CANON LAW AND ITS INTERSECTION WITH CIVIL LAW THROUGHOUT CANADIAN HISTORY

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Introduction

It is a privilege for me to be here at the first Decretum Symposium, exploring the intersection of civil and canon law. In the time allotted it will not be possible to enter into details regarding the past. Nevertheless, I hope that what we'll be able to cover here will be both helpful and interesting.

We begin by looking at the background, the context in which canon law came to be applicable in Canada, under the French regime. Then, we will look at a couple of points that affected Church-state relations in Canada after the conquest. We will then jump ahead to contemporary times, and try to see how some of these principles have been applied by the courts in Canada.

I. The Background

The canon law of the Catholic Church does not evolve in a vacuum. Rather, it develops within particular cultural and political contexts, which are continually evolving. The same could be said of its application in varying situations.

The current juridical position of the Catholic Church in Canada is illustrative of this evolution. As political circumstances changed, so too did the way in which the Church in this country could function and apply its applicable canonical norms.

What I intend to do here could, in fact, be done for almost any country where there have been different government regimes. In some instances, in order to provide for fruitful and productive dialogue, concordats have been entered into between governments and the Catholic Church. Such, however, has not been the case in Canada, where no such agreement was ever in place. Therefore, the juridical status of the Church, as far as the government of Canada is concerned, does not derive from any international treaty, but rather from a series of legislative acts that, through the course of time, have developed a modus vivendi that enables the Church to carry out its mission, and that, at the same time, respects certain legislative prerogatives of the government of Canada.

As law and as circumstances evolve, it is possible that the current juridical situation which the Catholic Church enjoys in Canada will change or be somewhat modified. But, for the present, there is excellent coexistence between Church and state in Canada. Potential difficulties do not concern the Catholic Church as such, but rather the interpretations given by the Canadian courts to the "freedom of religion" as guaranteed in the Canadian Constitution.

A. Church-State Relationships in France at the Beginning of the Sixteenth Century

When Jacques Cartier arrived in Canada in 1534, he brought with him a form of government that existed in France, and that could be identified in today's terms as a "union of Church and state."

The first two centuries began in peace and relative harmony between Church and state in Canada. Under the French government, when Canada was known as "New France" (along with the eastern colony of Acadia), there was union between the two and very reasonable cooperation.

Indeed, the beginning of the sixteenth century was marked, as far as Church-state relations in France are concerned, by the Concordat of Bologna in 1516 between Pope Leo X and King Francis I of France. We note in this important document the emergence of new principles that were to exert a profound influence on the question of relationships between Church and state in France: limitation of papal prerogatives and the exaltation of royal power.

Close union existed between the Church and the state at this time. The Catholic Church enjoyed the position of being an established church in France at the time of the concordat. Diplomatic relations existed between the papal states and the court of France; the state recognized the pope as head of the Church, and the mutual relationships of pope and king were determined by treaty and concordat. The monarch, as head of state, considered himself to be the secular arm of the Church and saw to the observance of religious laws. Indeed, the Church laws of the time were considered part of the laws of the kingdom. However, at times the state seemed to meddle in the internal life of the Church by legislating in matters of ecclesiastical discipline.

As protector of the Church, the king convoked local councils and synods, and their decisions became effective upon registration by Parliament.

The clergy was one of the three estates, part of the estates general, where legislation was passed on matters of ecclesiastical discipline applying to France.

Although the pope was accepted as the leader of Christianity, his freedom of operation had been restricted to a certain extent: he could now act only through his legates accredited to the country by letters of appointment registered with the Parliament. In fact, sectors of jurisdiction were carefully laid out in the concordat.

Another point agreed upon in the concordat of 1516 that was to be of great importance, not only to France, but also to the infant colony in New France, was the right given the king to appoint to benefices, subject to the approval of the pope, who would grant canonical institution. We will find, in the course of Canadian history, that this will be a recurrent theme with important overtones for

the status of the Catholic Church, especially concerning the appointment of bishops. The right of appointment of pastors does not seem to have been used by the king, although the state established a series of regulations for the appointment of clerics to major benefices.

We can rightly say, then, that at the beginning of the sixteenth century in France, there existed a very close union between Church and state. The Church with its organization and legislation was an integral part of the kingdom; the state protected the Church and gave public and obligatory effect to its decisions and laws once they had been registered by the Parliament. There also existed, however, what could be considered as disadvantages: the state could easily intervene in religious matters, and in fact did so. Royal assent was a necessary prerequisite for any decision to be binding in France before the courts.

Louis XIV established the Sovereign Council of Quebec (April 1663), marking the beginning of a new form of government for the land. The first ecclesiastic in the country (i.e., the bishop eventually) was automatically a senior member of the council. This council had judiciary power; all legislative authority, however, remained in the hands of the king of France.

The Church thus enjoyed in Canada the status it enjoyed in France and the canon law that was registered with Parliament (in France) was operative in the land.

B. The British Regime

When Britain conquered New France, the situation changed radically, not only legally, but also emotionally. Although the Catholic Church was still proscribed in England, and the Penal Laws were in effect there, in 1713 Britain granted freedom of religion to the Acadians. But in 1755, just four years before the conquest of Quebec, it deported many of them for failure to take the prescribed Oath of Allegiance and other related oaths. Fear of the same policy was strongly felt in Quebec during the interim period, and this led to a lasting distrust toward the British conquerors.

When, on September 18, 1759, de Ramezay, the French governor, surrendered the city of Quebec and the area under the government of Quebec to the British commanders Saunders and Townshend, he inserted in the document of capitulation two articles concerning the status of the Catholic Church in Canada.

One of these, article 6, asked as follows:

> That the exercise of the Catholic, Apostolic and Roman religion shall be maintained; and that safeguards shall be granted to the houses of the clergy, and to the monasteries, particularly to his Lordship the Bishop of Quebec, who, animated with zeal for religion, and

> charity for the people of his diocese, desires to reside in it constantly, to exercise freely and with that decency which his character and the sacred offices of the Roman religion require, his episcopal authority in the town of Quebec, whenever he shall think proper, until the possession of Canada shall be decided by a treaty between their most Christian and Britannic Majesties.

The fact that this article was inserted in the capitulation agreement shows the importance of the Catholic Church in the life of the people. While de Ramezay was possibly hoping to be able to maintain the Catholic Church as the established Church of Canada, the British commanders could not possibly grant his desire as it was formulated. Their reply was carefully and unambiguously worded: "The free exercise of the Roman religion is granted, likewise safeguards to all religious persons, as well as to the Bishop, who shall be at liberty to come and exercise, freely and with decency, the functions of his office, whenever he shall think proper, until the possession of Canada shall have been decided between their Britannic and most Christian Majesties."[1]

The agreement settled three points: free exercise of religion, protection of religious persons, and freedom of the bishop to exercise his functions.

The agreement concerned only that part of North America under the jurisdiction of de Ramezay. It was not until the following year that all the remaining French possessions were surrendered to the British by the Capitulation of Montreal.

The Act of Capitulation of Montreal by the Marquis de Vaudreuil, September 8, 1760, even though it too was of interim character, is most important for the subject of Church-state relationships in Canada. It is much more detailed than the preceding one, showing that the governor realized the tremendous difficulties he would now have to face to maintain the Catholic religion.

The principal articles of the act concerning religion can be summed up under the following headings: people are free to practice the "Catholic, Apostolic and Roman religion"; people have the right of meeting in churches; worshippers have the right to receive the sacraments publicly; the diocesan clergy have the right to retain and exercise their functions; religious communities of women could retain all their functions; communities of men retained their possessions but not their rights; the Indians will keep their missionaries; the bishop will no longer be chosen by the king of France. It must indeed have been most difficult and painful for the French leaders to see their Church reduced to a position of mere tolerance after so many years of freedom and protection.

The Act of Capitulation contains some fifty-five articles, nine of which are related to the question of the Catholic religion. Article 27 reads as follows:

> The free exercise of the Catholic, Apostolic, and Roman Religion, shall subsist entire, in such manner that all the states and the people of the Towns and country places and distant posts, shall continue to assemble in the churches, and to frequent the sacraments as heretofore, without being molested in any manner, directly or indirectly. These people shall be obliged, by the English Government, to pay their Priests the tithes, and all the taxes they were used to pay under the Government of his most Christian Majesty.

Amherst's reply was, "Granted, as to the free exercise of their religion, the obligation of paying the tithes to the Priests will depend on the King's pleasure." Amherst did not want to grant the right of obliging the people by law to continue to pay tithes. Under British rule, there was no question for the time being of making the state responsible for the well-being of religion (keeping in mind that the Catholic Church was proscribed in England at the time and the Church of England was the established church). His reply did not change the ecclesiastical law of contributing to the support of the pastor, but the protection of the priests' right was no longer guaranteed by civil authority, and delinquents could not be prosecuted for default of payment. The enforcement of the payment of tithes through a court action was restored in the Quebec Act of 1774.

The Treaty of Paris was concluded on February 10, 1763, by the kings of England, France, and Spain. The king of Portugal acceded to its articles on the same day.

Article 4 concerns the freedom of religion. After having stated that "His Most Christian Majesty cedes and guarantees to his said Britannick Majesty, in full right, Canada and all its dependencies," it is further accepted that

> His Britannick Majesty, on his side, agrees to grant the liberty of the Catholick religion to the inhabitants of Canada: he will, in consequence, give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church, as far as the laws of Great Britain permit.

The interpretation of this last clause was to lead to many controversies, as can be imagined: To what extent did the laws of Great Britain permit the exercise of the Catholic faith? Another question was: How far did these laws of Great Britain apply in Canada? It can also be noted that the text referred only to the exercise of worship, and not to any establishment or recognition of the Church as such.

The treaty stipulated that a period of eighteen months would be fixed in which the inhabitants of Canada could sell their estates and return to France if they so desired. Thus it wasn't until August 10, 1764, that the civil government of Canada came into effect, ending the military regime.

The "most effectual orders" were indeed issued on December 7, 1763, to General Murray, the first

governor, and are repeated in the instructions to subsequent governors general.[2]

The first article of the Instructions stated that all the subjects were to take the Oath of Allegiance and make and subscribe the Declaration of Abjuration, commonly called the "Test." It does not seem, though, that this order was applied directly. Nor was the following one, which called for all "professing the Religion of the Romish Church" to "deliver in upon Oath an exact Account of all Arms and Ammunition, of every sort in their actual possession."

Murray was also instructed to transmit an exact account of the nature and constitution of the religious communities, as well as of their revenues and holdings.

He was ordered "not to admit any Ecclesiastical Jurisdiction of the See of Rome, or any other Foreign Ecclesiastical Jurisdiction whatsoever in the Province."

The thinking behind the treaty or the factors that influenced its composition could be summed up under the following headings: "First, there was a desire to assimilate the new subjects to the life of the fold into which they had been introduced"; then, a sincere feeling of revulsion against the Catholic faith; third, a long-inherited suspicion against the papal court; also, the fear that France might use the Church to facilitate the future recovery of Quebec; "a curious worship of the legal dogma of the King's supremacy, and an extraordinary sensitiveness towards any formal detraction therefrom"; and, finally, a wish to show a friendly indulgence to the people of Canada.[3]

The Quebec Act of June 22, 1774, became effective on May 1, 1775. In addition to provisions for civil government and for a civil code, it granted the following:

> the "Religion of the Church of Rome" may be freely exercised; the clergy may receive "the accustomed dues and rights" from Catholics; provisions shall be made for the support of the Protestant clergy; no Catholic shall be obliged to take the Oaths of Supremacy and Adjuration; in their stead, another oath was substituted; and religious orders do not have the right to hold possessions.

In spite of its limitations, the act was certainly very lenient and went far to appease minds. But, as to the status of the Catholic Church itself at the time, we can look at a decision of the Privy Council in 1921 (Despatie v. Tremblay):

> The religious position in the Province of Quebec in 1774, was therefore that every individual had the right to profess and practise the Catholic religion without let or hindrance. But it must be borne in mind that this is a privilege granted to the individual. There is no legislative compulsion of any kind whatever. He may change his religion at will. If he remains in the Roman Catholic community he may, so far as the law is concerned, choose to be orthodox or

not, subject to the inherent power of any voluntary community, such as the Roman Catholic Church, to decide the conditions on which he may remain a member of that community since that power has been limited in some way by the past acts of the community itself.

In other words, each member of the Roman Catholic community in Quebec possessed the same privileges as any other citizen so far as religious freedom is concerned, save that he was not subject to any of the disabilities which then and, for a long time after, attached to Protestant dissenters. The Legislature did not put over him as a citizen any ecclesiastical jurisdiction. The decisions of the ecclesiastical courts that existed in the Roman Church bound him solely as a matter of conscience. The Legislature gave to their decrees no civil effect nor bound any of its subjects to obey them.

Indeed, the Act in Article 17 expressly reserved to His Majesty the power to set up Courts of ecclesiastical jurisdiction in the province and to appoint judges thereof, although that power seems never to have been acted upon. But what has just been said must not be misunderstood. The law did not interfere in any way with the jurisdiction of any ecclesiastical courts of the Roman Catholic religion over the members of the communion so far as questions of conscience were concerned. But it gave to them no civil operation. Whether the persons affected chose to recognize those decrees or not was a matter of individual choice which might, or might not, affect their continuance as members of that religious communion. But that was a matter which concerned them alone.

We cannot understand the present thinking in Canada, especially in Quebec, without keeping these historical facts in mind.

Under the new set up as a British territory, the Catholic Church was not recognized as existing in Canada. With time, the government agreed to establish certain corporations for dioceses, parishes, religious institutes, associations, and so forth. But there never was a concordat under the British regime, or later. So, in practice even today the Catholic Church is an unrecognized reality as such, although the corporations through which it carries out its mission are duly recognized. Canon law, as such, has no formal recognition in Canada. Indeed, there is now complete separation between Church and state in Canada.

I now wish to jump many years ahead, to try and see how, in spite of this legal situation, the canon law of the Catholic Church has, indeed, been applied by the secular courts of the country.

II. The Use of Canon Law in Canadian Secular Courts

In spite of the numerous difficulties faced by the Catholic Church in having its status recognized, it is important to examine how our courts have addressed the issue of the Catholic Church's internal legislation when it comes to matters brought before the various tribunals of the country.

We can note that both the United States and Canada have adopted the principle of separation of Church and state. Yet both interpret and apply it differently. In Canada, the federal and provincial governments provide funds for Catholic schools, for Catholic hospitals, and for many other services offered by one of the agencies of the Catholic Church, but on condition that such services not be directly for the furtherance of religion. Of course, other denominations can avail themselves of similar benefits in certain circumstances. I intend to refer in passing to a couple of US cases because of the influence they eventually exerted on Canadian jurisprudence.[4]

A. Recourse to the Secular Courts

Already in 1996, a Canadian publication listed twenty-seven pages of cases involving the churches and the secular courts of Canada.[5] This lists refers only to cases that have been published. There have been many more since then, particularly in relation to the Indian residential schools issues. Obviously, many of these cases do not refer to the Catholic Church, but their high number indicates that very often "religion," as distinct from "faith," leads people to positions that become hardened. Even in various parts of the world today, there are wars over religious questions, simply repeating a pattern that has been common in Europe and elsewhere since the sixteenth century.

There have been a number of cases where canon law was used to resolve taxation issues. See, for instance, Federal Court of Canada, Trial Division, W.A. MacKay, J., "William J. McRAE and Her Majesty the Queen," November 4, 1994, file T-494-90; decision upheld in Appeal, February 16, 1997. The defendants in this case, who were part of a Bible College, asserted that they constituted a "religious order" for the purposes of the taxation law. The expert in the case explained to the court, among other things, what was meant in canon law by the concept of "religious order" (now "religious institute"). However, these tax cases are not the primary ones applicable today.

Likewise, there are numerous cases where the civil law (as is often the case in Quebec, for instance) had issued norms regarding the Church, and which were taken almost directly from the canon law.[6]

Incidentally, on this score, there is a major difference between the Canadian approach and that used in the many courts of the United States. The Canadian courts are quite willing to make use of canon law. In fact, in a Thunder Bay case, the judge wrote,

> I have already suggested that the ultimate result of this case may well turn on the interpretation of the internal rules of the church. I would strongly suggest to counsel that if they have not done so they each acquire a copy of the *Code of Canon Law* and start doing a little research because the secular law stops at the door of the church and while basic concepts of trust and beneficiary are secular concepts and will be enforced by the secular authorities the disposition of the assets of the Church is to be determined in accordance with the rules of the Church and the secular authorities will apply the rules of the Church in these matters. While it may seem strange to people unversed in these matters that the secular courts will get involved in areas of canon law and other forms of ecclesiastical law, it is not any more strange than the courts getting involved in interpreting the bylaws of a service club or a sporting club and the courts do this all the time, and that will ultimately decide how this case will be determined.[7]

B. Other Areas Where Canon Law Was Invoked

There is another instance—outside the courts—where the secular law in Canada refers to the canonical legislation. In the incorporation acts of many Catholic hospitals in Ontario, the following (or a similar) clause is found:

> In the operation of the corporation, the canon law of the Roman Catholic Church, as amended from time to time, (except where such is contrary to the applicable civil law), and the *Health Ethics Guide* promulgated by the Canadian Conference of Catholic Bishops, shall be complied with and observed.

This integrates the canonical prescriptions into the secular world, with the advantages and the disadvantages that can be imagined. But, given the Canadian context, this appears to be a good approach taken by the legislatures. If a Catholic hospital does not observe the canon law in its operations, the act has no civil validity. Other provinces, however, such as Nova Scotia and Newfoundland, did not wish to bind themselves to canon law or to documents promulgated by the Conference of Bishops, and so instead have integrated the legal and moral principles into "Schedule 'A'" at the end of the various bills. This "Schedule 'A'" repeats most of the points found in the *Health Ethics Guide*.

C. The Intervention of the Courts in Internal Church Matters

There is, of course, a general reluctance on the part of the courts in Canada to become involved in internal ecclesiastical matters. A number of persons are quite pleased with this because they state that it is not prudent for the secular courts to begin interpreting canon law and Church doctrine; they refer to the traditional separation of Church and state to justify this approach. But it should be kept in mind that many of these civil court actions originated because of the impossibility for the parties to obtain justice before the Church.[8]

In Canada, the courts have limited their intervention in matters relating to the ecclesiastical tribunals to the following instances:

1. When church tribunals did not follow their own procedural and substantive rules.
2. When internal tribunals did not comply with the rules of natural justice, in particular the rights to know the case, to reply to the case and to have unbiased tribunal.
3. Where tribunals acted in an *ultra vires* fashion, that is, with malice, *mala fides*, bias, or some other vitiating factor.
4. Where disciplinary disputes occurred in religious organizations that have been incorporated pursuant to civil legislation, so as to be thereby subject to civil court supervision.
5. Where discipline was related to a property or a civil right.
6. Where a civil court was called on to carry out a punishment by an internal tribunal.[9]

Incidentally, this shows how important it is to make certain that Church courts observe the rules of canon law if they wish to have their decisions upheld by the secular courts. When the Church doesn't even observe its own rules, it will not be surprising to see others intervening, especially when matters relating to natural justice were not observed. This is in addition to obvious situations arising in matrimonial tribunals where the basic rights of the parties are often not respected (primary among such rights are the right to know the grounds—see canon 1507; to see the acts—see canon 1598; and to receive a copy of the sentence—see canon 1615). These three are usually considered under the general heading of "right of defence." Other fundamental rights would include the right to know who are the witnesses, to propose additional witnesses, to have assistance (e.g., advocates), and so forth.

This situation is not limited to Canada. For instance, on July 20, 2001, the European Court of Human Rights condemned the procedures used in a marriage tribunal in Italy and, because the government of Italy recognized the declaration of nullity given by the Church courts, without proper defense for the respondent, it was ordered to pay 28 million lire in damages.[10]

A recent case in Newfoundland addresses the issue of using canon law in secular cases:

> [167] While it is civil law which determines the question of liability, Canon Law may inform the analysis by providing insight into the internal governance structures of the Church. These may be relevant in defining whether, under those rules, there was a duty on the Archbishop to become involved in the operations of the orphanage. I see Canon Law as akin to the articles of incorporation governing corporate relationships. They may not determine civil liability, but they can define the expectations and responsibilities of the various actors.[11]

D. Cases Involving Religious

A number of the cases that were brought before Canadian secular courts concern religious men and women. Very often, the cases revolved around a question of departure or dismissal. At the beginning of the last century, in what was apparently an act of anti-Catholic bias, a judge ruled in relation to the vows pronounced by a religious in her congregation, that "such a contract, however meritorious the object, is incapable of enforcement and is wholly illegal and void, on grounds of public policy."[12]

A similar opinion was given by the Court of Appeals in a Minnesota case involving a Benedictine monk:

> Such an agreement [the profession of vows and the placing of goods in common] is no more enforceable, in the civil courts at least, that would be an agreement by one to surrender or forfeit to another his life. . . . In this country it is the inherent and natural right of every person to acquire and hold property in his own right; and the state is interested in preserving the liberties as well as the lives of its members, and they are guaranteed against the deprivation thereof, either by the state or by any person, individual or corporate, without due process of law. If the agreement to perform the service is not enforceable, then upon what principle can it be enforced as an equitable title to the fruits of such services?[13]

This decision was eventually overturned by the U.S. Supreme Court (234 U.S. 640 (1940)).

On the other hand, in a Canadian case (*Dodd*) where the canonical input took five days, the judge based his decision on canon law provisions. This was a case where five former religious, who had been legitimately dismissed from their institute, sued for the assets of the institute. In his decision, the judge noted,

> The status of a religious can only be conferred or taken away by the Roman Catholic Church and the law governing the matter is canon law.

Later on, he noted,

> All five plaintiffs ceased to be religious in the Roman Catholic Church immediately upon the communication of the rescripts. . . . The grounds for dismissal were grounds recognized by canon law as sufficient . . . and the procedure used in determining the matter was proper to canon law. . . . The method employed was canonically correct. . . . I have already stated that one must be a religious in the Roman Catholic Church to be a member of the defendant secular society. It follows that when one is properly dismissed as a religious she ceases to be a member of that secular society.[14]

As Jordan Hite notes, when speaking of the role of expert testimony in such a case,

> the importance of the expert testimony poses a further question, namely, what will occur when parties offer experts with differing interpretations of Church law. This can easily occur since such differing opinions are already a part of the commentaries and discussion of present Church law, and could easily find their way into court. However, even given differing court opinion it would seem to be very difficult for a civil judge to act contrary to the opinion and action of the proper Church authority, since that would in effect be the authoritative Church interpretation.[15]

It is interesting to note that in the March 16, 2018, decision in Newfoundland (par. 169–70), Judge Faour refers explicitly to this *Dodd* case and notes as follows:

> Defining the Canon Law relationships is the starting point for an assessment of civil law responsibility. . . . The Court will be deferential to matters of internal processes in the Church. However, in this case, those internal processes are relevant in the adjudication of the rights as between the Plaintiffs and the Defendant.

In a later paragraph (187), he notes,

> While Canon Law is not determinative of responsibilities imposed by the civil law, it can define the relationships among various parts of a religious organization such as the Catholic Church.

In a New Jersey case, eventually settled out of court in March 1997, the judge had ruled during the proceedings that canon law was irrelevant to the case, after having heard expert testimony and received briefs relating to the case. The case concerned a community of sisters who alleged that they had not been well-served by their lawyers, and sued for damages. The lawyers who were sued had

alleged, in turn, that the sisters had not observed canon law, and therefore did not have a right to plead in secular court.[16]

E. Liability and Internal Discipline Issues

As everyone knows, a number of contemporary cases concern the question of civil liability of a diocese for the actions of priests in cases where sexual abuse of one form or another has occurred. Certain dioceses in the United States pleaded without much success that the First Amendment prevents the courts from examining issues that would be based on the concept of canonical agency.[17]

In relation to what was noted above, but in a slightly different context now, we can say that, in Canada, it had in the past been generally held by the courts that the diocese was not responsible for the actions of a priest that were not within his mandate.[18] However, a 1997 British Columbia decision held "the Catholic Church" responsible for the actions, and not the diocesan corporation.[19] Of course, as we saw earlier, the "Catholic Church" does not have legal recognition in Canada.

The question of vicarious liability, after being addressed in numerous other courts, especially in Ontario and Newfoundland, ended up in the Supreme Court of Canada. In a well-publicized case decided on March 25, 2004, the chief justice wrote:

> All of the abuse took place in the diocese of St. George's. A Roman Catholic diocese is a territorial enterprise, composed of a number of parishes and administered by a bishop or archbishop. Dioceses are constituted by the Pope, who also appoints bishops and archbishops. A number of dioceses may form an ecclesiastical province. It is common for legislation to incorporate bishops and archbishops as episcopal corporations. I conclude that the episcopal corporation is the secular arm of the bishop or archbishop for all purposes. The bishop of bishop/archbishop, the enterprise of the diocese and the episcopal corporation are legally synonymous. (No. 7)[20]

The decision continues,

> In sum, the bishop is a corporation capable of suing and being sued "in all Courts" with respect to all matters, and has the power to hold property and borrow money for all diocesan purposes. The corporation can fairly be described as the temporal or secular arm of the bishop. The argument that only the bishop's acts relating to property are acts of the corporation must be rejected. All temporal or secular actions of the bishop are those of the corporation. This includes the direction, control and discipline of priests, which are the

> responsibility of the bishop. If the bishop is negligent in the discharge of these duties, the corporation is directly liable. Furthermore, this liability remains with the corporation sole, as a continuing legal entity, even when the bishop initially responsible moves from the diocese or retires from his position. (No. 15)

This decision does not refer as such to canon law, but creates the link between the canonical existence and operation of a diocese, and its civil counterpart.

In a number of other cases, the Supreme Court of Canada gave decisions recognizing the right of the Catholic Church to legislate in liturgical matters,[21] to establish standards for teachers in Catholic schools,[22] and so forth, but did not refer directly to canon law, although the Caldwell case refers in passing to "church law."

Referring to the seal of confession, which is a current topic of discussion in many countries, Judge Faour notes,

> It is instructive to examine what the Canon Law says about this issue. Again, while it is not determinative of the civil law implications of having knowledge received through the confessional, it does inform the kind of restrictions placed on a priest. It also identifies the basis for the high expectation of privacy on the part of those confessing. (254)

In one celebrated Quebec case, where religious art treasures belonging to a parish were sold by a parish priest without the necessary canonical permissions, the courts based their decisions on canon law.[23] In the Court of Appeal, the Judge noted,

> If it is true, as the appellants hold, that the Civil Code is complete in itself and does not require recourse to another Code to complete it, this statement is quite general and would have to be nuanced.
>
> Jurisprudence, for instance, completes and explicates many dispositions of the Civil Code. Likewise, the sources of civil law, and doctrine. Sometimes we refer to usages and customs, as in the case of commercial law, or to the *common law* in matters relating to municipal law and public law, etc. The courts make frequent and diverse use of such sources. There is nothing opposed to the practice, on the contrary, of the legislator having heard, in matters relating to divine worship, whether it be the canon law of the Roman Catholic religion, or the Torah for Judaism, or the Koran for the Islamic faith, etc. This does not mean that we introduce these religious codes into the civil law, but only that we refer to their prescriptions in the area where they are sovereign: divine worship.[24]

Conclusion

As is evident, many other cases could be cited.[25] But it is not necessary to do so. It seems evident that the courts in Canada have made abundant use of canon law, or at least have recognized its significance. This does not bring about a union of Church and state, but it recognizes the legitimate autonomy of both sectors. What is a common thread in most of these cases is the notion of "fair play." If the Church observes the rules of natural justice, it will have little to fear from the intervention of secular authorities. But if it does not, then there is no excuse.

ENDNOTES

1 See A. Shortt and A.G. Doughty, Documents Relating to the Constitutional History of Canada, Volume 1, (Ottawa : J. de L. Taché, 1918) p. 6.

2 See Shortt and Doughty, Documents, 1:191, 310–12, 696–97.

3 See J. Kenney, "Relations Between Church and State in Canada since the Cession of 1763," Catholic Historical Review 18 (1933): 446–48.

4 For background information on some of the cases mentioned here, see F.G. Morrisey, "Canon Law Meets Civil Law," Studia canonica 32 (1998): 183–202.

5 M.H. Ogilvie, Religious Institutions and the Law in Canada (Toronto: Carswell, 1996), xlii–282p.

6 See, for instance, the "Loi sur les évêques catholiques romains," L.R.Q., c. E-17; "Loi des fabriques," L.R.Q., c. F-1.

7 In "Zavagnin v. The Roman Catholic Bishop of Thunder Bay," Ontario, General Division, Thunder Bay, File No. 2456/90, September 21, 1990; deP Wright, J.

8 See W.W. Bassett, "Christian Rights in Civil Litigation: Translating Religion into Justiciable Categories," The Jurist 46 (1986): 286–87, where he says: "The Catholic Church in the United States must quickly develop fair, efficient, and confidence-inspiring procedures for resolving internal disputes."

9 See Ogilvie, Religious Institutions, 217–18.

10 See Canon Law Society of Great Britain and Ireland, Newsletter, No. 136, December 2003, 7–17.

11 Supreme Court of Newfoundland and Labrador, Docket 199901T3223, March 16, 2018, A.E. Faour, J.

12 In this regard, see "Archer v. The Society of the Sacred Heart," (1903), 2 O.W.R. 847, overturned by 9 O.L.R. 474 (C.A.), Garrow, J.; see p. 490. See also J. Hite, "The Status of the Vows of Poverty and Obedience in the Civil Law," Studia canonica 10 (1976): 131–93; Hite, "The Discipline and Dismissal of Religious as Seen by the Secular Courts of Canada," Studia canonica 11 (1977): 115–44. See also E. Caparros, "Le droit canonique devant les tribunaux canadiens," in Unico Ecclesiae Servitio, ed. M. Thériault and J. Thorn (Ottawa: Saint Paul University, 1992), 307–42.

13 See Hite, "Status," 147, quoting "Order of St. Benedict of New Jersey v. Steinhauser," 194 F. 297 (8th Cir.).

14 See "Dodd v. Society of the Love of Jesus," (1975) 45 D.L.R. (3d) 532 (B.C.S.C.), at pp. 560–61. See also Caparros, "Le droit canonique," 321–25; Hite, "Discipline and Dismissal," 130–43, which analyses the consequences of this case.

15 Hite, "Discipline and Dismissal," 142.

16 "Sisters of Charity of Saint Elizabeth v. Riker, Danzig et al," Superior Court of New Jersey, Law Division, Morris County, Docket No. MRS-L-1135-93.

17 See, for example, Supreme Court of New Jersey, Docket No. 42,565, Amicus curiae brief of the New Jersey Catholic Conference (February 19, 1997). Also, U.S. District Court, Rhode Island, docket No. 93-0615 T (February 26, 1997).

18 An example of this is found in Nova Scotia Court of Appeal, July 10, 1996 (file CA No. 122273): "The fact that the appellant [the diocese] employed him [the priest] as a clergyman and authorized him to act in a privileged position is not sufficient to impose liability particularly where he acts criminally and totally contrary to the religious tenets which he has sworn to uphold" (at p. 21).

19 B.C.S.C., Registry No. 92 1690, "Kaskiw v. Paul Pornbacher et al."

20 "John Doe v. Bennett," [2004] S.C.J. No. 17, File No. 29426.

21 See "Skoke-Graham v. R.," [1985] 1 R.C.S. 106.

22 "Caldwell v. Stuart," [1984] 2 R.C.S. 603.

23 See "Musées nationaux du Canada v. Fabrique de la paroisse de l'Ange-Gardien," [1987] 2 R.C.S. IX.

24 See Caparros, "Le droit canonique," 327.

25 For instance, among many others, in the lengthy court proceedings in Montreal regarding "Les Soeurs du Bon-Pasteur de Québec v. Marché central métropolitain Inc," 1996–2001, a number of canonical experts intervened, particularly in regard to the capacity of a religious institute to enter into financial agreements.

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