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Introduction

In The Royal Bank of Canada v. Lee and Fishman,1 the Court of Appeal of Alberta stated: "...privilege and confidentiality have merged in some areas in Canada, but appear distinct in England." Then, the court applied an injunctive remedy from the law of confidentiality to a problem of privilege. The court ordered that the contents of a privileged document that had inadvertently been disclosed should not be communicated to anyone. The court stated: "...older cases saying that privilege is lost when a document is dropped on the street, or when a non-party steals it, seem very doubtful in Canada today."2 This case comment aims to examine these statements and to explore the theoretical and practical significance of the Royal Bank decision to the law of privilege.

The legal problem in the Royal Bank case of the inadvertent disclosure of privileged documents is complex. The context is a juridical tapestry made from the threads of: rules of evidence; several, sometimes competing, public policies; equity’s protection of confidentiality by remedies for breach of confidence; an English law review article by A.L.E. Newbold entitled “Inadvertent Disclosure in Civil Proceedings”;3 the Supreme Court of Canada’s decisions in Slavutych v. Baker4 and Descôteaux v. Mierzwinski;5 and two controversial English cases, Calcraft v. Guest6 and Ashburton (Lord) v. Pape,7 which are alluded to but not named in the Royal Bank and

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2 Ibid.
7 [1913] 2 Ch. 469 (C.A.).
Descôteaux decisions. It is necessary to separate some of these threads before detailing the facts of the Royal Bank case.

Privilege is, in part, a matter of the law of evidence. There are several different types of privilege.8 Among others, there is the privilege afforded communications between a solicitor and client, the "solicitor-client privilege". There is the privilege afforded communications made in anticipation of or for the purposes of litigation, the "litigation privilege".9 There is the privilege accorded communications to settle disputes, "the privilege for without prejudice communications".10

Privilege applies to statements and documents; to say that a statement or a document is privileged is to say that the statement or document is protected from rules about the disclosure and use of evidence during a judicial proceeding. The several types of privilege mentioned above and others share the effect that they will permit a witness at trial to refuse to answer questions about communications or to produce documents. As demonstrated by the privilege for without prejudice communications, privilege may exclude a document from being admitted into evidence even if the parties know the document's contents. Earlier in the proceedings, parties may rely on privilege to refuse to answer questions during examinations for discovery and to refuse to produce documents, although under the rules of civil procedure for pre-trial discovery parties may have to disclose the existence or the contents of the documents.11 As recognized in Descôteaux v. Mierzwinski,12 discussed

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11 Rules of civil procedure may narrow or abrogate the various privileges. Using the Ontario Rules of Civil Procedure as an example, a party must disclose the existence of privileged documents and the court has the authority to inspect the documents to determine the validity of the claim. Under these rules, the findings, opinions and conclusions contained in an expert's report, which information would normally be protected by the litigation privilege, must be disclosed during the party's examination for discovery, unless the party being examined undertakes not to call the expert as a witness at trial.

12 Supra, footnote 5.
below, privilege may be relied on to resist compliance with a search warrant.\textsuperscript{13} The rationales for these exclusionary effects, however, differ, as do the relationships between the several privileges and confidentiality.\textsuperscript{14} This last point is important to keep in mind and is central to this comment.

For the litigation privilege, the modern rationale is that the exclusion of evidence is necessary to facilitate the adversarial system of dispute resolution.\textsuperscript{15} Relying on this privilege, a solicitor may investigate, research, and keep secret his or her case preparation and work product, and the solicitor may confidentially instruct and be informed by a witness, particularly an expert witness. But for the litigation privilege, communications between a solicitor and an expert witness would not be confidential, unless it could be established that the expert was acting as a surrogate for the client in the obtaining of legal advice and thus sheltered by the solicitor-client privilege.\textsuperscript{16} So, confidentiality is an effect of the litigation privilege. This also can be shown by the fact that some cases have held that this privilege ends with the litigation.\textsuperscript{17}


\textsuperscript{15} Sharpe, \textit{loc. cit.}, footnote 9. The rationale for privilege has changed over the years as N.J. Williams shows in his article, \textit{Discovery of Civil Litigation Trial Preparation in Canada} (1980), 58 Can. Bar Rev. 1.


For the privilege for without prejudice communications, the best rationale is a public policy to encourage communications intended to resolve disputes without litigation.\textsuperscript{18} Settlement communications are not confidential, at least in the sense that they are disclosed or known by the adversary, who wishes to use them prejudicially but is prevented from doing so by the operation of the privilege.

For the solicitor-client privilege, the modern rationale is that there is a confidential relationship between a solicitor and client and protecting the confidences of that relationship from compelled disclosure in judicial proceedings is necessary for the relationship and for society. The privilege emerges from the confidential relationship and from the need for privacy in obtaining and acting on legal advice whether or not litigation is involved.\textsuperscript{19} The privilege is indispensable to the operation of the legal system.\textsuperscript{20} Confidentiality is an underlying cause and a primary feature of the solicitor-client privilege.

While there is more to be said about the relationship between privilege and confidentiality, pausing here, it is already apparent that the relationship is subtle and complex. Sometimes confidentiality is the effect of the privilege; sometimes confidentiality is the cause or reason for the privilege. Confidentiality, however, does not by itself cause or create privilege;\textsuperscript{21} confidentiality is rather an element in the law of privilege, which alone governs when evidence may be suppressed. There must be something more than confidentiality to justify interfering with the public policy that the administration of justice requires the disclosure of relevant evidence to the adjudicator who is engaged in a search for truth and a just result. In \textit{R. v. Gruenke},\textsuperscript{22} the Supreme Court of Canada recently reiterated that privilege is a narrow concept and that the fundamental first principle is that relevant evidence is admissible and there must be a compelling overriding social concern or judicial policy to justify excluding relevant evidence.

That confidentiality is insufficient by itself to establish privilege is shown by the case law about confidential relationships of a type other than solicitor-


\textsuperscript{19} Greenough v. Gaskel (1833), 1 My. & K. 98, 39 E.R. 618 (Ch.).


\textsuperscript{22} Supra, footnote 20, at pp. 288, 296 (S.C.C.), 305, 310 (C.C.C.).
client. For example, communications between doctor and patient, priest and penitent, financial adviser and client, newspaper reporter and informant, while confidential, are not recognized as privileged. And while the law of equity has a general jurisdiction governing those in confidential relationships or those receiving confidential information, this jurisdiction is not determinative of the recognition of a privilege.

In Slavutych v. Baker, the facts of which will be discussed below, the Supreme Court of Canada generalized the idea of privileged communications by setting out the determinative elements. The court recognized the criteria from Wigmore, the leading American treatise on evidence. Wigmore’s criteria were: (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 relationship between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation. What is most important to note for present purposes is that Wigmore’s criteria confirm that while an element of privilege, confidentiality is insufficient by itself to establish privilege; confidentiality is tied to other factors and the public policy supporting the disclosure of probative and relevant evidence is entrenched in the criteria. For present purposes, it is also important to note that these criteria are satisfied for solicitor-client relationships and they may be satisfied for other relationships.

In Canada, privilege is, in part, a matter of substantive law. This point was stated in Descôteaux v. Mierzwinski, where, as already noted, the exclusionary effect of solicitor-client privilege was held to extend to the search for documents under the authority of a search warrant. Here, privilege

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26 Supra, footnote 4.
29 Supra, footnote 5.
was given effect before trial. In the case, the document sought to be seized in a lawyer's office was privileged—in part. This result followed because part of the document was classified within an exception to the general rule protecting solicitor-client communications; communications in furtherance of a fraud or a criminal act are not privileged. It was alleged that the client had lied about his financial means to obtain the social benefit of legal aid. The part of the seized document about his financial means was not privileged and could be seized; the part containing the lawyer's professional notes was privileged and protected from disclosure.

As a matter of principle, the Supreme Court of Canada in Descôteaux stated that a client had a fundamental civil and legal right to have communications with his or her lawyer kept confidential. The court stated that the solicitor-client privilege was rooted in confidentiality. It noted that privilege first emerged as a right that operated to exclude evidence at trial, but privilege came to be recognized as a substantive right that gave rise to preventive or curative remedies. Lamer J., who gave the judgment for the court, stated:

Thus a lawyer who communicates a confidential communication to others without his client's authorization could be sued by his client for damages; or a third party who had accidentally seen the contents of a lawyer's file could be prohibited by injunction from disclosing them.

Lamer J. then added a comment by footnote:

I am dealing here generally with the effects of the right to confidentiality. In its present state, the rule of evidence ... would not prohibit a third party from making such a disclosure.

With some explanation, this quotation and its footnote are important to understanding the significance of both the Descôteaux and the Royal Bank decisions. There are four points of explanation. The first point is that the Descôteaux case involved solicitor-client privilege; as we will see, the Royal Bank case involves litigation privilege. The second point is that Lamer J.'s discussion about the remedial weakness of the rules of evidence appears to be an allusion to the Calcraft v. Guest line of authorities, which support the proposition that inadvertently disclosed or surreptitiously obtained documents lose their privilege. The third point is that his discussion about the remedial strength of actions against solicitors and third parties appears to be an allusion to the Ashburton (Lord) v. Pape line of cases or to

34 Supra, footnote 6.
36 Supra, footnote 7.
Slavutych v. Baker,\textsuperscript{37} where equity’s jurisdiction to control breach of confidence alleviated the deficiencies of the rule of evidence. The fourth point is that Descôteaux does not provide any guidance about whether there were any limits on the application of remedies from equity’s jurisdiction.

Looking at these points in more detail we can begin with Calcraft v. Guest,\textsuperscript{38} a case, as seems typical of the cases in this area of the law, whose facts were odd. The plaintiff owned a river fishery, the boundaries of which were disputed. He successfully sued Mrs. Drax for trespass, and she appealed. In 1897, while her appeal was pending, her former solicitor, a Mr. Barlett, discovered among the papers of his late uncle, who had been a solicitor, the papers of his late grandfather, who had been a solicitor, and among the grandfather’s papers were documents about a case tried 110 years earlier. In the old case, the grandfather had acted for a predecessor in title to the plaintiff; the predecessor had unsuccessfully relied on the boundaries of the fishery in defence of an action for assault. Mr. Barlett gave the documents to Mrs. Drax’s solicitors and not to the solicitors acting for the plaintiff, although they ultimately obtained the documents. When Mrs. Drax wished to use in her appeal copies of the documents that her solicitors had made, the plaintiff objected on the grounds that the copies were privileged. The English Court of Appeal was asked to rule on the issue.

It seems to have been conceded that the plaintiff was entitled to assert the old privilege of his predecessor in title, but the Court of Appeal held that Mrs. Drax could tender copies of the documents as secondary evidence of the originals. Lindley M.R. gave the judgment for the court. He held that there had been no waiver of the privilege. Then, he applied the authority of Lloyd v. Mostyn\textsuperscript{39} in which, during argument, Parke B. commented as follows:

Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?

So while not cited, it is the authority emanating from Calcraft v. Guest that underlies Lamer J.’s comments in Descôteaux about the weaknesses of the rules of evidence in protecting the confidentiality of a privileged communication once it was revealed to a third party.

In Ashburton (Lord) v. Pape,\textsuperscript{40} Lord Ashburton opposed the discharge from bankruptcy of Pape. During the bankruptcy proceedings, Pape served a subpoena requiring a Mr. Brooks to produce for the court letters written

\textsuperscript{37} Supra, footnote 4.

\textsuperscript{38} Supra, footnote 6.

\textsuperscript{39} (1842), 10 M. & W. 478, at pp. 481-482, 152 E.R. 558, at p. 560 (Exch.).

\textsuperscript{40} Supra, footnote 7.
by Lord Ashburton to his solicitor Mr. Nocton. Brooks was Nocton's clerk, and, while in court to deliver the letters, he complained of not feeling well, handed over the letters to Pape, and left. Pape's solicitors made copies of the letters. Then, in separate proceedings, Lord Ashburton sued for an injunction restraining the use of the documents and moved for an interlocutory order for the return of the original documents, which were admitted to be privileged. He was successful, but the order allowed the copies to be used in the bankruptcy proceedings.

Lord Ashburton appealed. The Court of Appeal allowed the appeal and did so while maintaining the authority of Calcraft v. Guest. The reasoning of the court went along the following lines. As a matter of the law of evidence, there is no objection to the production of a surreptitiously obtained document because how a document is obtained does not go to the admissibility at trial of the document. However, as a matter of equity's jurisdiction to restrain a breach of confidence, the use of a surreptitiously obtained document could be restrained. Lord Ashburton by his separate proceedings was invoking this equitable jurisdiction and was entitled to the protection he sought. The practical result of Ashburton (Lord) v. Pape was that it provided the way to remedy the deficiencies of Calcraft v. Guest, if a party was aware and astute enough to bring an action in equity.

Slavutych v. Baker presents problems to understanding the connections among the rule of evidence, the role of equity, and the idea of confidentiality. The facts were that an arbitration board recommended that Professor Slavutych be dismissed from the faculty of the University of Alberta because he had written unsubstantiated allegations against a colleague. Slavutych's allegations appeared in a written form that he had been asked to complete as part of the university's procedure to consider tenure for the colleague. Professor Slavutych had been told that his response was confidential. In proceedings that worked their way to the Supreme Court of Canada, Professor Slavutych sued to set aside the decision of the arbitration board.

In the Supreme Court of Canada, Spence J. wrote the judgment for the court. He stated that if the case was considered as a question of privilege, then, by applying Wigmore's criteria, the evidence of the tenure form should have been ruled inadmissible. Spence J. stated:

I would, therefore, be of the opinion that considering this matter only an evidentiary one and under the doctrine of privilege as so ably considered in Wigmore the confidential document should have been ruled inadmissible. Any charge based thereon would, therefore, have failed.

41 It is interesting to note that on the appeal, Pape did not appear and the counsel acting for his solicitors took no part in the argument.

42 Supra, footnote 4.

43 See the text, supra, p. 76.

Although, technically speaking, Spence J.’s conclusion here was *obiter dicta*, as evidenced by his use of subjunctive language and by the fact that he went on to decide the case expressly not as a matter of privilege but as an application of equity’s doctrine of breach of confidence, *Slavutych v. Baker* has been accepted as endorsing the Wigmore criteria for the recognition of new privileges on a case-by-case basis. Since, as already noted, Wigmore’s criteria do not purport to make confidentiality the sole basis for privilege, this acceptance does not cause any problem in relating privilege and confidentiality. However, it has been pointed out that the difficulty posed by *Slavutych v. Baker* is that by applying equity’s doctrine of breach of confidence, the court appeared to allow confidentiality alone, that is, without the other factors necessary for a privilege, to operate to exclude evidence. This leaves the impression that confidentiality alone may establish a privilege.

This impression is incorrect; Spence J. did not purport to link privilege with equity’s jurisdiction over breaches of confidence. Rather, in this case, equity operated independently to stop the university from using the evidence against Professor Slavutych. It was only coincidental that confidentiality was an element of both the rule of evidence and the doctrine of equity. To illustrate, the court arguably could have arrived at the same result by concluding that the university was estopped from using the tenure form against Professor Slavutych. The court would then have used a doctrine with roots in both the common law and equity to produce the same effect as privilege, but this does not mean that privilege is linked to estoppel. Or, if the facts were varied slightly, the court could have concluded that the university could not use the tenure form against Professor Slavutych as a matter of contract, but this would not mean that privilege is linked to contract.

This returns the discussion to *Descôteaux v. Mierzwinski* where a connection is made between privilege as a rule of evidence and equity’s jurisdiction to control confidential relationships. While not cited, it is likely the authority emanating from *Ashburton (Lord) v. Pape* or the impression from *Slavutych v. Baker* is the source of this idea. This connection is genuine in pointing out that confidentiality is an element of the rule of evidence and of the doctrine of equity. It is genuine where it employs the remedial aspects of equity’s jurisdiction with the law of privilege and thus removes the need for separate proceedings in equity to protect the privilege. It is

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47 *Supra*, footnote 5.
not genuine where it suggests that the law of confidentiality alone will establish a privilege.

The Royal Bank of Canada v. Lee and Fishman

Leaving aside for the moment the thread represented by the Newbold article, this brings the discussion to the details of the Royal Bank case. The facts were that upon the application of the Royal Bank, a receiver had been appointed to manage two corporations. After the appointment, the receiver discovered documents that may have been fraudulently altered by a shareholder of one of the corporations. The receiver met with a Bank official and with the solicitor who was acting for both the bank and the receiver. The receiver reported the possible fraud, and the solicitor asked the receiver to prepare a report about the failure of the former auditor of the corporation to detect the fraud. An action for auditor’s negligence followed, and, during the action, a copy of the receiver’s report was inadvertently produced and given to the solicitor defending the auditor. Commendably, the solicitor asked whether a mistake had been made, and he agreed not to disclose the letter’s contents until the court ruled about whether the letter was privileged and, if privileged, whether the privilege had been waived or otherwise lost. The chamber’s judge ruled that the report was not privileged. The Court of Appeal disagreed and held that the report was prepared in anticipation of the Bank suing the auditor for negligence; the letter attracted litigation privilege. The court noted that it was not clear whether the solicitor-client privilege was engaged, that is, whether the letter was part of legal advice given to the Royal Bank. The Court of Appeal held that there was no waiver by the Bank of its privilege. Finally, the court rejected the argument that the privilege was otherwise lost; it stated:

Counsel for the respondent ex-auditor properly argues that waiver is not the only issue. She suggests that privilege might be lost without intentional waiver, citing older Canadian authority, and English cases. They do say that, but at one time privilege was thought to be a mere rule of evidence, a ground to resist a subpoena, and not a rule of property or other substantive law. As noted, that is no longer the law in Canada. Descôteaux v. Mierzwiniski itself was a case on custody already lost by seizure. Therefore, older cases saying that privilege is lost when a document is dropped on the street, or when a non-parties steals its, seem very doubtful in Canada today. The recent English cases cited by both parties draw very fine distinctions as to when the equitable protection for confidences will prevail over a loss of privilege in that way.

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49 Loc. cit., footnote 3.

50 Wilson J.’s reasons turned on the fact that the receiver was an officer of the court which necessitated that the report not be concealed from some parties to the litigation. The Court of Appeal viewed the facts differently.


52 Supra, footnote 1, at p. 204.
Those English cases conflict. But as Canada has abolished the old rules on loss of privilege, we need not draw those distinctions. There is no such conflict in Canada, because mere physical loss of custody does not end privilege automatically. To put it another way, privilege and confidentiality have merged in some areas in Canada, but appear distinct in England. Newbold's article[53]...seeks to distinguish Descôteaux as based on Quebec legislation, but we do not read the case that way. It relied on a previous Supreme Court of Canada appeal from Ontario and a decision of the Alberta Court of Appeal.

In this passage, the court quickly rejects the Newbold article. To understand the Royal Bank case, it is necessary to describe more particularly what the court was rejecting. In his article, Newbold argues that confidentiality and privilege operate totally separately. To make this argument, Newbold has to distinguish Descôteaux v. Mierzwinski,54 which connects privilege and equity's control of breach of confidence, and he has to assert that the English Law Reform Commission, the leading text writers, several academics, and a long list of judges have failed to understand the distinction between the operations of privilege and confidentiality.

Putting aside the merits of his argument, it may immediately be said that Newbold's reading of Descôteaux is perverse and the Alberta Court of Appeal was correct in rejecting his reading. The Supreme Court of Canada in Descôteaux does not mention the Quebec legislation advanced by Newbold as a distinguishing element, and, as noted by the Alberta Court, Lamer J. in Descôteaux clearly was treating privilege as a substantive matter of the general law of Canada.

On its merits, Newbold's argument is that while both privilege and confidentiality operate to prevent disclosure, privilege operates only to prevent compelled disclosure of evidence. Once a matter is disclosed, then the work of the law of privilege is at an end and the law of confidence only may operate. This view of privilege as a legal Humpty Dumpty that cannot be put back together follows from his definition tying privilege to compelled disclosure, but this definition understates the operation of privilege, which has a role to play even if there has been disclosure; it is the role of the law of privilege to provide the theory to justify why disclosed information still may not be used by the adjudicator. If there is disclosure, it is the role of the law of confidentiality to provide a remedy to protect the privilege by restoring the status quo. So, the Alberta Court rejects the idea that the laws of privilege and confidentiality operate totally separately.

In the above passage, the court redresses what Professor Vaver has described as the unsupportable doctrinal cleavage between enjoinability (the law of confidence) and admissibility (the law of evidence).55 Remedies from

54 Supra, footnote 5.
55 Vaver, loc. cit., footnote 23, at pp. 342-44.
equity's breach of confidence may be applied to maintain or restore privilege. However, beyond the introduction of equitable remedies, it is an overstatement to assert that privilege and confidentiality have merged. They are associated ideas, but they remain separate, although not as separate as Newbold would have it. Indeed, in its methodology in the Royal Bank case, the Alberta court applied the remedies from the law of confidence only after having determined that there was a privilege and that the privilege had not been waived. This was also the approach of Lamer J. in Descôteaux. So, first it is for the law of privilege to decide whether the use of the evidence should be suppressed and, as already noted above, confidentiality by itself does not establish the right to the privilege.

It appears from the above passage that once the claim of privilege has been established and it has been shown that disclosure was inadvertent or surreptitious, then the equitable remedy that would enjoin the use of the privileged information is to be applied automatically. That this was the court's intent emerges from the court's comments about the substantive nature of the privilege, its rejection of Newbold's article, and its rejection of the fine distinctions said to be drawn in English cases. Once the privilege is established, equity's remedial assistance is to be readily available.

By way of contrast, in England the recent decisions have struggled over whether there is a limit to equity's ability to restore the status quo when the contents of the privileged documents are known. In the English cases of Guinness Peat Properties Ltd. v. Fitzroy Robinson Partnership and Derby & Co. Ltd. v. Weldon (No. 8), the English Court of Appeal considered the significance of the contents becoming known and accepted that disclosure had an effect on equity's power to protect the privilege. The court rejected a rule that where there was disclosure, the availability of equitable relief should be determined by balancing the importance of the privilege with the importance of the disclosed document. Instead, the court adopted a rule that would deny equitable relief after the documents had been inspected, unless the party making the inspection had acquired the documents fraudulently or knew or ought to have known that a mistake had been made because the documents were obviously privileged.

There are practical problems to the English approach, entailing as it does an examination of not only the claim for privilege but also the claim's conspicuousness. The English approach also seems to overvalue the detriment suffered by a party with knowledge that he or she cannot use. This detriment

56 This issue of limits to equity's capability was not a problem in Descôteaux v. Mierzewinski, supra, footnote 5, and was not discussed in that case because the document seized under the authority of a search warrant was placed in a sealed envelope until the claim for privilege could be adjudicated.


is already present in the case of the privilege for without prejudice communications and does not prevent the operation of the privilege. And the problem is a routine one for judges and lawyers, who already have experience in the intellectual skills required to deal with it; for example, they often are called on to ignore evidence by doctrines such as estoppel or, in the criminal law context, by the evidentiary rules about the voluntariness of confessions and by the application of the Charter of Rights and Freedoms\(^9\) to exclude illegally obtained evidence.

By rejecting the English approach, it seems that the Alberta court aimed to avoid any approach requiring a third step to the analysis after findings of privilege and no waiver. If this conclusion about the aim of the court is correct, then it provides further proof that it is an overstatement to assert that privilege and confidentiality have merged and it has significant theoretical and practical consequences. For example, the approach that equity’s remedies should be readily available would mean that equitable defences such as laches or acquiescence are unimportant and delay in moving to restore the privilege is not an obstacle to obtaining relief, although delay might be relevant to the earlier issue of whether the privilege was waived. If privilege and equity’s protection of confidentiality were genuinely merged then arguably equitable defences would become relevant.

It seems also that the Alberta court aimed to avoid any approach distinguishing the various types of privilege. As already noted, in Descôteaux, the equitable remedy was called in aid of solicitor-client privilege; here the aid is for litigation privilege. This general availability of equitable relief is significant because, as already noted, litigation privilege excludes from evidence communications that may not be confidential and this exclusion is justified by the needs of the adversary system. Thus, it could perhaps be argued that if the adversary knows about the evidence, the rationale for its exclusion is gone. The Alberta court, however, was aware that it was dealing with litigation privilege, and there is no suggestion in its judgment that the type of privilege should make a difference to the availability of equitable relief.

Since it is during the management of the substantial paper flow of modern litigation and particularly during the procedures for discovery of documents when the inadvertent disclosure of privileged documents is most likely to occur, the result of all this is a fortunate development for litigation lawyers and their insurers. The theoretical and practical significance of The Royal Bank of Canada v. Lee and Fishman to the law of privilege is as important for solicitors as for clients.

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\(^{9}\) Constitution Act 1982, Part I.

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The Supreme Court of Canada's judgment in Machtinger v. HOJ Industries Ltd.1 was initially heralded by the plaintiffs' employment bar as a "pro-employee" decision; The Lawyers Weekly noted "...the court's reasons could have highly positive implications for employees".2 I take a much less sanguine view. HOJ Industries is something of a paradox—a decision that seemingly invigorates employee rights may be a harbinger of the ultimate derogation of an important employee perquisite, namely, the doctrine of "reasonable notice".

The Facts

In most respects, HOJ Industries was a "run-of-the-mill" wrongful dismissal case; the appellants, Lefebvre and Machtinger, sought damages for breach of their respective employment contracts. Both appellants were hired in 1978 and fired on June 24, 1985; at the time of their dismissals, each was employed in a managerial position (Machtinger was the credit manager; Lefebvre, the sales manager) with HOJ Industries Limited (a new and used car dealer). HOJ Industries Limited did not plead "just cause" by way of defence; accordingly, the only issue before the trial court3 was the former employees' entitlement to severance pay. It is at this point that the case strays from the well-trodden path.

In mid-January of 1985 Machtinger and Lefebvre executed written employment contracts of indefinite duration, each containing the following termination clause:

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3 Unreported, Ontario Supreme Court, Hollingworth J., April 9, 1988, 6 A.C.W.S. (3d) 350.
Termination—Employer may terminate employment at any time without notice for cause. Otherwise, Employer may terminate employment on giving Employee _______ weeks notice or salary (which does not include bonus) in lieu of notice. Bonus, if any, will be calculated and payable only to the date of the giving of notice of termination.

Machtinger's contract provided for "0" weeks' notice while Lefebvre's contract called for "two" weeks' notice. However, under section 40(1)(c) of the Ontario Employment Standards Act, the appellants were entitled to not less than "... four weeks notice in writing". In Ontario, and elsewhere, employment (or labour) standards legislation establishes minimum standards; "contracting out" is not permitted unless the effect is to give an employee a greater benefit than provided under the employment or labour standards law. Because the termination clause was "null and void" (at least with respect to the notice provision), the employer paid to each of the appellants the equivalent of four weeks' salary in lieu of notice. The appellants claimed that while four weeks' notice may have met the employer's minimum statutory obligation, they were entitled to substantially greater severance pay under the common law.

Thus, the issue before the Supreme Court of Canada (paraphrasing Iacobucci J.) was simply: "Where an employment contract specifies a notice period less than that prescribed by

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5 Such notice provisions are a standard feature of Canadian employment law. Every Canadian jurisdiction establishes minimum notice provisions in a general employment or labour standards law; notice periods can range from two weeks to a maximum of (typically) eight weeks. The various federal and provincial entitlements are set out in Employment Standards Legislation in Canada, Ottawa, Ontario: Labour Canada, 1991, pp. 97-105.
6 Employment Standards Act, supra footnote 4, s. 4(1).
7 Ibid., ss. 3 and 4(2).
8 Ibid., s. 3.
10 Supra, footnote 1, at pp. 990 (S.C.R.), 497-498 (D.L.R.).
employment standards legislation, is the employee entitled to "reasonable notice", or the statutory minimum?"

The Lower Courts

At trial, the employer argued that even though the express notice provisions were null and void, these provisions could nevertheless be taken into account as evidence of what the parties themselves viewed as "reasonable".\textsuperscript{11} Hollingworth J. rejected this submission because the express notice provisions were "unconscionable", holding that Machtinger was entitled to seven months' notice, and Lefebvre to seven and a half months' notice.

The employer fared much better in the Ontario Court of Appeal.\textsuperscript{12} Howland C.J.O., for the court, held that while the express notice provisions contained in Machtinger and Lefebvre's employment contracts were null and void, these provisions did constitute "evidence...as to the prior dealings between the parties...represent[ing] the agreement of the parties"\textsuperscript{13} (that is, neither employee would be entitled to reasonable notice on termination). Accordingly, the appeal was allowed and the employer's notice obligation was fixed at the statutory minimum (that is, four weeks).

The Supreme Court of Canada

The Supreme Court of Canada unanimously concluded that in the absence of express lawful notice provisions, employees are entitled, on termination, to "reasonable notice", not merely the minimum statutory notice set out in an employment or labour standards law.\textsuperscript{14} While this decision seemingly benefits employees, it may, paradoxically, serve as a catalyst to substantially limit employees' rights to reasonable compensation upon termination.

Iacobucci J.'s majority opinion proceeded on the premise that the "reasonable notice" doctrine is nothing more than a contractual presumption "...rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly".\textsuperscript{15} Because the express notice provisions contained in the appellants' employment contracts were, by virtue

\textsuperscript{14} Iacobucci J. (joined by La Forest, L'Heureux-Dubé, Sopinka, Gonthier, and Cory J.J.) wrote the principal opinion; McLachlin J. concurred in the result but disagreed with her colleagues on the issue of whether or not the parties' contractual intentions concerning a matter of law (that is, proper notice of termination) rather than of fact, were relevant (see McLachlin J., supra, footnote 1, at pp. 1008 et seq. (S.C.R.), 494 et seq. (D.L.R.)).
\textsuperscript{15} Ibid., at pp. 998 (S.C.R.), 503 (D.L.R.).
of the Employment Standards Act, null and void, these provisions could not stand as “evidence of the parties’ intention”. According to Iacobucci J., “[i]f the intention of the parties is to make an unlawful contract, no lawful contractual term can be derived from their intention”. In the absence of any properly admissible evidence regarding the parties’ contractual intention, the normal presumption of “reasonable notice” should be implied.

Iacobucci J. also found support for his decision under the rubric of “public policy”. Referring to the “supra-contractual” nature of employment enunciated by Dickson C.J.C. in the Alberta Reference, namely, that “[a] person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being”, Iacobucci J. held that, concomitantly, “the manner in which employment can be terminated is equally important”. Relying on the mandate of the Ontario Interpretation Act to liberally and remedially interpret provincial statutes, Iacobucci J. held that when express contractual notice provisions fall below statutory minimums, common law “reasonable notice” provisions will apply.

The Demise of “Reasonable Notice”?

From an employee’s perspective, the one troubling aspect of HOJ Industries is the clear implication that an employment contract may contain a notice provision that, in effect, transforms the statutory “floor” into a “ceiling”: Absent considerations of unconscionability, an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the [Employment Standards] Act or otherwise take into account later changes to the Act or to the employees’ notice entitlement under the Act. Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice.

As Iacobucci J. quite rightly noted earlier in his opinion, one desideratum of employment standards legislation is the attenuation of the

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16 Ibid., at pp. 1001 (S.C.R.), 506 (D.L.R.).
17 Ibid.
20 Supra, footnote 1, at pp. 1002 (S.C.R.), 507 (D.L.R.).
21 R.S.O. 1980, c. 219, s. 10. (See now R.S.O. 1990, c. 1.11).
employer's superior bargaining power. Presumably, employers are now free to offer employment contracts incorporating minimum statutory notice provisions on a "take it or leave it" basis; undoubtedly, most employees will, in the absence of substantial bargaining power, begrudgingly accept the employer's terms. While this option has always been open to employers, if a limited notice provision (that is, a minimal liquidated damages clause) was, in essence, imposed on the employee by virtue of his or her "inequality of bargaining position", then the clause could be held unenforceable as constituting a "penalty clause". Thus, the notion of "freedom of contract" was abrogated, to some degree, in favour of employees.

Some may argue that employees need not fear because the "unconscionability" defence was specifically reserved. But it would appear that "unconscionability" is not to be addressed by comparing express contractual notice periods to the period of "reasonable notice" that would otherwise be fixed under the common law. In the instant case, "reasonable notice" was assessed at seven and seven and a half months' notice for Machtinger and Lefebvre, respectively—neither the Ontario Court of Appeal, nor the Supreme Court of Canada took issue with those assessments. Pursuant to section 40(1)(c) of the Ontario Employment Standards Act, the appellants were entitled to only four weeks' notice. Neither the Ontario Court of Appeal nor the Supreme Court of Canada suggested that the statutory notice, representing as it did about 12.7% (Machtinger) and 13.6% (Lefebvre) of "reasonable notice" at common law, was therefore "unconscionable". Iacobucci J. at least impliedly accepts (contrary to the trial judge, Hollingworth J.), that two weeks' notice (Lefebvre) or even no notice (Machtinger) was not "unconscionable".


Supra, footnote 23.

Supra, footnote 4.

These percentages were calculated as follows: Machtinger: 4 divided by [7.5 x 4.2] = .127; Lefebvre: 4 divided by [7 x 4.2] = .136.

Supra, footnote 1, at pp. 993 (S.C.R.), 499 (D.L.R.).
Iacobucci J. specifically noted that employment standards laws fix what the various provincial legislatures "... deem to be fair minimum notice periods" and that the underlying purpose of these laws "... is to ensure that employees who are discharged are discharged fairly". The ratio decidendi is stated in these terms: "[W]here an employment contract fails to comply with the minimum notice periods set out in the [Employment Standards] Act, the employee can only be dismissed without cause if he or she is given reasonable notice of termination." Concomitantly, when the employment contract mandates a notice period that complies with the applicable employment standards legislation, no further notice obligation arises. Such a provision is not "unconscionable" no matter how far short it may fall of "reasonable notice" at common law. Nor is it now apparently relevant that the "statutory notice" limitation in the employment contract was "negotiated" in circumstances where the employee faced an "inequality of bargaining position" vis-à-vis the employer.

Employers who are concerned about minimizing their potential liability for severance pay need only ensure that all non-unionized employees' contracts provide that notice of termination will be governed by prevailing labour or employment standards legislation. The legacy of HOJ Industries may be that a case purporting to advance employer rights may in time serve to substantially limit employee rights.

Not all employees will be adversely affected by the fallout from HOJ Industries. Some employees, due to their particular advantages in the labour market, will be able to bargain for substantially better notice terms than are typically established by employment standards legislation. Unionized employees will continue to be protected by collective bargaining agreement provisions that provide for reinstatement in the case of unjust dismissal.

31 Ibid.
32 McLachlin J., ibid., at pp. 1013 (S.C.R.), 497 (D.L.R.), apparently adopts the same view: "Since there is no contrary agreement here, the Act having rendered what contrary agreement there was null and void, the reasonable term of notice implied by the law is not displaced and will be imposed by the court." The corollary is that an express "contrary agreement" (that is, an agreement complying with the Employment Standards Act) would be enforced by the court.
33 Unionized employees (representing about one third of the nonagricultural workforce), because of their relative bargaining strength compared to most nonunion employees, may fare better. Empirical evidence suggests that many, but not all, collective agreements contain severance pay provisions that, while generally less favourable than the common law, nonetheless exceed minimum standard notice requirements; see Thornicroft, loc. cit., footnote 9, at n. 7 & 8.
34 For example, Jobber v. Addressograph Multigraph of Canada Ltd. (1980), 1 C.C.E.L. 87 (Ont. C.A.).
35 A limited class of non-union employees may also be reinstated in the event of an unjust dismissal if they fall within the relevant provisions of the Canada Labour Code or the labour standards laws of the provinces of Nova Scotia and Quebec; see Thornicroft, loc. cit., footnote 9, at n. 12-18.
However, an entire class of nonunionized lower- and middle-level employees (the very employees that Iacobucci J. specifically recognized as being most in need of protection)\textsuperscript{36} may see their right to reasonable notice of termination gradually, but inevitably, eroded.\textsuperscript{37}

Has the Supreme Court of Canada unwittingly given employers the tool to dismantle the long-standing “reasonable notice” doctrine? Only time will surely tell.

* * *

STARE DECISIS—QUEBEC COURT OF APPEAL—AUTHORITY V. PERSUASIVENESS: Lefebvre c. Commission des affaires sociales

Alison Harvison Young*

Introduction

In a recent decision of the Quebec Court of Appeal, Lefebvre c. Commission des affaires sociales,\textsuperscript{1} a judgment written by Vallerand J.A. purported to apply the doctrine of \textit{stare decisis} to resolve the contradiction between two previously decided cases of that court. In so doing the judgment is understandably likely to attract the ire of civilians who would reject the application of such foreign doctrines in Quebec. Less likely to attract attention is the fact that the judgment rests on shaky grounds even as an application of the most strict version of \textit{stare decisis}. In addition, the judgment ignores

\textsuperscript{36} \textit{Supra}, footnote 24.

\textsuperscript{37} This erosion, at least in British Columbia, preceded (foreshadowed?) \textit{HOJ Industries: cf. Pelech v. Hyundai Auto Canada Inc.} (1991), 92 C.L.L.C. 12, 175 (B.C.C.A.), where the appeal court overturned a four month notice award to an “unskilled labourer” in favour of the statutory minimum four weeks.

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I am grateful to Patrick Glenn, Patrick Healy, Rod Macdonald and Stephen Perry for their helpful comments.

\textsuperscript{1} (1991), 39 Q.A.C. 206, [1991] R.J.Q. 1864. All judges (Vallerand, Tourigny and Baudouin JJ.A.) concurred in the result, but Baudouin J.A. (with whose reasons Tourigny J.A. concurred), wrote separate reasons in which he declined to decide the case on the basis of \textit{stare decisis}. 
shifts and nuances which have taken place in recent years with respect to the treatment of decided cases in both common law and civil law. Most significantly in this respect the judgment treats the concept of binding decisional authority as one which precludes consideration of a broader range of justificatory reasons for subsequent judicial decisions.

A full discussion of the nature of *stare decisis* is beyond the scope of this comment. It should nevertheless be stated at the outset that the doctrine has carried rather different meanings. Under the first conception of *stare decisis*, a subsequent court is bound to follow the earlier decision, and is precluded from reconsidering the reasons for that decision. In this sense *stare decisis* operates as a rule which excludes any other reasons for decision from consideration. This conception, which I will refer to as the strict understanding of *stare decisis* is the one which prevailed in the House of Lords until the 1966 Practice Statement. It is also this conception which Vallerand J.A. seems to have applied in his judgment in *Lefebvre*.

Under a second conception of *stare decisis* a court is generally bound by a previous decision but is not precluded from considering or reconsidering the reasons for that decision. In effect, the existence of the previous decision becomes just one reason—albeit a weighty one—to be considered among others. Accordingly, the possibility of reaching a different result in a subsequent decision is open. This conception and its variants are reflected in the modern application of *stare decisis* in England and elsewhere in the

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4 This corresponds to the first mode of practical reasoning set out by J. Raz, *Practical Reason and Norms* (1975), chapters 4-5, according to which a rational actor makes a decision by assessing the total weight of the various reasons that favour each alternative course of action, and then acts upon that alternative which has the greatest overall support. The reasons which make up this mode are called first-order reasons. See also Perry's discussion of Raz, *ibid.*  

5 Raz, *ibid.*  

6 R. Dworkin, *Law's Empire* (1986), p. 24, uses the term "strict" to describe the doctrine of precedent which obliges judges to follow the earlier decisions of certain other courts even if they believe those decisions to have been wrong. He uses the term "relaxed" to describe the doctrine of precedent which requires only that a judge give some weight to past decisions and must follow them unless he or she is of the view that they are so wrong that the initial presumption in their favour is outweighed.  


8 It should be noted that there are variants of this second conception; see Perry, *loc. cit.*, footnote 3, at pp. 221-223.
common law world. I will refer to this, using Dworkin's term, as the “relaxed” doctrine of precedent. A key distinction between the two conceptions is that the former treats *stare decisis* as a *rule* while the latter treats it as a *reason* based on the principle which values consistency and predictability.

*Stare Decisis in Quebec and Beyond*

A. **The Facts**

*Lefebvre c. Commission des affaires sociales* arrived at the Court of Appeal by way of an appeal from a Superior Court decision which dismissed an application for evocation from a decision of the Commission des affaires sociales. The Commission had denied Mr. Lefebvre's claim for workers' compensation on the grounds that his illness had not been work-related. Mr. Lefebvre had suffered a heart attack while on the job, but the evidence indicated that he had a pre-existing heart condition and that the attack in question could have happened anywhere. The Superior Court denied Mr. Lefebvre's application for evocation, holding that the Commission's decision had been “juste”. On appeal to the Court of Appeal, Mr. Lefebvre claimed that in determining that his heart attack did not arise from a work-related accident, the Commission had committed a jurisdictional error. The Commission, on the other hand, argued that this question was one falling entirely within its competence and could only be reviewed in the case of unreasonableness. Even if it had been wrong on the question of whether the heart attack constituted a work-related accident, the Commission argued, the matter was entirely within its jurisdiction and was therefore not subject to review unless it had committed an unreasonable error.

The central substantive question before the Court of Appeal then, was whether the Commission was to be held to a standard of correctness, as the issue related to its jurisdiction, or whether it was only required to attain a standard of reasonableness on the basis that the issue was one falling entirely within the jurisdiction of the Commission. Administrative lawyers will recognize the issue as one which Canadian courts have struggled with.

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9 See Perry, *ibid.*, at p. 247.
10 See Dworkin, *op. cit.*, footnote 6.
11 *Supra*, footnote 1.
12 Art. 846, Code of Civil Procedure. This remedy is comparable to review in the nature of *certiorari* or prohibition elsewhere in Canada: see R. Dussault and L. Borgeat, Administrative Law (2nd ed., 1990), Vol. 4.
14 “La Commission des affaires sociales... [prétend qu'il s'agit] d'une question 'intra-jurisdictionnelle' qui ne relève de sa compétence et qui ne saurait être réformée qu'en cas d'erreur 'déraisonnable'.”; *supra*, footnote 1, at pp. 210 (Q.A.C.), 1867 (R.J.Q.).
in recent years. The question of the role of judicial review in the modern regulatory state is an important and difficult one. Canadian law has reflected a great deal of uncertainty and tension between what one might call the classic Diceyan heritage on one hand, and the attempt on the other to reconcile the role of courts with the increasingly complex regulatory state which entrusts a vast number of matters to specialist agencies. While it is fair to say that courts generally recognize that they should show some deference to the determinations of administrative boards and tribunals, the parameters remain very much in flux. Space does not permit an examination of this issue here, but it is important to note that the very issue before the Court of Appeal in Lefebvre—whether the Commission was to be held to a standard of correctness or just reasonableness—is an issue which may be seen as a microcosm of the larger debate. The standard of correctness, of course, is associated with a much broader scope for judicial intervention and reinforces the traditional view that the ordinary courts are best suited to arrive at the “right” answer to a given issue. The reasonableness standard, on the other hand, explicitly recognizes that there may be legitimate answers to questions which are not those that the reviewing court might have reached. This test reflects and reinforces the idea that administrative bodies should normally be deferred to and recognized as best suited to rendering the sorts of decisions entrusted to them. The critical point, then, is that the choice between a reasonableness standard and a correctness standard is not merely a formal or trivial one, but rather a choice reflecting the very essence of the role of the judiciary in a rapidly evolving and increasingly regulatory state.

In deciding which standard to apply to the Commission determination in the case at bar, the Court of Appeal found itself with two precedents on the same issue which came to contradictory conclusions on the very point. In Labelle c. C.T.C.U.M., the Quebec Court of Appeal had held that in deciding erroneously that the worker’s accident was not an “accident de travail” within the meaning of the Loi sur les accidents du travail, the Commission des affaires sociales had committed a jurisdictional error.


For a discussion of this, see A. Harvison Young and R.A. Macdonald, Canadian Administrative Law on the Threshold of the 1990s (1991), 16 Queen’s L.J. 31.

(1987), 18 Q.A.C. 277 (C.A.). This case was heard by Monet, McCarthy and Malouf J.J.A., with reasons given by Monet J.A.

Four years later, in *Canada Steamship Lines c. Antenucci*, the same court held that the standard of review was one of reasonableness, stating that *Labelle* and the earlier decisions on which it was based “s’harmonisaient mal avec la jurisprudence développée par la Cour suprême, particulièrement depuis l’arrêt Syndicat canadien de la fonction publique c. Société des alcools du Nouveau-Brunswick...”.

The most controversial aspect of the *Lefebvre* judgment lies in the fact that Vallerand J.A. based his decision to follow the earlier *Labelle* decision not on the respective merits of the correctness/reasonableness standards, but on the application of the rule of *stare decisis*. In other words, he held that the Court of Appeal was strictly bound by its own previous jurisprudence. The fact that it provided a basis for decision which avoided yet another judicial foray into the deep waters of distinguishing between jurisdictional and non-jurisdictional error may well have rendered this approach attractive. Vallerand J.A.’s conclusion is based on the following three assertions, which I shall set out now and discuss further below:

(1) *stare decisis* is well-rooted in Quebec law, as in British law which is the source of our administrative law;

19 (1991), 37 Q.A.C. 113, [1991] R.J.Q. 968 (C.A.) (hereinafter *Antenucci*). This appeal was heard by Beauregard, Chevalier (*ad hoc*) and LeBel J.A.


...la détermination de ce qui constitue un accident et par conséquent l’interprétation qu’il y a lieu de faire quant au sens et à la portée de la définition du mot “accident” font partie intégrante de l’expertise de l’organisme administratif et relève de sa compétence et que, même si cette interprétation s’avère erronée, elle n’est pas susceptible au contrôle judiciaire à moins qu’elle ne soit jugée déraisonnable.

21 Vallerand J.A., *supra*, footnote 1, at pp. 211 (Q.A.C.), 1868-1869 (R.J.Q.), states that:

Bien qu’elle ne soit plus tenue pour aussi rigoureuse que naguère, la règle du *stare decisis* est encore aujourd’hui bien ancrée dans notre droit, (Louis-Philippe Pigeon, *Rédaction et interprétation des lois*, p. 45) tout comme dans le droit britannique, la source de notre droit administratif; en ce qui a trait à des points de droit, une cour est, sauf exceptions bien cernées, liée par ses propres précédents et ceux des instances qui lui sont supérieures. La raison s’impose: ... même si une affaire a été décidée de façon erronée, le principe de la certitude en droit demeure une considération importante (*R. c. Bernard* [1989] 2 R.C.S. 833; 90 N.R. 321; 32 O.A.R. 161, à la p. 849 R.C.S.)... (Emphasis in the original).
(2) the doctrine of *stare decisis* includes the general rule that courts of appeal, including the Quebec Court of Appeal, are bound by their own previous decisions;\(^\text{22}\)

(3) the Court of Appeal may only depart from one of its previous decisions if it was given *per incuriam*.\(^\text{23}\)

In applying these propositions to the case before him, it was Vallerand J.A.'s view that according to *Bristol Aeroplane*,\(^\text{24}\) the Court of Appeal could disregard *Labelle* only if the decision was *per incuriam*. As he held that it was not, the intervening decision of the Court in *Antenucci* could not in his view be regarded as binding authority to replace *Labelle* and the court was thus bound in *Lefebvre* to follow *Labelle*. Accordingly, the determination in question was jurisdictional in nature (as the court had held in *Labelle*) and the Commission was to be held to a standard of correctness in deciding whether Mr. Lefebvre's heart attack was an accident within the meaning of the Act. Interestingly, Vallerand J.A. concluded that the Commission had been correct in its interpretation of the Act and the result reached on these facts. For that reason, he concluded (writing for the court on this point) that the appeal should be dismissed.

It should be emphasized that Vallerand J.A.’s treatment of *stare decisis* cannot be seen as a majority decision. Baudouin J.A., with whom Tourigny J.A. agreed, concurred with Vallerand J.A. in upholding the decision of the Commission des affaires sociales. He disagreed, however, with Vallerand J.A.’s application of *stare decisis*. In the course of brief reasons, he stated that he shared his colleague’s view that in the interests of stability and predictability the Court of Appeal should try to maintain some consistency. He disagreed with Vallerand J.A.’s reliance on *stare decisis*, noting that the doctrine should not be applied in Quebec with the rigour with which it used to be applied in Britain for two reasons. First, he noted that even the House of Lords has recognized in modern times that “... la règle du *stare decisis* ne peut s'appliquer inflexiblement et sans nuance”.\(^\text{25}\) Second,
he reasoned that the advent of the Charters has increasingly cast courts in the role of rendering decisions based on "politique juridique" rather than purely positive law, and that this changing role has not been restricted to cases involving the application of the Charter. Although Baudouin J.A.'s comments are quite consistent with generally held attitudes to stare decisis in Quebec, he did not attempt a more detailed analysis of Vallerand J.A.'s treatment of the doctrine. This comment will attempt to do so.

B. Analysis

Today in Quebec, a decision such as Vallerand J.A.'s which grounds a judgment not merely on precedent as persuasive authority but on previous decisions as formal and binding authority is striking to say the least. This is particularly true at a time when, as Baudouin J.A. noted in his reasons, and as discussed at the beginning of this comment, even the English are moving away from treating stare decisis as an inviolable rule towards a more relaxed doctrine which considers precedent as an important principle. Even if the application of stare decisis in the strict sense could have been justified, however, it is my view that it was misapplied. Had it been correctly applied, the conclusion would have been that the court, in light of the inconsistency between Labelle and Antenucci, was not bound by Labelle, and the issue as to the appropriate standard of review should have been reexamined on a balance of reasons. In other words, a proper application of the methodology of both systems would have required the court to attempt to resolve the substantive issue by canvassing all arguments and authorities in an attempt to arrive at the best answer. This will be made clear, I hope, by a closer examination of the propositions outlined above.

1. The Status of Stare Decisis

It is trite to say that in the civil law, decided cases are not treated as formal sources of law in the same way that they are in the common law jurisdictions. The advent of the Charters has increasingly cast courts in the role of rendering decisions based on "politique juridique" rather than purely positive law, and that this changing role has not been restricted to cases involving the application of the Charter. Although Baudouin J.A.'s comments are quite consistent with generally held attitudes to stare decisis in Quebec, he did not attempt a more detailed analysis of Vallerand J.A.'s treatment of the doctrine. This comment will attempt to do so.

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law. In the civil law tradition, it is "la loi" as set out by the legislator which is the true and primary source of law; the role of the judge is simply to apply the law to particular circumstances. Portalis has put the point elegantly:30

La science du législateur consiste à trouver dans chaque matière, les principes les plus favorables au bien commun: la science du magistrat est de mettre ces principes en action, de les ramifier, de les étendre, par une application sage et raisonnée....

It would, of course, be a gross overstatement to suggest that decided cases have no authority in civil law. Rather, jurisprudence has always been recognized as important persuasive authority for any court.31 The basis for the role of jurisprudence in civil law has been classically formulated as an interpretive aid to assist the judge in discerning the true meaning and intent of the legislator:32

Cettedispositionserévèle parfoisambiguë, il est appelé à en préciser le sens. Parfois il ne trouve aucune disposition qui donnerait la solution du cas d'espèce: il est donc appelé à combler la lacune en partant de la volonté que le législateur a exprimée dans des contextes voisins. Cette recherche de la volonté du législateur, soit expresse ou implicite, constitue l'interprétation jurisprudentielle.

When a line of consistent jurisprudence develops ("jurisprudence constante") a subsequent court is entitled to see it as strong evidence of the true meaning or intention of the legislator. Indeed, such jurisprudence can take on what has been called "autorité de fait".33 But the crucial difference between the strict as opposed to the relaxed version of stare decisis is that the common law understanding of the strict version is that the prior decision, in and of itself, is formally binding. In civil law, judicial decisions cannot be treated as sources of law in this strict sense.34 The notions of both traditions reflect a recognition that previous decisions on similar points carry some moral

30 Portalis, Discours préliminaires prononcés lors de la présentation du projet, 24 thermidor, an 8, in P.A. Fenet, Recueil complet des travaux préparatoires du Code civil, t. 1, p. 476.

31 The treatment of decided cases as a "source" in French law is quite nuanced; J. Ghestin and G. Goubeaux, Traité de droit civil, t. 1, Introduction générale (2nd ed., 1983), p. 186, list jurisprudence as a source, but upon closer analysis it appears that it is not a formal source of the law per se, but an invaluable tool "... pour la connaissance du droit positif...". Similarly, H. Mazeaud, L. Mazeaud, J. Mazeaud and F. Chabas, Leçons de droit civil: Introduction à l'étude de droit (19th ed., 1991), no. 105, p. 159, see jurisprudence as an important "source d'interprétation" with "importance considérable".


34 As A. Rivard, Manuel de la Cour d'appel: juridiction civile (1941), p. 54, explains, "[l]a règle de droit qu'ils appliquent, nos juges doivent la chercher dans les prescriptions du législateur, non par les arrêts antérieurs".
weight ("like cases should be treated alike"), and that from a more pragmatic
view, consideration of decisions in like cases is more efficient than
"reinventing the wheel" in each case. Moreover, as Vallerand J.A.
emphasized in Lefebvre, an underlying concern is that of certainty and
predictability.

A discussion of the modern application of these doctrines in Quebec
raises two difficulties. First, there is some basis for a claim that the doctrine
applies to some extent in the area of public law, rooted as it is in English
law. It has, however, generally been interpreted—at least recently—much
more flexibly in Quebec than in common law jurisdictions. I shall return
to this point in the course of my discussion of the authority of previous
court of appeal decisions with respect to subsequent courts of appeal.

Although *stare decisis* seems to have been accepted in Quebec to the extent
that the Court of Appeal considers itself bound by the decisions of the
Supreme Court of Canada in public law matters, the treatment of decided
cases otherwise could quite easily be seen simply as a manifestation of the

35 But the line between recognizing precedent as a source of persuasive authority on
the one hand or as formally binding in itself is not always easy to draw, and the language
used in Quebec has been imprecise and confusing at times. For example, in *Desmeules
v. Renaud*, [1950] B.R. 659, at p. 663, Gagné J. stated that:

> Il me paraît bien difficile de demander aux tribunaux de mettre de côté une
jurisprudence que l'on peut dire avoir été unanimement suivie depuis un si grand
nombre d'années.

Tancelin refers to this statement as an example of a Quebec court treating jurisprudence
as "compulsory", but Gagné J.'s statement may, I suggest, just as easily be understood in
terms quite consistent with the civilian notion of "jurisprudence constante"; see M. Tancelin,
Introduction to F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower
Canada* (1980). (Note: This is a republication, with Tancelin's Introduction, of Walton's
work which was originally published in 1907).

36 For example, *supra*, footnote 1, at pp. 211 (Q.A.C.), 1869 (R.J.Q.), he cites the
si une affaire a été décidée de façon erronée, le principe de la certitude en droit demeure
une considération importante".

37 See Pigeon, *op. cit.*, footnote 22. But there is also authority for the proposition that
the tendency to allow the doctrine to slip in this manner is dangerous and should be resisted;
see N. Bernier, *L'autorité du précédent judiciaire à la Cour d'appel du Québec* (1971),
6 R.J.T. 535, à la p. 557.

38 But see Friedmann, *loc. cit.*, footnote 33, at p. 743, where he cites some judicial
authority which indicates considerable support from the first half of this century for a strict
adherence to *stare decisis*. This was particularly remarkable because the authorities he
discovered were in the area of criminal appeals, and as he pointed out, criminal courts
in England and common law Canada have not considered themselves strictly bound by
precedent. In addition, Friedmann noted that as a general matter, cases of deliberate departure
from precedent in Quebec were very rare.

39 Baudouin J.A. in his reasons in *Lefebvre* treats this as a matter beyond dispute;
*supra*, footnote 1, at pp. 222 (Q.A.C.), 1877 (R.J.Q.). Pigeon also treats this as beyond
question; see *op. cit.*, footnote 22, pp. 45-46. The point is not unanimously accepted in Quebec,
however; for a discussion of a contrary view, see Bernier, *loc. cit.*, footnote 37.
respectede civilian notion of “jurisprudence constante”. In other words, decided cases are regarded as likely sources of persuasive authority rather than as sources of binding law in themselves. As Rivard has written, “[l]es précédents valent ce que valent leurs motifs”. Writing in 1925, Mignault noted that while it was exceptional for lower courts to refuse to follow the Court of Appeal, this could not be seen as a blind submission to precedent. Rather,

... failing all other reasons for acquiescence, the question of convenience, the advantage of securing fixity of jurisprudence, and perhaps above all the uselessness of resistance, would convince a judge that it is better in the interest of the parties to accept as final the pronouncement of a higher court.

The second difficulty to address in discussing stare decisis and Quebec law is the fact that it has always been easy from a civilian perspective to overstate the extent to which decided cases actually bind subsequent courts at common law. The doctrine of stare decisis itself and the crucial distinction between ratio decidendi and obiter dictum has always given courts considerable latitude with which to deviate from previous cases. In addition, the doctrine of stare decisis in common law jurisdictions, as discussed above, has evolved considerably in recent years. In the 1966 Practice Statement the House of Lords announced that it would “depart from a previous decision when it appears right to do so”. Although this has in fact happened rarely, it has happened. In 1986, the House of Lords overruled a decision it had rendered only a year earlier. Moreover, and most interestingly from a...

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40 Again, as was noted supra, footnote 35, the language used to describe the role of jurisprudence has sometimes been vague in this respect.
41 See Rivard, op. cit, footnote 34, p. 55.
43 Ibid, at p. 15.
44 See Friedmann, loc. cit, footnote 33, at p. 739. The problem with defining just what is binding from previous decided cases was articulated by Laskin C.J.C. in dissent in Harrison v. Carswell, supra, footnote 2:

This Court, above all others in this country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to such decisions (at pp. 205 (S.C.R.), 71 (D.L.R.)).

What is important... is not whether we have a previous decision involving a “brown horse” by which to judge a pending appeal involving a “brown horse”, but rather what were the principles and, indeed the facts, upon which the previous case, now urged as conclusive, was decided. (at pp. 206 (S.C.R.), 72 (D.L.R.).)

45 As Baudouin J.A. also observed, supra, footnote 1, at pp. 221 (Q.A.C.), 1877 (R.J.Q.).
46 Supra, footnote 7. The Supreme Court of Canada did not explicitly make such a statement until 1978: see Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, at p. 1290, (1978), 84 D.L.R. (3d) 257, at p. 322, although the application of stare decisis is generally regarded to have been somewhat more flexible in Canada than in Britain: see Friedman, loc. cit, footnote 33.
civilians perspective, it did so on the basis of persuasion from doctrinal sources. These included an article by Glanville Williams and a Law Commission report. This is of particular interest to civilians as it is an instance of a common law court (the most common law of them all!) paying a great deal of attention to a doctrinal source. This change may be said to mark a shift not so much in the frequency with which common law courts abide by their previous decisions, but in the role that previous decisions play: decided cases are the most likely and important sources of persuasive authority, but are to be accorded something less than blind obedience. If other sources of justification render them completely unpersuasive, they are not "binding" in themselves on the highest courts. In this respect, the two traditions may be said to be moving closer together in their treatment of decided cases in two senses. First, both systems arguably recognize decided cases as sources of persuasive authority based on similar moral and systemic considerations as outlined above. Second, and more broadly, both systems are generally increasingly open to reliance on forms of justification beyond or in addition to those traditionally relied on in the respective systems.

In summary on this point, then, Vallerand J.A. seems to have overstated the application of stare decisis in the common law, both in terms of its traditional role, and in terms of its shifting role in the evolving common law.

2. Previous Quebec Court of Appeal Decisions: Are They Prima Facie "Binding"?

Vallerand's J.A.'s judgment, as we have seen above, seems to see stare decisis as an "all or nothing" matter, without differentiating between the strict and relaxed forms of the doctrine. This is further illustrated by the conclusions he reached with respect to the treatment the Quebec Court of Appeal is to accord its earlier decisions. He cites the English Court of Appeal decision, Bristol Aeroplane as authority for the proposition that courts of appeal are generally bound by their own decisions. But this aspect of the common law of stare decisis never seems to have operated in Quebec,

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49 Of course, lower courts are bound by upper courts.

50 See, for an excellent discussion of the concept of persuasive authority, Glenn, loc. cit., footnote 2. For a discussion of the evolving use of sources in the two systems, see J.H. Merryman, On the Convergence (and Divergence) of the Civil Law and the Common Law, in The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America (2nd ed., 1985).

51 Supra, footnote 22.

52 Supra, footnote 1, at pp. 213 (Q.A.C.), 1870 (R.J.Q.).
and has by no means been universally followed in common law Canada either. 53 Although Quebec courts have generally recognized the applicability of the doctrine as between the Supreme Court and the Court of Appeal, 54 the Quebec Court of Appeal, unlike Canadian common law courts, has never considered itself bound by its previous decisions. 55 As Pigeon explains: 56

Les confrères des autres provinces en sont littéralement abasourdis lorsqu'on leur cite des arrêts contradictoires de notre Cour d'appel, y compris deux cas d'arrêt contradictoires rendus le même jour. Pour eux, c'est tout simplement impensable car ils considèrent que c'est un principe contre lequel aucun tribunal ne s'insurge: leur Cour d'appel ne renverse jamais sa jurisprudence. Naturellement, cela implique que les arrêts contradictoires sont tout simplement impensables.

On this point, Vallerand J.A. was simply mistaken to apply the general rule as enunciated in Bristol Aeroplane to Quebec. Stare decisis, as applied in Quebec, would have left the Court of Appeal free to decide the case before it on the respective merits of the standard of review to be applied.

3. Bristol Aeroplane: Exceptions to the rule

The difficulties with the Vallerand J.A.'s judgment in Lefebvre do not, however, end with the application of Bristol Aeroplane to the Quebec Court of Appeal. As we shall see, Bristol Aeroplane was misapplied on its own terms.

In applying Bristol Aeroplane, Vallerand J.A. correctly identified judgments rendered per incuriam as exceptions from the general rule, and quoted both from that case and from Pigeon on the point. 57 He then proceeded to examine the Labelle decision to determine whether it could be said to

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53 There has, in fact, been considerable variation among the provincial courts of appeal on this point. Ontario has been most inclined to follow Bristol Aeroplane, and British Columbia the least inclined to consider itself bound by the decision. For a discussion of the attitudes taken by the various courts of appeal, see J.D. Murphy and R. Rueter, Stare Decisis in Commonwealth Appellate Courts (1981), pp. 24-55.

54 Although the authority of the Supreme Court of Canada has been controversial in cases involving the Civil Code, the point has been less controversial with respect to public law matters within federal legislative jurisdiction. In any event, the issue is less controversial in the sense that the decisions of higher courts within Quebec are generally considered to bind lower courts; see Mignault, loc. cit., footnote 42.

55 Rivard, op. cit., footnote 34, p. 65, points out that the Court of Appeal generally tries to avoid inconsistency between decisions. He continues, however, as follows:

Cependant, si par une délibération mieux éclairée et plus sûre, elle s’aperçoit qu’elle s’est trompée ou que des conditions nouvelles rendent opportune une autre orientation de la doctrine, elle a toujours le droit de changer d’avis, de revenir sur ce qu’elle a décidé et de rectifier sa jurisprudence. Elle n’est pas liée par ses propres décisions. (Emphasis added).

See also Murphy and Rueter, op. cit., footnote 53, p. 51.


57 Supra, footnote 1, at pp. 213, 214 (Q.A.C.), 1870, 1871 (R.J.Q.).
have been rendered *per incuriam* and concluded that it could not. From there he reasoned that *Bristol Aeroplane* applied and that *Labelle* and the standard of correctness rather than reasonableness prevailed. But *Bristol Aeroplane* also set out two other exceptions to the general rule requiring the court of appeal to follow its own decisions: (1) it held that the court is entitled and indeed bound to decide which of two prior conflicting decisions it will follow; and (2) it held that the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords.

It is arguable that both these exceptions applied in *Lefebvre*. As far as the former is concerned, there can be no question that *Labelle* and *Antenucci* were contradictory decisions. As far as the latter is concerned, the court in *Antenucci* had refused to follow *Labelle* and similar cases precisely because of its judgment that they were not consistent with recent Supreme Court of Canada authority. The difficulty with this latter exception is that it presupposes that a new "right" answer has replaced a former one. Canadian administrative law in this area has been in a state of flux for over ten years, and it would be premature to say that the most recent cases from the Supreme Court have determined the issues. This is true not only because the Supreme Court cases over the last decade on standards of review and jurisdictional error are difficult if not impossible to reconcile among themselves, but also because there is at least arguably some deviation in trend between the Quebec decisions and those from the rest of Canada. Applying this exception, then, would be a little artificial, because it would direct the Court of Appeal not to examine the merits of the debate for itself (taking the Supreme Court jurisprudence into account), but to apply directly the new Supreme Court jurisprudence as binding and exclusionary

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58 Vallerand J.A.'s judgment seems to have assumed that it was the prior decision (*Labelle*) rather than the latter decision (*Antenucci*) which bound the court in *Lefebvre*.


60 *Antenucci*, supra, footnote 19, at pp. 133 (Q.A.C.), 986 (R.J.Q.).

61 Baudouin J.A. touches on this point in his reference to the increasing role of "politique juridique" in judgments of the Supreme Court of Canada: see supra, footnote 1, at pp. 221 (Q.A.C.), 1877 (R.J.Q.).

62 For example, *C.U.P.E. v. New Brunswick Liquor Board*, supra, footnote 15, which may be regarded as a high-water mark for the reasonableness standard and a narrow definition of the jurisdictional question, was from New Brunswick and was based on authorities which were largely from common law jurisdictions.

The major cases which have been seen to revert to a larger conception of what constitutes jurisdictional error have been Quebec cases, for example *Syndicat des Employés de Production de l'Acadie v. Canada Labour Relations Board*, supra, footnote 15; *Syndicat national des employés de la Commission scolaire de l'Outaouais v. Union des employés de service*, supra, footnote 15. For a critical discussion of these decisions, see B.A. Langille, Judicial Review, Judicial Revisionism and Judicial Responsibility (1986), 17 R.G.D. 169; J.M. Evans, Developments in Administrative Law: the 1984-85 Term (1986), 8 Supreme Court L.R. 1; Harvison Young and Macdonald, *loc. cit.*, footnote 16.
authority. As the Supreme Court itself does not seem to have rendered directly applicable and unequivocal judgments on this subject, reliance on this exception could also be rather circular.

For this reason, the exception triggered by the existence of conflicting court of appeal jurisprudence is both more applicable on its own terms and more compatible with civilian approaches to decided cases. This is because the civilian approach emphasizes the persuasive value of precedent as an interpretive aid rather than regarding it as formally authoritative. The existence of conflicting Court of Appeal jurisprudence indicates, in civilian terms, the absence of “jurisprudence constante”. Accordingly, the court is to reexamine the issue on its merits. In common law terms, this exception supports the argument that even strict formulations of stare decisis place greater emphasis upon the persuasiveness (as opposed to the formal authoritativeness) of decided cases as persuasive authority rather than simply as pure binding authority than appear at first glance to be the case.63 The exception is also a point of similarity between the civil law and the common law.

The fact that, in Lefebvre, a civilian judge has applied a more rigorous and inflexible form of stare decisis than that articulated by the English Court of Appeal in 1944 is not without some irony. Moreover, his principal reasons consist of a concern for certainty and predictability. After citing Pigeon, Vallander J.A. stated:64

La raison s'impose: ... même si une affaire a été décidée de façon erronée, le principe de la certitude en droit demeure une considération importante. . . .

He continued, quoting from an English decision:65

... certainty in relation to substantive law is to be preferred to correctness, since this at least enables the public to order their affairs with confidence.

In the face of conflicting court of appeal jurisprudence, it is highly doubtful, however, that applying a formal notion of stare decisis really does serve these values. This is illustrated by Lefebvre itself. Applying Labelle without regard for its merits or persuasiveness risked choosing one authority which might well have been isolated in a sea of authority evolving in a different direction, as the court in Antenucci suggested. In such circumstances, the result chosen appears to be simply arbitrary and is unlikely to have any staying power, because the result is reached independently and perhaps even in spite of persuasive authority. Even the strictest common law approach, in articulating this exception to the application of stare decisis to court of appeal decisions, has recognized this.

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63 See Friedmann, loc. cit., footnote 33.
In summary, Vallerand J.A. misapplied the common law rule as expressed in *Bristol Aeroplane*. This, in effect, constructed a rather caricatured version of the common law which would appear vastly different from civilian approaches. In fact, the *Bristol Aeroplane* exceptions and the modern more relaxed approach to *stare decisis* at common law render the two systems very similar in their treatment of inconsistent court of appeal cases in subsequent decisions.

**Conclusion**

The application of the quintessentially common law notion of *stare decisis* in Quebec is a very delicate matter. Vallerand J.A.'s judgment not only applied *stare decisis* in a context in which it has historically not been applied in Quebec, but it applied a stricter version of the doctrine than that currently adopted at common law. This may be seen, in one sense, as a lost opportunity for a recognition of some common ground between the two legal systems, because a correct application of the doctrine could have been framed in terms compatible with and familiar to the civil law tradition in Quebec.

From an administrative law perspective, this decision is also disturbing. The field of jurisdictional review and standards of review of administrative bodies has been and continues to be one of the most complex facing jurists today. The substantive debate continues, and attempts to resolve it on the basis of formal binding authority independently of a broader exploration of the issues cannot be seen as legitimate or persuasive justifications for legal decisions. Modern doctrines of *stare decisis* do not permit the existence of a precedent to preempt consideration of the balance of reasons for a decision. Moreover, the civil law has never treated decided cases as binding in and of themselves. Put another way, there is no way to avoid difficult substantive issues such as the one posed by *Lefebvre*. Attempts to do so through the strict application of the doctrine of *stare decisis* will accordingly be doomed to failure.