic person? The perceived Catholicity of the university and the clarity of mission, once again, continue. However, even though statutes must be approved by a competent Church authority, ecclesiastical control is somewhat diminished in the ways outlined in Chapter Three. From a practical vantage, these statutes can serve as the corporate by-laws. As for the temporal goods, they are not considered ecclesiastical property. Therefore, Book V of the *Code of Canon Law* is only minimally applicable. As a result, to increase the autonomy of the institute remains one of the greatest advantages of the private juridic person.

The canonical status which provides the greatest autonomy from ecclesiastical authority and for the fewest formalities of administration is the private association of the faithful. However, because there exists no real sponsor, many of the advantages are severely weakened. Certainly, the perceived Catholicity of the institution is not as focused which, in turn, affects the clarity of mission. This shift is due in part to the very

nature of an association which tends to center on groups of baptized individuals who band together for a common purpose, which can include the exercise of apostolic or charitable works. The juridic person, on the other hand, focuses primarily on apostolic and charitable works themselves. Thus, the tendency for an association to be less structured and less formally involved in specific works, such as higher education, can undermine the commitment and spirit of the sponsors. In many ways, the spiritual patrimony of the institution may erode as the life of the institution alters.

A major disadvantage to the association of the faithful is that members are co-owners of the property. As a result, there is the greatest possibility of being sued and held individually liable in tort. In short, the members themselves become very vulnerable before the law.

B. The Declaration of Intent

To oblige certain Basilians who request not to surrender complete control of the operations and management of the university, the clarity of mission is preserved in a written declaration. Alternative ways of maintaining such control include, inserting into the articles of incorporation and by-laws of the university provisions which bind its board, officers, and staff to fidelity to the educational, ethical, or other heritage of the sponsor and which reserve to the same individuals authority to amend such provisions. Most of these powers result from corporate business considerations rather than from any canonical requirements. While many others are imaginable, however, the use of such powers to retain a measure of control may jeopardize the sponsor. So, in an effort to avoid liability exposure, a minimal number of reserved powers is best which concentrate principally on the heritage of the religious body. In fact, in accordance with canons 578 and 586 of the 1983 Code, the Congregation ought to give the spiritual patrimony first

priority . On this point, an explanation is provided for one illustration of a written argreement which seeks to safeguard the spiritual patrimony of the religious instítute.

Contrary to the opinion of Maida, canonical ownership of property is not always necessary in order to engage in service to the Church and to maintain control over a charitable institution. In fact, in this decade, ownership can work to the detriment of the religious body in just one area alone - litigation. Certainly, in some charitable institutions there are more creative ways to minister effectively without having to rely on corporate control and canonical ownership.¹⁰¹

Prompted by the call of the Second Vatican Council to the renewal of religious life as stipulated in the more recent legislation of the 1983 Code of Canon Law, religious institutes sought ways to ensure the preservation of the spirit and philosophy which had originally permeated their educational institutions. The above-mentioned declaration, which is born out of this canonical reflection, strives to preserve the proper patrimony of the institute and to remain faithful to the charisms of the founders while maintaining an effective leadership role within the academy. However, in order to appreciate the strengths of this declaration, two significant shifts must occur. The first is a change in language; the second is a change in methodology.

Fundamentally, sponsorship is relational in nature. It acts as a metaphor to describe any number of affiliations and associations. For instance, in the health-care field, religious bodies who sponsor medical institutions generally carry out roles of governance through a complex of reserved powers which are mainly centered on business

¹⁰¹Indeed, the laity have come of age. They have proven capable of responsibly establishing, diligently sponsoring, prudently managing, and loyally directing church-related institutions together with the ordained and the professed. Commenting on the presence of lay men and women on university boards of governors, Órsy writes: "Lay persons have assumed the lion's share in financial management, and demonstrated a sense of responsibility which invites nothing but admiration." See L. ÓRSY, "Teaching Authority, Catholic Universities, Academic Freedom," in *The Church: Learning and Teaching*, Wilmington, Michael Glazier Inc., 1987, footnote 17, p. 132.

practices enabling the religious to exercise control over the apostolic work. However, as time moves on and uncontrollable factors exert pressure on this type of relationship, the religious body gradually experiences a loss of power as a sponsor and has no choice but to relinquish control. In short, the point is that a new understanding of the term must take form involving a fundamental move from corporate control to influence.

More precisely, both bodies require a shift from autonomy to collaboration according to new words and operations which serve to redefine sponsorship. Accordingly, religious and educational institutes must abandon a view of sponsorship as a means of securing tight corporate control and begin to understand and accept it as a declaration, guaranteeing close cooperation, communication, and collaboration with all the constituencies who participate in the work of the educational apostolate. Moreover, since this transposition from autonomy to collaboration necessitates a shift in the language, religious and educational administrators must learn to converse anew. For example, legal terms would no longer suffuse the pages of corporate declarations. Instead, on another level one word would influence the operations of the university and the drafting of any new declarations -- *communio*.¹⁰²

Coming out of the language of the Second Vatican Council, the key concept of *communio* helps not only to advance the self-understanding of the Catholic university and college, but it also intensifies the relational unity between itself and the religious institute. Örsy describes this term as a firm dedication to unity, which unleashes energies, inspires actions on the part of all, and holds the university and the religious institute together. Of definite value and interest is his notion that all Catholic universities, whether they have ecclesiastical juridical personality or not are related to the Church by this bond of

¹⁰²This principle is contextually related to the mandate of c. 675, §3 and the concept of *communio* that the apostolic action of religious institutes is to be carried out in communion with the Church. See CIC 1983, c. 675, §3: "Actio apostolica, nomine et mandato Ecclesiae exercenda, in eius *communione* peragatur."

communion.¹⁰³ In short, a proper understanding of and an appreciation for *communio* motivate the shift from autonomy to collaboration and grounds the relational unity between the religious institute and the educational institution within the particular living Church.

Rooted in a fundamental understanding of the university as an instance of *communio*, a second shift directs religious and educational institutes to draft declarations according to a new methodology. This method would guarantee the religious bodies of their institutional continuity and the preservation of their spiritual patrimony. In order to ensure that the declaration remains in place, it would work in concert with several other methods available at canon law, such as the conferral of juridic personality, and at civil law, such as the incorporation of the declaration into the by-laws of a re-structured civil corporation. Here, canonical status emerges as an essential starting-point in securing this declaration. In any event, the rationale for this declaration is first noted in the conciliar literature. With respect to religious institutes, the Second Vatican Council is neither irrelevant nor silent on this matter. *Perfectae caritatis* gives the place of honour to the individual religious institutes and their particular apostolates:

It is for the good of the Church that institutes have their own proper characters and functions. Therefore, the spirit and aims of each founder should be faithfully accepted and retained, as indeed should each institute's sound traditions for all of these constitute the patrimony of an institute.¹⁰⁴

In this decree, the Council makes an important distinction in speaking of the spiritual and not the economic patrimony of the religious institute.

¹⁰³See L. ÖRSY, *The Church: Learning and Teaching*, p. 130-133.

¹⁰⁴See SECOND VATICAN COUNCIL, Decree on the Up-to-date Renewal of Religious Life, *Perfectae caritatis*, 28 October 1965, in *Acta Apostolicae Sedis*, 56(1966), pp. 702-712 (English translation in A. FLANNERY (ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents*, 1981, ed., Northport, Costello Publishing Co., 1975, pp. 611-612.

Later, the 1983 *Code of Canon Law* reflects the awareness of and appreciation for this conciliar vision of consecrated life and institutional charisms. On this point, three canons seem germane to this discussion. Together, they provide religious with the just autonomy needed to protect and safeguard their patrimony in written constitutions and directories. In fact, the main feature of religious law in the 1983 Code encourages a latitude in religious life proper to particular institutions. Specifically, rightful autonomy belongs to the context of the conciliar teaching and points to its finality in relationship to its primary object, that is, the preservation of institutional patrimony as legislated in c. 578.¹⁰⁵ Meanwhile, c. 586, §1 addresses the true autonomy of life of the institute as expressed in the *ius proprium* while c. 587, §1 stipulates that religious are to protect more faithfully the vocation and identity of the institute as described in their respective constitutions.¹⁰⁶

Directing that all are bound to faithful observance of the intentions and purposes of the founders as sanctioned by the competent ecclesiastical authority, c. 578 appropriately moves *Perfectae caritatis* into the realm of law. With regard to the nature and charisms of the religious institute, it states:

The whole patrimony of an institute must be faithfully preserved by all. This patrimony is comprised of the intentions of the founders of all that the competent ecclesiastical authority has approved concerning the nature,

¹⁰⁵Cf. *CIC 1983*, c. 578: "Fundatorum mens atque proposita a competenti auctoritate ecclesiastica sancita circa naturam, finem, spiritum et indolem instituti, necnon eius sanae traditiones, quae omnia patrimonium eiusdem instituti constituunt, ab omnibus fideliter servanda sunt."

¹⁰⁶See *CIC 1983*, c. 586, §1: "Singulis institutis iusta autonomia vitae, praesertim regiminis, agnoscitur, qua gaudeant in Ecclesia propria disciplina atque integrum servare valeant suum patrimonium, de quo in can. 578."

CIC 1983, c. 587, §1: "Ad propriam singulorum institutorum vocationem et identitatem fidelius tuendam, in cuiusvis instituti codice fundamentalis seu constitutionibus contineri debent, praeter ea quae in can. 578 servanda statuuntur, normae fundamentales circa instituti regimen et sodalium disciplinam, membrorum incorporationem atque institutionem, necnon proprium sacrorum ligaminum obiectum."

purpose, spirit, and character of the institute, and of its sound tradition.¹⁰⁷

Indeed, the canon echoes the call of the Second Vatican Council to institutes of consecrated life to safeguard and to maintain their rich patrimony.

The expression *patrimonium* is not used univocally in the 1983 Code. Three of the four occurrences in the law in institutes of consecrated life refer to the institutional patrimony as described in *Perfectae caritatis*. In Ochoa's analysis of the expressions, charism and patrimony, written in the initial stage of the post-conciliar period, he indicates that the first signifies the gift of the Spirit as it was granted at the origin of the institute and from which has come the character, spirit, form of life, and purpose of the institute. Patrimony denotes these same realities as they have evolved in the course of time.¹⁰⁸

More recent commentators, such as Beyer, make no distinction, referring to the spiritual institutional charism.¹⁰⁹ On the other hand, Fitzgerald and Hayes view patrimony as a concept introduced to answer the needs of our modern economy which no longer rests prevalently on classes of property, once defined as immovable. Vaguely defined as the meaningful heritage or expression of charisms contained in the proper law, patrimony is indeed a polysemous concept capable of referring to the economic condition

¹⁰⁷SECOND VATICAN COUNCIL, Decree on the Up-to-date Renewal of Religious Life, *Perfectae caritatis*, 28 October 1965, in *Acta Apostolicae Sedis*, 56(1966), pp. 702-712 (English translation in A. FLANNERY (ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents*, 1981 ed., Northport, NY, Costello Pub. Co. 1975, pp. 611-680

¹⁰⁸See J. OCHOA, "Modus determinandi patrimonium constitutionale cuiusvis instituti perfectionis proprium," in *Commentarium pro Religiosis et Missionariis*, 48(1967), pp. 338-340.

¹⁰⁹See J. BEYER, "De novo iure circa vitae consecratae instituta et eorum sodales quaesita et dubia solvenda," in *Periodica*, 73(1984), p. 423; see E. HAYES, *Rightful Autonomy of Life and Charism in the Proper Law of the Norbertine Order*, JCD dissertation, Washington DC, The Catholic University of America, 1990, xii, 588p; see J. FITZGERALD, "The Official Catholic Directory: Civil and Canon Law Requirements," in *Catholic Lawyer*, 30(1980), pp. 127-128.

of a juridic person, explaining the heritage of philosophy which is perennially valid in the formation of clerics, and describing the nature and charisms of the religious institution.

Maintenance of patrimony and of proper discipline describes the twofold purpose of just autonomy. As mentioned, patrimony encompasses a number of meanings, one of which is the institutional charism and sound traditions as enumerated in c. 578. With regard to sponsoring bodies, the spiritual patrimony links the religious institute to the educational institution. This religious heritage touches the educational institute in an obvious and concrete way, distinctly animating and shaping a particular Catholic ethos. This is precisely the patrimony which the declaration sets out to safeguard and preserve.

Thereupon, an alternative way for institutes to maintain a relationship with a civilly-incorporated Catholic university is to fashion a declaration between the religious and educational institutions that seeks to maintain and preserve the institutional spiritual patrimony of the religious body. In order for this new understanding to succeed, both the religious community and the educational institute must undergo a steady, and in some cases, painful shift from autonomy to collaboration, acknowledging that the apostolic action of religious institutes is carried out in communion with the Church. That is, the institutions must be willing to recognize sponsorship for what it truly is -- a relationship.

This model does not rely excessively on instruments of corporate control and ownership of properties and assets. Rather, preserving and fostering the sound traditions, character, spirituality, and heritage of the sponsoring body rest on mutual desire. It finds its expression in leadership, influence, not in power and control, relying on strong commitments of the part of all those involved in the work.

Legally maintaining such a declaration means the interaction of the canon law with the civil law. That is, the corporate by-laws of the educational institution recognize the certain proper laws of the religious body which pertain to its apostolic works, especially

in the areas of patrimony and intentions of the donors. While this form of declaration generates well-written and legally binding statements, the law is not what is central to the declaration. Instead, it is a contingent expression of the relationship between the two bodies. In a certain sense, the legalistic prescriptions of rights and obligations are secondary and are not to overshadow the basic relationship between the sponsoring body and the educational institute. If there is a close and continuous working relationship between the organization and the sponsoring religious body, then the values proposed will be received, accepted, and lived. With mutual interaction, collaboration, and co-operation without either sacrificing its own mission, the academy would find meaning and increased depth in a religious *milieu* steeped in the rich tradition of the sponsoring religious body and the living faith of the faculty, students, and religious.¹¹⁰

VII. Making a Case for Altering Canonical Status

Deciding on what kind of status is best served in a given situation clearly demands consideration of a number of issues. Generally, five areas need examination. What is

¹¹⁰The book, *Northrop Frye in Conversation*, presents the main thoughts and ideas of Frye as he sat in conversation with David Cayley. Of particular note is a small section of chapter six, "The Critical Path," in which Cayley engages Frye in a discussion on Matthew Arnold's idea of culture. Frye points out that culture is the ultimate authority in society, even though culture may be impotent to impose its authority, and, in fact, would be false to itself if it did. When asked if culture is an alternative conception of power, Frye replies, "Yes. It's utterly weak physically, but it's the only surviving power there is."

In many ways the power that emerges from people working in relationship for a common good recreates and allows for efficacious changes. The university exists as a community and meeting-place wherein the on-going activities of teaching and learning foster these important relationships among people and between institutions. If the charitable work is at all excelling in what it is supposed to do, then Christian ideals ought to wed with the cultural dimensions of the university to produce a sponsorship that is precisely the type of relationship that the agreement seeks to procure between the institutions. These relationships, built on trust and motivated by good faith, generate a power that moves the university forward, steeped in a religious tradition of teaching and learning. Indeed, culture, comprised of the spiritual heritage and rich traditions, can be a motivating force as it binds people together who share a common identity. See also D. CAYLEY, *Northrop Frye in Conversation*, Concord, Ontario, House of Anansi Press Limited, 1992, vii, 221p.

the history and heritage of the sponsored institution? What is the present civil status of the institution? Looking beyond the acts of civil incorporation into the titles to deeds to property, what is the present canonical status of the corporation? In the light of civil and canon law, what is its organizational structure, *vis-à-vis* the sponsoring religious body? Weighing the pros and the cons, what is the desired status for the institution?

The designation of the association of the faithful or the juridic person as public or private identifies the structure's proximate relationship to the Church's apostolic life and mission. Hence, it determines how and to what degree an association or juridic person is accountable and dependent on competent ecclesiastical authority. In certain situations, it can also determine for civil law purposes the extent to which a sponsored body has vested interest in the charitable corporation.¹¹¹

The canonical structure that provides for the fewest formalities of administration may not necessarily be the most feasible or advisable. The legal prescriptions should enhance and facilitate the apostolic work and not dictate it. To that end, the canonical status must properly reflect how closely an institution is linked to the life of the work and the mission of the sponsoring religious body.

The history of the Congregation of Priests of Saint Basil reveals an ever-present commitment to Catholic higher education in the light of the traditions and the heritage of the Congregation. Assumption University testifies to that commitment. In past decades and even up to the present, a strong link to the local and universal Church has always stood as hallmark of the Basilian tradition. Moreover, commitment to Catholic ideals and values have permeated the works of all who worked or were educated within a Basilian *milieu*. That spirit and tradition must continue. In and through it all, the members of the Basilian Fathers formed more than a loose association of educators. Moreover, the

¹¹¹See J. HOWARTH, "Juridic Person or Private Association: Choosing a Canonical Structure," p. 51

sponsored corporations continue to focus primarily on charitable objectives in themselves, exercising their works in the name of the Church. All in all, the institution's commitment to Catholic education has already been firmly established at an earlier time and continues into the present. But, given a number of elements, not the least of which include the ever-developing roles of the laity and the ever-declining number of religious serving on the campuses of Catholic universities and colleges, it may be well-advised to begin a process whereby ownership and control of the institution are turned over to a newly-structured civil corporation. Through the Declaration of Intent, this economic divestiture will oblige the university to integrate the on-going commitment to Catholic higher education into its charter or by-laws of the university.

By placing all of the properties and assets currently administered by the Basilian Fathers of Sandwich into the civil corporation of Assumption University, the Basilian Fathers of Sandwich relinquish legal title as trustees, but through a Declaration of Intent incorporated into the corporate documents of Assumption University they are assured of the protection of the institutional nature and character of the university.¹¹² Accordingly,

¹¹²In their book, Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook, Maida and Cafardi devote one chapter to the topic of divestiture. In it, they describe six forms of divestiture ranging from the dissolution of a public juridic person to a conveyance in trust. While all of the types of divestitures constitute acts of alienation, the conveyance in trust is the one of particular note for this dissertation. This type occurs when the religious sponsor relinquishes canonical control of an institution through the creation of a trust. That is, the religious sponsor or owner (the trust settlor) conveys the trust property (the institution) to the trustee (the governing body). However, because of the nature of such a trust, certain prescriptions guarantee and preserve the sound traditions of the sponsoring religious body together with the nature, the catholic identity, and the character of the institutions. Both authors conclude that because of the preservation of the Catholic identity, it should have no difficulty obtaining the necessary ecclesiastical approval. See 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, Chapter xvii, 1984, pp. 269-272. Black's Law Dictionary defines an irrevocable trust as a "trust which may not be revoked after its creation as in the case of a deposit of money by one in the name of another as trustee for the benefit of a third person (beneficiary)." H. BLACK, Black's Law Dictionary, p. 1050. The sponsorship declaration which seeks to safeguard the spiritual patrimony of the religious institute, in accordance with the prescriptions of the 1983 Code, fits well with this type of trust agreement. Moreover, economic divestiture and corporate restructuring coupled with a sponsorship declaration that is included within a irrevocable trust document heeds the general call of the Second Vatican Council

the operation and management of Assumption University fall directly to the newly-established Board members of Assumption University. The Corporation of the Basilian Fathers of Sandwich could remain as a corporation administering the funds and overseeing the management of O'Connor House with no involvement in the operation of the charitable works. Contributed services donated to Assumption University would not necessarily cease though the new structuring would call for an amended formula. On this point, the university would have to find ways and means to sustain its religious and educational objectives without relying heavily on the contributed services of the Basilian Fathers.

In the boardroom of Assumption University, a restructured civil corporation would better reflect an awareness of the ideals of the Second Vatican Council and the exhortations of *Ex corde Ecclesiae* in which primary corporate authority over administration and policy is invested in a single board of trustees that represents various constituencies within the university and the local community. This newly-constituted board would have a fiduciary responsibility to preserve the nature and character of the institution as detailed in the sponsorship declaration. Moreover, the sponsorship declaration would meet the norm contained within the apostolic constitution, *Ex corde Ecclesiae*, which calls for the external recognition of the ecclesial relationship between the university and the Church. As mentioned in Chapter I, this external bond takes one of two forms, either a constitutive bond or an informal institutional commitment.

A new corporate structure would signal the Basilian Fathers' commitment to begin the development of a new partnership which highlights the parity between the lay men and women and religious-priests at Assumption University. The present bi-cameral independent corporation does not allow for such equality since the structure, as outlined

concerning the role of the laity and the specific message of *Ex corde Ecclesiae* declaring that the future of Catholic universities and colleges depends on competent lay service.

in Chapter III, centers the locus of corporate power around the exclusively Basilian Board of Governors. This Board retains most of the corporate authority and only bestows certain primary corporate responsibilities to the lower body -- the exclusively lay Board of Regents. However, a sound indication that the Basilian Fathers are supportive of lay efforts, confident and hopeful in their visions, and respondent to the broader light of the Second Vatican Council, lies in economic divestiture concomitant with a corporate restructuring.

Accordingly, a suggested model is the uni-cameral, independent corporate structure in which the institution is governed by a single corporate group of trustees which exercises all primary corporate functions.¹¹³ By allowing the laity to share equally in the responsibility for Catholic higher education at Assumption University, this new model meets the purposes and objectives of a Catholic university in better harmony with the directives and ideals of the Second Vatican Council and *Ex corde Ecclesiae*, specifically, together with present cultural and societal practices.

In the final analysis, several reasons support the conclusion for an alteration to the canonical status of Assumption through economic divestiture. First, the university would achieve canonical separateness to match its civil-law separateness, and thereby further insulate the Basilian Fathers from various canonical and civil liabilities as well as the common law doctrines of ascending liability. Secondly, transfer of ownership would signal a desire, on the part of the religious institute, to witness publicly to the vow of poverty and the theological virtue of charity. Such motivation addresses in a concrete way a firm resolve to correct the apparent contradictory lifestyle of members of the religious institute who claim, on the one hand, to live according to this evangelical

¹¹³For a study on the various models of governance of Catholic universities and colleges in the United States, see H. STAMM, "Emerging Corporate Models of Governance in Contemporary American Catholic Higher Education," in Current Issues in Catholic Higher Education, 2 (1981) no. 1, pp. 38-50.

counsel while, on the other hand, accumulate and own institutional goods apart from the directed involvement of the laity. Third, in keeping with the theological teaching on *communio*, there is no indication to assume that Assumption University, as a professedly Catholic institution, cannot endure without a juridical bond to the universal Church. Moreover, *Ex corde Ecclesiae* does not require such legal ties. Juridic personality or status as an association of the faithful offers no real benefits to this institution. Rather, a well-integrated community which is committed to the pursuits of knowledge in the light of faith and reason and bound by internal trust and respect among constituent members will bear fruits in the world that are both, as John Paul II writes, decidedly Catholic and academically excellent. In fact, juridicizing this relationship may even hamper the works of the university. Finally, the days have passed when the key to the boardroom of the Catholic college and university belonged exclusively to the religious institute. Having had sufficient personnel necessary to carry out most of the functions of the university, the religious institute operated one corporate complex under the title of *domus religiosa*. In short, to both the religious institute and the educational institution, ownership meant control. Now, in the light of a rapid decline in the number of Basilians who are competent administrators, highly-specialized scholars, or even interested in teaching and researching at Catholic universities and colleges as opposed to secular universities, coupled with the rapid marginalization of religious communities, "the future," as John Paul II claims, "depends to a great extent on the competent and dedicated service of lay Catholics." Furthermore, "the Church sees their developing presence in these institutions both as a sign of hope and as a confirmation of the irreplaceable lay vocation in the Church and in the world."¹¹⁴ Indeed, over the last thirty years, the social, cultural, and the educational context in which religious bodies

¹¹⁴*Ex corde Ecclesiae*, paragraph 17, p. 269.

educated so many students and owned and sponsored so many institutes of higher education has changed beyond recall. However, through it all, many of the Catholic universities survived. Now, faced with different difficulties and new sets of circumstances, their continued viability is open, as L. Shook writes, "to as many forms as man's ingenuity can propose."¹¹⁵

Conclusion

This chapter attempted to focus on the mechanism whereby the incorporated apostolate of Assumption University and the Corporation of the Basilian Fathers generally relates, severally and jointly, under two legal systems. Moreover, the interaction of the civil and canon law was also highlighted through substantive and case law in an effort to illustrate their divergence and convergence. Their similarities and differences were outlined in an effort to uncover the liability risks to which a sponsoring religious body may expose itself by retaining title to real estate used by a separately incorporated educational institution. Because of the many statutory laws and regulations at canon and civil law to which such institutes are subject, this chapter concentrated primarily on the more salient liabilities and human rights violations that touch both bodies directly. Highlighting this area of law, valid under both systems, served to present the case for corporate restructuring.

The overriding concern was the alteration of the present canonical status of Assumption University. Thus, in relying on the problem played out in the canonical and civil investigation, together with other considerations presented throughout this chapter and others, the intent was to provide an alternative solution that facilitated not only the hoped-

¹¹⁵L. SHOOK, Catholic Post-Secondary Education, p. 433.

for insulation from liabilities for both the sponsoring religious body and the apostolate which presently shared in the religious institute's canonical status, but also maintained the nature, purpose, and Catholic identity of the university as well as the spiritual patrimony of the Basilian Fathers. Studying the advantages and disadvantages of the principal options for canonical status under the 1983 Code in the light of Catholicity, autonomy, clarity of mission, and ecclesiastical control revealed that the most feasible and advisable option rested in the conveyance of ownership of titles to property from the Corporation of the Basilian Fathers of Sandwich to the Corporation of Assumption University conditional upon the inclusion of a Declaration of Intent into the corporate documents and concomitant with a re-organization of the governing bodies. A declaration of intent is included in the transference of ownership and is maintained through the fiduciary relation. In all, this alteration represents a sound and practical way of ensuring that the timeless principles continue to guide Catholic universities while respecting the continued evolution of Assumption University within a particular culture and academic setting.

EPILOGUE

Towards the Future

"Take heed then *how* you hear."
-Luke 8, 18

In the final paragraph of L. Shook's book on the historical developments of Catholic universities and colleges in Canada, he cites this puzzling admonition of Jesus from the Lucan text, pointing out that the Master's concern was with "how you hear" and not "what you hear". Shook finds in this a critical distinction, recalling Marshall McLuhan's concern with what he liked to call percepts or medium, rather than with concepts. While concepts are valid, Shook claims that they are imperfectly so until correctly learned:

Only those who learn in the fully human medium, the how medium, the God-context, have learning. For those who grasp this fact, the rest of Jesus's text contains no enigma: 'For anyone who has will be given more; from anyone who has not, even what he thinks he has will be taken away.'¹¹⁶

Preserving the integrity of all learning in relation to the mysteries of the Godhead becomes the primary, Christian element which guides the Catholic university or college. Put another way, it represents an essential, timeless principle.

For centuries, within a diversity of cultural and academic settings and under a variety of governance models, serious-minded Christians have attempted to achieve this

¹¹⁶L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, p. 433. In this quote, he concludes with the remainder of Luke 8, 18.

practical orientation of all learning to God as they engaged in their administrative duties, academic pursuits, and pastoral ministries within the university community. Today, in spite of certain deficiencies and failures, Catholic universities and colleges are striving to maintain this kind of awareness, endeavouring to witness in so many different ways to the presence of a transcendent God and seeking by their concern for God to confer on all human activity what Shook labels, "a valid sort of finality."¹¹⁷ For this reason alone, preserving such institutions is critical for humanity and for its activities, namely learning.

Many forms of Catholic universities and colleges are quite capable of completing these tasks -- in relation to God. The difficulty, however, is that many secular universities are also quite capable of attending to these tasks -- in relation to God. In fact, many of these universities which offer Scripture courses, Schools of Divinity and Christian Studies, and Departments of Religion already compete with Catholic institutions for qualified students, highly-skilled faculty, sound scholarship, and government money. Moreover, the increased proportional enrolment of Catholic students in secular universities is reason enough to pose several questions.

Is the federative model, based originally on a denominational principle and upon which most of the Catholic universities in Canada now depend, the best model for the present time? Are not the restrictions placed upon federated universities, *vis-à-vis* the abeyance of degree-granting powers, the approval of administrative and faculty appointments by the host university, and the limited role currently played by the local bishop, real indicators that the Canadian Catholic institutions of today already exist as quasi-faculties of the secular institution? Why must all Catholic federated universities remain in an enclave, going about their activities within a sectarian context? Would not

¹¹⁷L. SHOOK, Catholic Post-Secondary Education in English-speaking Canada, p. 432.

a joint venture between the denominational college and the secular university better adapt to the needs of the modern day? If this shift occurs, what then becomes of the relationship that such colleges now enjoy with the Church? Or, perhaps Catholic universities and colleges ought to remain independent but focus on advanced learning within highly-specialized institutes?

In any event, depending upon the motivations, divested of its economic interests in Assumption University, the Basilian Fathers, together with the members of Assumption University, who now equally control the institution, put themselves in the enviable position to chart the future direction of the University. In fact, in answering the above questions, two distinct options emerge. First, in an effort to meet the academic, spiritual, and cultural needs not only of the constituent Catholic population but also of the community, generally, Assumption University could move to place itself directly within the public university structure. Second, by way of an alternative, Assumption could maintain a highly-specialized autonomous institute that would prepare and teach Catholic leaders for areas of service within the Church. In either case, its primary task, though taking place in different domains, remains -- to advance the "concepts" relative to God.

Under the first scenario, the ecclesial college, which is fully-integrated into the secular university, strives to demonstrate to the scholarly world that its interdisciplinary dialogue, now largely carried on within its own closed academic circle, will gain, not lose, from a Christian vision of wisdom that accepts the essential unity of all truth and the ultimate harmony of faith and reason. Within the secular university, this ecclesial college serves to enhance the witness value of the Catholic faith, broaden the forum for pastoral services, provide a wider spectrum for Catholic scholars to engage in their academic pursuits and to educate students, who come from a diversity of backgrounds, in Christian studies. This movement breaks open the Catholic university and makes it

more accessible to the Christian and secular worlds. Moreover, only a lack of creativity and initiative stands in the way of the faculty members making significant gains within the professional faculties and schools of the public university.

Within this secular setting, the university intensifies the intellectual life of the ecclesial college as it freely competes within an open forum. In doing so, the intellectual activity maintains the Catholic nature of the college. Furthermore, the responsibility for its identity and mission is distributed more evenly among all who work within the college. This obligation is no longer left to the campus minister who, in many instances, presently interprets this duty in a narrow sense, namely sacramentally. Rather, the chaplain and the members of the faculty, as active participators, bring Catholic faith to bear on the intellectual life and claim a charge over the college itself. This internal dynamic motivates the constituent relationships within the college in their on-going dedication both to the acquisition and the advancement of learning to God.

The external ecclesial relationship does not necessarily disappear under this model. As mentioned, under the present federative arrangements, the authority and the role of the diocesan bishop have been greatly reduced. Admittedly, it is true that this integration eliminates the possibility of having a diocesan bishop act as chancellor or the president named by a Church body. Yet, because the college is now directly immersed within the secular institution, this model enhances the proper and essential role of the bishop in relation to the members of the college and the community at large. That is, his role as pastor becomes central. Not in any active way concerned with the scholarly life of the college (unless academically qualified to engage in such debates) nor in any manner reduced to a "potted plant at the graduation," the bishop serves the institution in many ways. First, his connection to the college is a visible sign that its Catholicity rests on communion with the Church. Consequently, he must assert that fact in active and frequent sacramental celebration, in dialogue with members of the secular university

through seminars and colloquia on specific Church-related topics, and in the on-going support of the intellectual pursuits of the faculty by encouraging the promotion of magisterial statements or by requesting further research into those matters not yet refined. It is true that this arrangement proceeds only in mutual respect and trust and calls for a fundamental shift in understanding. It is not any juridical tie that binds but a relationship between highly-skilled, committed Catholic faculty and a diocesan bishop who plays a leadership role by supporting, enlightening, and inspiring the academic and spiritual life.

Granted, there are many questions left unanswered with this proposal. While it represents a brief, thumb-nail sketch of a future possibility, this model is neither entirely new nor unimaginable as a future direction. In fact, as early as 1971, Shook predicted that the federative model would no longer be a viable means for Canadian Catholic institutions of higher learning to witness effectively nor pursue academically the objectives of Catholic universities. Moreover, as pointed out in Chapter One, Örsy lists somewhat similar colleges in his second of six types of institutions which are presently found on the campuses of the secular universities in Germany and Switzerland. In reality, these colleges are merely Catholic academic units of the larger university with no formal or informal institutional link to the Church. However, the ecclesial college is related to the diocesan bishop and depends upon his active support. There is also no reason why a declaration between the secular university and the college could not outline consultative procedures for appointments and curricula development.

As regards the second option, there will always be a need for specialized institutes of Catholic and Christian studies to provide professors, professional scholars, and members of the Catholic community a forum necessary for their personal development and for the carrying out of research projects in the service of learning, of society, and of the Church. In fact, many such institutes already exist throughout the world. Though still very much in its infancy, the Institute of Pastoral and Educational Ministry of

Assumption stands as one example of a university moving towards this specialized involvement in education. Indeed, it ought to pursue in this venture since it is poised to make a major contribution to the life of the Canadian Church. In order for it to demonstrate intellectual seriousness, however, it is necessary to remain focused on high-quality teaching and researching in specialized areas, such as adult education, Catholic teacher training, family studies, bioethics, or social justice relative to labour relations. Further, completed within an array of services, such as, pastoral, counselling, and community, the academic pursuits flourish. Still, Assumption could broaden these efforts and establish a complement of educational services not only for the surrounding community but also for Northern Ontario and other such areas which are currently in need of scholarly Catholic education. This outreach program could take the form of summer programmes and institutes which are aimed at parish pastoral workers or Catholic teachers, parish programs, diocesan workshops which touch on specialized topics in canon law, scripture, and liturgy, or community service programs which are oriented toward current topics in social justice, or Catholic hospital or university administration. Also, plenty of room exists for expansion in other forms of media such as television and computers. All such efforts would assist the local Churches in their respective educational needs.

Needless to say, as an autonomous institute, the financial obligations are immense. On this point, Assumption must continue to develop more seriously an active campaign through an Office of Development in order to establish endowments and other sources of income to fund the projects and to identify and recruit potential faculty. In short, the members must choose professionally qualified people to fulfill this task which demands much time and effort.

In and through it all, Catholic teaching and learning in all places insist on preserving the integrity of the message of Jesus Christ in connection with faith. But, the

ultimate survival of the Catholic university rests in the inventive minds of men and women, both lay and religious, who desire to transmit this message to all people and to all places. It is true that Catholic intellectuals do have something to offer the academy. In fact, they stand on the brink of an historic shift in understanding their role in scholarship, but they will not achieve any of their goals as long as they remain divorced from the issues of contemporary culture and fail to take responsibility for their convictions in all fora. Are Canadian Catholic universities lagging behind others who are willing to make their message known? In any event, whether inside the secular university or outside as an autonomous institute, intellectually serious Catholics can continue the effort to clarify the mission of Catholic universities to the benefit of the human community as they teach people how to hear. Here, the words of the patron saint of the Congregation of Priests of Saint Basil ring true:

When we compare the two kinds of learning, we see that there can be value for us in knowing both if they are like one another and if they are not, then at least the comparison, by showing us the difference, will help considerably to strengthen us in our attachment to the better.¹¹⁸

It is true that while the options seem attractive and certainly attainable, the *modus quo* needs more reflection and study, especially as regards the interface between the two legal systems and the interplay between the secular and Catholic universities. Indeed, Paré has the opportunity to re-evaluate his constituencies and to act accordingly in order to respond effectively to the needs of Christian education in this postmodern culture. In any event, thinking diachronically, as opposed to synchronically, will help to shape a vision which will ultimately advance the life and the work of the Basilian Fathers in the apostolates of

¹¹⁸BASIL OF CAESAREA, "For the Young on How They Might Derive Profit from Hellenic Literature," excerpt from J. HANRAHAN, St. Basil the Great 329-379: A Life with Excerpts from His Work, Toronto, Basilian Press, 1979, p. 58.

teaching and preaching. After all, the historical accounts are gentle reminders to the Basilian Fathers that such dynamic thinking has successfully led the Congregation thus far.

Appendix A

Catholic Universities and Colleges in Canada

The Apostolic Constitution *Ex corde Ecclesiae* and the ordinances for its implementation address the following Catholic universities and colleges:

- 1° - *Canadian Catholic universities and colleges established by a Religious Institute:*
- University of St. Jerome's College, Waterloo, Ontario
 - The University of St. Michael's College, Toronto, Ontario
 - St. Thomas More College, Saskatoon, Saskatchewan
 - The University of Sudbury, Sudbury, Ontario
 - Brescia College, London, Ontario
 - Université Saint-Paul/Saint Paul University, Ottawa, Ontario
 - Assumption University, Windsor, Ontario
- 2° - *Canadian Catholic universities and colleges established by the local diocese*
- St. Paul's College, Winnipeg, Manitoba
 - St. Joseph's College, Edmonton, Alberta
 - St. Mark's College, Vancouver, British Columbia
 - St. Thomas University, Fredericton, New Brunswick
 - St. Francis Xavier University, Antigonish, Nova Scotia

- King's College, London, Ontario
- St. Mary's University, Halifax, Nova Scotia
- Campion College, Regina, Saskatchewan
- Newman Theological College, Edmonton, Alberta

The above information was taken from the Ordinances Issued by the Canadian Conference of Catholic Bishops in View of the Correct Application of the Apostolic Constitution, *Ex corde Ecclesiae*, p. 4. The norms for the implementation of *Ex corde Ecclesiae* have yet to receive final approval from the Congregation for Catholic Education.

APPENDIX B**Schedule A**

To Agreement between Assumption University and The Basilian Fathers of Sandwich in Ontario made as of the 1st day of May, 1977

1. 400 Huron Church Road including East and West Wing and St. Michael's Residence (Assumption University)
2. Huron Church Road frontage of approximately nine acres lying between University Plaza and Assumption High School
3. 320 California Avenue
4. 324 California Avenue
5. 2365-2399 University Avenue West

Title to 400 Huron Church Road is in the name of the Basilian Fathers of Sandwich in Ontario. Assumption University is the beneficial owner. The lands listed in this Schedule belong to Assumption University. For purposes of sale, permission from the Corporation of the Basilian Fathers of Sandwich must be given since it retains legal titles.

Schedule B

To Agreement between Assumption University and The Basilian Fathers of Sandwich in Ontario made as of the 1st of May, 1977.

1. 2311 University Avenue West
2. 2331-33 University Avenue West
3. 2354 University Avenue West

The titles for these lands also remain with the Corporation of the Basilian Fathers of Sandwich. O'Connor House is presently located on these sites.

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BIOGRAPHICAL NOTE

Daniel John Zorzi is an ordained member in the Congregation of Priests of Saint Basil. He was born in Sault Ste. Marie, Ontario, Canada on 30 April 1960. Following his secondary school education at Saint Mary's College, he completed his Honours B.A. degree in Psychology at McMaster University, Hamilton, Ontario. After one year of teaching at Saint Charles' College in Sudbury, Ontario, the Basilian Fathers accepted him into their novitiate in Houston, Texas. He obtained the M. Div. degree from The University of Saint Michael's College, Faculty of Theology in Toronto, Ontario. In September 1989, the late Bishop James Mahoney, former Bishop of Saskatoon, ordained Daniel to the Order of Deacon. That same year, Bishop Bernard Pappin, Auxiliary Bishop of Sault Ste. Marie, ordained him to the Order of Priest. In 1993, Daniel completed his M.C.L. and J.C.L. degrees at Saint Paul University, Ottawa. In 1995, he obtained the Ph.D. (Canon Law) degree from the University of Ottawa and the J.C.D. degree from Saint Paul University. Presently, he is pastor of Our Lady of the Assumption Church, Windsor, Ontario and will begin teaching canon law at The University of Windsor, Faculty of Common Law and at Assumption University in the Institute of Pastoral and Education Ministry.