NON-APPLICATION DES LOIS PROFESSIONNELLES PROVINCIALES AUX FONCTIONNAIRES FÉDÉRAUX: UNE SITUATION QUI DOIT ÊTRE CORRIGÉE.— Le récent jugement rendu par la Cour d'appel fédérale, dans *La Reine c. Lefebvre et l'Institut professionnel de la Fonction publique du Canada et la Commission des relations de travail dans la Fonction Publique*,[1] marque un point tournant dans l'évolution du droit professionnel au Canada. En effet, il rend ce droit inapplicable à la fonction publique fédérale.

Assez curieusement, toutefois, personne, à ce jour, ne semble avoir attiré l'attention sur la brêche importante qu'ouvre ce jugement dans la compétence législative des provinces dans le domaine des professions et sur les conséquences qu'il peut avoir en ce qui concerne la protection du public dans la distribution des services professionnels.

Pourtant, cette notion de "protection du public" constitue la préoccupation centrale des rapports soumis ces dernières années par les divers comités, commissions ou groupes de travail chargés d'étudier l'organisation des professions au Canada[2] et de l'ensemble des mesures législatives adoptées par les Législatures des provinces à la suite de ces rapports.[3]

Dans ce jugement, il s'agissait fondamentalement de savoir si les professionnels fonctionnaires exerçant au Québec pour le compte du

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[1] [1980] 2 C.F. 199.

[2] Les professions et la Société, rapport de la Commission d'enquête sur la santé et le bien-être social (Commission Castonguay-Neuveu), Editeur officiel du Québec (1970); L'évolution du professionalisme au Québec, Office des professions (1976); Royal Commission inquiry into Civil Rights, Report Number One, Toronto (1968), vol. 3; Committee on the Healing Arts, Toronto (1970); Report of the Professional Organizations Committee, Ministry of Attorney General, Toronto (1980); Select Committee of the Legislative Assembly on Professions and Occupations, Reports I and II (1973), province d'Alberta. Voir aussi de façon générale, Philip Slayton et Michael J. Trebilcock (eds), The Professions and Public Policy (1978).

[3] Health Disciplines Act, S.O., 1974, c. 47; Code des professions, L.Q., 1973, c. 43, maintenant, L.R.Q., 1977, c. C-26.

gouvernement fédéral sont soumis à l'application du Code des professions et de la loi régissant leur profession. Plus précisément, le litige portait sur l'interprétation qu'il convient de donner à l'article 32.01 de la convention collective régissant les chimistes à l'emploi du ministère de la Santé nationale et du Bien-être social. Cet article se lit comme suit:

> 32.01 L'employeur rembourse les cotisations des membres et les droits d'inscription payés par l'employé à une association ou à un conseil d'administration lorsque le versement est *indispensable à l'exercice continu des fonctions de l'emploi qu'il occupe.*

Les intimés, chimistes à l'emploi du gouvernement fédéral et exerçant leur profession au Québec, alléguaient devant la Cour fédérale que des cotisations professionnelles payées par des employés de la Couronne fédérale en vertu de lois provinciales constitutives de corporations professionnelles d'appartenance obligatoire, comme la Loi des chimistes professionnels,[4] sont des cotisations que l'employeur doit rembourser à ses employés parce qu'elles sont "indispensables" à l'exécution de leurs fonctions. Leur grief avait, auparavant, été rejeté par leur employeur au motif que leur statut de préposé de la Couronne fédérale les soustrayait à l'obligation d'appartenir à l'Ordre des chimistes du Québec même si leur travail effectué au Québec en était un normalement réservé aux membres de l'Ordre mais avait été accueilli par l'arbitre dans une décision rendue le 16 janvier 1979.[5]

Appelé à se prononcer sur cette sentence arbitrale, le juge Pratte, rendant le jugement au nom de la Cour, fit sienne la position des autorités fédérales. Faisant d'abord remarquer que "l'exécution par la Couronne fédérale des tâches administratives qui sont les siennes exige qu'il y ait une Fonction publique fédérale", le juge Pratte poursuit:[6]

> Le pouvoir de réglementer l'engagement de ses fonctionnaires, comme celui de réglementer leurs conditions de travail, m'apparaît appartenir exclusivement au Parlement fédéral. C'est pourquoi, à mon avis, des lois comme le *Code des Professions* et la *Loi des chimistes professionnels* ne peuvent s'appliquer aux préposés de la Couronne en raison des actes qu'ils accomplissent dans l'exécution de leurs fonctions. *S'il en était autrement, cela reviendrait à dire que chacune des dix provinces pourrait établir à sa guise les critères de compétence auxquels devrait se soumettre le gouvernement fédéral dans l'engagement de son personnel.* Je ne peux accepter pareille conclusion.

Le 6 mai 1980, la Cour suprême du Canada rejetait une requête pour permission d'appeler présentée par les intimés. Bien que cette requête ne s'appuyait pas essentiellement sur des arguments de nature

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[4] L.R.Q. 1977, c. C-15.

[5] No du dossier: 166-2-5022.

[6] *Supra*, note 1, aux pp. 203-204. Italiques ajoutés.

constitutionnelle, on peut dire que pour l'instant, dans l'état actuel du droit, les professionnels à l'emploi du gouvernement fédéral, qu'ils soient médecins, avocats, infirmiers ou autres, ne sont pas tenus d'appartenir à leur corporation professionnelle, même lorsqu'ils pratiquent au Québec et malgré l'obligation en se cens que leur fait la loi provinciale. Il en découle qu'ils ne sont pas assujettis aux mécanismes de discipline et d'inspection professionnelle prévus par le Code des professions, sauf s'ils décident eux mêmes d'adhérer à leur corporation. A la limite, à défaut par leur employeur de leur en faire une exigence, ils n'auraient même pas à être dûment qualifiés comme médecins, avocats, infirmiers ou autres au sens des lois provinciales pour exercer pour le compte du gouvernement fédéral.

Une telle situation, qui existe à la grandeur du Canada, est inacceptable. Comment admettre, en effet, que du seul fait de son emploi par le gouvernement fédéral, un professionnel pourrait se permettre de devenir incompétent ou de manquer à l'éthique de sa profession par des fraudes ou d'autres manières sans qu'il puisse être sujet au contrôle de la corporation professionnelle à laquelle il appartient? Il est vrai qu'il existe au sein des grandes administrations, publiques ou privées, certains mécanismes internes de contrôle de la qualité des services professionnels mais serait-il vraiment sage de se départir sans plus d'examen du contrôle externe qu'offre le mécanisme de la corporation professionnelle?

En 1969, le gouvernement du Québec lui-même a tenté, en déposant à l'Assemblée nationale un projet de loi 23, intitulé Loi du ministère de la fonction publique,[7] de soustraire clairement tout fonctionnaire québécois membre d'une corporation professionnelle à toute sanction que celle-ci pourrait prendre contre lui, "en raison des actes qu'il a posés, des paroles qu'il a prononcées ou des écrits qu'il a publiés en sa qualité de sous-chef ou de fonctionnaire".[8] Un débat parlementaire orageux s'ensuivit et cette disposition ne fut pas reproduite dans le texte définitif de la loi. Quelques années plus tard, le Code des professions fut adopté sans que jamais on ne revienne sur cette question.

Nous sommes donc actuellement placés dans une situation où la compétence législative fondamentale des provinces dans le domaine des professions[9] est battue en brèche par cet autre principe constitutionnel voulant que "les législatures provinciales sont impuissantes à apporter un frein à l'exercice des pouvoirs de la Couronne fédérale".[10]

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[7] 4ième sess, 28ème législature. [8] Art. 56 c.

[9] *Lafferty* c. *Lincoln* (1970), 38 R.C.S. 620, à la p. 627; *Re Hayward et al.*, [1934] 2 D.L.R. 210.

[10] *Supra*, note 1, à la p. 201.

Si, dans des domaines comme ceux des relations de travail ou du salaire minimum, on peut concevoir que les employés du gouvernement fédéral soient assujettis à des lois fédérales distinctes de celles des provinces,[11] la chose est plus difficile dans le domaine des professions où le contrôle de l'exercice par les membres doit nécessairement être confié à la corporation professionnelle qui les regroupe dont l'existence relève de la compétence législative des provinces.

La situation d'exception, pour ne pas dire le vide, créé sur le plan de l'application des mécanismes de contrôle de l'acte professionnel par le jugement de la Cour d'appel fédérale, dans l'arrêt *Lefebvre,* doit être corrigée dans l'intérêt même du public. A cette fin, deux voies semblent possibles.

La première serait l'adoption par le Parlement du Canada d'un Code des professions canadien dont l'application devrait nécessairement, pour des raisons pratiques, être confiée par délégation aux diverses corporations professionnelles existant dans les provinces.[12] Malgré les avantages évidents qu'elle présente sur le plan d'une certaine uniformité, cette solution ne me paraît pas souhaitable en raison des dangers de chevauchement de juridictions constitutionnelles, de conflit et de confusion qu'elle créerait non seulement au sein des deux ordres de gouvernement et des corporations professionnelles mais aussi dans le public. En effet, dans une même province, les exigences de formation et de maintien de compétence d'un professionnel exerçant auprès du public seraient alors susceptibles de varier selon qu'il travaille pour le compte du gouvernement fédéral ou pour le compte de toute autre organisation, y compris son propre compte.

La seconde, qui me paraît préférable étant donné la compétence constitutionnelle fondamentale des provinces dans le domaine des professions et aussi la capacité des corporations professionnelles d'harmoniser raisonnablement leurs exigences d'une province à l'autre, serait qu'une corporation professionnelle, à l'occasion d'un litige, sollicite l'appui du gouvernement d'une province et conteste de plein front une telle situation jusqu'en Cour suprême du Canada. A défaut pour une corporation de prendre action, le gouvernement de l'une ou l'autre des provinces pourrait peut-être intervenir de lui-même.

Une corporation ou le gouvernement pourrait, en ce faisant, faire valoir que la Couronne fédérale ne peut prendre avantage de certaines dispositions de la législation professionnelle, particulièrement celles

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[11] Ce qui a d'ailleurs été reconnu par les tribunaux: *Commission du salaire minimum* v. *Bell Telephone Co. of Canada* (1967), 59 D.L.R. (2d) 145.

[12] Une telle délégation à un organisme provincial a été reconnue comme valide dans: *P.E.I. Potato Marketing Board* v. *H.B. Willis,* [1952] 2 R.C.S. 392.

qui lui assurent des candidats plus compétents et des services professionnels meilleurs—ce qu'elle fait lorsqu'elle demande comme condition d'emploi que les postulants satisfassent aux conditions de l'ordre professionnel visé—et en même temps refuser d'être soumise au reste de la loi plus spécialement aux dispositions qui visent la meilleure protection du public.[13]

Elle pourrait également s'appuyer sur l'arrêt rendu par la Cour d'appel du Québec dans *Corporation des agronomes de la province de Québec* v. *Mercier*[14] où il fut reconnu que la Loi des agronomes[15] s'appliquait à un fonctionnaire provincial exerçant la profession d'agronome, pour le motif, comme le déclarait le juge en chef Létourneau, que "cette loi ne vise ni n'affecte aucun des droits de la Couronne".[16] En l'espèce, précisait le magistrat, "il ne s'agit que de droits propres au défendeur, pouvant à l'occasion impliquer quelque intérêt pour la Couronne en sa qualité d'employeur, mais qui ne sont pas du domaine de celle-ci".

Un tel raisonnement, qui permet de contourner la prérogative voulant que les lois ne portent pas atteinte à la Couronne, pourrait, s'il était éventuellement retenu par la Cour suprême du Canada, permettre l'application des lois professionnelles d'une province aux fonctionnaires fédéraux exerçant leur profession dans cette province.[17] Ce raisonnement, d'ailleurs, a été retenu par les tribunaux pour justifier, dans un contexte où la protection du public était également en cause, l'application du Code de la route[18] d'une province aux fonctionnaires fédéraux circulant sur les routes de cette province.[19]

RENÉ DUSSAULT*

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[13] *La Reine du Chef de l'Alberta* c. *C.C.T.*, [1978] R.C.S. 61, à la p. 72.

[14] [1945] B.R. 59.

[15] S.R.Q., 1964, c. 260, maintenant L.R.Q. 1977, c. A-12.

[16] *Supra*, note 14, à la p. 61. Voir cependant, en sens contraire, *Barreau de Montréal* c. *Wagner*, [1968] B.R. 235. Dans ce dernier cas, il s'agissait toutefois d'un acte posé par un ministre de la Couronne et non par un fonctionnaire.

[17] Voir René Dussault et Gaston Pelletier, Le professionnel fonctionnaire face aux mécanismes d'inspection professionnelle et de discipline institués par le Code de professions (1977), R. du B. 2, aux pp. 15-16, 33-34.

[18] Motor Vehicle Act, S.N.S., 1928, c. 2.

[19] *R.* v. *McLeod*, [1930] 4 D.L.R. 226 (N.E.).

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CANDID CONFESSIONS.—The headnote to a recent British Columbia appellate case[1] commences: "Wiretap—Private communication—Definition—Communication with God". The accused, suspected to have counselled two persons to set a forest fire, was placed alone in a room in a Royal Canadian Mounted Police station which was equipped with a concealed video camera and microphone. Two R.C.M.P. officers, by virtue of the installed equipment, "saw and heard [the accused] slide out his chair, fall to his knees and raise up his arms, saying: 'Oh God, let me get away with it just this once.' The accused continued to speak in this fashion, addressing himself to God and promising future obedience in return for present deliverance."[2] Section 178.16(1)[3] of the Criminal Code renders inadmissible a private communication, defined as:[4]

> . . . any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it.

The trial judge found the statement to be a "prayer" intended to be heard by God, not the R.C.M.P., and held it inadmissible. The British Columbia Court of Appeal, however, held the statement to be admissible, on the grounds, *inter alia* that God is not a "person" in section 178.1: "There is no earthly authority which can grant rights or impose duties upon God."[5] It is not only spiritual soliloquies or dialogues which are not afforded protection, for Hutcheon J.A. continued: "I find no support . . . for the proposition that the oral utterances of a speaker to the family pet or to his deceased mother . . . are within the protection of privacy . . . ."[6] Conversations with one's favourite potted plant, pet rock or big toe are now suspect.

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[1] *R.* v. *Davie* (1980), 17 C.R. (3d) 72 (B.C.C.A.).

[2] *Ibid.*, at p. 75

[3] R.S.C., 1970, c. C-34 as am. "A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless (a) the interception was lawfully made; or (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof; but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence." There is no "fruit of the poisoned tree" doctrine in Canada, as in the U.S.: *Silverthorne Lumber Co.* v. *United States* (1920), 251 U.S. 385; *United States* v. *Wallace and Tiernan Co.* (1949), 336 U.S. 793, at p. 796.

[4] *Ibid.*, s. 178.1.

[5] *Supra*, footnote 2, at p. 81, per Hutcheon J.A. God, of course, figures highly in Canadian trials; witnesses, including the two R.C.M.P. officers, before giving evidence of having listened in on Davie's particilar line to God (there being no direct telephone connection) take an oath before God to tell the truth.

[6] *Ibid.*, at p. 81

The Chief Justice of British Columbia, Nemetz C.J., after "anxious reflection" (communication with God?), dissented, on the ground that a statement is a private communication if it is imparted in circumstances giving rise to a reasonable expectation of privacy. "[I]t is not necessary . . . to decide whether 'person' includes a theological Person. . . . It cannot have been the intention of Parliament to exclude from . . . protection . . . theists who believe that their private prayers are heard and answered."[7]

The overhearing by police of statements originating from accused in custody, and the reception of such statements in court is not new in Canada: in *Watson*,[8] a police officer was placed in a cell between two accused arrested on related narcotics charges; in *Becker*,[9] in a cell next to an accused which was close to the cell of a friend of the accused; and in *Rothman*,[10] in the same cell as the accused. In the last case, the accused intially told the police officer he "looked like a nark" (narcotics agent) because of the way the police officer was dressed, "blue jeans, a blue jacket and brown boots, and had a four or five day growth of beard".[11] The police officer was able to convince Rothman that he was really a fisherman, (a fishing expedition might more accurately describe his purpose, and his catch), and was in gaol because of a traffic ticket (as unlikely a tale as vice-versa: a truck driver in gaol for having berthed his truck at the wrong mooring) (in fact, the police officer also said he was a truck driver). At trial the various incriminating statements elicited as a consequence were ruled inadmissible, and the jury returned a (directed) verdict of acquittal; the Court of Appeal[12] held that the state-

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[7] *Ibid.*, at p. 78. Notice of appeal to the Supreme Court of Canada has been filed (#16193), though the motion for leave to appeal has not yet been heard.

[8] (1976), 31 C.C.C. (2d) (Ont. Co. Ct).

[9] (1978), 43 C.C.C. (2d) 356 (Ont. C.A.). See also *Stewart* v. *R.* (1970), 54 Cr. App. R. 210 (Eng. C.A.), where a police officer, having "adopted a style of dress which gave the appearance of a fellow prisoner" (no shoes, tie, or trouser suspenders), gave "absolutely damning" evidence of statements by the accused to other prisoners; and *R.* v. *Todd* (1901), 4 C.C.C. 514, 13 Man. L.R. 364 (Man. C.A.): "The means employed in this case to obtain the confession were contemptible; but it does not seem to be a sufficient ground for excluding the evidence," per Dubuc J., at pp. 520, 370 respectively. But see *Boutilier and Melnick* (1976), 35 C.C.C. (2d) 555 (N.S.T.D.).

[10] Supreme Court of Canada, March 2nd, 1981, not yet reported. See also *R.* v. *Towler* (1969), 2 C.C.C. 335 (B.C.C.A.). No U.S. "Miranda" caution (*Miranda* v. *Arizona* (1966), 384 U.S. 436, but see *Harris* v. *New York* (1971), 401 U.S. 222 and *North Carolina* v. *Butler* (1979), 441 U.S. 369) is necessary in Canada: *R.* v. *Frank* (1969), 69 W.W.R. 588, at pp. 595 (B.C.C.A.); *Boudreau* v. *R.* (1949), 94 C.C.C. 1, at p. 3 (S.C.C.). For a case in which an accused was charged with damaging property for having scratched "Peter loves Joy" on a cell door during a 3-day incarceration, see *R.* v. *(Peter) Ambrose* (1973), 57 Cr. App. R. 538, at p. 540 (Eng. C.A.).

[11] *Ibid.*

[12] (1979), 42 C.C.C. (2d) 377 (Ont. C.A.), Dubin J.A. dissenting.

ments were admissible and ordered a new trial, which was recently upheld by the Supreme Court of Canada in a seven to two decision. Each of the Supreme Court judgments offer interestingly differing interpretations as to the facts, and differing approaches to police investigative procedures:

> Martland J. for the majority stated:[13]
> The circumstances of this case show only that the accused was mistaken as to the identity of the person with whom he was talking. The accused thought that person was a fellow prisoner, who presented himself as a sympathetic listener.

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[13] P. 20 of the learned Justice's judgment (concurred in by Ritchie, Dickson, Beetz, McIntyre and Chouinard JJ.). Might there be an analogy between *Rothman* and the following, amended, nursery tale?

Once upon a time, there lived a little girl called Red Riding Hood. One day her mother asked her to take a basket of fruit to her Grandmother, who had been ill and lived alone in a cottage in the forest. A wolf, lurking in the bushes, overheard the conversation. He decided to take a shortcut to the grandmother's house. The wolf disposed of the grandmother, then dressed in her nightgown and jumped into bed to await the little girl, and upon arrival, she thought the wolf was her grandmother. After she suspiciously remarked on the wolf's appearance, the wolf tried to grab the girl, who managed to escape, and ran screaming from the cottage. A woodcutter, working nearby, heard her cries and rushed to the rescue. He killed the wolf with his axe, thereby saving Red Riding Hood's life. All the townspeople hurried to the scene and proclaimed the woodcutter a hero.

But at the inquest, the following emerged:

1. The wolf had never been advised of his rights.
2. The Wildlife Federation determined that the wolf was a sub-species, might be endangered, and hence should have been accorded more consideration.
3. The woodcutter had made no warning swings before striking the fatal blow.
4. The Animal Lovers Association submitted that killing a wolf with an axe (as seal pups with clubs) was cruel and unusual punishment, and that the woodcutter should have adopted a more humane method of dispatching the wolf.
5. The Citizens' Liberties Association stressed the point that although the act of eating Grandma may have been in bad taste, the wolf was only "doing his thing" and thus did not deserve the death penalty.
6. A schoolfriend of Red Riding Hood testified that she was "a bit of a tease", and a neighbour of Grandma's gave evidence that Grandma had "had occasional male visitors" and may have behaved in a seductive manner.
7. The Forest Bar Association contended that the killing of the grandmother should be considered self-defence inasmuch as the wolf's intent was to "make love not war", and that it could be reasonably assumed that Grandma had resisted, and might, given the opportunity, have killed the wolf.

On the basis of these considerations, it was decided that there would have been no valid basis for charges against the wolf. Moreover, the woodcutter was indicted for assault with a deadly weapon, with other more serious charges under consideration. Several nights later, his cottage was burned to the ground. One year from the date of "The Incident at Grandma's", her cottage was made a shrine for the wolf who had bled and died there. All the village officials spoke at the dedication, but it was Red Riding Hood who gave the most touching tribute. She said that while she had been selfishly grateful for the woodcutter's intervention, she realized in retrospect that she had over-reacted. As Red Riding Hood knelt and placed a wreath in honour of the brave wolf, there wasn't a dry eye in the whole forest.

Lamer J. for the majority said:[14]

> The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule [*re* "person in authority"] be hampered in their work.

Estey J. for the minority was of the opinion that:[15]

> [T]he accused was unaware that he was speaking to an undercover policeman and that the policeman had deceived the accused by making false statements concerning his identity, including a denial that he was a police officer. In the result, the statement was given by the accused after his arrest, and after he had been given a warning by the police and had refused to give any statement to the police. In the face of this express election in the presence of a uniformed policeman by the accused to remain silent, the police then employed a trick and lies to obtain the statement . . . .

In *Pettipiece*,[16] the accused was placed in a cell next to a police agent masquerading as a fellow detainee, who offered to find a bondsman[17] who would secure the accused's release. The bondsman, an R.C.M.P. sergeant in reality, procured the "release" of the accused "before the fake justice of the peace [an R.C.M.P. constable], in fake bail procedures, in which a fake bail document was actually drawn up",[18] which evidence "Crown counsel kept . . . down to a minimum".[19] The confession made by the grateful accused (unrepresented at trial) to his new-found "bondsman" friend was admitted at

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[14] P. 20 of the learned Justice's judgment. The learned Justice proposes the "Shock the Community" test to determine which tricks are proscribed and which permitted—a police officer dressing up as a chaplain to hear a suspect's confession would be proscribed, but dressing up as a drug addict would be permitted (pp. 20-21).

[15] P. 2 of the learned Justice's judgment (concurred in by Chief Justice Laskin). It may be that our southern neighbour, the United States, and its judiciary, is more sensitive to individual rights and protections; Mr. Justice Douglas, speaking for the U.S. Supreme Court, stated: "[E]very citizen is entitled to fair warning to the traps which the criminal law lays." (*U.S.* v. *Carroll* (1953), 345 U.S. 457, at p. 460), though it must be conceded that the recent "Abscam" prosecutions (of Congressmen *et al.* for influence peddling to F.B.I. agents posing as Arab shieks) have been somewhat checkered *re* the entrapment defence. See N. Lewin, Caveat Vendor. The Trouble with Abscam, The New Republic, Feb. 23rd, 1980, p. 18; New York Times, Dec. 7th, 1980, Section 4, pp. 1 and 22; J.M. Livermore, Abscam Entrapment (1981), 17 Crim. L. Bull. 69.

[16] [1972] 5 W.W.R. 129 (B.C.C.A.).

[17] One who posts a bond enabling an accused to be released on bail. Not a gratuitious public service—such activity is illegal, contrary to s.127(1) of the Criminal Code.

[18] *Supra*, footnote 16, at p. 144. Titular disguise is not reserved for zealous police officers—during a police raid on the Home Hotel in Edmonton, suspected of being, to use the hoary appellation of s.193 of the Criminal Code, a common bawdy house, 23 room registration cards were seized bearing the names "Mr. and Mrs. Smith". Edmonton Journal, Aug. 12th, 1980, p. B1.

[19] *Ibid.*

trial. Here the British Columbia Court of Appeal ordered a new trial,[20] Branca J.A. (not dissenting) nevertheless affirming:[21]

> It has been held repeatedly that where police officers or others in the employ of the police pretend to be criminals or assume a character other than their own, which is unknown to the accused, and such persons gain the confidence of the accused as a result of which the accused makes incriminating statements, the statements are perfectly admissible . . . .

A recent British Columbia case[22] has also held that a confession made to a police officer pretending to be a cell-mate is not an invasion of privacy protected by what is incongruously referred to as the Protection of Privacy Act.[23]

Clergymen (who may have direct communication with God) have been held, in Canada, to be "persons in authority"[24] *re* the *Ibrahim* rule,[25] but not mothers-in-law,[26] nor, of course, a police officer dressed in blue jeans, brown boots and more than a "5 o'clock shadow" (particularly if he is a "sympathetic listener").[27] It is no bar to a confession being admitted that a police officer promises on his "sheriff's honour" he "won't tell",[28] nor that a Crown doctor (who

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[20] At which the confession was admitted.

[21] *Supra,* footnote 16, at pp. 141-142.

[22] *R.* v. *Grant, Higgins and Sharma* (1980), 48 C.C.C. (2d) 504 (Co. Ct of Vancouver).

[23] S.C., 1973-74, c.50 (ss 178.1-178.23 of the Criminal Code).

[24] *R.* v. *Royds* (1904), 8 C.C.C. 209 (B.C. Co. Ct). But see *R.* v. *Gilman* (1828), 168 E.R. 1235 and *R.* v. *Radford* (1823), 168 E.R. 1239 (Exeter Assizes). Clergymen are also persons in authority in Scotland, as the following anecdote would indicate: Rev. MacTavish was a violent preacher, and made his congregation shiver at the terrors of their post-vital state. One Sabbath morning, he was holding forth on predestination. "The greater part o' ye in this kirk to day are headin' straight for the everlasting fire that burneth and is not consumed." Here he paused, for a bustling fly, a blue-bottle, and momentarily rested upon the text in the open Bible before him. The preacher lifted his fist protentously above his head. "Ye shall suffer the torments of the damned, I say, as surely as I shall ding the guts oot o' that muckle blue flee." His hand crashed down, but the fly had seen the shadow of Nemesis and was off. The thwarted predestinarian glowered at the poker-faced pews. His face slowly relaxed. "Aye, there's a chance for ye yet!"

[25] "[N]o statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." [1914] A.C. 599, at p. 609, per Lord Sumner.

[26] *R.* v. *Collins* (1976), 29 C.C.C. (2d) 304 (Alta S.C., T.D.).

[27] *R.* v. *Rothman, supra,* footnote 10. Advertisement for U.S. General Telephone and Electronics: "Who's that ringing your bell? A friend? Or the Boston Strangler?"

[28] *R.* v. *Frank* (1969), 69 W.W.R. 588 (B.C.C.A.). See also *R.* v. *Shaw* (1834), 172 E.R. 1282, *re* confession to a fellow prisoner: "I wish you would tell me how you murdered the boy—pray split." The accused replied, "Will you be upon your oath not to mention what I tell you?"

determines whether the accused is fit to stand trial) promises that any statement made by the accused is confidential and cannot be revealed in court.[29]

Another recent British Columbia case, which has been appealed to the Supreme Court of Canada is that of *Horvath* v. *R.*,[30] in which a suspect was interviewed[31] by a Sergeant Proke of the R.C.M.P. regarding the recent death of the suspect's mother. A psychiatrist

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[29] *R.* v. *Stewart* (1980), 21 A.R. 300 (Alta C.A.). The report indicates (at page 302) that this particular doctor was also chief coroner, and had, prior to interviewing the accused, attended at the scene of the killing, where, seeing the bullet-ridden body, he determined (correctly) the cause of death to have been bullet wounds. The reasoning for the admission of the confession, despite the promise to the contrary, appears somewhat strained: "The main reason for questioning and admissibility of a confession appears to be that it may not be true. It is more likely to be true if it is freely and voluntarily given, rather than procured by fear of prejudice or hope of advantage. . . .[C]ommon sense dictates that this type of inducement to talk would tend to promote a free and voluntary statement. There is no pressure through fear or hope of a temporal advantage to give a statement that is likely to be untrue. Rather the doctor is offering the accused protection which would allow him to deliver the truth without fear of consequences.[!] . . . [T]he inducement would not give the appellant any hope of advantage which, in turn, might constitute a motive for a false statement." Per McGillivray C.J.A., at pp. 308-317. One of the reasons for the "person in authority" rule is expressed in the latin maxim *nemo tenetur se ipsum prodere*, that it is unfair to induce a person to incriminate himself ("the protection principle") has had support from two relatively recent House of Lords decisions: *Commissioners of Customs and Excise* v. *Harz and Another*, [1967] 1 A.C. 760, at p. 821, per Lord Reid; *R.* v. *Sang*, [1979] 3 W.L.R. 263, at pp. 270-271, per Lord Diplock, at p. 279, per Lord Salmon, and at p. 287, per Lord Scarman. Twenty-two cases are referred to by the learned Chief Justice in *R.* v. *Stewart;* neither *Harz* nor *Sang* is mentioned. One can fairly state that the *Stewart* case emphasizes the "reliability principle" to the exclusion of the "protection principle". For a criticism of the "person in authority" rule, see *Deokinan* v. *R.*, [1969] 1 A.C. 20, at p. 33 (Viscount Dilhorne for J.C.P.C.); Criminal Law Revision Committee, Eleventh Report, Evidence (1972), para. 58; Royal Commission on Criminal Procedure, Report (1981), paras. 4.68-4.75; P. Mirfield, Confessions—the "Person in Authority" Requirement, [1981] Crim. L.R. 92.

[30] (1979), 44 C.C.C. (2d) 385, 93 D.L.R. (3d) 1, 7 C.R. (3d) 97, [1979] 3 W.W.R. 1 (S.C.C.). Version française: (1980), 11 C.R. (3d) 206. Referred to in the following cases: *Park* v. *R.* (1981), 59 C.C.C. (2d) 385 (S.C.C.); *Sawchyn* v. *R.* (1981), 22 C.R. (3d) 34 (Alta. C.A.); *R.* v. *Griffin* (1981), 59 C.C.C. (2d) 503 (Ont. H.C.) *R.* v. *Hobbins* (1981), 54 C.C.C. (2d) 353 (Ont. C.A.); *R.* v. *Stewart, ibid.*; *R.* v. *MacPherson* (1980), 52 C.C.C. (2d) 547 (N.S.C.A.); *R.* v. *DesLauriers* (1980), 50 C.C.C. (2d) 572 (B.C.S.C.); *R.* v. *Helparti* (1980), 49 C.C.C. (2d) 35 (N.S.C.A.); *R.* v. *McNamara* (1980), 48 C.C.C. (2d) 201 (Ont. Co. Ct); *R.* v. *Sabean* (1979), 4 W.C.B. 78 (N.S.C.A.); *R.* v. *Letendre* (1979), 46 C.C.C. (2d) 398 (B.C.C.A.); *R.* v. *Allen (No. 3)* (1979), 46 C.C.C. (2d) 553 (Ont. H.C.). See also *Ward* v. *R.* (1979), 44 C.C.C. (2d) 498, 94 D.L.R. (3d) 18, 7 C.R. (3d) 153, 25 N.R. 514, [1979] 2 S.C.R. 30, 2 W.W.R. 193 (S.C.C.).

[31] "[T]he most skilful example of police interrogation that has ever come to my attention in 36 years as a lawyer and a judge", per Gould J., *ibid.*, at pp. 391, 7, 143, 41, 225 respectively.

commented on the [taped] questioning: ". . . the interrogator skillfully plays upon the subject's feelings, and his . . . 'and his' means the subject's—latent pressure to bring the hidden material into consciousness . . . the interrogator's manner and voice take on a hypnotic quality, and the subject's manner of response strongly suggests he is slipping into an hypnotic state".[32] The subject was interviewed three times, then left alone; during which periods of (apparent) isolation, the subject confessed, in trance-like monologues, to having killed his mother, all of which was taped. The trial judge, after some pithy observations,

> Delwisch [an R.C.M.P. constable present at the interrogation, as well as Constable Charlton and Sgt. Proke] . . . was particularly honest to the court in describing the whole technique of the interrogation. It was hot and furious . . . Delwisch is an imposing officer in size, with a firm personality. He is six foot three, and weighs some 225 pounds. Charlton is an older man, experienced, positive personality, and I have no hesitation in speculating that both these officers were a great deal more positive that night in that interview than they were in court. . . . There was no match between the interrogator and the interrogatee in mental strength. It was a case intellectually of a cat manoeuvering a mouse . . . police interrogation is not a sporting event such that one is interested in a fair match between contestants. . . . It is clear that he brought about in this young man, under these circumstances, within the four hours and four minutes involved, a complete emotional disintegration,[33]

refused to admit the statements, on the basis of hypnosis. The British Columbia Court of Appeal overturned the trial judge, who was finally upheld by the Supreme Court of Canada in a four to three decision, where Beetz J. observed:

> [W]hile under hypnosis Horvath was in a dreamy state of altered consciousness, not in full and voluntary control or possession of his faculties, labouring under extreme emotional turmoil, and greatly vulnerable to suggestion and to an appeal to unburden himself which was almost irresistible and which in fact was not resisted. Horvath had been ambivalent about the telling of the inculpatory material. Yet he had resolved the ambivalence and begun to speak while he was still under the spell. . . . [N]othing that Horvath said under hypnosis was voluntary in the legal sense... . . . [T]hrough the use of an interrogation technique involving certain physical elements such as an hypnotic quality of voice and manner, a police offier has gained unconsented access to what in a human being is of the utmost privacy, the privacy of his own mind. . . . [T]his was a form of violence or intrusion of a moral or mental nature, more subtle than visible violence, but not less efficient in the result than an amytal injection adminstered by force. Whether or not it amounts to oppression, unconsented hypnosis[34] induced by a person in authority is quite sufficient by itself to render a statement involuntary, at par with threats, promises and violence. . . . [T]he use of such interrogation techniques on

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[32] *Ibid.*, at pp. 415, 31, 120-121, 20, 237 respectively. See T. Reik, The Compulsion to Confess (1959).

[33] "I do not say that in criticism." Per Gould J., *ibid.*, at pp. 399-401, 15-17, 102-105, 3-5, 208-289 respectively.

[34] A contradiction in terms?

unwilling suspects is a dehumanizing process,[35] and should, in my view, be proscribed.[36]

Hypnotism is not new in British Columbia. In 1967, a woman, charged with having hammered (with a hammer) her husband to death, could not apparently remember the event. She was hypnotized by a psychiatrist, in court, in front of the jury, to attempt to jog her memory with regard to her husband's untimely passing. The report

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[35] The fact that in this case the mother had "her head bludgeoned into a pulp" with a baseball bat (*supra*, footnote 30, at pp. 398, 15, 102, 3, 207 respectively) might also be considered dehumanizing. The mother did, presumably. "Let me remember when I find myself inclined to pity a criminal, that there is likewise a pity due to the country.": Matthew Hale, History of the Pleas of the Crown (1736). "A sign of the loss of freedom is the new compassion which extends compassion not to the raped but to the rapist.": Fulton J. Sheen, quoted by S.H. Hofstadter & S.R. Levittan, Lest the Constable Blunder, A Remedial Proposal (1965), 20 The Record 629, at p. 637.

[36] *Supra*, footnote 30, at pp. 423-431, 38-47, 129-139, 29-38, 246-256 respectively. With regard to "amytal interviews", Beetz J. stated: "Staff Sergeant Proke had suggested the use of narcoanalysis to Horvath . . . Doctor Stephenson said that sodium amytal is a barbiturate. In a so-called amytal interview, it was administered intravenously, produced a mild drowsiness and reduced inhibitory controls. The subjet would then become able to discuss certain subjects he could not otherwise voluntarily talk about because of the intensity of emotion which they elicited. Doctor Stephenson agreed with the trial Judge that someone having something to hide would be a bit of an idiot if he took that test. He said that the state of a person under the influence of sodium amytal was not a hypnotic state. . . . Narcoanalysis produced through the use of sodium amytal is distinct from hypnosis but (as it seems) not to the point of a total absence of similarity; under narcoanalysis, emotional controls are less inhibted than they are in a fully conscious state and the subject is assisted to say what he was not able to say voluntarily because of the emotional intensity of it. The long interview by Sergeant Proke was not exactly comparable to an amytal interview but, having regard to the over-all effect of the interview and the reaction of the subject, a shot of Sergeant Proke was essentially the same as a shot of truth serum. . . . Had Horvath made a statement while under the influence of an amytal injection administered without his consent, the statement would have been inadmissible because of the assault and, presumably, because also of the effect of the injection on his mind. . . . It would appear that hypnosis and narcoanalysis are used on a consensual basis by certain police forces as well as by the defence. . . . I refrain from commenting on such practices short of noting that even the consensual use of hypnosis and narcoanalysis for evidentiary purposes may present problems: under normal police interrogation, a suspect has the opportunity to renew or deny his consent to answer each question, which is no longer the case once he is, although by consent, in a state of hypnosis or under the influence of a truth serum." *Ibid.*, at pp. 416-431, 32-47, 123-139, 22-38, 239-256 respectively. There do not appear to be any reported Canadian cases on "amytal interviews" on accuseds. One unreported case however is that of *R.* v. *Tenorio* (Bergeron J.C.S., Cour supérieure, District de Montréal, 5 mai 1980); the accused here voluntarily submitted to "le test de sérum de vérité", the learned judge, after holding a voir dire, refusing to admit the evidence given by the accused after having been injected with sodium amytal, due to, *inter alia*, in this particular case, its marked contrast with the evidence given by the accused at trial. (The writer is grateful to Mr. Justice Kaufman of the Quebec Court of Appeal for bringing this case to the writer's attention). With regard to sodium amytal being injected into a witness to assist recollection, see *R.* v. *Allen (No. 2)* (1979), 46 C.C.C. (2d) 477 (Ont. H.C.).

does not, somewhat unsportingly, reveal what, if anything, was remembered.[37]

The 1981 English Royal Commission on Criminal Procedure does not recommend any significant modifications to the law regarding police questioning or the right to silence.[38] With regard to the latter, a relatively recent English Court of Appeal decision (in which two Law Lords, Lord Scarman and Viscount Dilhorne, participated) noted that:[39]

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[37] *R.* v. *Pitt* (1968), 68 D.L.R. (2d) 513, 66 W.W.R. 400, [1968] 3 C.C.C. 342 (B.C.S.C.). But see *R.* v. *K.* (1979), 10 C.R. (3d) 235, 47 C.C.C. (2d) 436 (Man. Prov. Ct). There appears to be only one other case in which hypnotism was directly involved in legal proceedings: *R.* v. *Booher* (1928), 50 C.C.C. 271, [1928] 4 D.L.R. 795, 3 W.W.R. 203 (Alta S.C.) (confession inadmissible on the basis it appeared it was induced by hypnotism). See also *Kowall* v. *McRae et al.* (1980), 108 D.L.R. (3d) 486 (Man. C.A.), *re* privilege extending to a psychologist's and a psychiatrist's reports on the recollection, by hypnosis, of a motor vehicle accident in which the plaintiff was involved; *Re PSI Mind Development Institute Ltd. et al.* and *The Queen* (1978), 37 C.C.C. (2d) 263 (Ont. H.C.), *re* the allegation of using hypnosis to induce persons to make donations or interest-free loans or both to the Institute, which offered courses to "improve mind awareness and expand the mind", the funds being converted to personal use; *McDonald et al* v. *Little* (1971), 14 D.L.R. (3d) 114 (Alta S.C.), *re* a driver falling into a "hypnoidal" state. Some relevant articles: H.W. Timm, The Effect of Forensic Hypnosis Techniques on Eyewitness Recall and Recognition (1981), 9 Jo. of Police Sc. & Admin. 188; L. Howard and A. Ashworth, Some Problems of Evidence Obtained by Hypnosis, [1980] Crim. L.R. 469; B.L. Diamond M.D., Inherent Problems in the Use of Pretrial Hypnosis (1980), 68 Cal. L.Rev. 313; R.S. Spector and T.E. Foster, Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible (1977), 38 Ohio State L.J. 567; N.J. Dilloff, The Admissibility of Hypnotically Influenced Testimony (1977), 4 Ohio Northern Univ. L.Rev. 1; D.K. Lowther, Should Statements Made during Drug Interviews be Admissible into Evidence in Criminal Cases? (1975), 7 U.W.L.A. L. Rev. 222. See also, Letter to the Editor, [1980] Crim. L.R. 805 and U.S. cases mentioned therein.

[38] Cmnd. 8092, para. 5.13. The Royal Commission does however make the less than startling recommendations that note taking skills of police officers be improved (they might commence by taking notes of this Report, in excess of several thousand pages, including Research Studies), and that tape recording be gradually introduced: para. 5.14. The main work of the Commission is in three separate volumes: Report, Cmnd. 8092 (1981); The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure, Cmnd. 8092-1 (1981); The Balance of Criminal Justice. Summary of the Report, Cmnd. 8092-2 (1981). Twelve Royal Commission Research Studies are also available. A brief sketch of the recommendations can be found in (1981), 131 New L.J. 57. See also: M. Inman, The Royal Commission on Criminal Procedure, The Admissibility of Confessions, [1981] Crim. L.R. 469; I.R. Scott, Controlling the Reception in Evidence of Unreliable Admissions, [1981] Crim. L.R. 285; D. Wolchover, Cross-Examination of the Accused on his Record when a Confession is Denied or Retracted, [1981] Crim. L.R. 312; A.C. Hutchison & N.R. Withimpton, *Horvath* v. *The Queen*. Reflections on the Doctrine of Confessions (1980), 18 Osgoode L.J. 146.

[39] Per Viscount Dilhorne *R.* v. *Gilbert* (1978), 66 Cr. App. R. 237, at p. 245, emphasis added.

> A judge *is entitled to comment on [an accused's] failure to give evidence*. As the law now stands, he must not comment *adversely* on the accused's failure to make a statement.

The Research Studies for the Royal Commission reveal some interesting statistics. In one survey 47% of those questioned made a confession, and a further 13% some form of incriminating statement,[40] whilst those with a previous criminal record (experience?) were less likely to make any confession or statement.[41] The observers were of the opinion that confessions "were often made because they were an easy and logical way out of a tense and uncomfortable situation created by persistent and determined police officers".[42] To which the observation (literally) of another Research Study is particularly germane:[43]

> To remain silent in a police interview room in the face of determined questioning by an officer with legitimate authority to carry on this activity requires an abnormal exercise of will. So uncommon is it for a person to remain silent while being questioned, that when it does occur, any observer would be forgiven for making the fallacious assumption that the abnormal behaviour is associated with some significant cause (in this context guilt as opposed to innocence). The innocent . . . do not exercise their right of silence; they talk, usually volubly.

Of those who had made an incriminating statement, whether written or verbal, 83% subsequently pleaded guilty[44]—a high correspondence between confessions and convictions. The same authors pertinently note that in close to 20% of the cases the prosecution relied upon confessions "gathered in circumstances which pre-empt the possibility of ascertaining the conditions under which it was obtained

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[40] P. Softley, Police Interrogation: an Observational Study in Four Police Stations, Royal Commission on Criminal Procedure, Research Study No. 4 (1980), p. 85.

[41] *Ibid.*, p. 86. Contrary findings in Research Study No. 5 below, p. 24.

[42] *Ibid.*, p. 95. for a current example, in which a youth signed a written confession of having stolen two miniature toy cars (for which he had a receipt) because "he was frightened and tongue-tied at this treatment", with unfortunate career consequences for the youth, though the case was dismissed in court, see David Leigh, How the innocent can "confess", The Guardian (airmail edition), March 15th, 1981, p. 19. The writer wishes to thank Martin and Louise Davis for bringing this to his attention.

[43] B. Irving, Police Interrogation: a Case Study of Current Practice, Royal Commission on Criminal Procedure, Research Study No. 2 (1980), p. 153. (A photograph on p. 120 of this Royal Commission's Research Study, showing the security block and interview rooms of the Police Station in which the study was conducted, and described in detail on the previous page, seemed a little unusual initially—in fact the photograph is upside down.)

[44] J. Baldwin & M. McConville, Confessions in Crown Court Trials, Royal Commission on Criminal Procedure, Research Study No. 5 (1980), pp. 13-14. Responses to police questioning included: "I did it but I'm no grass [informer]. You can't expect me to say who was with me. I'm taking it on my own. You can talk till you're blue in the face but you're not getting me to grass. Unless, of course, I get bail." (p. 15). "You must be joking if you think I'm going to make a statement. You're not going to prove anything against me. I'm not daft, you know. I've got eight G.C.E's [passes in high school subjects]." (p. 16).

and give it an unchallengeable character which may or may not be justified on the facts''.[45] One final statistic: in a non-Royal Commission Research Study survey, 77% of defendants who requested to be allowed to consult a solicitor were refused by the police,[46] and one final (the-case-for-the-prosecution) comment: ''None of the defendants who challenged the voluntariness of statements produced evidence to substantiate their allegations of police malpractice''[47]—scarcely astonishing given that the defendant and police are invariably the only ones present.

The recently circulated[48] *Report of the Federal-Provincial Task Force on Uniform Rules of Evidence,* by a majority, ''oppose requiring proof of voluntariness in any case where the accused was unaware that he was dealing with a person in authority'',[49] and recommend, by a majority, that the *Ibrahim* rule ''not apply where the accused was unaware that he was dealing with a person in authority when he gave his statement''.[50] This recommendation is misleading in so far as it may give the impression that any change in the law is indicated, for the recommendation begs the question ''who is a person in authority?''—undercover police officers[51] and other persons not in authority will therefore continue to induce confessions without fear of the *Ibrahim* rule.[52] The minority view of the Task Force is to distinguish

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[45] *Ibid.*, p. 35.

[46] J. Baldwin & M. McConville, Police Interrogation and the Right to See a Solicitor, [1979] Crim L.Rev. 145, at p. 150 No information is given on whether the request was made pre- or post- arrest. The 77% figure is close to the 74% figure found in a previous study: M. Zander, Access to a Solicitor in the Police Station, [1972] Crim. L.Rev. 342. One defendant alleged his request to one droll police officer to see a solicitor met with ''Oh, this is the Dorchester Hotel; would you take a 3-course lunch as well?'' (J. Baldwin & M. McConville, at p. 150).

[47] J. Vennard, Contested Trials in Magistrates Courts: the Case for the Prosecution, Royal Commission on Criminal Procedure, Research Study No. 6 (1980), p. 20. Further reading on police activity would include the two following significant books: J.H. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society (1975); and D. Black, The Manners and Customs of the Police (1981).

[48] January 1981. The writer is grateful to Mr. John Cassels Q.C., Chief Crown Attorney for the Ottawa-Carleton Region, and member of the Task Force, for relaying a copy of the Report.

[49] Report, p. 205.

[50] *Ibid.*, p. 221. Of the twelve members on the Task Force, ten are either prosecutors or government lawyers—one cannot reasonably anticipate such a clan to produce a pro-accused ''charter of rights and freedoms''.

[51] *Supra,* footnote 10, at pp. 5-6 of Martland J.'s judgment (with whom Ritchie, Dickson, Beetz, McIntyre and Chouinard JJ. concurred). It should be noted that the Task Force did not have the S.C.C. decision in *Rothman* (which came down on March 2nd, 1981), though did have the Ontario Court of Appeal decision, which the S.C.C. affirmed.

[52] The Canadian Bill of Rights, R.S.C., 1970, Appendix III, provides illusory (*i.e.* non-existent) protection in this regard:

between the investigative stage and the post-charge stage.[53] During the investigative stage "the police should be able to use such techniques as they find most effective"; during the post-charge stage "the general principle that the Crown cannot compel discovery should come into play, and . . . should be obliged to prove that any statements given thereafter by the accused to a person in authority (whether he knew the person was a person in authority or not) were given voluntarily".[54] The minority view has much to commend it, and should be quite acceptable to the law enforcement agencies as it does not preclude the use of undercover agents or stratagems, but does have the Crown prove that statements were given voluntarily[55]—for the law to be otherwise, as it is now, is a parody of the alleged "right to remain silent" and "right to be protected from (at least, unwitting) self-incrimination".

A quote from one final British Columbia case on R.C.M.P. questioning methods in that province will serve to conclude:

> Serack [the accused] had no clothes [they were removed for examination and analysis]; all he had was a blanket. He held it about himself as he followed Constable Cumming to the interview room. They had to walk past other members of the detachment and civilian employees to get there. . . . The accused had to give up all his clothing, including his trousers and his undershorts.

"s.2: [N]o law of Canada shall be construed or applied so as to:

. . . (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards", [*re* self crimination, see *supra*, footnote 10, judgment of Lamer J. in the S.C.C., at pp. 7-8, 14 and 16: "[M]ere lack of voluntariness cannot as such be a reason for excluding a statement as there is no general right to no self-crimination".]

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty *according to law* in a *fair* and *public* hearing by an *independant and impartial tribunal* . . . ." (italics added)

Similarly the proposed Constitution Act, Pt. I. Canadian Charter of Rights and Freedoms[!]:

"s.11: Any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty *according to law* in a fair and public hearing by an independant and impartial tribunal . . . ."

"s.15: Every individual is equal *before and under the law* and has the right to the equal protection and equal benefit *of the law* . . . ." Report to Parliament of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Feb. 13th, 1981. (Italics added).

[53] *Op cit.*, footnote 48, pp. 204-205.

[54] *Ibid.*

[55] *Ibid.*

. . . A man's trousers are . . . essential to his dignity and his composure.[56]

Indeed.

EUGENE MEEHAN*

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[56] *R.* v. *Serack* (1973), 24 C.R.N.S. 295, at p. 296 (B.C.S.C.), per Berger J., who continued: "When a man is questioned at a time when he is clad only in a blanket, the police officer has the advantage and it is a palpable advantage, one that may quite disarm an accused . . ." Not only in Canada; the Royal Commission on Criminal Procedure, Research Study No. 2 (1980), pp. 122-146: "The [police] officers will usually be dressed in suits, or jackets and trousers, shirt and tie; prisoners will be without their shoes and belts, maybe with no clothes at all and covered with a blanket. . . . Where clothes are removed, the primary purpose is for forensic examination, although with aggressive suspects . . . this also serves a secondary purpose in deflating the suspect and also making him more compliant." The fair sex is not immune from such police disrobing: *Lindley* v. *Rutter* (Eng. Q.B.), The Times, Aug. 1st, 1980, p. 4, *re* the forcible removal of a 29 year old woman's brassiere by two (female) police officers, acting in accordance with the chief constable's standing order; see Edmonton Journal, March 14th, 1980, p. A1 *are* a 15 year old black girl strip-searched by police for having jaywalked; and Edmonton Journal, Oct. 7th, 1980, p. B1, and Oct. 21st, 1980, p. B1, *re* a 20 year old woman arrested from a line-up outside a cinema, being suspected of loitering and being a drug addict (she carried two syringes in her purse—as well as medical identification indicating she was a diabetic) who was also strip-searched. In the latter two cases the Police Chief indicated both searches where in conformity with standard policy for any person arrested and placed in a holding cell in the city gaol. The third, the 20 year old woman, has commenced legal action. Most recently, see Edmonton Journal, Feb. 5th, 1981, p. B1 and B3 *re* a 25 year old woman arrested and strip-searched for allegedly having two outstanding traffic tickets. The Alberta Human Rights Commission will initiate an investigation to determine if there have been breaches of the Individual's Rights Protection Act, S.A., 1972, c.2 (Edmonton Journal, Feb. 7th, 1981, p. B3). The Commission of Inquiry Concerning Certain Activities of the R.C.M.P., appointed in July 1977 by Order-in-Council P.C. 1977-1911 ("WHEREAS, after having made inquiries into these allegations at the instance of the Government, the Commissioner of the R.C.M.P. now advises that there are indications that certain persons who were members of the R.C.M.P. may indeed have been involved in investigative actions or other activities that were not authorized or provided for by law . . . .") has completed hearings, and has released its final report. Mr. Tom McEwen, a 1950's columnist for the Vancouver Pacific Tribune is attributed to have, irreverently, commented: "These Royal Commissions we have that you hear so much about. It's like someone sitting on a toilet seat: there's a loud report, and then it's dropped."

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DISCOVERY—PRIVILEGE AND PRELIMINARY INVESTIGATIVE REPORTS.—The decision of the Nova Scotia Court of Appeal in *Davies* v. *Harrington*[1] indicates a significant limitation on the privilege afforded preliminary investigative reports. The facts were as follows.[2] In August 1978, a poultry building owned by the plaintiff was extensively damaged by a fire. Plaintiff recovered on a fire insurance policy, and in July 1979, subrogated proceedings were commenced against the defendant. In the subrogated action, it was alleged that the fire had resulted from a chain of electrical events set off when the defendant's truck was negligently driven into a power pole near the plaintiff's premises.

Two days after the accident, the plaintiff's insurer had retained an electrical engineer to investigate the cause of the fire. The sole purpose for which the engineer had been retained was to investigate the possibility that the fire had been caused as a result of the defendant's accident with a view to the subrograted action which was later brought. The engineer duly prepared his report, and it apparently indicated that there was some basis for a claim against the defendant. By the time the action was commenced the plaintiff's premises had been completely rebuilt so that no remnant of the fire damage could be seen.

In these circumstances, the significance of the engineer's report is obvious, and the defendant sought production of it. Until recently, it would likely have been held that the report was privileged from production on discovery. The case law supplied abundant authority for the proposition that such a report was privileged on the grounds that one of the substantial purposes for which it had been prepared was the contemplation of litigation then pending or anticipated.[3] However, both the chambers judge,[4] Cowan C.J.T.D., and the Nova Scotia Court of Appeal held that the report was not privileged. On the chambers application, Cowan C.J.T.D. held that the document was not privileged because the engineer "was not retained by a solicitor" and his report was made to the insurance company and not the lawyer.[5]

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[1] 115 D.L.R. (3d) 347, aff'g. 39 N.S.R. (2d) 199.

[2] *Ibid.*, at pp. 348-350.

[3] See, *e.g. Blackstone* v. *Mutual Life Insurance Co. of New York*, [1944] O.R. 328, at p. 333 (C.A.); *Vernon* v. *Board of Education for the Borough of North York* (1975), 9 O.R. (2d) 613; *Birmingham and Midland Motor Omnibus Co. Ltd.* v. *London and North Western Railway Co.*, [1913] 3 K.B. 850 (C.A.); *Ogden* v. *London Electric Railway Co.* (1933), 49 T.L.R. 542 (C.A.).

[4] 39 N.S.R. (2d) 199.

[5] *Ibid.*, at pp. 208, and 216. However, it has often been held that privilege may attach to documents prepared prior to the engagement of a lawyer: see, *e.g. Blackstone*

The Court of Appeal upheld the decision, but on different grounds. MacDonald J.A., delivering the unanimous decision, relied on the recent decision of the House of Lords in *Waugh* v. *British Railways Board*,[6] holding that a routine incident report was only privileged from production where submission to a lawyer for advice was at least the dominant purpose for which it was prepared.[7] The *Waugh* test was applied in the following concluding passage in MacDonald J.A.'s judgment:[8]

> Applying the test laid down in *Waugh* it is my view that the dominant purpose for which the report of Mr. Baker [the electrical engineer] was commissioned by the insurance company was to determine whether the fire had an electrical origin. The opinion of Mr. Baker on this point would dictate whether the company sought legal advice as to whether it had a subrogated cause of action against Mr. Harrington. If Mr. Baker's conclusion was completely against the cause of the fire being in any way connected with Harrington's collision with the power pole it is very doubtful whether the company would have forwarded it to their solicitor for advice, there are being no practical reason for doing so.

It is submitted that this is a questionable application of the dominant purpose test. What purpose, other than litigation, did anyone have in mind? The evidence was that the engineer was only engaged where subrogated proceedings were contemplated. According to the evidence, apart from the prospect of a lawsuit, there was no other reason for obtaining the report.

It is submitted that the "dominant purpose" test relates to the motive of the maker of the document at the time he made it, and that the degree of imminence of litigation is not itself determinative. If litigation has been commenced or seems certain, it will be easier to infer that the maker of the document had intended communication with his solicitor to obtain advice uppermost in his mind. On the other hand, even if there is merely some chance of litigation, so long as the maker has no other purpose in mind than communicating with his lawyer to obtain advice, his sole purpose is obtaining legal advice,[9] and the

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v. *Mutual Life Insurance Co. of New York, supra,* footnote 3; *Southwark and Vauxhall Water Co.* v. *Quick* (1878), 3 Q.B.D. 315 (C.A.); *Birmingham and Midland Motor Omnibus Co. Ltd.* v. *London and North Western Railway Co., supra,* footnote 3, at p. 856; *Adam S.S. Co. Ltd.* v. *London Assurance Co.*, [1914] 3 K.B. 1256 (C.A.). See *infra,* footnote 34, for discussion of the significance of early retention of counsel.

[6] [1980] A.C. 521, discussed *infra*.

[7] *Cf.* the more stringent "sole purpose" test adopted by the High Court of Australia in *Grant* v. *Downs* (1976), 135 C.L.R. 674 which was considered but rejected by the House of Lords in *Waugh*.

[8] *Supra,* footnote 1, at p. 354-355. The *Waugh* test appears to be gaining acceptance in Canada. It was applied in *New West Construction Co. Ltd.* v. *The Queen* (1979), 106 D.L.R. (3d) 272 (Fed. Ct T.D.); and *Shaw* v. *Roemer et al.* (1979), 12 C.P.C. 152 (N.S.). Cf. *Ilich* v. *Hartford Fire Insurance company* (1980), 17 C.P.C. 163 (Ont. Master).

[9] See *infra,* footnote 32, for further elaboration of this point.

communication should be protected even under the more limited principle enunciated in *Waugh*.

From this perspective, the reasoning of the Nova Scotia Court of Appeal appears to be open to question. The sole purpose of the preparation of the document in question was anticipation of litigation. However, it is further submitted that if approached in another and, in my view, more satisfactory way, the actual result of requiring production of the report may be fully justified.

In my view, the reasoning provides an example of the difficulty produced by the failure to distinguish clearly the two separate and distinct grounds for privilege in the litigation context.[10] The result, however, recognizes a judicial unwillingness to permit a claim of privilege to bite where no interest underlying its rationale would be infringed. To explain, I propose to describe briefly the nature of the two grounds for privilege and to summarize the rationale which underlies each.

First is the privilege extending to communications made by a client to a solicitor to obtain legal advice. The rationale for protecting such communications is well known and generally accepted. If the client does not have the guarantee of confidence, candour will be inhibited with the result that he would be unable to obtain full and frank legal advice.[11] Solicitor-client privilege extends beyond the

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[10] For a thorough analysis of privilege in the discovery process which carefully analyzes the various grounds for privilege, see Williams, Discovery of Civil Litigation Trial Preparation in Canada (1980), 58 Can. Bar Rev. 1.

For an earlier example of a case which appears to confuse the two grounds of privilege, see *Strauss* v. *Goldsack* (1976), 58 D.L.R. (3d) 397 (Alta C.A.), discussed in Lederman, Discovery-Production of Documents-Claim of Privilege to Prevent Disclosure (1976), 54 Can. Bar Rev. 422. For a similar case, see *Mitsui & Co. (Canada) Ltd.* v. *Pacific Bulk Carrier Inc.* (1977), 3 C.P.C. 275 (B.C.S.C.). The distinction between the two privileges was explained by Jackett P. in *Susan Hosiery Ltd.* v. *M.N.R.*, [1969] 2 Ex. C.R. 27, at pp. 33-34. See also *Meany* v. *Busby* (1977), 15 O.R. (2d) 71, at p. 72, per Grange J.: "It may be as suggested in 8 Wigmore, Evidence (McNaughton rev. 1961), para. 2318, that the courts have failed to distinguish and keep separate the solicitor-client privilege and the exemption from discovery of certain documents." Applying the distinction, Grange J. ordered production of reports prepared in anticipation of earlier litigation.

[11] The rationale was well put by Jessel M.R. in *Anderson* v. *Bank of British Columbia* (1876), 2 Ch. D. 644, at p. 649: "The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it

context of litigation and protects any communication made to a lawyer in a *bona fide* effort to obtain legal advice.

The second privilege, often called legal professional privilege, but perhaps more aptly described as the litigation privilege,[12] is more complex. The protection extended by the litigation privilege goes beyond direct communications made by the client to his solicitor and protects certain third party communications, but it is strictly limited to the process of litigation.

The rationale for the litigation privilege has been explained in a variety of ways.[13] It is deeply rooted in the adversarial mode of trial which relies so completely upon the self-interest of the parties themselves to investigate and present evidence.

Perhaps the least compelling argument to support the litigation privilege is that an adversary trial depends to some extent upon surprise, and that disclosure of evidence rather than facts might lead to witness tampering and suborning perjury.[14] Although this approach has a long and respectable history, it seems out of keeping with the modern view in favour of greater pre-trial disclosure and is gradually but surely being eroded.[15] While several Canadian jurisdictions retain the traditional rule that on oral discovery a party need not disclose his evidence or names of witnesses,[16] to the extent open to

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is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

[12] Williams, *op. cit.*, footnote 10 uses this label. Lederman, *op. cit.*, footnote 10, calls it the the "anticipation of litigation" privilege.

[13] Williams, *op. cit., ibid.*, provides a valuable analysis of the various reasons used to justify the privilege and traces the origins and development of equitable and common law principles which determine the extent to which pre-trial investigation must be disclosed. For another excellent discussion of the arguments for and against disclosure of material generated in pre-trial preparation, see Developments in the Law-Discovery (1961), 74 Harv. L. Rev. 940, at pp. 1027-1045.

[14] Williams, *op. cit., ibid.*, collects the authorities which give this as a reason for refusing to compel disclosure. See *e.g. Benbow* v. *Low* (1880), 16 Ch. D. 93, at p. 95, per Jessel M.R.: "If you give one side the opportunity of knowing the particulars of the evidence that is to be brought against him, then you give a rogue an enormous advantage. He then may be able, although he has no evidence in support of his own case, to shape his case and his evidence altogether in such a way as to defeat entirely the ends of justice."

[15] See Williams, *op. cit., ibid.*, at pp. 22-37. The rule is difficult to justify on principle. If one assumes that one party will cheat, disclosure has advantages or disadvantages depending on whether the party disclosing or the party being discovered is dishonest. It is not clear that there is a greater threat to the truth from forcing a truthful party to disclose, thereby giving a dishonest party the chance to suborn perjury, than from forcing a dishonest party to disclose, thereby giving the honest party a chance to prepare a truthful rebuttal for trial.

[16] See Williams, *op. cit., ibid.*, at pp. 30-33. The prohibition against obtaining names of witnesses has been removed in British Columbia, Rule 27(22) and Nova

them, the courts are less and less willing to permit concealment on discovery which will foster surprise at the trial.[17]

It has also been suggested that the adversarial motivation to investigate fully might be impaired if the litigation privilege did not exist.[18] On the one hand, a party might deliberately refrain from conducting a thorough investigation, hoping to borrow on the work of his opponent. By contrary hypothesis, it may be suggested (perhaps more convincingly), that abolition of the privilege could produce a disincentive to investigate fully in delicate areas, or at the very least, to commit to writing sensitive information.[19] Counsel might be fearful of uncovering unfavourable information, or of pursuing in written form an investigation into a delicate area if all had to be disclosed. An initial unfavourable impression of one aspect of the case might produce an unwillingness to look further. On the other hand, there is a strong belief in the motivating force of party self-interest, and the risks associated with either "free-riding" or "back-sliding" are so substantial that it is doubtful that either would be pursued as a conscious strategy.[20] Indeed, the general drift towards more complete pre-trial disclosure indicates an acceptance of the fact that disclosure is not inevitably destructive of party motivation.

Scotia, Rule 18.12(2). A similar proposal is made in the Ontario Civil Procedure Revision Committee Draft, Rule 32.06(1).

[17] See, *e.g.*, *Liszkay* v. *Brouwer and Company General Insurance Adjusters Ltd. et al.* (1978), 99 D.L.R. (3d) 266 (B.C.C.A.), at p. 269, per Craig J.A.: "The object of the rule 'is to secure the just, speedy, and inexpensive determination of every proceeding on its merits'. The disclosure of a litigant's case by discovery of documents may be (and often is) a very significant factor in the attainment of this object and should, therefore, be encouraged. The basis for non-disclosure, *i.e.* privilege, should not be extended except for cogent reasons." *Taylor* v. *The Queen* (1977), 82 D.L.R. (3d) 63, at p. 70, per Anderson J.: ". . . the older cases in this area and the 'adversary process' must be viewed in the light of a greatly altered social context. Litigation is becoming more expensive. Cases are becoming more complicated. We are surely compelled in the public interest to make the process as simple, equitable and inexpensive as possible. The public interest suffers, in my opinion, when we seek to retain ancient rules relating to 'privilege' in matters of this kind." *Cf. Bates* v. *Stubbs* (1979), 101 D.L.R. (3d) 623, esp. at pp. 631-632, where this passage is criticized, but where an order that the plaintiff submit to a medical examination on condition that the defendant provide a copy of the report to the plaintiff and that the plaintiff produce *all* his medical reports was upheld.

In *Canadian General Electric Co. Ltd.* v. *Liverpool & London & Globe Insurance Co. Ltd.* (1977), 4 C.P.C. 51, Krever J. stated "I approached the appeal with a strong conviction of the need for very broad discovery in contemporary litigation." Also, *Mancao* v. *Casino* (1977), 17 O.R. (2d) 458, at p. 459, per Steele J.: "I am of the opinion that the rules providing for production and discovery contemplate full production and discovery so that parties to an action may know exactly what they must meet at trial, thereby avoiding surprise."

[18] See Developments in the Law-Discovery, *op. cit.*, footnote 13, at pp. 1028-1029 for discussion on this point.

[19] *Ibid.*, at p. 1029.

[20] James, Civil Procedure (1st ed., 1965), pp. 206-207.

The most convincing, and also the narrowest rationale for the protection from disclosure of documents generated in preparing for litigation is that suggested by the "work product" test. Although not yet explicitly adopted by Canadian courts, the judges often demonstrate an instinctive grasp of this principle,[21] and variants of it have been suggested as models for reform.[22] It was explained in the leading American decision, *Hickman* v. *Taylor*[23] where production of a witness statement, taken by the lawyer of one of the parties, was sought by counsel for the other side who candidly admitted "that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing".[24]

Murphy J., delivering the opinion of the court distinguished solicitor-client privilege, and held that it:[25]

> . . . does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

However, there was another policy, directly related to the litigation process which could be invoked. Noting that the information contained in the witness statement was otherwise available, Murphy J. identified the real issue:[26]

> Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

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[21] See Williams, *op. cit.*, footnote 10, at pp. 50-53. At one time the English courts spoke in terms of the "lawyer's brief": *Anderson* v. *Bank of British Columbia, supra,* footnote 11, at p. 656. See also *Lyell* v. *Kennedy* (1884), 27 Ch. D. 1 (C.A.), at p. 26, refusing to order production of documents culled from public records to make out title because the selection". . . might show what [the solicitor's] view was as to the case of his client . . ." For a more recent example, see *Mancao* v. *Casino, supra,* footnote 17, requiring production of the defendant's own statement taken by the plaintiff's solicitor, but on condition that the statement be edited to exclude "comments or impressions recorded by the solicitor for the plaintiff in his notes as to the credibility or otherwise of the defendant as a witness."

[22] The Law Reform Commission of Canada Model Evidence Code (1975), s. 42(2) would enact the relative protection extended by the work product test.

[23] (1945), 329 U.S. 495.

[24] *Ibid.*, at p. 516.

[25] *Ibid.*, at p. 508.

[26] *Ibid.*, at pp. 510-511.

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . .Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

An important qualification, relevant in the *Davies* case, was added:[27]

> Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. . . . But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.

This analysis identifies in sharp focus the interest which the courts are trying to protect through the litigation privilege. Unlike the solicitor-client privilege, the litigation privilege, is relative and qualified. In particular, where information is otherwise unavailable, the need for disclosure may be seen to override the interest the privilege protects.

Thus, to summarize, the litigation privilege is based upon the need to foster adversarial investigation and preparation. It extends to third party communications. To decide whether its protection ought to be extended, one ought to ask whether disclosure would unduly impair the orderly functioning of the adversarial process. On the other hand, communications within the solicitor-client privilege are absolutely protected. To determine its applicability the question is whether the maker had uppermost in his mind the fact that he was speaking to his laywer to get advice. I suggest that the "contemplation of litigation" element is simply a way of focusing on the question "was he speaking to his lawyer to obtain legal advice?"

In the *Waugh* case[28] the House of Lords referred to both grounds of privilege, but in the end, applied the solicitor client rationale. The action was brought as a result of a fatal railway accident, and the report in question had been produced as a matter of routine by the

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[27] *Ibid.*, at p. 511.

[28] *Supra*, footnote 6.

defendant's employees. Although it had been written on a printed form which stated that it was for the information of the board's solicitor, the evidence clearly disclosed that it had been prepared not only for the purpose of obtaining legal advice, but equally for the purpose of facilitating railway operation and safety. Lord Wilberforce referred to the "exigencies of the adversary system of litigation under which a litigant is entitled within limits to refuse to disclose the nature of his case until the trial",[29] but found that "a more powerful argument" was "that everything should be done in order to encourage anyone who knows the facts to state them fully and candidly . . . to his lawyer. . . . This he may not do unless he knows that his communication is privileged".[30] Thus, he saw the question as being whether requiring the report to be produced would inhibit such candour. The competing interest was that the due administration of justice would be fostered by the production of the report. It was made shortly after the incident in question, contained statements by witnesses and was perhaps the best evidence available as to the cause of accident. Balancing these interests his Lordship held that unless the purpose of preparing for litigation was either the sole or at least the dominant purpose, privilege could not be justified.

In the concurring speeches by Lord Simon of Glaisdale and Lord Edmund Davies there are similar mixed references to solicitor-client privilege and what has been called here the litigation privilege, but a clear emphasis on the former.[31] Both accepted the dominant purpose test.

In a case like *Waugh,* where production of internal corporate reports is sought, the issue is whether the maker of the document, speaking for the company was truly motivated by the desire to relate the events to the company's lawyer to obtain advice.[32] The answer turns upon contemplation of litigation, not because there is one rule of solicitor-client privilege for litigation and another for non-litigious matters, but because the possibility of litigation is the only conceivable matter upon which legal advice was being sought. The claim of privilege failed in *Waugh* because the maker of the report did not have

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[29] *Ibid.*, at p. 531.

[30] *Ibid.*

[31] *Ibid.*, at pp. 536, 542.

[32] An important question not addressed by the House of Lords is whether communications of all corporate agents and employees warrant the protection of the solicitor-client privilege. There is little doubt in the case of communications made by a senior corporate officer in a position to speak on behalf of the corporation. But should the same protection necessarily extend to communications made by lower level employees? For discussion of the American position, see Markey and Bonnell, Privileged Communications between Counsel and the Corporate Client (1979), 28 Clev. St. L. Rev. 565.

uppermost in his mind the promise of confidence as the dominant incentive for candour. The maker of the document was found to have other equally operative motives in making the report. To deny privilege in such circumstances would not, therefore, deny one of the necessary attributes of the lawyer-client relationship.

In *Davies*, however, the document in question was prepared by a third party. In the circumstances, there was no basis upon which to apply the solicitor-client privilege. The engineer was not a client "making a clean breast of it" to his lawyer. He made the report in the capacity of an independent expert, and was speaking to his client to give advice, not to a lawyer to obtain advice.

When one turns to the litigation privilege, it is difficult to see a case for protecting the report.[33] I suggest that implicit in the result is an acceptance of the "work-product" rationale. The advantage of production to foster a fair trial is obvious. As the building had been reconstructed prior to the commencement of the action, the defendant had no way of obtaining information he would need to make out a defence. If refused production, he would have to wait until trial, when developing an exculpatory explanation for the fire would be difficult if not impossible. Against this, one must balance the extent to which production of the report would impair adversarial preparation and investigation. The report in *Davies* would not reflect the thinking, theory or strategy of the lawyer in the "work-product" sense.[34] Would the plaintiff's incentive to investigate be affected? Presumably, the insurer wanted an honest and open assessment of the situation to determine the advisability of proceedings. There may, however be a case for extending a "work product" type protection to expert reports.[35] Arguably, a rule which inevitably requires production of all

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[33] It is significant to note that even if the report is protected, a party must still disclose on oral discovery facts learned from the report: see, *e.g. Carmichael* v. *Hydro-Electric Power Commission of Ontario*, [1938] O.W.N. 467; *Cook* v. *Cook*, [1947] O.R. 354; *April Investments* v. *Menat Construction Ltd.* (1975), 11 O.R. (2d) 364.

[34] It might be supposed that the early retainer of counsel could be used to thwart the recent trend to limit privilege. *Cf.* however, *Shaw* v. *Roemer et al. supra*, footnote 8, where the general claims agent of a corporate defendant communicated verbally with counsel concerning the accident the day after its occurrence. In ordering production of a claims agent's investigation report, prepared for the general claim's agent to be forwarded by him to counsel, Glube J. commented as follows, at pp. 162-163: ". . . to allow conversation with general counsel . . . to frustrate the plaintiffs and make all investigations privileged would negate the Civil Procedure Rules of Nova Scotia." See also Developments in the Law-Discovery, *op. cit.*, footnote 13, at p. 1031: ". . . when the client acts in response to suggestions by counsel for routine activity—as, for example, in establishing a policy of preparing reports after all accidents—the extent of the lawyer's participation seems too insignificant to warrant denial of discovery."

[35] The United States Federal Court Rule protects such reports ordinarily: Rule 26(b)(4). See Wright and Miller, Federal Practice and Procedure, para. 2029; *Cf.*

expert reports, both favourable and unfavourable, could impair the orderly preparation of the case. Such a rule might encourage unduly partisan reports or discourage the careful and dispassionate formulation in writing of opinions in highly technical areas. However, where the party intends to call an expert at trial, a compelling case can be made in favour of disclosure to permit proper adversarial preparation.[36] Thus, a rule which allows the plaintiff to conceal reports of experts he does not propose to call at trial is all that is needed to avoid any possible disincentive to investigate thoroughly. In *Davies,* it is likely that the report in question was favourable to the plaintiff, and the expert's evidence would be used at trial. In any event, unlike the solicitor-client privilege which is absolute, the litigation privilege should be seen as relative and qualified. Its purpose is to protect orderly trial preparation. Where preparation is impossible or substantially frustrated by the application of the privilege, then in light of its underlying purpose, the privilege should yield. Even if an interest ordinarily protected by the litigation privilege might be infringed, surely the privilege should yield where, as in *Davies,* the defendant has no other access to information crucial to the case.

Accordingly, while it is difficult to accept the stated reason in *Davies,* it is suggested that indeed the report ought to have been produced. The result indicates a sound instinctive grasp of what may be disclosed without undue injury to the interests protected by either of the two possible sources of privilege. Taken together with *Waugh,*

Friedenthal, Discovery and Use of an Adverse Party's Expert Information (1962), 14 Stan. L. Rev. 455.

[36] Although not mentioned in the *Davies* judgment, Nova Scotia Rule 31.08(1) is particularly relevant:

> 31.08(1) Unless a copy of a report, containing the opinion of an expert, the facts on which the opinion is based, and his qualifications, has been
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> (a) served on each opposite party at least 20 days before the evidence of the expert is given, and
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> (b) delivered with the brief to the trial judge under Rule 28.07(1) [containing a summary of the facts, issues and law],
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> the evidence of the expert shall not be admissible on the trial without leave of the court.

A similar provision is found in the Evidence Act, R.S.B.C., 1979, c. 116, s. 11. This is also the effect of Federal Court Rule 482, which requires that "a full statement of the proposed evidence in chief of the [expert] witness has been set out in an affidavit, . . . a copy of which has been served on the other party or parties not less than 10 days before the commencement of trial." Similar provision has been made in Ontario with respect to medical evidence: Evidence Act, R.S.O., 1970, c. 151, s. 52. Under the rule proposed by the Ontario Civil Procedure Revision Committee (1980), a party would be required to give full particulars on oral discovery of expert evidence he intends to call: proposed rule 32.06.

which it purported to follow, *Davies* v. *Harrington* significantly limits the privilege afforded preliminary investigative reports, and corresponds with the unmistakable and unrelenting trend toward more complete pretrial disclosure.

ROBERT J. SHARPE*

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CONFLICT OF LAWS—EVICTION OF PROPER LAW OF CONTRACT BY LEGISLATION CREATING PROVINCIAL OFFENCE—EXTRATERRITORIAL EFFECT OF PROVINCIAL LEGISLATION—WHERE IS AN OMISSION?.—In *R.* v. *Thomas Equipment Ltd.*,[1] the Supreme Court of Canada held that an out-of-province manufacturer could not avoid conviction for breach of a provincial regulatory statute through reliance on a choice of law clause in one of its contracts of dealership. The decision is an important one for the conflict of laws in matters of contract, as well as for the continuing debate over constitutional limitations on the choice of law process.[2] It also represents a rare attempt to localize an omission, that is, something which does not exist and which has never happened. There was some division in the Supreme Court as to how to go about this.

Thomas Equipment is a New Brunswick manufacturer of farm implements which markets its products through independent dealers. It entered into a dealership agreement with a northern Alberta retailer, the contract providing for sale of implements by Thomas to the dealer for purposes of re-sale, advertising of the products by Thomas, and maintenance by the dealer of a repair and parts service. Thomas was not registered in Alberta as an extra-provincial company, and the contract expressly provided that the rights and duties of the parties were to be determined according to New Brunswick law. The agreement was terminated by the Alberta dealer, acting in accordance with the agreement, and the dealer also served notice on Thomas calling for re-purchase of all unused farm implements and parts obtained by the

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[1] [1979] 2 S.C.R. 529, 96 D.L.R. (3d) 1, 26 N.R. 499.

[2] See Castel, Canadian Conflict of Laws, vol. 2, pp. 32 *et seq.*; Hertz, *Interprovincial*, The Constitution and the Conflict of Law (1976), 26 U. of T.L.J. 84; *ibid.*, The Constitution and the Conflict of Laws: Approaches in Canadian and U.S. Law (1977), 27 U. of T.L.J. 1; Blom, The Conflict of Laws and the Constitution—*Interprovincial Co-operatives Ltd.* v. *The Queen* (1977), 11 U.B.C.L. Rev. 144.

dealer from Thomas. The notice was served pursuant to section 22 of the Alberta Farm Implement Act[3] which, subject to certain conditions, obliges manufacturer re-purchase of unused farm implements on termination of a dealership agreement. Contravention of the Act is an offence punishable by fine of not more than $500.00.[4] There is no such legislation in New Brunswick.

On Thomas' failure to re-purchase it was charged and convicted in Alberta Provincial Court of an offence under the Farm Implement Act. Thomas' appeal by way of stated case to a single judge of the Alberta Supreme Court, Trial Division, was successful,[5] and the Crown's subsequent appeal to the Appellate Division of the Supreme Court of Alberta was dismissed by a majority of two to one.[6] The Supreme Court of Canada, by a majority of six to three, allowed the Crown's appeal and restored the conviction. In the entire proceedings eight judges thus favoured application of the Alberta statute while six would have preferred exclusive application of New Brunswick law. The division of opinion is comparable to that which prevailed recently in *Interprovincial Co-operatives Ltd.* v. *The Queen in Right of Manitoba,*[7] in which the Supreme Court rejected the application of Manitoba environmental legislation to a case of pollution in Manitoba caused by extra-provincial polluters.

Speaking for the majority in the Supreme Court of Canada,[8] Martland J. was of the view that the contract related "not only to the sale of farm equipment by Thomas to [the dealer] but also to promoting the resale of . . . products in Alberta and to the establishment in that Province of good will in relation to Thomas' products".[9] He stated that when Thomas "sold the farm implements to [the dealer] for re-sale in Alberta, it rendered itself subject to the provisions of the regulating statute," and quoted with approval the statement of Sinclair J.A., in the Appellate Division of the Supreme Court of Alberta that: "If a manufacturer wants to have his farm implements sold here he must comply with the rules of the game, as it were, established by the Legislature of Alberta."[10] Martland J. also cited section 22 (12) of the Farm Implement Act to the effect that: "This section applies to a vendor and a dealer notwithstanding anything in an agreement or

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[3] R.S.A., 1970, c.136, as am. S. 22 was enacted by S.A., 1971, c.33, s. 9.

[4] R.S.A., 1970, c.136, s.18.

[5] 8 A.R. 285.

[6] 94 D.L.R. (3d) 205, 5 Alta L.R. (2d) 258.

[7] [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321; and see the commentaries cited *supra,* footnote 2.

[8] Martland, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

[9] *Supra,* footnote 1, at p. 11 (D.L.R.).

[10] *Ibid,* at p. 12.

any other contract or arrangement between the vendor and dealer . . . ,'' and concluded that the basis of the prosecution against Thomas was a ''statutory obligation entirely independent of contract''.[11] The parties' choice of New Brunswick law to govern their contract was therefore irrelevant to the prosecution, though it would govern their rights and obligations apart from the statute. Finally, the case raised ''no constitutional question'',[12] since Thomas was being penalized not ''for its conduct in New Brunswick, but because of what it failed to do in Alberta''.[13] There was therefore no question of extraterritoriality.

In dissent, speaking for himself, Ritchie and Spence JJ., Chief Justice Laskin appeared not to challenge the majority's construction of the Alberta statute. He found it, however, ''an equally if not a more tenable proposition that if [the dealer] wishes to buy from Thomas it must accept New Brunswick law'',[14] and regarded ''as relevant the place where the contract between them was made''.[15] Given this impasse over whose ''rules of the game'' should govern, the decisive consideration was the constitutional one, and Laskin C.J.C. could not agree ''that Alberta legislation may be enforced against a manufacturer in New Brunswick who does not carry on business in Alberta simply because that manufacturer's goods are sold to an Alberta retail dealer who resells them in the ordinary course of its own business''.[16] The prosecution should therefore have failed because it was ''an attempt to give Alberta law an extra-provincial application''. This was ultimately the case because: ''Thomas received the notice of termination in New Brunswick, and the refusal to repurchase was within its rights under New Brunswick law.''[17]

Choice of law

The judgment is important first for the majority decision that such a trans-border transaction fell within the terms of the Alberta statute. The statute did not expressly declare itself applicable to such a

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[11] *Ibid.*, at p. 13.

[12] *Ibid.*

[13] *Ibid.*, at p. 12.

[14] *Ibid.*, at p. 4.

[15] *Ibid.*, at p. 3.

[16] *Ibid.*

[17] *Ibid.*, at p. 4. The fact that notice of termination was received in New Brunswick is reiterated three times in this single page of the judgment of Laskin C.J.C., and it appears clear that he does not consider the extra-provincial character of one of the parties in itself to give rise to unlawful extraterritoriality. Provincial duties can therefore be imposed on non-provincial persons, unless the circumstances of the case are considered extraterritorial.

case and the conclusion of the majority is thus based on statutory interpretation.[18] This is one of the rare occasions on which the Supreme Court has found legislation creating a provincial offence to be necessarily applicable, absent express legislative direction, to a case presenting important extra-provincial elements.[19] The decision tells us relatively little, however, as to how this conclusion was reached, limiting itself to the findings that Thomas was a "manufacturer or supplier of farm implements", that the dealer was a "dealer", that the Act contained a code regulating the sale of farm implements in Alberta and that the contract contained provisions relating to advertising in Alberta by Thomas and customer service to be provided by the dealer.[20] So much could have been conceded by counsel for Thomas without prejudice to the question whether the Act was intended to apply to extra-provincial manufacturers and to sale and repurchase by them, without regard to the proper law of the sale. One can surmise that the interpretation of the majority is correct, given the geographical distribution of farm implement manufacturing in North America and the probable futility of the legislation were it limited to purely intra-provincial dealership agreements. One can also sympathize with a court forced to construct legislative intention from a record free of any legislative or factual clues as to that intention. Lower courts in the past, however, have shown greater sensitivity to the question[21] and have on occasion admitted factual evidence to establish legislative intent.[22] As well, the impression is inescapable that the question of legislative intention to affect extra-provincial traders and contracts was not squarely put for fear of raising the parallel constitutional question of whether the provincial legislation

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[18] *Cf.* the Manitoba legislation in *Interprovincial Co-operatives Ltd.* v. *The Queen*, cited *supra*, footnote 7. In *Thomas* neither the definition nor the charging section of the statute (including s.22(12), cited *infra* in text accompanying footnote 10) contained any language suggesting its application in space.

[19] *Cf. Gregory & Co. Inc.* v. *Quebec Securities Commission*, [1961] S.C.R. 584, 28 D.L.R. (2d) 721 (Quebec securities legislation held applicable to trader in Quebec dealing by mail with extra-provincial investors, all constitutional questions having been abandoned by counsel in the appeal); *A.-G. of British Columbia* v. *Cowen*, [1939] 1 D.L.R. 288, [1939] S.C.R. 20 (U.S. dentist held not practising dentistry in British Columbia by simply advertising therein. Amended B.C. legislation made expressly applicable to the case subsequently upheld in *Cowen* v. *Attorney-General for B.C.*, [1941] S.C.R. 321, [1941] 2 D.L.R. 687).

[20] *Supra*, footnote 1, at p. 11 (D.L.R.).

[21] See *R.* v. *W. McKenzie Securities Ltd.* (1969), 56 D.L.R. (2d) 56 (Man. C.A.) (Manitoba securities legislation intended to protect the Manitoba public and therefore applicable to all trading activities in securities within Manitoba, including those by extra-provincial traders).

[22] See the recent judgment of Deschênes C.J. admitting evidence as to the inter- and intra-provincial character of the Quebec asbestos industry in *Société Asbestos Limitée* c. *Société Nationale de l'Amiante*, [1980] C.S. 331.

could have extraterritorial effect. Since the answer to this question is frequently negative, the statute and the underlying transaction were "read down", and the notion of a sale *in Alberta* simply taken as including one by a non-Albertan vendor, at least in the circumstances of the case.

In the result, the Alberta legislation was found to be of "immediate application",[23] mandatorily applicable by the courts of the enacting province to the exclusion of traditional choice-of-law rules. Though it is clear that federal criminal law is of such mandatory territorial application, the Supreme Court here placed little express reliance on the fact that the Alberta legislature had opted for the creation of a provincial offence rather than relying on, supplementing, or creating, civil remedies. In principle, nothing should preclude the same analysis of provincial legislation adopting, for example, strict liability in tort, rather than an offence accompanied by a minimal fine, as an appropriate sanction. As well, the decision of the majority provides an excellent example of "dépeçage",[24] the carving out of a specific issue from the mass of questions which remain subject to the proper law of the transaction. The specific issue is submitted to the law most appropriate to that issue. The method is antithetical to a system of broadly-formulated reference rules.[25]

The judgment of Laskin C.J.C. embodies a different view of the Supreme Court's function in inter-provincial choice of law cases. For the majority, the statute was applicable once it had been construed as applicable, subject only to constitutional restraints. The Supreme Court was essentially seen as the final appellate tribunal of Alberta, a forum of the enacting province and bound to follow its constitutionally valid enactments. Laskin C.J.C's perception of the court is apparently broader, since he balanced Alberta's admitted claim to

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[23] As to this notion see Blom, Choice of Law Method in the Private International Law of Contract (1978), 16 Can.Y.B.I.L. 230, at pp. 247-253.

[24] See Reese, Dépeçage: A Common Phenomenon in Choice of Law (1973), 73 Col. L. Rev. 58; Blom, *op. cit.*, footnote 20, at p. 221.

[25] Its effect on the normal choice of law process would be more evident if the Alberta dealer now chose to sue in New Brunswick for the price of goods required by the Alberta statute to be re-purchased. Since the Alberta statute has been held applicable for purposes of the provincial offence, must it not also be applicable vis-à-vis the civil obligations of the parties? The "dépeçage" effected by the court is especially noteworthy in view of a series of earlier cases deciding that the right of a Quebec vendor to "dissolve" a contract of sale and recuperate the goods, as allowed under Quebec law in certain cases, is governed by the proper law of the contract. See *Re Columbia Shirt Co.* (1922), 23 O.W.N. 18; *Re Hudson Fashion Shoppe Ltd.*, 29 O.W.N. 203, [1926] 1 D.L.R. 199; *Re Viscount Supply Co. Ltd.*, [1963], 1 O.R. 640; *Re Modern Fashions Ltd.* (1969), 8 D.L.R. (3d) 590. See also *In re Harte and Ontario Express & Transportation Co.* (1893), 22 O.R. 510 and generally Castel, *op. cit.*, footnote 2, p. 556. *Cf. In re Satisfaction Stores Ltd.*, [1929] 2 D.L.R. 435.

regulate the case against its factual connections with New Brunswick. The majority's adherence to the *lex fori* was qualified as "a one-sided view".[26] Such a perception of the court emphasizes its national dimension and responsibility for harmonious resolution of inter-provincial disputes. The function of the court is seen as an inherent one of disinterested allocation. Laskin C.J.C. chose not to pursue this avenue of resolution, however, and simply noted the connections of the case with both Alberta and New Brunswick. He preferred to base his decision on the constitutional notion that provincial legislation is territorially limited.

Extraterritorial effect of provincial legislation

The constitutional dimension of the case is as noteworthy as that relating to the conflict of laws. In contrast with a series of earlier and frequently-cited decisions,[27] the majority in *Thomas* decided that provincial legislation was capable of striking at acquired contractual rights of an extra-provincial creditor, even in the case where the contract was governed by an extra-provincial law. The decision marks a major shift in attitude towards provincial control of trans-border contractual relations, but the significance of the decision is, with respect, obscured by the reasoning in both the majority and minority judgments.

For the majority, as indicated, the application of the statute posed no constitutional question since Thomas was being penalized not "for its conduct in New Brunswick, but because of what it failed to do in Alberta".[28] Laskin C.J.C., however, perceived the statute to be of clear extraterritorial application since "Thomas received the notice of termination in New Brunswick, and the refusal to re-purchase was within its rights under New Brunswick law".[29] Two points should be noted here. The first is that, as has been seen, the localization of Thomas' failure to re-purchase was not considered by either side to follow conclusively from the localization of the contract in New Brunswick. The failure to re-purchase was therefore not akin to breach of contract by way of omission, the localization of which is effected by localization of the contract itself. Second, both

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[26] *Supra*, footnote 1, at p. 4 (D.L.R.).

[27] *Royal Bank of Canada* v. *The King* (1913), 9. D.L.R. 337, [1913] A.C. 283; *Ottawa Valley Power Co.* v. *A.-G. Ontario*, [1936] D.L.R. 594,[1937] O.R. 265; *Beauharnois Light, Heat & Power Co.* v. *Hydro-Electric Power Commission*, [1937] 3 D.L.R. 458, [1937] O.R. 796; *Crédit Foncier Franco-Canadien* v. *Ross*, [1937] 3 D.L.R. 365, [1937] 2 W.W.R. 353. See also *Grey* v. *Kerslake*, [1958] S.C.R. 3, 11 D.L.R. (2d) 225.

[28] *Supra*, footnote 12.

[29] *Supra*, footnote 15.

judgments[30] proceeded on the assumption that provincial legislation is territorially limited, and the duty to re-purchase imposed by the Alberta statute was therefore considered to be territorially limited to circumstances arising in Alberta. The only remaining question was as to the situs of breach, the situs of the offence. Where was the omission? More precisely, where was the omission, seen in isolation from all surrounding circumstances? In the result, it is difficult to say either side is entirely wrong. Thomas failed to re-purchase the goods in New Brunswick, and also failed to re-purchase them in Alberta. The goods were not re-purchased—anywhere and everywhere. Thomas' failure cannot, however, be localized exclusively in one or the other of Alberta or New Brunswick. Nor can the Alberta legislation be said to be directed only to that part of the omission which occurred in Alberta, since re-purchase of the goods in New Brunswick, or elsewhere, would have been a valid defence. Putting it another way, failure to re-purchase outside of Alberta was as essential to the offence as failure to re-purchase in Alberta. Section 22 of the Alberta Farm Implement Act is of universal application.

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In accepting a rule of provincial extraterritorial incompetence, the court in *Thomas* forced itself to attempt the impossible—localizing, in the abstract, an omission. An omission is, if you will, omnipresent. In expressing different conclusions as to its locale, the members of the court were acting according to either unexpressed or necessarily unconvincing criteria.

If the rule of provincial extraterritorial incompetence requires this type of reasoning, and if provinces are nevertheless able to do what was done in *Thomas*, then surely the time has come to re-examine the rule itself. It obscures more than it reveals, and it does not prevent extraterritoriality.

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[30] Though Laskin C.J.C. stated (*supra*, footnote 1, at p. 4 (D.L.R.)) that he did "have some doubts about the actual results" in *Royal Bank of Canada* v. *The King*, *supra*, footnote 27.

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