

Notes of Cases

Commentaires d'arrêt

DAMAGES—DAMAGE TO PROPERTY—BETTERMENT—CALCULATION OF DAMAGES—INTEREST ON SUMS EXPENDED: *James Street Hardware & Furniture Co. Ltd. v. Spizziri*.

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Introduction

No matter what the context in which property is damaged through the fault of another, a fundamental principle governing the measure of monetary compensation to be paid to the victim of the wrong is that no rigid rule can be applied to all cases. Rather, all of the relevant circumstances must be considered. As summarized in *Hollebone v. Midhurst and Fernhurst Builders Ltd.*¹:

In *The Susquehanna*. . . Viscount Dunedin states that no rigid rule or rules that apply to all cases can be laid down, but one must consider all the relevant circumstances.

In *The Chekiang*. . . the proposition is put by Lord Sumner in these words:

The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of law on this subject. . .

The relevant circumstances must clearly depend on such matters as the interest which the injured party has in what is damaged: whether it be a chattel or realty, the principle is equally applicable.

Although flexibility and the assessment of the circumstances of each particular case are laudable and justifiable principles, in few areas concerning the assessment of damages has more confusion and unpredictability arisen than on the question of betterment of damaged property through its repair or replacement. The inconsistent approaches to this problem which have been taken in the past are irreconcilable and largely unjustifiable in principle. Fortunately, the recent decision of the Ontario Court of Appeal in *James Street Hardware & Furniture Co. Ltd. v.*

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¹ [1968] 1 Lloyd's Rep. 38, at p. 40 (Q.B.D.) (Official Referee's Ct.). The citations to the cases referred to in the quotation in the text are: *The Susquehanna*, [1926] A.C. 655, (1926), 25 Ll. L.R. 205 (H.L.); *The Chekiang*, [1926] A.C. 637, at p. 643, (1926), 25 Ll. L.R. 173, at p. 175 (H.L.).

*Spizziri*² offers a new and compelling method for accounting for improvement of the plaintiff's property through repair. This approach, which is described below, is intended to ensure full compensation of the plaintiff for the loss suffered, without affording him a windfall in the form of restoration of his property at the defendant's expense to a condition better than it was before it was damaged.

The issue of betterment is a common one which arises in both tort and contract actions, wherever realty or chattels have been damaged and have been or will be repaired by the plaintiff.³ In its simplest form, betterment occurs where property with a limited lifespan is damaged or destroyed after only part of that lifespan has expired. The plaintiff then restores or replaces the property, and in the result obtains property which, because it contains new materials or is built to modern specifications, is better than what he had before and can be expected to last beyond when the useful life of the old property would have expired.

To take a simple example, suppose a person buys a new car which has tires with a life expectancy of 50,000 kilometres. After he has driven the car for 25,000 kilometres and the tires have become half worn, he drives down a road which, owing to the defendant's negligence, is littered with nails which have fallen from the defendant's truck. The nails puncture the plaintiff's tires, damaging them beyond repair. Assume that no used tires are available. As a result, the plaintiff is forced to invest \$400 in a set of new tires, which again have a life expectancy of 50,000 kilometres. The plaintiff sues the defendant, who admits that his negligence was the sole cause of the loss of the plaintiff's old tires. Regarding the assessment of damages, however, the defendant argues that it is not fair that he should pay \$400 for a set of new tires when all that the plaintiff lost was a set of half worn tires which he would have replaced after another 25,000 kilometres anyway. The plaintiff on the other hand says that it is not fair that he should have to invest \$400 in new tires earlier than he would have had to do otherwise. The plaintiff also argues that it does not lie in the mouth of the defendant to complain if the plaintiff must buy four new tires when good used tires are unavailable. Faced with these conflicting arguments, the court must assess the plaintiff's damages, keeping in mind the principle that the plaintiff is entitled to be put in the position he would have been in had the defendant's negligent act not been committed, while at the same time avoiding over-compensation of the plaintiff in light of what he lost, namely a set of half worn rather than new tires.

² (1987), 62 O.R. (2d) 385, 43 C.C.L.T. 9, 24 O.A.C. 42 (Ont. C.A.) reversing in part (1985), 51 O.R. (2d) 641, 33 C.C.L.T. 109, 16 C.L.R. 254 (Ont. H.C.).

³ It is beyond the scope of this comment to consider the diverse case law on the effect on the measure of damages of the possibility that repairs will not be made.

This example can be applied by analogy to a wide variety of circumstances both simple and complicated. The partially worn roof on a building may be damaged and replaced; an old building which does not comply with current building codes and thus cannot be rebuilt as it existed before may be destroyed; or a vehicle may be repaired using newer and better material than what was damaged. In these and many other circumstances, courts have answered the question of how to provide proper compensation but not overcompensation in ways which have often failed to meet one of those objectives, in the result either undercompensating or overcompensating the plaintiff. The two approaches which have been used most frequently in the past are as follows:

- (a) to award the plaintiff only the "depreciated value" of what was lost or damaged, taking into account that the property was partially worn out, notwithstanding the fact that repair or replacement of the damaged property might cost more than the depreciated value; or
- (b) to award the plaintiff the full cost of repair or replacement of the damaged or destroyed property, notwithstanding the fact that what the plaintiff then receives is something better or with a life expectancy longer than what he lost.

It is readily apparent that these two approaches are inconsistent with one another and that neither fulfills the two objectives of:

- (a) providing full compensation for the plaintiff's loss, which may include the cost of investing in repair or replacement earlier than had been expected; and
- (b) requiring the defendant to pay only for the injury which he actually inflicted on the plaintiff, not to improve the plaintiff's position beyond what it was immediately before the loss.

The purpose of this comment is to consider whether there exists another approach which meets both of these objectives and provides a practicable formula for assessment of damages where betterment of damaged property has occurred. It is submitted that the *James Street Hardware* case shows that such an approach does exist and should be adopted to remedy the injustices caused by both of the methods of calculation which have been used in the past. First, however, an analysis of the case law under the two earlier approaches will be made.

Traditional Approaches

It is a well established principle of Admiralty law that no deduction from the award of damages to the owner of a repaired chattel is to be made on account of the substitution of new materials for old. This approach has been taken in cases in which ships damaged in collisions were repaired and made better than they were before. No deduction on account of

betterment was made in such circumstances in *The Gazelle*,⁴ *The Clyde*⁵ and *The Pactolus*.⁶ Waddams has criticized the result in *The Gazelle* on the basis that, consistently with the principle that a plaintiff is not entitled to the cost of a new ship if his old ship is totally destroyed, he should not in the case of a partial loss have his position improved by having the old, damaged parts of his chattel replaced with new parts at no expense to him.⁷ Nevertheless, the same principle was adopted by the Federal Court of Appeal, without reference to the old admiralty cases, in *The Ship "Dumurra" v. Maritime Telegraph & Telephone Co. Ltd.*⁸ In the *Dumurra* case, the Federal Court of Appeal adopted the decision of the English Court of Appeal in *Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co. Ltd.*⁹ In *Harbutt's* case, it was held that the plaintiff factory owner whose plant was destroyed by fire was entitled to rebuild his old factory to modern specifications which rendered his operation more efficient, without deduction from the cost of rebuilding to account for the fact that he had received a new plant in place of his old one. The English Court of Appeal explained this result on the basis that the plaintiff should not be forced by the defendant's negligence to invest capital in constructing a new plant to replace the old one which had served the plaintiff's purposes, albeit less efficiently than did the new plant. In *Dumurra*, the Federal Court of Appeal applied this approach to underwater cables which had been damaged by the defendant's ship. The court's reasoning on this point was brief:¹⁰

Counsel for the appellant finally argued that the damages awarded were excessive. The amount of those damages was calculated on the basis of the replacement cost of the damaged cables and counsel contended that the trial Judge had not given sufficient consideration to the fact that the damaged cables, which were not new, had had to be replaced by new cables that had, for that reason, a greater value than the cables that had been damaged. In view of the decision of the Court of Appeal of England in *Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co. Ltd.* . . . we are of opinion that this argument must also be rejected.

⁴ (1844), 1 W. Rob. 279, 166 E.R. 759 (Adm.).

⁵ (1856), Swab. 23, 166 E.R. 998 (Adm.).

⁶ (1856), Swab. 173, 166 E.R. 1079 (Adm.). This principle from *The Pactolus* was adopted in A.D. Gibb, *The Law of Collisions on Land* (4th ed., 1938), pp. 203-204, which in turn was adopted by the Exchequer Court in *The King v. Toronto Transportation Commission*, [1946] Ex. C.R. 604, at pp. 612-613, [1947] 1 D.L.R. 657, at p. 664; reversed on other grounds, [1949] S.C.R. 510, [1949] 3 D.L.R. 161.

⁷ S.M. Waddams, *The Law of Damages* (1983), p. 12, para. 21. Cf., *A-1 Rentals, Sales & Services v. Alberta Arches & Beams Ltd.* (1966), 60 D.L.R. (2d) 4, 58 W.W.R. 227 (Alta. App. Div.), where the plaintiff was awarded the cost of a replacement which was not as good as what was lost, plus the cost of reconditioning it, minus an allowance for depreciation of what had been lost.

⁸ (1977), 75 D.L.R. (3d) 766 (Fed. C.A.); leave to appeal to the Supreme Court of Canada refused (1977), 75 D.L.R. (3d) 766n.

⁹ [1970] 1 Q.B. 447, [1970] 1 All E.R. 225 (C.A.).

¹⁰ *Supra*, footnote 8, at p. 768.

Many non-admiralty cases have taken the same approach. In *T. Donovan & Sons Limited v. Baker*,¹¹ the plaintiff's car was damaged, and *Bridges C.J.N.B.* held as follows:

In my opinion, in the case of an automobile damaged in a collision, where it is reasonable to repair, the plaintiff is entitled to the cost of such repairs as will put the car in the condition it was before the accident. If used parts are available and will do this or if the damaged parts can be repaired so that they will be restored to their condition before the collision, the plaintiff is not entitled to the cost of new. On the other hand, if used parts are not available or if the damaged parts cannot be repaired so as to be restored to their condition before the accident, the plaintiff is entitled to new and to recover their cost without deduction even though as a result he has a car of greater value. If, after the repairs, the plaintiff has a car of less value, he is entitled to something for depreciation.

The last line in this quotation from the *Donovan* case raises another issue, namely the recoverability of damages for residual depreciation following repair of a damaged chattel. It is well established that upon appropriate evidence a plaintiff is entitled to such damages.¹² However, strict proof of diminution in value is required.¹³

Failure to take account of betterment, with the result of overcompensating the plaintiff, has also occurred in cases involving damaged realty, although the Canadian cases on this point have shown a willingness to make a deduction from the damages to account for "depreciation" of realty which was damaged or destroyed and later restored. No deduction for betterment was made in *Medjuck and Budovitch Ltd. v. Adi Ltd.*,¹⁴ which adopted *Harbutt's "Plasticine"*,¹⁵ *National Theatres Limited v. Mac-*

¹¹ (1966), 53 M.P.R. 113, at p. 115 (N.B. App. Div.). See also *Busenius v. Pott* (1988), 87 A.R. 270, 57 Alta. L.R. (2d) 416n (Alta. Q.B.).

¹² This principle is well established in Canadian law, and can be traced back at least as far as *Hughes v. Quentin* (1838), 8 Car. & P. 703, 173 E.R. 681 (C.P.). The same principle was also applied in *Chotem v. Porteous* (1920), 51 D.L.R. 507 (Sask. C.A.); *The Georgina v. The Anglican* (1872), 21 W.R. 280 (Ire.); *Burthwick v. Lucas*, [1940] 4 D.L.R. 288 (Sask. C.A.); *T. Donovan & Sons Limited v. Baker*, *supra*, footnote 11; *Matheson & MacMillan Ltd. v. Hogg* (1971), 1 Nfld. & P.E.I.R. 235 (P.E.I.T.D.); *Green v. White* (1975), 10 N.B.R. (2d) 299 (N.B.Q.B.); *LeBlanc v. Malcolm* (1975), 10 N.B.R. (2d) 610 (N.B.Q.B.); *Payton v. Brooks*, [1974] R.T.R. 169, [1974] 1 Lloyd's Rep. 241 (C.A.); *Maritime Aircraft Overhaul & Repair Ltd. v. Savoie* (1980), 30 N.B.R. (2d) 541 (N.B.Q.B.); *Gunn v. Tritow Systems Ltd.* (1984), 31 C.C.L.T. 102 (B.C. Co. Ct.); *Westmount Properties Ltd. v. Sandhu* (1985), 20 C.C.L.I. 9 (B.C.S.C.); but see *The King v. Toronto Transportation Commission*, *supra*, footnote 6, where *Gibb, op. cit.*, footnote 6, pp. 203-204, was adopted for the proposition that where the damage to a chattel can be fully repaired, nothing will be allowed in respect of residual depreciation. Regarding residual depreciation affecting realty, see *Carr-Harris v. Schacter* (1956), 6 D.L.R. (2d) 225, [1956] O.R. 994 (Ont. H.C.); *Roy v. St. John's Metropolitan Area Board* (1984), 46 Nfld. & P.E.I.R. 149 (Nfld. Dist. Ct.).

¹³ See for example, *Payton v. Brooks*, *supra*, footnote 12, at pp. 176 (R.T.R.), 245 (Lloyd's Rep.); *Gunn v. Tritow Systems Ltd.*, *supra*, footnote 12, at p. 110.

¹⁴ (1980), 33 N.B.R. (2d) 271 (N.B.Q.B.).

¹⁵ *Supra*, footnote 9.

donald's Consolidated Ltd.,¹⁶ *Sulisz v. Flin Flon*¹⁷ or *Galatiuk v. City of Regina*.¹⁸ It is more common, however, to make such a deduction in cases involving damaged realty, to reflect the fact that the repairs to the plaintiff's building have made it better than it was before. Typically, an estimate is made of the building's expected lifespan, and a deduction is made in a proportion equal to the proportion of the expected lifespan which had expired at the time of the loss.¹⁹ In *Hide v. Thornborough*,²⁰ Parke B. instructed the jury that in assessing the plaintiff's damages for loss of support of his old house, they "ought not to give him a new house for an old one". This approach has been explained on the basis that in certain cases it is the diminution in the value of the plaintiff's property caused by the defendant's wrong, rather than the cost of repair, which provides the measure of damages. In *Stevens v. Abbotsford Lumber*,²¹ it was held that the original cost of the plaintiff's building minus the calculated depreciation was evidence of the diminution in value of the plaintiff's realty as a whole caused by the destruction of the building. In *Regnier v. Nelson*,²² the approach taken in *The Pactolus*²³ and *National Theatres*²⁴ was rejected, it being held to be "self evident" that a deduction from the cost of repairs on account of betterment must be made, since the true measure of damages where realty has been injured is the diminution in value caused by the defendant's wrong. This is obviously inconsistent with *Harbutt's "Plasticine"*.²⁵

Some cases have taken a more flexible approach, holding that it depends on the facts of the case whether proper compensation of the plaintiff without overcompensation at the expense of the defendant requires a deduction from replacement cost to account for depreciation.²⁶ A flexi-

¹⁶ [1940] 1 W.W.R. 168 (Alta Dist. Ct.).

¹⁷ [1979] 3 W.W.R. 728, (1979), 9 C.C.L.T. 89 (Man. Q.B.).

¹⁸ [1984] 6 W.W.R. 262, (1984), 36 Sask. R. 2 (Sask. Q.B.); *revd. on other grounds*, [1986] 6 W.W.R. 764, (1986), 32 D.L.R. (4th) 432, 49 Sask. R. 142 (Sask. C.A.).

¹⁹ *Klimenko v. Winnipeg* (1965), 55 D.L.R. (2d) 573, 55 W.W.R. 180 (Man. C.A.); *Church of Scientology v. Ahmed* (1983), 146 D.L.R. (3d) 219, 44 B.C.L.R. 297 (B.C.S.C.); *McAlinden v. Lohnes* (1979), 25 N.B.R. (2d) 58 (N.B.Q.B.); *Empire Marble v. Northwestern Utilities*, [1933] 3 W.W.R. 225 (Alta S.C.); *Lukin v. Godsall* (1795), Peake Add. Cas. 15, 170 E.R. 178 (Nisi Prius); *University of Regina v. Pettick* (1986), 38 C.C.L.T. 230, 51 Sask. R. 270 (Sask. Q.B.); *The King v. Anthony*, [1946] S.C.R. 569, [1946] 3 D.L.R. 577.

²⁰ (1846), 2 Car. & K. 250, at p. 255, 175 E.R. 103, at p. 106 (C.P.). See also *Dodd v. Holme* (1834), 1 Ad. & E. 493, 110 E.R. 1296 (K.B.).

²¹ [1924] 1 D.L.R. 1163, [1924] 1 W.W.R. 660, (1924), 33 B.C.R. 299 (B.C.C.A.).

²² (1956), 19 W.W.R. 36, 64 Man. R. 56 (Man. Q.B.).

²³ *Supra*, footnote 6.

²⁴ *Supra*, footnote 16.

²⁵ *Supra*, footnote 9.

²⁶ See, for example, *Vanderburgh v. Oneida Farmers' Mutual Fire Ins. Co.*, [1935] 1 D.L.R. 257, [1935] O.R. 67 (Ont. C.A.). The cases regarding damaged realty have

ble approach was also taken in *Hollebone v. Midhurst and Fernhurst Builders Ltd.*,²⁷ where a workman's negligence caused the plaintiff's house to catch fire, resulting in damage to the house and its contents. The plaintiff had structural repairs and decorative work done to restore the damage, at a cost of £18,900.91. It was also shown that the value of the structure prior to the fire was £28,000, and after the fire £13,150, a difference of £14,850. After citing *The Susquehanna*²⁸ and *The Chekiang*²⁹ for the proposition that flexibility is required in assessing damages, the official referee, Mr. Richards, Q.C., distinguished some earlier case law and held that in the circumstances the correct measure of damage to provide fair and proper restitution was the cost of repair. He then went on to consider whether a deduction should be made for betterment on the basis of substitution of new material for old. The defendant relied on *Lukin v. Godsall*³⁰ in arguing in favour of the deduction, while the plaintiff referred to *The Pactolus*³¹ and *The Munster*.³² Mr. Richards then stated:³³

... it is clear that if an allowance of new for old must always be made, this may well prevent the plaintiff from being fairly compensated.

In this case evidence was called to suggest betterment under three main heads, namely new rafters for old, new floors for old and new wiring for old. As regards the first two heads, the defendants' expert in answer to a question by me conceded that the old rafters and floors would have lasted out the life of the house, so it is difficult to see where the betterment can lie. As regards the new wiring, it is true that this has deferred the need for rewiring in the damaged part of the house for some 15 or 20 years, and in this respect the benefit to the plaintiffs I put at a figure of £250. But in my judgment this is not a case where in the circumstances it would be fair to the plaintiffs to make such a deduction for the cost of repair, and in any event the plaintiffs are entitled to off-set an equivalent amount in that they have lost a number of exposed oak beams which were a feature of some of the rooms.

Nevertheless, in *Jens v. Mannix Co. Ltd.*³⁴ the result in the *Hollebone* case was not applied, and a deduction from the cost of replacement was made to account for depreciation in accordance with what the British Columbia Court of Appeal described as "the usual principle".

applied three distinct measures of damages: (a) the cost of repairs, (b) the diminution in value of the realty, often measured by reference to the cost of repairs, or (c) the "actual value" of the property to the plaintiff. Relatively few cases have expressly considered the issue of betterment, however.

²⁷ *Supra*, footnote 1.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Supra*, footnote 19.

³¹ *Supra*, footnote 6.

³² (1896), 12 T.L.R. 264 (P.D.A.).

³³ *Supra*, footnote 1, at p. 41.

³⁴ (1979), 30 D.L.R. (4th) 260, [1986] 5 W.W.R. 563 (B.C.C.A.); rev'g. (1978), 89 D.L.R. (3d) 351, [1978] 5 W.W.R. 486 (B.C.S.C.).

No clear test has been enunciated which would allow a court to determine whether on particular facts it should make no deduction on account of betterment or should take it into account and award the plaintiff only the depreciated value of what was lost. In *Bacon v. Cooper (Metals) Ltd.*³⁵ a machine part which had only half of its useful life left was destroyed due to the defendant's breach of contract. The court awarded the plaintiff the full cost of replacement, although the defendant postulated that this approach could lead to the absurd result of the plaintiff receiving the cost of the new part even if the old one had only one day of useful life left at the time of its loss. Cantley J. rejected that argument by stating that each case had to be assessed on its own facts, and that there was nothing absurd about awarding the plaintiff a new part which had an estimated life of fifteen years, when the old part had been used for half of that period at the time of its loss.

It is submitted that the *Bacon* "absurdity" test is unsatisfactory, for it makes the result in a particular case unpredictable, given the considerations that Cantley J. raised in assessing what was or was not "absurd". Furthermore, as Waddams and Ogus have suggested, the plaintiff should not receive a new part of a type which has a limited and estimatable life span when what was lost had part of its life span used up.³⁶

The older cases have either made no deduction from the award of damages on account of betterment, thus improving the plaintiff's position at the defendant's expense, or have deducted the full value of the betterment, without compensating the plaintiff for having to invest in repairs which, although they may have "bettered" his property, had to be done earlier than expected because of the defendant's wrongful act. The injustice of the former approach in particular is amplified by the rule that the full cost of repairing a damaged chattel is recoverable even if those repairs will not or cannot be made by the plaintiff.³⁷

A Better Method: Compensation for the Plaintiff's Actual Expenditures

The fact that a plaintiff must invest money in the repair or replacement of his property earlier than he would have, if the defendant had not damaged it, can be compensated for by awarding the plaintiff interest on

³⁵ [1982] 1 All E.R. 397 (Q.B.D.).

³⁶ Waddams, *op. cit.*, footnote 9, p. 12, para. 21; A. Ogus, *The Law of Damages* (1973), p. 134.

³⁷ See *The London Corporation*, [1935] P. 70 (C.A.); *The Glenfinlas*, [1918] P. 363n (P.D.A.); *The Endeavour* (1890), 6 Asp. M.C. 511, 62 L.T. 840 (P.D.A.); *The York*, [1929] P. 178 (C.A.); *The King v. Hochelaga Shipping & Towing Ltd.*, [1940] S.C.R. 153, [1940] 1 D.L.R. 369; *Dawson v. Sawatzky*, [1946] 1 D.L.R. 476, [1946] 1 W.W.R. 33 (Sask. C.A.); *Fitzner v. MacNeil* (1966), 58 D.L.R. (2d) 251 (N.S.C.A.); *Blair's Plumbing & Heating Ltd. v. McGraw* (1981), 35 N.B.R. (2d) 501 (N.B.Q.B.); varied on other grounds (1981), 39 N.B.R. (2d) 356 (N.B. App. Div.); *Burgess Transfer & Storage Ltd. v. Squire's Estate* (1982), 54 N.S.R. (2d) 186, at p. 198 (N.S.T.D.).

the capital which he has been required to invest earlier than he would have otherwise. It is this approach which the Ontario Court of Appeal has endorsed in *James Street Hardware*. For the reasons set out above, it is submitted that the traditional lines of authority should generally be abandoned, as *James Street Hardware* remedies the injustices of the earlier cases.

The facts of the case are simple and commonplace. The plaintiff owned two adjacent buildings, both about twenty-five years old. The plaintiff's furniture store occupied one of the buildings. He wished to expand his furniture store to include the building next door. To do so, he had to cut a passageway in the wall between the buildings, and he engaged the defendant welder to do the necessary reinforcing work around the passageway. Due to the welder's negligence, the buildings caught fire and were seriously damaged.

Following the fire, the plaintiff's position was complicated by the fact that the Ontario Building Code Act³⁸ prohibited restoring the structures to their pre-fire condition. The plaintiff decided to build a different and larger structure, which of course complied with the current Building Code standards. Nevertheless, expert evidence was accepted at trial to show that the cost of rebuilding the structure to its original specifications would have been \$340,000. From this the trial judge deducted \$34,000 to account for the fact that the plaintiff was receiving a new building in place of his old one. Furthermore, the trial judge found that rebuilding the original structure to current Building Code standards would have cost an additional \$49,394. However, it was held at trial that the plaintiff was not entitled to that amount.

The plaintiff appealed, arguing that the \$34,000 was improperly deducted in light of the decision of the English Court of Appeal in *Harbutt's 'Plasticine'*.³⁹ The plaintiff also challenged the trial judge's refusal to award damages to cover the cost of complying with the current Building Code.

The Court of Appeal, composed of Morden, Cory and Robins JJ.A., adopted *Harbutt's 'Plasticine'* for the proposition that two possible measures of the damages where a building is destroyed are: (1) the diminution in the value of the land,⁴⁰ and (2) the cost of replacement or repair. If, as was found in *James Street Hardware*, the plaintiff acted reasonably in electing to rebuild the damaged structure, the cost of replacement is, as a general rule, also the measure of the damages to be awarded.

³⁸ R.S.O. 1980, c.51.

³⁹ *Supra*, footnote 9.

⁴⁰ Which the court recognized might require assessing the pre-fire depreciation of the structure: *supra*, footnote 2, at pp. 402 (O.R.), 30 (C.C.L.T.), 56 (O.A.C.).

That the rebuilding which occurred resulted in larger premises than had been destroyed was held not to preclude using the replacement cost approach to measuring the damages. However, the Court of Appeal also addressed directly the question of how to provide proper compensation to the plaintiff where he had received a new building in place of an old but still usable one.

On the issue of how to account for betterment of the plaintiff's position by his receipt of new for old, the court held that as a general rule, the plaintiff will be properly compensated if his damages include the cost of investing in a new building earlier than had been anticipated:⁴¹

Quite simply, if a plaintiff, who is entitled to be compensated on the basis of cost of replacement, is obliged to submit to a deduction from the compensation for incidental and unavoidable enhancement, he or she will not be fully compensated for the loss suffered. The plaintiff will be obliged, if the difference is paid for out of his or her own pocket, whether borrowed or already possessed, to submit to "some loss of burden", to quote from Dr. Lushington [in *The Gazelle*]. Widgery L.J. in *Harbutt's "Plasticine"* called it "forcing the plaintiffs to invest their money in the modernizing of their plant which might be highly inconvenient for them".

These considerations, however, do not necessarily mean that in cases of this kind the plaintiff is entitled to damages which include the element of betterment. As Waddams suggests,⁴² the answer lies in compensating the plaintiff for the loss imposed on him or her in being forced to spend money he or she would not otherwise have spent—at least as early as was required by the damages occasioned to him by the tort. In general terms, this loss would be the cost (if he has to borrow) or value (if he already has the money) of the money equivalent of the betterment over a particular period of time.

The court then went on to caution that the facts of each particular case must be taken into consideration. The court also noted that a substitution of new for old might not result in any increase in the value of the property as a whole, although the significance of this is not clear once it has been determined that the cost of repair, not the diminution in value of the property, is the appropriate measure of damages. Furthermore, the onus of proving the loss flowing from making an unexpected expenditure rests on the plaintiff, while the onus of showing that betterment has occurred is on the defendant.⁴³ On the facts, the court noted that there was no satisfactory evidence of the life expectancy of the building before or after the fire and later rebuilding, nor evidence of the increase in value of the property following the reconstruction. The court concluded that the defendant had not discharged his onus of quantifying the betterment, and so held that the trial judge had erred in deducting \$34,000 on that account.

⁴¹ *Ibid.*, at pp. 404 (O.R.), 32 (C.C.L.T.), 58 (O.A.C.).

⁴² Waddams, *op. cit.*, footnote 9, p. 162, para. 281, and p. 165, para. 287, quoted *ibid.*, at pp. 403-404 (O.R.), 31-32 (C.C.L.T.), 57 (O.A.C.).

⁴³ *Ibid.*, at pp. 404-405 (O.R.), 32-33 (C.C.L.T.), 58-59 (O.A.C.).

A related issue was compensating for the cost of complying with the current Building Code. The court observed, *obiter*, that if the plaintiff,⁴⁴

... had rebuilt according to [the building's] pre-fire design and, in doing so, had necessarily incorporated the changes required by the new law, we think it would have been entitled to recover these additional costs subject, if relevant, to the application of the principles respecting betterment which we have earlier discussed. If the appellant had not rebuilt at all, we are inclined to think that this additional "cost" would not have been recoverable. Indeed, in these circumstances, the appropriate measure of damages might simply be the diminution in the value of the property rather than the cost of replacement.

Quantification of the "betterment" caused by complying with current building standards is a difficult problem which must be addressed on the facts of each particular case. The court went on to state, however, that substituting new, non-combustible materials for old ones which fail to meet current standards, for example, might allow the recovery of some proportion of the cost of the new material. Nevertheless, the plaintiff had not met the onus of showing what compensation was appropriate and the court concluded:⁴⁵

All that can be said is that the cost of compliance [with the current Building Code] is not irrelevant to this claim and that any injustice resulting from the failure to take into account in the appellant's favour may be balanced by the possible over-compensation of the appellant by the costs resulting in a better building—the value of the improvement itself not being quantified.

The Ontario Court of Appeal in *James Street Hardware* stressed the importance of avoiding applying inflexibly rules pertaining to the assessment of damages. The court recognized that difficult questions of fact are likely to arise in quantifying the betterment flowing from substituting new for old or complying with new building standards. The evidence in a particular case might show that the repairs will postpone the eventual replacement of the property, so that the plaintiff should give credit for the delay in having to make further investments.⁴⁶ The labour costs attributable to the defendant's wrong may also be difficult to assess, and courts have taken various approaches to this issue.⁴⁷ Nevertheless, *James Street Hardware* offers a new approach to accounting for betterment which, for the reasons discussed above, should be adopted by Canadian courts as the standard, but not inflexible, rule where betterment has occurred.

⁴⁴ *Ibid.*, at pp. 406 (O.R.), 34 (C.C.L.T.), 59 (O.A.C.).

⁴⁵ *Ibid.*

⁴⁶ See *North York v. Kert Chemical Industries Inc.* (1985), 33 C.C.L.T. 184 (Ont. H.C.).

⁴⁷ See for example, *City of Guelph v. United Dairy & Poultry Cooperative Ltd.* (1966), 57 D.L.R. (2d) 385, [1966] 2 O.R. 467 (Ont. Co. Ct.), aff'd 57 D.L.R. (2d) 387n, [1966] 2 O.R. 469n (Ont. C.A.); *Reliance Lumber Co. v. Dyck* (1951), 3 W.W.R. 332 (Sask. Dist. Ct.); *Sunnyside Greenhouses Ltd. v. Golden West Seeds Ltd.* (1972), 27 D.L.R. (3d) 434, at pp. 439-440, [1972] 4 W.W.R. 420 at pp. 425-426 (Alta C.A.), aff'd (1973), 33 D.L.R. (3d) 384, [1973] 3 W.W.R. 288 (S.C.C.).

DROIT CIVIL—DROIT PUBLIC—NOTION D'ARBITRAGE CIVIL—IMMUNITÉ DES ARBITRES, DES JUGES ET MEMBRES D'ORGANISMES QUASI-JUDICIAIRES: *Sport Maska Inc. c. Zittner*

Patrice Garant*

Introduction

La Cour suprême rendait le 24 mars 1988¹ un arrêt important sur une question qui ne manque pas d'intérêt, surtout depuis la réforme du régime juridique de l'arbitrage civil au Québec en 1986. L'arrêt rendu par le juge Claire L'Heureux-Dubé contient un exposé remarquable de l'état du droit comparé français, québécois, américain, et common law sur le concept et la réalité même de l'arbitrage véritable.

La Cour suprême n'avait pas eu l'occasion de revenir sur le sujet de l'arbitrage depuis son arrêt *Zodiak International*² de 1983 où, confirmant cette fois la Cour d'appel, elle avait reconnu définitivement droit de cité à la clause compromissoire parfaite. En 1988, la cour renverse plutôt un jugement unanime de la Cour d'appel pour des raisons que nous n'aurons pas de difficulté à justifier.

L'arbitrage civil avant et après la réforme de 1986

Pendant cent ans, l'arbitrage civil général a été régi au Québec par quatorze articles du Code de procédure; en 1965 le Code reformula ces dispositions aux articles 940 à 951. Ce peu de loquacité du législateur s'explique, comme vient de le rappeler la Cour suprême, par le fait que dans notre régime de droit civil on s'en remet, sous réserve de ce qui est contraire à l'ordre public et aux bonnes mœurs, à la convention des parties, c'est-à-dire au consensualisme.³ Or, les parties ont de multiples avenues pour solutionner les difficultés ou différends, "expertise, évaluation, conciliation, médiation, transaction, arbitrage ou toute autre forme d'intervention de nature à tenter de régler ou à régler le problème qui les confronte".⁴ Traditionnellement notre droit conservait aux parties la liberté d'accès aux cours de justice: ce n'est "qu'avec une extrême réticence" que la jurisprudence a finalement accepté en 1983 la clause compromissoire parfaite.⁵

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¹ *Sport Maska Inc. c. Zittner*, [1988] 1 R.C.S. 564; en appel de *Zittner c. Sport Maska Inc.*, [1985] C.A. 386.

² *Zodiak International Productions Inc. c. The Polish People's Republic*, [1983] 1 R.C.S. 529.

³ *Supra*, note 1, à la p. 580.

⁴ *Ibid.*

⁵ *Supra*, note 2.

Malgré le peu d'empressement du législateur à régler le processus de résolution des conflits par voie d'arbitrage les cours de justice et le législateur à certains égards veillaient à ce "que le processus garantisse aux justiciables la même mesure de justice que celle distribuée par les tribunaux. . .".⁶ Ainsi suivant la jurisprudence "le véritable rôle de l'arbitre est assimilable à celui d'un juge chargé de trancher un différend".⁷ Toutefois ce juge est une quantité négligeable dans le monde de la justice, l'immense majorité des justiciables préférant la justice ordinaire de droit commun.

La réforme de 1986 ajoute six articles au Code civil et soixante-deux au Code de procédure civile. L'intention du législateur est certes de moderniser le cadre juridique de l'arbitrage mais il ne s'agit pas d'une révolution en la matière quant au fond du droit. En effet, le nouvel article 1926.1 du Code civil ne fait qu' "englober dans une seule définition de la 'convention d'arbitrage' la clause compromissoire et le compromis".⁸ La distinction entre les deux composantes de la convention d'arbitrage demeure: le différend né et actuel se réfère au compromis, alors que le différend éventuel se réfère à la clause compromissoire. Cette dernière vise un différend éventuel qui, s'il se concrétise, obligera au compromis. La réforme de 1986 modifie le mécanisme de mise en oeuvre de l'arbitrage; le nouvel article 944 stipule que la partie qui entend soumettre un différend doit en donner avis à l'autre partie en précisant l'objet du différend actualisé; cet avis déclenche la procédure arbitrale; l'avis de 944 fait office de compromis.

Les éléments distinctifs de l'arbitrage

En 1986 le Législateur donne une définition de l'arbitrage en ces termes:⁹

1926.1 La convention d'arbitrage est un contrat par lequel les parties s'engagent à soumettre un différend né ou éventuel à la décision d'un ou de plusieurs arbitres, à l'exclusion des tribunaux.

Cette définition, comme nous l'avons mentionné, n'a pas modifié l'état du droit en la matière. L'arrêt de 1988 est alors utile parce qu'on y retrouve une analyse des éléments constitutifs de l'arbitrage véritable par opposition notamment à la notion voisine ou connexe de l'expertise.

Le premier élément de la distinction est l'existence d'un différend précis mettant aux prises des intérêts opposés et susceptibles d'entraîner un recours en justice. S'il s'agit de confier à un tiers la tâche de détermi-

⁶ *Supra*, note 1, à la p. 581.

⁷ *Ibid.*

⁸ *Ibid.*, à la p. 582.

⁹ L.Q. 1986, c. 73, art. 1.

ner un élément même du contrat, soit pour le parfaire ou le réviser, il n'y a pas alors d'arbitrage au sens strict: il s'agit plutôt d'une expertise confiée à un mandataire commun des parties, comme l'a bien expliqué Brierly sur lequel s'appuie d'ailleurs la Cour suprême.¹⁰ La fonction de ce soit-disant arbitre est plutôt législative que judiciaire, comparable à celle de l'arbitre des différends en droit du travail.¹¹

Le deuxième élément est la volonté des parties de soumettre le différend à un tiers dans l'intention que celui-ci agisse comme arbitre. Les termes mêmes de l'entente et les circonstances de chaque espèce serviront de guide dans la recherche de cette intention; ainsi par exemple, le titre donné à l'entente, l'utilisation uniforme des mêmes termes, la référence ou l'absence de référence à une procédure particulière, la façon plus ou moins judiciairisée dont se déroulera l'instance devant ce tiers, les règles de preuves suivies, *etc.* . . . Il faut aussi rechercher si les parties avaient l'intention de s'en remettre à un tiers pour qu'il décide en fonction de ses connaissances personnelles ou plutôt en fonction des prétentions à lui être soumises au terme d'un débat contradictoire. La situation du tiers par rapport à l'une ou l'autre des parties, les liens qu'il entretient avec l'une ou l'autre, le fait qu'il soit rémunéré par l'une d'elles seront des indices pour vérifier si l'on a eu l'intention de s'en remettre à un décideur impartial suivant les exigences de la justice naturelle. Le fait que l'arbitre se conforme aux dispositions du Code de procédure est un indice non négligeable.

Comme le rappelle la Cour suprême dans *Sport Maska*¹² tous ces indices permettent de déceler l'intention des parties, mais il ne s'agit pas de critères nécessairement exhaustifs; il n'est pas nécessaire qu'ils soient tous présents ou qu'ils concordent dans un sens ou l'autre.

L'application de ces indices aux situations concrètes n'est pas facile: l'affaire *Sport Maska* l'illustre abondamment puisque la Cour d'appel et la Cour suprême ont divergé d'opinion de façon assez radicale sur cette question de qualification.

La délicate application des critères de distinction

Le 17 décembre 1982 une entreprise en faillite, CCM, conclut une convention avec une autre entreprise, Gestion R.A.D., dont l'objet est la vente de certains actifs dont le montant sera évalué et fixé par le vendeur, en présence des représentants de l'acheteur: ce montant sera vérifié et révisé par les vérificateurs du vendeur, aux frais du vendeur. À

¹⁰ J. Brierley, *La convention d'arbitrage en droit québécois interne* (1987), C.P. du N. 507, à la p. 535: cité par la Cour suprême dans *Sport Maska Inc. c. Zittler*, *supra*, note 1, à la p. 601.

¹¹ P. Garant, *Droit administratif* (Éditions Yvon Blais, 2e éd., 1985), p. 644.

¹² *Supra*, note 1, à la p. 605.

“la remise d’une telle opinion, le compte et l’évaluation du stock sont présumés être déterminés de façon définitive. . .”.¹³ Ce même 17 décembre, Gestion R.A.D. vend de nouveau le même stock à Sport Maska Inc. qui accepte par écrit les termes de la première convention dans une seconde convention qui ajoute la présence de Sport Maska Inc. lors de l’évaluation et de la révision. Il est ajouté alors que lors de la révision les vérificateurs, les comptables Zittler et autres, “tiendront compte des arguments de Sport Maska Inc.”.¹⁴ Dans une lettre envoyée par CCM à R.A.D. et Sport Maska Inc., le même jour, il est précisé que Sport Maska Inc. a “le droit d’assister à l’évaluation du stock. . . a en outre le droit de présenter des observations à CCM Inc. et à Zittler. . . , l’opinion de. . . Zittler. . . sera finale et obligatoire”.¹⁵

Le montant de l’évaluation fut fixé à 3 798,000\$ et confirmé par Zittler “conformément aux normes de vérification généralement reconnues et comprenant donc les tests et autres procédures que nous avons jugé nécessaires dans les circonstances”.¹⁶ Sport Maska Inc. paya la somme mais le regretta à un point tel qu’un an après il intenta une action de 1 306 223\$ en dommages-intérêts contre les comptables Zittler et autres pour faute professionnelle commise dans l’évaluation.

Zittler souleva en Cour supérieure une exception déclinatoire en irrecevabilité fondée sur la prétention qu’il exerçait alors une fonction arbitrale et bénéficiait de ce fait d’une immunité analogue à celle des juges. La cour rejeta cette exception par un jugement qui fut renversé unanimement en Cour d’appel subséquemment.

Essentiellement la Cour d’appel prétend qu’il y a dans cette convention et les documents qui l’accompagnent les éléments essentiels d’une clause compromissoire, une convention d’arbitrage destinée à mettre fin à tout litige éventuel relié à la détermination d’un des éléments essentiels du contrat, à savoir le prix de la vente.

Suivant la Cour suprême qui divergera radicalement avec la Cour d’appel, il n’y a pas ici d’arbitrage parce qu’aucun des éléments distinctifs ne s’y retrouve. Premièrement, au moment de la convention il n’y avait pas de différend, ni même de différend éventuel sur un élément essentiel du contrat, le prix, puisque celui-ci n’était pas fixé. Deuxièmement, l’ensemble des indices révélateurs de l’intention des parties convergent tous dans le même sens: les parties n’ont jamais utilisé le terme “arbitrage” mais “évaluation”, “opinion”. Elles s’en remettent

¹³ *Ibid.*, à la p. 571.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, à la p. 572.

¹⁶ *Ibid.*, à la p. 573, lettre de Zittler datée du 20 janvier 1983 contenant l’opinion des comptables.

à des comptables pour faire la vérification et la révision de l'évaluation; cette firme comptable est à l'emploi d'une des parties et rémunérée par elle seule. Rien n'indique dans le contrat, même s'il y est stipulé que l'une des parties pourra faire des représentations, que le rôle des comptables "consistait à exercer un pouvoir juridictionnel en optant entre plusieurs positions contradictoires".¹⁷ D'autres indices ont été enfin relevés qui militent en faveur de la conclusion de la cour: il n'est pas clair si ce sont des individus ou une société qui ont été retenus pour faire l'évaluation; or seule une personne physique peut normalement agir comme arbitre. De plus, le rapport des comptables ne possède pas les caractéristiques d'une sentence arbitrale ne contenant aucun élément d'analyse ni aucun motif expliquant les conclusions.

La Cour suprême conclut que les parties "ont entendu obtenir une expertise comptable et n'ont pas voulu se soumettre à l'arbitrage des intimés tel qu'il faut l'entendre dans sa conception et ses conséquences juridiques".¹⁸ Il y a donc une conception juridique de l'arbitrage. Il n'y a peut-être pas de formules sacramentelles comme le laissait entendre le juge LeBel de la Cour d'appel,¹⁹ mais il y a un minimum de rigueur d'exigé pour que l'on puisse repérer les deux éléments essentiels de la clause compromissaire ou du compromis.

Nous sommes toutefois étonnés que la Cour suprême n'insiste pas, dans sa conclusion, sur un aspect qu'elle analyse dans la première partie de l'arrêt en citant Brierley;²⁰ il s'agit de situation où la tâche confiée au tiers est plutôt de nature législative et non judiciaire; les parties mandaient alors un expert pour parfaire ou réviser un élément même du contrat. En l'espèce, la tâche confiée à Zittler consistait à parfaire un élément essentiel du contrat de vente. Même si on avait utilisé le terme arbitrage, la réalité aurait été la même, quoique semble en penser le juge Claire L'Heureux-Dubé.²¹

Les conséquences juridiques de la qualification d'arbitrage au sens strict

La réforme du régime juridique de l'arbitrage de 1986 renforce le caractère judiciaire de l'arbitrage civil à l'image de l'arbitrage du travail. Il s'agit donc d'une justice parallèle assujettie à un ensemble de règles fortement structuré. Certaines de ces règles sont d'ordre public mais d'autres peuvent faire l'objet de dérogations par les parties. Néanmoins l'intention est très claire; même si la démarche vers cette forme de justice est contractuelle,

¹⁷ *Ibid.*, à la p. 610.

¹⁸ *Ibid.*, à la p. 612.

¹⁹ [1985] C.A. 386, à la p. 393.

²⁰ *Loc. cit.*, *supra*, note 10.

²¹ *Supra*, note 1, à la p. 609.

... toutefois, le législateur devait s'assurer que le processus garantirait aux justiciables la même mesure de justice que celle distribuée par les tribunaux, d'où l'élaboration des règles de procédure destinées à assurer l'impartialité de l'arbitre et le respect des règles de justice fondamentale telle la règle *audi alteram partem*. L'arbitre rendra une sentence qui deviendra exécutoire par voie d'homologation. C'est là qu'on voit que le véritable rôle de l'arbitre est assimilable à celui d'un juge chargé de trancher un différend. Ce juge que les parties ont librement choisi est astreint à des contraintes procédurales que l'on n'exigera pas d'autres intervenants, tel l'expert qui ne sera pas chargé de trancher un différend comme le serait un juge ni de rendre une décision suivant le mode habituel aux tribunaux.²²

Il y a deux catégories essentielles de dispositions auxquelles les parties ne peuvent déroger. Premièrement, ce sont celles du Code civil aux articles 1926.1 à 1926.6; le Code ne le dit pas expressément, mais il est de l'essence même de l'arbitrage que ces éléments se retrouvent. Il y aura alors arbitrage et application de l'ensemble du Livre VII du Code de procédure sauf dérogation expresse des parties dans le contrat, à l'exclusion des articles 940.2, 941.3, 942.7, 943.2, 945.8 et 946 à 947.4 ainsi que 940.5.

Le problème qui se soulève ici consiste à se demander si les parties peuvent véritablement déroger à toutes les dispositions du Livre VII, à l'exclusion des quelques articles ci-haut mentionnés, et prétendre qu'il s'agit encore là d'un arbitrage quasi-judiciaire. Supposons, par hypothèse, que la convention prévoit que l'arbitre sera nommé et rémunéré par une seule des parties, que les causes de récusation ne s'appliquent pas, que l'arbitre ne pourra pas statuer sur sa propre compétence, qu'il est dispensé du secret du délibéré, que la sentence n'est pas rendue par écrit et n'a pas à être motivée. . . , on peut se demander si certains indices très importants de l'arbitrage quasi-judiciaire véritable ne sont pas abandonnés?

On répondra peut-être que le fait que les parties autorisent les arbitres ou l'arbitre à agir comme amiable compositeur, c'est-à-dire à ne pas trancher le différend selon les règles de droit, est une dérogation importante. Mais l'article 944.10 du Code le prévoit expressément. D'ailleurs, la Cour suprême dans l'arrêt *Sport Maska*²³ considère que l'amiable compositeur n'empêche pas l'arbitrage d'être un arbitrage véritable. Aussi bien dans l'amiable composition que dans l'arbitrage ordinaire les parties ne peuvent mettre de côté, comme le souligne la Cour,²⁴

... évidemment les règles d'ordre public, notamment les règles de justice naturelle qui prévoient l'impartialité, l'obligation d'accorder aux parties la possibilité d'être entendues, de motiver la sentence arbitrale, etc.

La cour fait donc des ingrédients essentiels du processus judiciaire ou quasi-judiciaire l'objet de règles d'ordre public.

²² *Ibid.*, à la p. 581.

²³ *Ibid.*, aux pp. 614-615.

²⁴ *Ibid.*, à la p. 614.

Si l'on compare les dispositions du Code du travail²⁵ traitant de l'arbitrage des griefs et le Livre VII du Code de procédure civile, on est frappé de constater que le Code du travail prévoit que la convention collective peut réglementer l'arbitrage mais l'article 100 stipule que "sauf disposition contraire, les dispositions du Code prévalent, en cas d'incompatibilité sur les dispositions de toute convention collective". Il y a un minimum vital que le Code du travail préserve, ce que ne fait pas à notre avis suffisamment le Code de procédure civile.

Par ailleurs, si les parties dérogent aux articles 941, 942, 945 et que l'arbitre est nommé et rémunéré par une seule des parties, comment peut-on prétendre que cet arbitre ait le minimum d'indépendance prescrit par l'article 23 de la Charte québécoise applicable à tout tribunal judiciaire ou quasi-judiciaire?

À notre avis, la liberté des parties de déroger aux dispositions du Livre VII est plus limitée que ce dernier le laisse entendre, sinon les cours supérieures ne retrouveront pas les éléments distinctifs et caractéristiques de l'arbitrage véritable.

La seconde conséquence de la qualification est l'application aux arbitres des immunités propres à la fonction judiciaire ou quasi-judiciaire en vertu de notre droit public. Ces immunités sont régies par le droit public comme l'a encore rappelé la jurisprudence récente.²⁶

Il y a deux sortes d'immunités, l'immunité absolue qui appartient aux juges des cours supérieures et l'immunité relative dont bénéficient les juges de tribunaux inférieurs et membres d'organismes quasi-judiciaires. La Cour suprême a confirmé cette distinction et ce double régime en 1985 dans l'arrêt *Rivard c. Morier*.²⁷ Ces immunités peuvent être confirmées statutairement: certaines législations peuvent conférer aux membres des tribunaux inférieurs la même immunité que celle des juges des cours supérieures, ce qui est parfaitement valable; ainsi au Québec depuis 1982 la Loi sur les privilèges des magistrats²⁸ confert cette immunité absolue aux juges de la Cour provinciale, Cour des sessions, Tribunal de la jeunesse, Cours municipales et juges de paix visés par l'article 186 de la Loi sur les tribunaux judiciaires;²⁹ la loi constitutive de plusieurs tri-

²⁵ L.R.Q. 1977, c. C-27.

²⁶ *Royer c. Mignault*, [1988] R.J.Q. 670, à la p. 673: "well established principle of our law inherited from English common law"; *Rivard c. Morier*, [1985] 2 R.C.S. 716, à la p. 737; *Mayrand c. Cronier*, [1981] C.A. 503. Voir G. Pepin, L'immunité absolue des juges des cours supérieures et des commissaires enquêteurs, en matière de responsabilité civile (1986), 46 R. du B. 149.

²⁷ *Ibid.*

²⁸ L.R.Q., c. P. 24, art. 1.

²⁹ L.R.Q., c. T. 16.

bunaux administratifs confert à ces derniers cette immunité absolue.³⁰ D'autres législations, telle le Code du Travail,³¹ vont octroyer expressément aux titulaires de fonctions quasi-judiciaires l'immunité relative; ainsi l'article 100.1 stipule que "l'arbitre ne peut être poursuivi en justice en raison d'actes accomplis de bonne foi dans l'exercice de ses fonctions".

Certains arrêts semblent laisser entendre que les juges des tribunaux inférieurs n'auraient aucune immunité;³² d'autres à l'inverse semblent à l'effet qu'il n'y a qu'une sorte d'immunité;²⁷ enfin, plus récemment des prises de position de Lord Denning dans *Sirros c. Moore*³⁴ et de Lord Bridge of Harwich dans *In Re McC. (A Minor)*³⁵ vont dans cette dernière direction avec une réserve quant au caractère totalement absolu de l'immunité.³⁶ Il nous semble toutefois que la Cour suprême a été fortement réticente à accepter ce point de vue, notamment dans *Rivard c. Morier*³⁷ en 1985; le juge Chouinard mentionne:³⁸

Il convient de signaler que ni Lord Bridge of Harwich, ni Lord Denning ne citent d'autorités à l'appui de la réserve qu'ils formulent. Il n'est pas nécessaire de toute façon pour les fins de ce pourvoi d'en décider le bien-fondé.

Toutefois précédemment le même juge cite avec approbation cet extrait significatif de Halsbury's Laws of England:³⁹

[Traduction] 206. Les personnes protégées. Les personnes qui exercent des fonctions judiciaires dans un tribunal sont dégagées de toute responsabilité civile quelle qu'elle soit pour tout ce qu'elles font ou disent à titre de juge. En outre aucune action ne peut être intentée contre Sa Majesté pour les actes ou omissions des personnes qui s'acquittent de responsabilité de nature judiciaire ou en exécution du processus judiciaire.

210. Portée de la protection. Où que la protection de l'exercice des pouvoirs judiciaires s'applique, elle est si absolue qu'aucune allégation que les actes ou omissions dont on se plaint ont été faits ou dits de mauvaise foi, avec malveillance, par

³⁰ Voir Gouvernement du Québec, Rapport du Groupe de travail sur les tribunaux administratifs (1987), ch. 2, pp. 142, 217-228.

³¹ *Supra*, note 25.

³² Voici les arrêts cités dans P. Glenn, La responsabilité des juges (1982-1983), 28 McGill L.J. 228, aux pp. 237 et ss.

³³ *Duquette c. Bélanger*, [1973] C.F. 868 (D.p.i.); *Stack c. Auerbach* (1979), 98 D.L.R. (3d) 583 (C.S.C.B.); *Perry c. Heathrington* (1971), 24 D.L.R. (3d) 127 (C.S.C.B.).

³⁴ [1975] Q.B. 118, à la p. 136 (C.A.).

³⁵ [1985] A.C. 528, *sub nom. McC c. Mullan*, [1984] 3 All E.R. 908 (H.L.).

³⁶ La Cour d'appel du Québec étant d'accord avec le point de vue dans *Rivard c. Morier*, [1983] C.A. 334 et également dans *Royer c. Mignault*, [1988] R.J.Q. 670, à la p. 675.

³⁷ *Supra*, note 26.

³⁸ *Ibid.*, à la p. 744.

³⁹ Halsbury's Laws of England, vol. 1 (4e éd., 1973), p. 197; voir *Morier c. Rivard*, *ibid.*, à la p. 738.

corruption ou sans cause raisonnable ou probable suffit à fonder une action. Toutefois, la protection ne s'étend pas aux actes purement extra-judiciaires ou étrangers au devoir judiciaire du défendeur; et donc si les mots en cause n'ont pas été prononcés au cours du processus judiciaire, le défendeur n'est pas protégé.

La protection s'étend à tous les juges, jurys, avocats, parties et témoins pour ce qui est dit ou écrit au cours d'une enquête judiciaire, même si le lien avec elle est lointain.

L'immunité absolue met le titulaire d'une fonction judiciaire à l'abri de toute poursuite judiciaire. Quant à l'immunité relative, elle a pour effet de ne rendre possible la poursuite en dommage que lorsque le titulaire agit par mauvaise foi, collusion ou fraude: c'est ce que certains auteurs appellent le régime de la faute qualifiée.

La Cour d'appel dans l'affaire *Sport Maska* a considéré que l'immunité relative s'appliquait à M. Zittler parce qu'elle avait qualifié la fonction exercée d'arbitrale ou judiciaire. Cette immunité relative signifie qu'il faut "trouver des éléments qui allèguent plus que la négligence ou la faute professionnelle", contrairement au cas d'une poursuite ordinaire en responsabilité professionnelle.⁴⁰ Il y a donc une différence essentielle entre le régime de responsabilité professionnelle pour faute auquel est soumis un expert comptable et celui d'un arbitre exerçant une fonction judiciaire ou quasi-judiciaire.

Le régime de l'immunité relative applicable à l'exercice des fonctions judiciaires et quasi-judiciaires a été développé par une jurisprudence assez ancienne. La Cour suprême statuait en 1936 qu'un comité de discipline exerçant des fonctions quasi-judiciaires peut avoir rendu une décision illégale et erronée en droit sans que cela donne de soi ouverture à un recours en dommage.⁴¹

La portée exacte de cette immunité n'est pas facile à préciser car dans la jurisprudence connue sur la question, les requérants ont rarement réussi à avoir gain de cause. La jurisprudence ancienne et même certains arrêts contemporains sont d'un apport discutable car les juges ont quelquefois confondu entre immunité absolue et immunité relative. Si l'immunité est relative une poursuite en dommage est admise mais le demandeur doit démontrer la mauvaise foi, la malice ou la fraude.⁴² Toute erreur de droit, c'est-à-dire dans l'interprétation ou l'application des règles de droit, toute erreur dans la vérification ou l'appréciation des faits ne constitue pas une faute susceptible de donner lieu à une condamnation en dommages. Ceci veut dire que le régime de la faute simple issue des

⁴⁰ [1974] C.A. 386, à la p. 394 (j. LeBel).

⁴¹ *Harris c. Law Society of Alberta*, [1936] R.C.S. 88, à la p. 105; voir aussi *Hlookoff c. City of Vancouver* (1968), 67 D.L.R. (2d) 119 (C.S.C.B.); *Hollenberg c. B.C. Optometric Association* (1967), 61 D.L.R. (2d) 295 (C.A.C.B.).

⁴² *Lavoie c. Déry*, C.S. Québec 26/10/83 no 200-05-002172-794 (j. Trottier); *Houde c. Benoît*, [1943] B.R. 713.

articles 1053 et suivants du Code civil et applicable à la responsabilité professionnelle ordinaire n'est pas applicable aux arbitres.

L'autre élément important de ce régime de responsabilité est le critère de "l'exécution des fonctions". Il faut que le juge ou l'arbitre soit dans l'exécution de ses fonctions officielles. Une jurisprudence plus ancienne et un peu confuse a pu faire croire qu'il y a coïncidence entre la compétence ou la juridiction et l'exécution des fonctions. Or, plus récemment, la Cour suprême et la Cour d'appel l'entendent différemment.⁴³ Elles donnent un sens très large à ce concept: un organisme judiciaire ou quasi-judiciaire est dans l'exécution de ses fonctions à partir du moment où il est saisi d'une affaire jusqu'à la décision finale envisagée par la loi qui lui confert ses attributions.

Il a beau excéder sa compétence, commettre des erreurs, agir par mauvaise foi ou commettre d'autres irrégularités ou abus de pouvoir, l'essentiel est qu'il agisse en qualité de juge ou quasi-juge.

Conclusion

Le législateur québécois donne à l'arbitrage véritable un statut précis et un encadrement juridique élaboré. La distinction entre l'arbitrage et toute autre forme de solution de difficultés entre les parties revêt une importance plus grande. De la qualification d'arbitrage qui s'infère de la lecture de la convention d'arbitrage, de l'ensemble des documents et du contexte qui l'entoure, l'on conclura à l'application du régime juridique prévu au Livre VII et à l'application du régime de responsabilité civile propre à la fonction quasi-judiciaire.

Pratiquement et concrètement, l'entente par laquelle les parties recherchent une opinion d'expert, une évaluation comptable, un certificat d'ingénieur ou d'architecte pour trancher une question ou une difficulté n'est pas en principe une convention d'arbitrage. Dans ces cas, les parties ont fait affaire avec un professionnel qui doit agir suivant les règles de son art ou de sa profession et rendre les services qu'on attend de lui; s'il commet des fautes professionnelles il pourra être tenu responsable suivant les règles ordinaires de la responsabilité civile, ou les règles du droit professionnel. Il se peut que les parties n'aient même pas attribué de pouvoir décisionnel à cet expert, lui conférant plutôt un rôle de médiation ou de conciliation. On est encore plus loin de l'arbitrage véritable.

La Cour suprême tranche la question qui lui est soumise en fonction du droit québécois, mais elle nous montre bien que sur cette question le droit français, le droit américain, la common law anglaise peuvent varier.

⁴³ Rivard c. Morier, *supra*, note 26, à la p. 732; Royer c. Mignault, *supra*, note 26, à la p. 673.

Le juge Beetz qui ne souscrit que quelques lignes à l'arrêt se contentera de signaler que la similitude ou la dissemblance avec le système de common law importent peu vu les origines du droit québécois en la matière.⁴⁴ Néanmoins, la dissertation du juge Claire L'Heureux-Dubé est instructive surtout dans un contexte d'expansion de l'arbitrage commercial international. Elle nous démontre qu'il y a une grande similitude entre tous ces systèmes juridiques sur la définition même de l'arbitrage véritable et les éléments essentiels.

Il importe toutefois de souligner que le droit français contemporain distingue l'arbitrage contractuel prévu par l'article 1592 du Code civil français qui s'applique à la perfection ou révision d'un contrat, et l'arbitrage juridictionnel, le seul véritable arbitrage comparable à celui qui existe en droit québécois. Il faut alors être prudent dans l'utilisation des termes. En droit québécois le véritable arbitrage est contractuel mais dans le sens où il a pour source un contrat, la convention d'arbitrage; il est en même temps juridictionnel ou quasi-judiciaire.

* * *

EVIDENCE—PRIVILEGE—PRIEST-PENITENT PRIVILEGE:

R. v. Church of Scientology of Toronto and Zaharia.

Robert Chambers* and Mitchell McInnes**

Introduction

Wenceslaus IV, King of Bohemia at the end of the fourteenth century, is remembered

... as a vicious young man who gave way unrestrainedly to fits of rage or caprice in which he would perpetrate acts of savage cruelty. Shamelessly unfaithful himself, Wenceslaus was intensely jealous, and harboured suspicions of his young wife, whose conduct was irreproachable.¹

In an attempt to uncover the imagined indiscretions of his Queen, the King demanded that her confessor, John Nepomucen, reveal the contents of the confessions she had made. Father John had vowed to uphold the absolute secrecy of the confessional and refused to betray that confidence. The King, in a fit of rage, struck John down, picked up a burning torch and applied it to the poor priest's sides. As John lay dying

⁴⁴ *Supra*, note 1, à la p. 570.

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¹ H.J. Thurston, S.J. and D. Attwater, 2 Butler's Lives of the Saints (1981), p. 332.

from his wounds, Wenceslaus ordered that he be trussed up like a wheel with his heels tied to his head, gagged and carried secretly through the streets to be drowned in the river Moldau. John Nepomucen is remembered today as a saint and martyr for the confessional.²

Almost six hundred years later, the offices of the Church of Scientology of Toronto were raided by the Ontario Provincial Police. Two million documents were seized and the validity of that search and seizure was the subject of numerous hearings over the years which followed. The matter came before the Ontario Court of Appeal in 1987 and is reported as *R. v. Church of Scientology and Zaharia*.³ In addition to a number of issues involving search warrants and freedom of religion, the case deals with the same question raised by John Nepomucen's death: the possible existence of a priest-penitent privilege.⁴

This question of privilege has arisen from time to time in England and other common law countries over the centuries. The *Scientology* case is interesting because it is the first time that a common law privilege for clerics has been made possible in Canada. This possibility exists because of the Supreme Court of Canada's decision of *Slavutych v. Baker*⁵ in 1975. The acceptance by our highest court of Wigmore's four-fold test for privileged communications paved the way for the emergence of new forms of privilege at common law and, as we shall see, for the re-emergence of old ones.

In addition to Wigmore's test, the Ontario Court of Appeal discussed two other issues affecting the matter of priest and penitent privilege: its possible existence as a traditionally recognized head of privilege at common law and the guarantee of freedom of religion under the Charter of Rights of Freedoms.⁶ This comment will deal with all three aspects of the *Scientology* decision. The narrow question of whether a priest can claim privilege in a court of law is necessarily just that: a

² *Ibid.* John Nepomucen was martyred in 1393. The manner of his death at the hands of King Wenceslaus IV is certain, but there is some doubt surrounding the exact cause of the King's rage. That it was caused by John's refusal to reveal the contents of the Queen's confession is a widely credited tradition which can be traced back to within fifty years of Saint John's death.

³ *R. v. Church of Scientology of Toronto and Zaharia* (1987), 18 O.A.C. 321 (Ont. C.A.).

⁴ This privilege is referred to as priest and penitent privilege throughout the present discussion. It is the term used by the Ontario Court of Appeal in *R. v. Church of Scientology of Toronto and Zaharia* and is the one most often encountered in other sources. The use of the term is not meant to limit the discussion to the sacrament of confession as practised by members of catholic faiths, but is intended to include all confidential communications made to a cleric in his or her official capacity.

⁵ [1976] 1 S.C.R. 254, (1975), 55 D.L.R. (3d) 224, [1975] 4 W.W.R. 620.

⁶ Constitution Act, 1982, Part I.

narrow question. But how this question is resolved has a broader application. The usefulness of Wigmore's test depends on uniformity in the application of each of its parts and the predictability of the result obtained. *R. v. Church of Scientology and Zaharia* gives us an opportunity to consider the test's application to a unique situation.

The Facts

The warrant to search the offices of the Church of Scientology of Toronto was obtained in March 1983 by the Anti-Rackets Branch of the Ontario Provincial Police. The information used to obtain the warrant was over 1,000 pages long and alleged that the described documents would provide evidence of "tax fraud, fraud on the public respecting the sale of certain items, and conspiracy to effect a lawful purpose by unlawful means".⁷ The 850 boxes of documents obtained through the search contained,

... a large quantity of "pastoral counseling folders" and "ethics files"... In an affidavit filed by the appellant Scientology on the motion to quash, these documents were described as part of the auditing process which frequently involves the confession of sins in order to promote spiritual growth and maintained that absolute confidentiality was necessary for these purposes and for the continuation of the religion itself.⁸

These documents were sealed following the seizure "to preserve the status quo until such time as the question of a priest and penitent or confidential religious communication privilege was determined".⁹ During the course of the hearings which followed, Osler J. ruled that there existed no priest-penitent privilege at common law.¹⁰ This decision was just one of a number of issues raised on appeal.

In the Ontario Court of Appeal

The Church of Scientology presented two arguments to the Ontario Court of Appeal in support of its claim of privilege. First,

... that the relationship between priest and penitent is a recognized class of privilege in the common law, although it has not been necessary to rule on its existence in England or in Canada in this century. In the alternative, the appellant claims that the relationship gives rise to the establishment of a new privilege on the basis of the four criteria established by Wigmore and recognized by the Supreme Court of Canada in *Slavutych v. Baker et al.* . . .¹¹

After briefly tracing the history of the privilege back to 1693, the court determined that "there is no recognized class privilege accorded to the

⁷ *R. v. Church of Scientology of Toronto and Zaharia*, *supra*, footnote 3, at p. 322.

⁸ *Ibid.*, at p. 384.

⁹ *Ibid.*, at p. 332.

¹⁰ *Re Church of Scientology and the Queen (No. 1)* (1984), 13 C.C.C. (3d) 93, at pp. 98-99 (Ont. H.C.).

¹¹ *R. v. Church of Scientology of Toronto and Zaharia*, *supra*, footnote 3, at p. 385.

priest and penitent relationship".¹² It did, however, overrule the lower court's decision with regard to the second argument.¹³

We cannot agree, however, that it is too late to expand the modern law of privilege. In the light of the constitutional protection given by the *Charter* and having regard to the expansion of the law of privilege enunciated by Dean Wigmore and accepted by the Supreme Court of Canada in *Slavutych v. Baker*, we are satisfied that our courts will be encouraged to recognize the propriety of a priest and penitent privilege, if not as a class, at least on a case by case basis.

Even though the Court of Appeal accepted the possibility of privilege, it found that the documents seized did not satisfy Wigmore's test and so, although the legal issue was decided in its favour, the Church of Scientology lost its appeal.

The Priest and Penitent Relationship as a Recognized Head of Privilege at Common Law

In making its determination of whether there existed a recognized head of privilege for communications made between priests and penitents, the Ontario Court of Appeal briefly discussed the history of the concept. It began by dividing the development of priest-penitent privilege into three periods: "pre-Reformation England", "from post-Reformation England to the end of the Victorian era" and "the twentieth century".¹⁴ This division is useful because the differing ideological and political climates of these times causally affected the acceptance or rejection of the privilege.

(1) *Before the Reformation*

The Court of Appeal stated simply that "[i]n the first phase, beginning as far back as 1693 in pre-Reformation England, the privilege was recognized".¹⁵ The development of the privilege can be traced back even earlier and probably should be, for, as we will see, by 1693 the privilege was either dead or dying. Its earlier existence is not universally accepted but the evidence, taken as a whole, accords with the bold statement of the Irish court in *Cook v. Carroll*.¹⁶

I have no doubt the seal of the confessional was respected in the courts of England before the Reformation. . . and its recognition before the Norman Conquest seems to be proved.

The privilege grew out of the confessional seal of the Roman Catholic Church which considered a penitent's auricular confession to a priest to be inviolably secret. Given the relation between secular and canon

¹² *Ibid.*, at p. 388.

¹³ *Ibid.*, at pp. 388-389.

¹⁴ *Ibid.*, at pp. 385-386.

¹⁵ *Ibid.*, at p. 385.

¹⁶ *Cook v. Carroll*, [1945] Ir. R. 515, at p. 517 (Ir. H.C.).

law at this time and the fact that the courts of law were largely staffed by bishops and clerics,¹⁷ it seems plausible that the secrecy of the confessional would be respected at law. Furthermore, the laws of Anglo-Saxon kings prior to the Norman Conquest illustrate a recognition of the merit of confession,¹⁸ and while they do not specifically provide for a privilege, it is reasonable to conclude that such was the case.¹⁹ Evidence of a continued recognition of the inviolable secrecy of the confessional after the Norman Conquest can be seen in the laws of Henry I, the provincial canons of Oxford in 1222, and in the twenty-first canon of the Lateran Council in 1215.²⁰

There is little specific case or statutory law concerning priest-penitent privilege from that period and that which exists is somewhat ambiguous. The English Parliament first legislatively addressed the issue during the fourteenth century in the "Articuli Cleri" which stated in part: "It pleases our Lord the King that felons and approvers be able to confess their misdeeds to a priest."²¹ This is often interpreted as Parliamentary recognition of a privilege even though it is not sufficiently conclusive to warrant such a reputation.

Garnett's Trial,²² reported in 1606 during the reign of James I, was the first to confront the question of priest and penitent privilege. It too adds uncertainty to the discussion. Father Garnett served as spiritual adviser to Guy Fawkes, who made an unsuccessful attempt on the King's life. At the trial of Guy Fawkes, Garnett was called to testify but refused to disclose the contents of his communications with the accused or even whether they arose during confession or not. What occurred next is subject to debate. Blackstone asserts that Garnett was tried (likely for misprison of treason) and convicted, thereby clearly inferring that no privilege existed before the Reformation.²³ On the other hand, Wigmore offers a different version in which questioners made no attempt to compel

¹⁷ Nolan, *The Law of the Seal of Confessional* (1913), 13 Cath. En cycl. 649, at p. 652.

¹⁸ Edward the Elder (921-24), said: "And if a man guilty of death. . . desires confession, let it never be denied to him." An identical provision was repeated by King Canute (1017-34). King Etheled declared: "And let every Christian man do as is needful to him: let him keep strictly to his Christianity and accustom himself frequently to. . . fearlessly confess his sins."

¹⁹ J. Yellin, *The History and Current Status of the Clergy-Penitent Privilege* (1983), 23 Santa Clara L.R. 95, at p. 98.

²⁰ Nolan, *loc. cit.*, footnote 17, at p. 649.

²¹ Articuli Cleri, c. 10, para. 9 (Edward II, 1315), quoted in W. Best, 2 Principles of the Law of Evidence (J. Morgan (ed.), 1876), para. 584.

²² (1606), 2 Howell's State Trials 218, cited in J.H. Wigmore, Evidence, Vol. 8 (McNaughten rev., 1961), p. 869, para. 2394, note 1.

²³ W. Blackstone, Commentaries, Vol. 4, p. 119.

Garnett to disclose any confessed secrets.²⁴ The contradiction between Blackstone's stance and that of Wigmore and most other writers can be reconciled if, as Sir Edward Coke asserted, the pre-Reformation privilege applied except in the case of treason.²⁵ At any rate, despite the uncertainty arising from *Garnett's Trial* and the *Articuli Cleri*, there is little which casts doubt on the commonly held view that a privilege did exist prior to the Reformation.

(2) *After the Reformation*

The privilege accorded the priest-penitent relationship almost certainly ceased to exist some time after the sixteenth century. The English Reformation saw the Roman Catholic Church replaced by the Church of England as the established church. Confession was retained as a voluntary practice and, initially, the inviolable nature of its secrecy remained intact. As the practice of confession became less often exercised, it was natural that recognition of a privilege for such communications would fall by the wayside. By 1603, the privilege was subject to the exception that full disclosure be made in cases involving crimes so serious that knowledge of the crime carried a penalty of capital punishment.²⁶ Some time later, the privilege was lost completely.²⁷ As Yellin notes,²⁸ Holt L.C.J. observed in 1693 that a privilege was to be extended to communications with an attorney or scrivener, but not a parson,²⁹ and Buller J. in 1792 stated:³⁰

I take the distinction to be well settled, that the privilege extends only to those three enumerated cases [of counsel, solicitor and attorney] at all times, but that it is confined to these cases only.

A priest was found guilty of contempt in 1860 for refusing to disclose from whom he had received a stolen watch,³¹ and in *Normanshaw v. Normanshaw*,³² the court was strongly of the opinion that a clergyman had no right to withhold evidence. Wigmore cites a number of similar decisions.³³ The court in the *Scientology* case relied on the following quotation from an 1886 decision of Jessel M.R. as indicative of the period:³⁴

²⁴ Wigmore, *op. cit.*, footnote 22, p. 869, para. 2394, note 1.

²⁵ E. Coke, *Institutes*, Vol. 2, p. 629, quoted in Best, *op. cit.*, footnote 21.

²⁶ Canon 113 of the Anglican Canons of 1606.

²⁷ Wigmore, *op. cit.*, footnote 22, p. 869, para. 2394, suggests that this did not occur until the Restoration.

²⁸ *Loc. cit.*, footnote 19, at p. 103.

²⁹ Anonymous (1693), *Skinner* 404, 90 E.R. 179. (K.B.).

³⁰ *Wilson v. Rastall* (1792), 4 T.R. 753, 100 E.R. 1283 (K.B.).

³¹ *R. v. Hay* (1860), 2 F. & F. 4, 175 E.R. 933 (Assizes).

³² (1893), 69 L.T.R. (N.S.) 468 (P.D.A.).

³³ *Op. cit.*, footnote 22, pp. 869-870.

³⁴ *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675, at p. 681 (C.A.).

Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected.

The rejection of priest-penitent privilege following the Reformation can be attributed, as the Ontario Court of Appeal points out, "to the post-Reformation climate of religious intolerance and anti-Catholicism".³⁵ That priest and penitent privilege was lost during this era is significant because that protection was not part of the common law at the time of its reception into Canada. Some have taken the opposite view arguing that the privilege was recognized before the Reformation and had never been specifically done away with. In answer to this, Stephen pointed out that the modern law of evidence does not date back as far as the Reformation, and it is a later era, when auricular confessions were not protected, which is relevant.³⁶ In any event, Canadian courts have followed the English lead and have, at least in theory, denied clerics any immunity as witnesses.

(3) *In the Twentieth Century*

The twentieth century is said to have arrived with an improved tolerance and respect for differing religious ideas which made possible a chance for a renewed acceptance of priest and penitent privilege. The Ontario Court of Appeal cites two cases in which a common law privilege was accepted: *Cook v. Carroll*,³⁷ a 1945 Irish case, and *Mullen v. U.S.A.*,³⁸ a 1985 decision of the United States Court of Appeals for the District of Columbia. These cases were not based on a recognized priest-penitent privilege continuing from earlier times, but "relied upon Dean Wigmore's general criteria for privileged communications"³⁹ to create a new privilege.

Apart from the *Scientology* case, there is no Canadian or modern English jurisprudence which confronts this question of privilege.⁴⁰

In the third phase, the twentieth century, no English decisions have dealt with the privilege as it appears that the discretion of the prosecutors and the courts has avoided any necessity for such a determination. The Ontario practice has similarly been for the trial judge to suggest that questions that would require a violation of priest and penitent confidence not be pressed. . .

The use of judicial discretion as a solution to this problem actually predates the twentieth century. In 1828, Best L.C.J. said that although cler-

³⁵ *R. v. Church of Scientology of Toronto and Zaharia*, footnote 3, at p. 386.

³⁶ J.F. Stephen, *Digest of Law of Evidence* (12th ed., 1948), p. 219, cited in E. Koroway, *Confidentiality in the Law of Evidence* (1978), 16 Osgoode Hall L.J. 361, at p. 399.

³⁷ *Supra*, footnote 16.

³⁸ *Mullen v. U.S.A.*, 263 F. 2d 275 (D.C. Ct. App., 1985).

³⁹ *R. v. Church of Scientology of Toronto and Zaharia*, footnote 3, at p. 386.

⁴⁰ *Ibid.*

ics could not claim privilege, "I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner, but if he chooses to disclose them, I shall receive them in evidence".⁴¹

In a 1970 divorce case,⁴² a priest was called by the wife to disclose what had been said during counseling sessions aimed at reconciliation. The Ontario High Court rejected the existence of a privilege, but relied on the Ontario Court of Appeal decision of *R. v. Wray*⁴³ as authority for the exercise of its discretion to refuse to hear the evidence. The court was apparently unaware that *Wray* had already been overturned by the Supreme Court of Canada on that point. In the Supreme Court Martland J. stated the law as follows:⁴⁴

The extent to which a discretion exists to disallow evidence if the strict rules of admissibility would operate against the accused. . . is a part of the function of the court to ensure that the accused has a fair trial. But other than that, in my opinion, under our law, the function of the court is to determine the issue before it, on the evidence admissible in law, and it does not extend to the exclusion of admissible evidence for any other reason.

With the ambit of judicial discretion greatly narrowed by the *Wray* decision, the question of priest and penitent privilege would need to be considered.

It is interesting to note that two Canadian jurisdictions have statutes granting privilege to clerics. In Newfoundland, the privilege dates as far back as 1916.⁴⁵ That province's Evidence Act provides that "[a] clergyman or priest shall not be compellable to give evidence as to any confession made to him in his professional character".⁴⁶ Quebec has, by Canadian standards, been very liberal in the area of privilege. It is extended to a wide range of government officials and professionals as well as priests.⁴⁷ Clerics in Quebec are protected by the Human Rights and Freedoms Act:⁴⁸

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

⁴¹ *Broad v. Pitt* (1828), 3 Car. & P. 518, at p. 519, 172 E.R. 528, at p. 529 (C.P.).

⁴² *Cronkwright v. Conkwright*, [1970] 3 O.R. 784 (Ont. H.C.).

⁴³ [1970] 2 O.R. 3 (Ont. C.A.).

⁴⁴ *The Queen v. Wray*, [1971] S.C.R. 272, at p. 288.

⁴⁵ Nfld. Cons. Stat. 1916, c. 91, s. 5.

⁴⁶ Evidence Act, R.S.N. 1970, c. 115, s. 6.

⁴⁷ Dentists, physicians and veterinary surgeons are among those protected by a statutory privilege.

⁴⁸ Human Rights and Freedoms Act, R.S.Q. 1977, c. C-12, s. 9.

(4) *In the United States*

The experience in the United States has been quite different from that of Canada and England. It is generally agreed that no priest-penitent privilege was imported as common law from England to the United States, but as early as 1813, a Roman Catholic priest was allowed to claim privilege before a New York court.⁴⁹ This was based on the Constitution of New York which provided that "the free exercise and enjoyment of religious profession and worship, without discrimination of practice, shall forever hereafter be allowed within this state, to all mankind".⁵⁰ The wording of the decision limited its application to those faiths which require confession as part of their practice.⁵¹

It is essential to the free exercise of a religion that its ordinances should be administered—that its ceremonies as well as its essentials be protected. . . . To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance, and this important branch of the Roman Catholic church would be annihilated.

Four years later, privilege was denied to a minister in a New York murder case. The earlier decision was narrowly construed and distinguished on the basis that a distinction must be drawn between "auricular confessions made to a priest in the course of discipline, according to the canons of the church, and those made to a minister of the gospel in confidence, merely as a friend or adviser".⁵²

In a reaction to these two decisions, the New York legislature passed a statute in 1828 which extended the privilege to other denominations.⁵³

No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination.

New York's lead was followed and at present, all fifty states and the District of Columbia have statutes recognizing some form of priest-penitent privilege.

Wigmore's Test

As we have seen, before the common law ever reached Canada, the privilege accorded priests and penitents had ceased to be a part of it. Its

⁴⁹ *People v. Phillips* (N.Y. Ct. Gen. Sess., 1813). This case was never officially reported. However, the notes of one of the lawyers involved are reprinted in *Privileged Communications to Clergymen* (1955), 1 Cath. Lawyer 199. It is also abstracted in 1 Western L.J. (1843), 109.

⁵⁰ N.Y. Constitution of 1777, art. XXXVIII.

⁵¹ *People v. Phillips*, *supra*, footnote 49.

⁵² *People v. Smith* (1817). This case was not officially reported but appears as an editor's report in *Privileged Communications to Clergymen*, *supra*, footnote 49.

⁵³ N.Y. Rev. Stat. para. 72, pt. 3, c. VII, art. 8 (1828).

re-emergence here was made possible by the acceptance of John Wigmore's famous test in the Supreme Court of Canada's decision of *Slavutych v. Baker*.⁵⁴ Yar Slavutych was an associate professor at the University of Alberta who had been dismissed for strong comments he made about a colleague on a "Tenure Form Sheet". The University authorities had requested Slavutych to fill out the form and had assured him that the information would be kept confidential. The Supreme Court held that the information satisfied Wigmore's test for privilege and therefore should not have been admitted into evidence at his disciplinary hearing. Wigmore's test contains four conditions which must be met:⁵⁵

- (1) The communication must originate in a *confidence* that it will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

This test must be applied with caution for, as Wigmore stated, all evidentiary privileges are remarkable exemptions from the general duty to testify when called upon to do so.⁵⁶

The investigation of truth and the enforcement of testimonial duty demand the restriction, not expansion, of these privileges. They should be recognized only within the narrowest limits required by the principle.

However, the restrictive application of the test should not preclude the possibility of a priest and penitent privilege. Wigmore himself believed that such a privilege for Roman Catholic priests had adequate grounds for recognition.⁵⁷

Although it was accepted in the *Scientology* case that Wigmore's test applies to the question of priest-penitent privilege, little time was devoted to its application. A longer discussion was unnecessary as the court decided it was possible for the justice who issued the search warrant,⁵⁸

... to conclude that information contained in the files was elicited in furtherance of a criminal purpose or to facilitate the commission of one of the criminal offences referred to in the information. Thus, the issuing justice could conclude that the documents would not be capable of meeting Wigmore's third and fourth criteria, and in fact, came within the common law exception to all claims of privilege by reason of the *prima facie* case of criminality.

⁵⁴ *Supra*, footnote 5.

⁵⁵ Wigmore, *op. cit.*, footnote 22, p. 527, para. 2285.

⁵⁶ *Ibid.*, at p. 73.

⁵⁷ *Ibid.*, at p. 878.

⁵⁸ *R. v. Church of Scientology of Toronto and Zaharia*, *supra*, footnote 3, at p.

The *Scientology* decision opens the Canadian door to a priest-penitent privilege based on Wigmore, but we are left to speculate on how each of the four elements of the test are to be applied.

(1) *The First Criterion: Originating in Confidence*

The first criterion asks whether the communication originated in a confidence of secrecy. Wigmore thought:⁵⁹

. . . that a permanent secrecy. . . is an essential of any real confessional system as now maintained. In so far as it may not be, in the discipline of a particular church, the privilege cannot apply.

The pre-condition that a cleric adhere to a denomination which demands confessional secrecy raises an interesting issue. If followed, the availability of the priest-penitent privilege would certainly be restrictive. The Roman Catholic faith, for example, requires that confessional communications be kept in absolute secrecy,⁶⁰ but many other denominations do not.

Twenty-one American states and the District of Columbia have enacted legislation which grants a privilege only where confessional secrecy is part of a religion's "discipline enjoined". Courts dealing with these provisions have found that they add little but confusion to the debate over whether clerics should be compelled to testify.⁶¹ The trend has been to read the statutes liberally and hold that all churches have confidentiality of confessions as part of their disciplines.⁶² As a result, the privilege has been granted so long as the communicant sought out the cleric for the purpose of "religious counsel, advice, solace, absolution or ministration" in a context of expected secrecy.⁶³

Canadian courts would be wise to follow the American lead. The rigid application of Wigmore's first criterion could result in an unfair discrimination between religions. It would be inconsistent with expectations if a communication received by a cleric in confidence was privileged only if the rules governing his or her conduct required the maintenance of secrecy.

⁵⁹ *Op. cit.*, footnote 22, p. 878.

⁶⁰ J.A. Hardon S.J., *The Catholic Catechism* (1975), pp. 406-407. The following solemn declaration was made by the Roman Catholic church at the Fourth Lateran Council: ". . . he who shall presume to reveal a sin entrusted to him in confession, we decree not only must be deposed from priestly office but must also be thrust into a strict monastery to do perpetual penance." The requirement of absolute secrecy "applies only to what was told in a sacramental confession. . . Consequently, no such obligation arises from a 'confession' made to someone who is not a priest, nor from a mock confession, nor from a conversation with a priest without the explicit intention of confessing, as when a person is seeking advice".

⁶¹ For a discussion of the American law, see Yellin, *loc. cit.*, footnote 19, and M. Mitchell, *Must Clergy Tell* (1987), 71 Minn. L.R. 723.

⁶² See *Re Swenson*, 183 Minn. 602, 237 N.W. 589 (S.C. Minn., 1931).

⁶³ *Matter of Fuhrer*, 100 Misc. 2d 315, at p. 320, 417 N.Y.S. 2d 426, at p. 431 (1979).

(2) *The Second Criterion: Confidentiality is Essential*

"Is confidentiality of communication essential to the relation?"⁶⁴ As explained by Wigmore, the question seems only to ask whether confidentiality is necessary for the maintenance of the penitential relationship and not whether it is essential for the full and proper observance of the religion as a whole.⁶⁵ In *Slavutych v. Baker*,⁶⁶ Spence J. applied the criterion quite narrowly, focusing on the necessity of secrecy for "the operation of a procedure whereby fellow members of the university staff were requested to give their opinions. . .". Whether this was a pre-determined method of analysis or simply resulted for the facts involved is difficult to know. Other courts have similarly examined the question by looking only at the communicative relationship and not at the larger scheme which it serves.⁶⁷ The Alberta Court of Appeal used the broader approach in *R. v. Littlechild*⁶⁸ and found that the condition was satisfied because disclosure would seriously hamper the proper functioning of the entire legal aid system and not just relations between the accused and the legal aid officer.

The choice of method for applying this branch of Wigmore's test to the question of priest-penitent privilege could be determinative of the issue. Denial of a privilege, though harmful to the penitential relationship, might not greatly affect the observance of the religion as a whole. Those faiths for which the act of penance constitute a fundamental tenet (for example, Roman Catholic) might find it easier to show that they are adversely affected in the broader sense.

Wigmore argued that the priest-penitent relationship met the second part of his test:⁶⁹

Is confidentiality of communication essential to the relation? In other words, would penitential confessions. . . continue to be made if they were liable to be demanded for disclosure in a court of justice when needed? In so far as such confessions concern crimes and wrongs, they might certainly, in some indefinite but substantial measure, be discontinued, and the penitential relationship to that extent annulled.

The extent to which this is true might depend on the relative importance which a particular denomination attaches to the penitential act. The fact that sins are confessed despite a lack of priest-penitent privilege in this country could lead to the conclusion that this privilege is not essential to

⁶⁴ Wigmore, *op. cit.*, footnote 22, p. 878, para. 2396.

⁶⁵ *Ibid.*

⁶⁶ *Supra*, footnote 5, at pp. 261 (S.C.R.), 229 (D.L.R.), 626 (W.W.R.).

⁶⁷ See, for example, *Smith v. Royal Columbian Hospital* (1981), 29 B.C.L.R. 99 (B.C.S.C.), which focused on the necessity of confidentiality to the relationship of those conducting an investigation and not to the investigation itself.

⁶⁸ *R. v. Littlechild* (1979), 108 D.L.R. (3d) 340, 51 C.C.C. (2d) 406 (Alta. C.A.).

⁶⁹ *Op. cit.*, footnote 22, p. 878, para. 2346.

that relationship. However, there have been no widely publicized Canadian cases in which the silence of the confessional has been breached. The effect of such an occurrence can only be the subject of speculation.

(3) *The Third Criterion: the Relation Ought to be Fostered*

The third canon of the test requires that the relationship between communicant and cleric be one that in the community's opinion ought to be sedulously fostered. Before this aspect of the test can be applied, we must determine what is meant by "community". In *Slavutych v. Baker*,⁷⁰ Spence J. stated that it was in the interest of the "university community" that the relationship in question be fostered. Wigmore favoured a broader definition in relation to penitential communications.⁷¹ The meaning of community may depend on the facts of each case and where the public has little connection to the relationship (as in *Slavutych*) perhaps the scope of the term should be restricted. But going too far in this direction would render the criterion meaningless. For example, if "community" was interpreted as referring only to the adherents of a particular faith, the answer to the question of whether the penitential relationship should be fostered would become absurdly self-evident.

Wigmore reasoned that priest and penitent communications met his third criterion "where a substantial part of the community professes a religion practicing a confessional system".⁷² Times have changed, but given the continued pervasive nature of religious institutions in Canadian society,⁷³ priest-penitent privilege should satisfy Wigmore's third test as he applied it.

(4) *The Fourth Criterion: Injury vs. Benefit*

The final of Wigmore's four hurdles is by far the most complex and seemingly the most difficult to leap.⁷⁴ "Would the injury to the penitential relation by compulsory disclosure be greater than the benefit to justice?"⁷⁵ Wigmore answers his own question by saying "[t]he injury is plain".⁷⁶ He chose not to elaborate on this except by referring to the writings of Jeremy Bentham. In 1827, Bentham (described by Wigmore as "the

⁷⁰ *Supra*, footnote 5, at pp. 261 (S.C.R.), 229 (D.L.R.), 626 (W.W.R.).

⁷¹ *Op. cit.*, footnote 22, p. 878, para. 2396.

⁷² *Ibid.*

⁷³ Statistics Canada's 1981 Census showed that out of a total population of 24,343,181, only 1,788,995 (7%) are listed as having no religion.

⁷⁴ The following cases are among those in which a privilege was denied because Wigmore's fourth criterion was held not to be satisfied: *Swift Can. Co. v. Alta. Hog Producers Marketing Bd.* (1979), 9 Alta. L.R. (2d) 107 (Alta. Dist. Ct.); *Bergwitz v. Fast* (1980), 18 B.C.L.R. 368 (B.C.C.A.); *Glover v. Glover (no. 2)* (1980), 29 O.R. (2d) 401 (Ont. C.A.); *F. v. A. Psychiatrist* (1984), 53 B.C.L.R. 216 (B.C.S.C.); *Alta. Human Rights Commission v. Alta. Blue Cross Plan*, [1983] 6 W.W.R. 758 (Alta. C.A.).

⁷⁵ *Op. cit.*, footnote 22, p. 878, para. 2396.

⁷⁶ *Ibid.*

greatest opponent of privileges''⁷⁷) offered the following thoughts on the subject.⁷⁸

If in some shapes the revelation of testimony thus obtained would be of use to justice, there are others in which the disclosures thus made are actually of use to justice under the assurance of their never reaching the ears of a judge. Repentance, and consequent abstinence from further misdeeds of like nature—repentance followed even by satisfaction in some shape or other, satisfaction more or less adequate for the past,—such are the well known consequences of the institution

Bentham thus felt that a priest-penitent privilege would serve the very interests which are the goals of our legal system: reparation and abstinence from future wrong-doing.⁷⁹

The Ontario Court of Appeal accepted the possibility of priest-penitent privilege on a case by case basis.⁸⁰ What does this mean in relation to the fourth criterion? Must a court weigh the harm and benefits of disclosure anew with each case or can governing principles be established? The restrictive approach would limit the granting of a privilege and may better reflect the realities of a given case, but it would also place undue emphasis on the immediate need for evidence and could result in the neglect of long-term effects. Allowing the utility of the evidence to determine the contest between harm and benefit would render the privilege largely illusory as penitents could not know in advance whether their confessions would remain secret. Wigmore favoured the broader approach to his test, but Canadian cases are divided on the issue. When applying the fourth criterion to other questions of privilege, some courts have confined themselves to the immediate facts of the case,⁸¹ while others have considered the long term ramifications of disclosure.⁸²

Developing a comprehensive set of guidelines would be difficult as the court would need to look beyond the facts before it and attempt a prediction of the benefit which would enure to justice generally. This would mean considering the utility, necessity and availability of evidence obtained from confessionals in the future. The case for privilege would be stronger using this broad approach: the cumulative detrimental effect of decisions compelling testimony may well be pervasive while the benefit only rare and largely fortuitous.

⁷⁷ *Ibid.*, p. 877, para. 2396.

⁷⁸ J. Bentham, 4 *Rationale of Judicial Evidence* (1st ed., 1827), p. 590.

⁷⁹ See, for example, *R. v. Hay*, *supra*, footnote 31, where a priest had returned a stolen watch he had received from a penitent. (The priest was found guilty of contempt for refusing to identify the thief).

⁸⁰ *R. v. Church of Scientology of Toronto and Zaharia*, *supra*, footnote 3, at pp. 388-389.

⁸¹ See, for example, *R. v. Fehr* (1983), 6 D.L.R. (4th) 281 (Alta. Q.B.); *Bergwitz v. Fast*, *supra*, footnote 74.

⁸² See, for example, *R. v. Littlechild*, *supra*, footnote 68.

The Charter

As we have seen, the development of priest-penitent privilege in the United States was largely a result of constitutional guarantees of freedom of religion. Our guarantee of "freedom of conscience and religion" in section 2(a) of the Canadian Charter of Rights and Freedoms may play an important role in the acceptance of priest and penitent privilege in Canadian common law. The Ontario Court of Appeal considered the effect of section 2(a) of the Charter in the *Scientology* case from two perspectives. First it examined the possible infringement of section 2(a) and concluded that freedom of religion is not absolute but was properly limited by the criminal law in this case.⁸³ Even though the court found no infringement of the Charter, it still considered the effect of section 2(a) on the possible existence of privilege.⁸⁴

Chief Justice Dickson stated in *R. v. Big M Drug Mart* that the fundamental freedom of conscience and religion now enshrined in s. 2(a) of the *Charter* embraces not only the freedom of religious thought and belief but also "the right to manifest religious belief by worship and practice or by teaching and dissemination". This protection will no doubt strengthen the argument in favour of recognition of a priest and penitent privilege. The restrictive common law interpretation of the privilege may have to be reassessed to bring it in conformity with the constitutional freedom.

The Court of Appeal concluded that the existence of a guarantee of freedom of religion makes the recognition of priest-penitent privilege more likely. That this should be so makes sense when we consider two elements of Wigmore's test. The third branch of the test requires that the relation be one which the community wishes to foster. Wigmore applied it as follows:⁸⁵

Does the penitential relation deserve recognition and countenance? In a state where tolerance of religion exists by law, and where a substantial part of the community professes a religion practicing a confessional system, this question must be answered in the affirmative.

A guarantee of religious freedom should assist in passing this test. Section 2(a) of the Charter reveals our fundamental concern for respecting and protecting the religious practices of others.⁸⁶ This is strong evidence that the priest-penitent relationship is one which the entire community wishes to foster even if few choose to enter into it.

The fourth branch of Wigmore's test requires a comparison between the injury to the relation and the benefit for litigation created by disclo-

⁸³ *R. v. Church of Scientology of Toronto and Zaharia*, *supra*, footnote 3, at pp. 334-338.

⁸⁴ *Ibid.*, at p. 388. The citation to the case referred to in the quotation in the text is: *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

⁸⁵ *Op. cit.*, footnote 22, p. 878, para. 2396.

⁸⁶ *R. v. Big M Drug Mart*, *supra*, footnote 84, at p. 337.

sure. Again the Charter should tip the scale in favour of the recognition of priest and penitent privilege. The injury to that relationship should weigh more heavily in light of our constitutional concern for the free practice of religion. As Jeremy Bentham stated in 1827:⁸⁷

I set out with the supposition that, in the country in question, the catholic religion was meant to be tolerated. But with any idea of toleration, a coercion of this nature is altogether inconsistent and incompatible. In the character of penitents, the people would be pressed with the whole weight of the penal branch of the law; inhibited from the exercise of this essential and indispensable article of their religion. . .

Conclusion

As it is with most writing, this comment touches only a portion of the concerns it might have. The question of priest and penitent privilege has most often arisen in the context of the criminal law, but it can and does affect other areas. Ministers of religion can often be involved in family matters which end up before the courts. One wonders how priest-penitent privilege would fare in a custody hearing when the best interests of the child are at stake. Of additional concern to clerics is the existence in every Canadian province and territory of legislation creating a duty to report suspected cases of child abuse.⁸⁸ A priest could face a conflict between religious and civic duties just from hearing a confession. Even when not directly applicable, the existence of child welfare legislation can also play a role in the application of the fourth criterion of Wigmore's test as "a strong and useful indication of public policy".⁸⁹

Guidelines need to be developed in the courts, so that clergy and laity can know in advance which communications will remain secret and which are subject to disclosure. The strength or necessity of the evidence in question should not be allowed to influence the granting of privilege. The harm from denying priest-penitent privilege will be far greater if its future denial is left unpredictable. American case law should be of valuable assistance in the creation of these guidelines. Although these cases are largely based on statutory privileges, they have grappled with difficult issues such as what types of communications should be privileged, and who "clergy", "priest" or "minister" is to include. Also, the constitutional basis for the development of priest and penitent privilege in the United States should render those decisions more useful to Canadian courts now that we too have a guarantee of freedom of religion.

The *Scientology* case provides an interesting relation between the Canadian Charter of Rights and Freedoms and the common law. Nor-

⁸⁷ *Op. cit.*, footnote 78, p. 588.

⁸⁸ This issue is beyond the scope of this comment. None of the statutes exempt clergy from the duty to report suspected child abuse.

⁸⁹ *R. v. R.J.S.* (1985), 45 C.R. (3d) 161, at p. 182 (Ont. C.A.).

mally, it is the infringement or denial of Charter rights which are important to a case. Here, the development of the common law is affected by the existence of a guarantee of freedom of religion as a statement of community values. By following the history of priest and penitent privilege at common law, the Ontario Court of Appeal was able to recognize that its earlier existence and demise resulted from changes in commonly held values. Tolerance of religion is a relatively modern community value which we have recently identified as a constitutional concern. It seems fitting that this change should affect the acceptance of priest-penitent privilege and that this time we should recognize that effect.