CRIMINAL LAW—DEFENCES—AUTOMATISM—ACCUSED KILLING WHILE SLEEPWALKING—ACQUITTAL OR NOT GUILTY BY REASON OF INSANITY: *R.* v. *Parks.*

Isabel Grant* and Laura Spitz**

Background to the Case

In *R.* v. *Parks*[1] the Supreme Court of Canada had the opportunity to clarify the test for distinguishing between insane and non-insane automatism and to locate sleep-walking, or somnambulism, within this dichotomy. Its judgments accomplished neither purpose satisfactorily and thus the case is more striking for its unusual facts than for its advancement of the law. The judgment of the Chief Justice, in particular, reads more like a trial decision than that of an appellate tribunal and generates more questions than answers about the defences.

Mr. Parks was charged with the murder of his mother-in-law and the attempted murder of his father-in-law. He drove twenty-three kilometres across a busy Toronto highway, while sleep-walking, to the home of his in-laws. Once at the house, Parks went upstairs and attacked his in-laws. After the assault, he drove himself to the police station and turned himself in saying: "Oh my God, I just killed someone." The accused had been facing serious financial problems and had stolen $30,000 from his employer, which had resulted in his dismissal. Despite these crises he had apparently been getting on well with his in-laws.[2] Several of his family members had suffered from sleep problems including sleep-walking, adult enuresis, nightmares and sleep-talking.

* Isabel Grant, Associate Professor, of the Faculty of Law, University of British Columbia, Vancouver, British Columbia.

** Laura Spitz, B.A., University of Toronto, 1989; LLB, University of British Columbia, 1993.

[1] [1992] 2 S.C.R. 871, (1992), 95 D.L.R. (4th) 27; affg. (1990), 73 O.R. (2d) 129, 56 C.C.C. (3d) 449 (Ont. C.A.).

[2] June Callwood, The Sleepwalker (1990), suggests that a meeting had been scheduled between Parks and his in-laws for the day after the attack to discuss his financial indiscretions.

The trial judge put non-insane automatism to the jury but did not charge the jury on the insanity defence. Parks was acquitted of murder by the jury and subsequently of attempted murder by the trial judge. The Ontario Court of Appeal upheld the acquittal, holding that Parks' conduct was involuntary. Since the impaired consciousness was a function of sleep, and sleep is a "natural, normal condition",[3] the accused was not suffering from a disease of the mind.[4] The Supreme Court of Canada unanimously dismissed the Crown's appeal.

The question before the Supreme Court of Canada was simple: was Parks entitled to an absolute acquittal on the basis that his acts were involuntary, or was the involuntariness caused by a disease of the mind, thus leaving him only with the defence of insanity?[5]

The Defence of Automatism[6]

The defence of automatism is premised on the accused acting in a dissociative state where his or her mind is not associated with his or her actions. In *R.* v. *Rabey*[7] Ritchie J. stated:

> Automatism is a term used to describe unconscious, involuntary behaviour, the state of a person who, though capable of action is not conscious of what he is doing. It means an unconscious involuntary act, where the mind does not go with what is being done.

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[3] *Supra*, footnote 1, at pp. 141 (O.R.), 466 (C.C.C.) (C.A.).

[4] It was this distinction which enabled the court to distinguish epilepsy, which has historically been classified as a disease of the mind, from sleep-walking. In *R.* v. *Sullivan*, [1984] A.C. 156, [1983] 2 All E.R. 673, the House of Lords concluded that an epileptic seizure is pathological and hence a disease of the mind. After the *Sullivan* decision, Glanville Williams predicted that sleep-walkers would be "saddled with an insanity verdict": Textbook of Criminal Law (2nd ed., 1983), p. 666.

See also the South African case of *R.* v. *Dhlamini*, [1955] 1 S.A.L.R. 120 (Transvaal Prov. Div.) where the accused was acquitted absolutely of a killing he committed while emerging from a nightmare. For an interesting account of a case where a mother killed her 19 year-old daughter after waking up from a nightmare in which the daughter was being attacked by North Korean troops, see Norval Morris, Somnambulistic Homicide: Ghosts, Spiders, and North Koreans (1951), 5 Res Judicatae 29. The mother was acquitted absolutely on the basis that it was not her act.

[5] Now the defence of mental disorder under s. 16 of the Criminal Code, R.S.C. 1985, c. C-46, s. 16, as am. S.C. 1991, c. 43, s. 2. At the time of *Parks*, the defence was the insanity defence and led to a verdict of "not guilty by reason of insanity". The recently reformed law now refers to "mental disorder" and a verdict of "not criminally responsible by reason of mental disorder".

[6] For a more detailed discussion of this defence in the context of homicide see I. Grant, D. Chunn and C. Boyle, The Law of Homicide in Canada (1993), forthcoming.

[7] *R.* v. *Rabey*, [1980] 2 S.C.R. 513, at p. 518, 54 C.C.C. (2d) 1, at p. 6, quoting Lacourciere J. in *R.* v. *K.*, [1971] 2 O.R. 401, at p. 402, 3 C.C.C. (2d) 84, at p. 84 (Ont. H.C.).

Because a successful defence of automatism leads to an acquittal, judges have been wary of false claims. In *R.* v. *Szymusiak*[8] the Ontario Court of Appeal sounded a note of caution:

> It [automatism] is a defence which in a true and proper case may be the only one open to an honest man, but it may just as readily be the last refuge of a scoundrel. It is for these reasons that a Judge presiding at a trial has the responsibility cast upon him of separating the wheat from the chaff.

One of the established limits has been to disallow the defence where mental illness has contributed to the dissociative state, on the basis that the existence of mental disorder may make the accused more dangerous in the future. There has also been a concern that accused persons with a mental disorder could avoid the insanity/mental disorder defence, and the indefinite hospitalization that historically went with it, in favour of a full acquittal. Automatism has thus been divided into two forms: insane automatism and non-insane automatism. The former is channelled into the insanity/mental disorder defence while the latter results in an absolute acquittal. Insane automatism refers to a particular manifestation of the mental disorder defence going to negate the *actus reus* of the offence.[9] It triggers the application of section 16 of the Criminal Code[10] and all the related provisions.[11] Non-insane automatism is an assertion that the Crown has failed to prove a voluntary *actus reus*,[12] that lack of voluntariness being caused by some factor other than a disease of the mind, voluntary intoxication,[13] or some internal weakness of the accused.[14]

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[8] *R.* v. *Szymusiak* (1972), 8 C.C.C. (2d) 407, at p. 413 (Ont. C.A.), cited in *R.* v. *Bartlett* (1983), 5 C.C.C. (3d) 321 (Ont. H.C.), and *R.* v. *Macrae* (1987), 76 N.S.R. (2d) 30 (N.S. App. Div.).

[9] In *R.* v. *Chaulk*, [1990] 3 S.C.R. 1303, at p. 1321, 62 C.C.C. (3d) 193, at p. 206, Lamer C.J.C. expressly states that the mental disorder defence may be manifest through an involuntary *actus reus*.

[10] *Supra*, footnote 5.

[11] For a discussion of the distinction between the two defences see Winifred Holland, Automatism and Criminal Responsibility (1982-83), 25 Crim. L.Q. 95.

[12] Strictly speaking, non-insane automatism is not a defence at all but merely an assertion that the Crown has failed to meet its burden of proving a voluntary *actus reus*. We refer to it as a defence only in the sense that it is something that must be raised in evidence by the accused. See *Hill* v. *Baxter*, [1958] 1 Q.B. 277, [1958] 1 All E.R. 193 (Q.B.D.).

[13] The defences of mental disorder and intoxication have clearly narrowed the scope left for the defence of non-insane automatism because if voluntary intoxication is a contributing factor to the dissociative state, intoxication is the only defence and if mental disorder contributes, then the defence is channelled into s. 16 of the Criminal Code, *supra*, footnote 5.

[14] Because of the different nature of the claims, the burden of proof differs. An accused asserting a defence of insane automatism, that is a defence of mental disorder, is required to prove that defence on a balance of probabilities. An accused raising a defence of non-insane automatism need only raise a reasonable doubt that his or her actions were involuntary. For a useful discussion of the interaction of the burdens of proof for these defences see the various judgments in *R.* v. *Falconer* (1990), 65 A.L.J.R. 20 (H.C. Aust.).

What distinguishes insane from non insane automatism is the cause of the dissociative state. Prior to *Parks*, the general rule in Canada was thought to be that if an individual was in a dissociative state as a result of some internal factor, or some personal psychological susceptibility, that dissociative state would probably constitute a disease of the mind, leaving the accused only with the insanity/mental disorder defence. If, on the other hand, the dissociative state was caused by some factor external to the accused, such as a blow to the head or involuntary intoxication,[15] an individual would have the defence of non-insane automatism open to him or her.

The leading case for distinguishing between a disease of the mind leading to an insanity/mental disorder defence and a defence of non-insane automatism is the judgment of Martin J.A. in *R.* v. *Rabey*:[16]

> In general, the distinction to be drawn is between a malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up or in some organic pathology, as opposed to a malfunctioning of the mind which is the transient effect produced by some specific external factor such as, for example, concussion. Any malfunctioning of the mind, or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not), may be a "disease of the mind" if it prevents the accused from knowing what he is doing, but transient disturbances of consciousness due to certain external factors do not fall within disease of the mind.

The classic example of an external cause is a blow to the head,[17] but other causes of a dissociative state are more difficult to characterize. For example, hypoglycemia caused by not eating after taking insulin,[18] and possibly exposure to toxic fumes are considered external causes.[19] On the other hand, epilepsy,[20] and hyperglycemia caused by diabetes[21] are both considered factors internal to the accused and will be channelled into the insanity/mental disorder defence. The issue in *Parks* was where to locate sleep-walking in this dichotomy.[22]

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[15] See *R.* v. *King* (1982), 67 C.C.C. (2d) 549 (Ont. C.A.).

[16] (1977), 37 C.C.C. (2d) 461, at pp. 477-478 (Ont. C.A.), affd., *supra*, footnote 7 (S.C.C.).

[17] See *R.* v. *Adkins* (1987), 39 C.C.C. (3d) 346 (B.C.C.A.). The accused was acquitted of murder. One of the issues on appeal was whether non-insane automatism should have been put to the jury on the basis of evidence that the accused suffered a concussion in an earlier fight with the victim and may have been acting involuntarily. The Court of Appeal held that it was not an error to leave the defence with the jury.

[18] See *R.* v. *Quick*, [1973] Q.B. 910, [1973] 3 All E.R. 347 (C.A.).

[19] See the dicta in *R.* v. *Oakley* (1986), 24 C.C.C. (3d) 351 (Ont. C.A.). The court held that if a dissociative state was caused by exposure to toxic fumes it could constitute an external cause. However, if the exposure had caused brain damages, it would constitute a disease of the mind.

[20] See *R.* v. *Sullivan*, *supra*, footnote 4.

[21] See *R.* v. *Quick*, *supra*, footnote 18.

[22] The English Court of Appeal, in *R.* v. *Burgess*, [1991] 2 All E.R. 769, shortly after the Ontario Court of Appeal decision in *Parks*, declined to follow *Parks* and concluded that sleep-walking is a disease of the mind, requiring treatment.

The Judgments

There are two leading judgments in the case, those of Lamer C.J.C. and La Forest J. Lamer C.J.C.'s discussion of automatism was unanimously endorsed by the court, and all members except Lamer C.J.C. (Cory J. concurring) also agreed with La Forest J., both as to the reasons and as to the disposition of Mr. Parks. The Chief Justice dissented on the issue of disposition.[23] We will examine both of the leading judgments in turn, although we suggest that the judgment of La Forest J. is the most important as it will provide more guidance for the future.

Lamer C.J.C.

The Chief Justice began his analysis with a discussion of case-law relating to somnambulism, and found authority for the proposition that sleep-walking is not a disease of the mind.[24] He noted two British decisions that appear to go against this line of authority.[25] He then discussed the decision of the trial judge, and found it necessary to review the medical evidence adduced at trial. In his opinion, three important points emerged:[26]

> (1) the respondent was sleep-walking at the time of the incident; (2) sleep-walking is not a neurological, psychiatric or other illness: it is a sleep disorder very common in children and also found in adults; (3) there is no medical treatment as such, apart from good health practices, especially as regards sleep.

At this point in his judgment, Lamer C.J.C. turned back to one of the two British decisions referred to above, namely *R.* v. *Burgess*.[27] He was forced to do this both because the English Court of Appeal declined to follow the Ontario Court of appeal's decision in *Parks*, and because the Crown relied upon *Burgess* in its submissions before the Supreme Court of Canada.[28] He determined that the facts of *Burgess* were more or less similar to *Parks*, but that the evidence was completely "different from or even contradictory to",[29] and therefore "clearly dis-

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[23] Sopinka and McLachlin JJ. both wrote short reasons to express disagreement with the Chief Justice on the disposition issue.

[24] *R.* v. *Rabey*, *supra*, footnote 16; *Bratty* v. *Attorney-General for Northern Ireland*, [1963] A.C. 386, [1961] 3 All E.R. 523 (H.L.); *Ryan* v. *The Queen* (1967), 40 A.L.J.R. 488 (H.C. Aust.); *R.* v. *Cottle*, [1958] N.Z.L.R. 999 (C.A.); *R.* v. *Ngang*, [1960] 3 S.A.L.R. 363 (Trans. P. Div.); *R.* v. *Tolson* (1889), 23 Q.B.D. 168; *H.M. Advocate* v. *Fraser* (1878), 4 Couper 70.

[25] *R.* v. *Sullivan*, *supra*, footnote 4, holding that epilepsy is a disease of the mind, and *R.* v. *Burgess*, *supra*, footnote 22, holding that sleep-walking is a disease of the mind.

[26] *Supra*, footnote 1, at pp. 889 (S.C.R.), 38 (D.L.R.).

[27] *Supra*, footnote 22.

[28] At the time of the trial and the appeal hearing, there were no cases the Crown could cite supporting its position that sleep-walking is a disease of the mind.

[29] *Supra*, footnote 1, at pp. 890 (S.C.R.), 38 (D.L.R.).

tinguishable"[30] from, that presented in the case at bar. The Chief Justice concluded that:[31]

> ... in the instant case, based on the evidence and the testimony of the expert witnesses heard, the trial judge did not err in leaving the defence of automatism rather than that of insanity with the jury, and that the instant appeal should be dismissed.

In the final portion of his judgment, Lamer C.J.C. expressed concern about granting an outright acquittal to an accused in the circumstances of Parks, and, dissenting on this point, suggested that the case be sent back to the trial judge to determine whether it would be appropriate to attach conditions to Parks' acquittal under the auspices of a common law order to keep the peace.

Lamer C.J.C.'s judgment is troubling for its dependence on medical evidence and its explanation of the distinction between non-insane and insane automatism. Furthermore, it is significant that his analysis fails to account for the lack of randomness in Parks' actions as this would seem particularly relevant to a discussion of automatism, or voluntariness. Finally, the reasoning behind Lamer C.J.C.'s desire to invoke a common law order to keep the peace is logically inconsistent with the reasoning upon which he upholds Parks' acquittal. We will deal with each of these points in turn.

The Chief Justice reviewed in some detail the medical evidence adduced at trial. By placing so much emphasis on expert evidence, Lamer C.J.C. appeared to be saying that the legal determination of whether a particular dissociative state is a disease of the mind, while still a question of law, will be based almost exclusively on the presentation of expert medical evidence. Indeed, the answer to the question "is sleep-walking a disease of the mind?" can only be "sometimes yes and sometimes no", depending on whether the accused can muster adequate expert testimony supporting the fact that he was not suffering from a disease or disorder. In so doing, Lamer C.J.C. invited every accused who raises the defence of sleep-walking to engage in a battle of expert evidence with the Crown. Is it a disease of the mind? Will it recur? Is it treatable? All these questions will have to be litigated at every trial of this nature, at great expense to both the defence and to the state.

In *Parks*, the accused was able to present evidence persuading the court that sleep-walking is "not regarded as an illness, whether physical, mental or neurological",[32] and the Crown offered no expert evidence to

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[30] *Ibid.*, at pp. 891 (S.C.R.), 39 (D.L.R.).

[31] *Ibid.*

[32] *Ibid.*, at pp. 885 (S.C.R.), 35 (D.L.R.).

the contrary.[33] By contrast, it was held in *R.* v. *Burgess*[34] that sleep-walking is a disease of the mind and amenable to treatment. Lamer C.J.C. characterized the evidence in *Burgess* as different from, if not contradictory to, the evidence in *Parks*. To the extent that the prosecution in *Burgess* was able to present experts to testify that sleep-walking is a disorder amenable to treatment, this is true.[35] The *Parks* evidence was overwhelmingly to the contrary. However, the evidence in both cases was that a further violent episode was extremely unlikely.

The most confusing part of Lamer C.J.C.'s judgment relates to how one determines whether sleep-walking is a disease of the mind in a particular case. He relied on the Ontario Court of Appeal's dubious distinction between sleep and sleep-walking, and its reliance on that distinction in identifying the former as the cause of Parks' dissociative state. He concluded that as sleep was the cause of the accused's mental state, and sleep is a normal condition, Parks did not suffer from a disease of the mind. For there to have been a finding to the contrary,[36]

> there would have had to have been in the record evidence tending to show that sleep-walking was the cause of the respondent's state of mind ... that is not the case here. This is not to say sleep-walking could never be a disease of the mind, in another case on different evidence.

This distinction does not make clear when sleep-walking would constitute a disease of the mind. Everyone agreed that Parks was sleep-walking. Yet if it was not the cause of his mental state here, when would it ever be? Sleep always precedes sleep-walking. Furthermore, this causal distinction between sleep and sleep-walking obscures the fact that driving across a major highway and killing a person is not usually seen as a normal function of sleep. In other words, even if Parks's dissociative state was caused by sleep, a *normal* or *reasonable* person does not react to sleep in that way, and therefore it is his *abnormal* reaction to the *normal* condition that ought to have been the focus of the court's attention.[37]

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[33] In fact, as documented by Callwood, *op. cit.*, footnote 2, the Crown presented almost no evidence to rebut the defence's argument. Calwood hints that Crown counsel was inexperienced and overworked compared to defence counsel. She also indicates that the Crown assumed from early on that the defence would be one of insanity.

[34] *Supra*, footnote 22.

[35] Because Lamer C.J.C. characterized Parks' dissociative state of mind as flowing from sleep, not sleep-walking, the issue of treatability became relatively meaningless, and he found that "there is no medical treatment as such, apart from good health practices, especially as regards sleep"; *supra*, footnote 1, at pp. 889 (S.C.R.), 38 (D.L.R.).

[36] *Ibid.*, at pp. 891 (S.C.R.), 39-40 (D.L.R.).

[37] In *R.* v. *Rabey*, *supra*, footnote 16, for example, Martin J.A. concluded that Rabey's *abnormal* reaction to an event in the *normal* course of life could be best characterized as attributable to the internal make-up of Rabey, and therefore a disease of the mind. If the focus had been on Parks' *reaction* to sleep, rather than to the fact of sleep *per se*, the court might have been more willing to reach the same conclusion as in *Rabey*.

Despite Lamer C.J.C.'s reliance on the expert evidence adduced at trial, there was very little discussion of what Parks actually did. The Chief Justice constantly referred to the brutal stabbing of Parks' in-laws as the "incidents". These "incidents", however, included a twenty-three kilometre drive in the middle of the night to the home of his in-laws, where he stabbed them both with a kitchen knife, killing his mother-in-law and seriously injuring his father-in-law. Parks did not strike out in a random fashion at just "anybody". Yet, no question was raised as to whether these might have been the actions of a directed, if not conscious, mind,[38] nor was any examination made of the significance of the lack of randomness suggested by Parks' actions. If Parks' mind did not direct his twenty-three kilometre drive to a specific location, what did? Rogers and Mitchell[39] make this point about *Rabey*:

> ... one must ask: whose eyes saw the victim, whose hands wielded the rock and did the choking. If unconscious behaviour is truly involuntary and haphazard, why in criminal cases is it always directed at precisely the target the accused's conscious self would choose to attach? Although such explanation is normally absent, many judges accept as a given that dissociation results in accidental, involuntary actions.

In the final portion of his judgment, the Chief Justice suggested that the case should be sent back to the trial judge to determine whether it would be appropriate to use the common law power to make an order to keep the peace to attach conditions to Parks' acquittal.[40] In so doing, the Chief Justice appeared to contradict the earlier part of his judgment on the relevance of likelihood of recurrence. In concluding that the defence of non-insane automatism was available, he relied on the unlikelihood of recurring violence.[41] However, in expressing his view on the need for an order to obey the peace, he stressed the need to protect the public from Parks in the future, pointing out that his first violent episode was unpredictable and thus predictions about the future should not be relied upon.

Sopinka J. identified this inconsistency in a judgment on this issue only, and described the order with a quotation from Blackstone:[42]

> This preventative justice consists in obliging those *persons, whom there is probable ground to suspect of future misbehaviour*, to stipulate with and to give full assurance to the public, that *such offence as is apprehended* shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour.

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[38] R. Rogers and C.N. Mitchell, Mental Health Experts and the Criminal Courts (1991), p. 134, make a similar point: "Sleepwalkers, in fact, do not wander about aimlessly and blindly unaware, rather they have their eyes open to avoid obstacles and know what they want to do ...".

[39] *Ibid.*, p. 136.

[40] *Supra*, footnote 1, at pp. 892-895 (S.C.R.), 40-42 (D.L.R.). Only Cory J. concurred with the Chief Justice on this point.

[41] *Ibid.*, at pp. 894 (S.C.R.), 41-42 (D.L.R.).

[42] Cited by Kerwin J. in *Mackenzie* v. *Martin*, [1954] S.C.R. 361, at p. 368, quoted *supra*, footnote 1, at pp. 911 (S.C.R.), 54 (D.L.R.). (Emphasis added by Sopinka J.).

Sopinka J. referred to several lower court decisions[43] similarly recognizing that this common law power "cannot be exercised on the basis of mere speculation, but requires a proven factual foundation which raises a probable ground to suspect of future misbehaviour",[44] and he found that:[45]

> The uncontroverted evidence in this case is wholly inconsistent with such a conclusion. The Chief Justice characterizes that evidence as indicating that "the chances of such an occurrence taking place again are for all practical purposes nil"....

Finally, Sopinka J. expressed grave doubts about whether a power that can be exercised "on the basis of 'probable ground[s] to suspect future misbehaviour' without limits as to the type of 'misbehaviour' or potential victims, would survive *Charter* scrutiny".[46]

With regard to the form that such an order could take, it is instructive to examine cases where this power has been invoked or considered in the past. In both *R.* v. *White, ex parte Chohan*[47] and *Re Regina and Shaben*[48] the respective courts contemplated orders that strongly resembled "restraining orders".[49] In *Parks*, it is difficult to imagine what such an order would accomplish. Can an order to keep the peace force an accused to control what the courts have already labelled as uncontrollable (involuntary) behaviour? Lamer C.J.C. could not have been contemplating an order restraining Parks from coming into contact with the rest of the world, nor one requiring Parks to sleep in a locked room or to have someone in attendance while he slept. If Lamer C.J.C. was concerned that Parks might exhibit violence again while sleep-walking, he must have been contemplating some sort of order requiring Parks to get treatment for his sleep disorder.

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[43] *R.* v. *White, ex parte Chohan*, [1969] 1 C.C.C. 19 (B.C.S.C.); *Re Regina and Shaben*, [1972] 3 O.R. 613 (Ont. H.C.); *Stevenson* v. *Saskatchewan (Minister of Justice)* (Q.B., June 8, 1987), unreported). In *Regina* v. *White, ex parte Chohan*, for example, the court found that where a person has committed no offence, but a judge has good reason to believe, based on the person's behaviour in the past, that he or she may commit, or cause to be committed, an offence "against the Queen's peace" in the future, the judge has the jurisdiction to make a common law order to keep the peace and "be of good behaviour".

[44] *Supra*, footnote 1, at pp. 911 (S.C.R.), 54 (D.L.R.).

[45] *Ibid.*

[46] *Ibid.*, at pp. 912 (S.C.R.), 54-55 (D.L.R.), referring to the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 (hereinafter the Charter). McLachlin J. agrees with the reasons of Sopinka J. She further questioned whether it is appropriate for the courts to grant remedies affecting the liberty of a subject in the absence of a request to do so by the Crown; *ibid.*, at pp. 914 (S.C.R.), 56 (D.L.R.).

[47] *Supra*, footnote 43.

[48] *Ibid.*

[49] In *R.* v. *White, ex parte Chohan*, *supra*, footnote 43, for example, although the magistrate was not satisfied that the informant had reasonable grounds for his fears that Chohan would cause him personal injury, he made an order requiring both Chohan and the informant to enter into a recognizance to keep the peace and be of good behaviour. In *Re Regina and Shaben*, *ibid.*, three men were ordered, among other things, to "stay away from" a fourth man.

Indeed, Lamer C.J.C. stated that an "order might be made requiring Parks to do certain things suggested by a specialist in sleep disorders . . .".[50] In so doing, he spoke in favour of attaching conditions to Parks' "outright acquittal" in ways that strongly resemble an order compelling Parks to seek treatment, even in the absence of a finding of mental disorder.[51]

The Chief Justice made a brief reference to section 7 of the Charter[52] in relation to whether an accused ought to be subjected to a hearing such as the one he contemplated, and he suggested that if conditions are imposed, they "must be rationally connected to the apprehended danger posed by the person and go no further than necessary to protect the public from this danger".[53] He did not, however, consider the Charter implications flowing from attaching a forcible treatment order to a person who has been fully acquitted.[54]

La Forest J.

In contrast to the fact based judgment of the Chief Justice, the reasons of La Forest J. were almost entirely policy based. He began by accepting Lamer C.J.C.'s view of the medical evidence, but then went on to hold that the determination of what is a disease of the mind has a substantial policy component. La Forest J. premised his analysis on the fact that the

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[50] *Supra*, footnote 1, at pp. 894 (S.C.R.), 41 (D.L.R.).

[51] Interestingly, what Lamer C.J.C. seemed to be advocating is similar to what is envisaged by the new mental disorder provisions, that is, flexible dispositions for those found not responsible. Although it is important to note that the new disposition provisions do not authorize compulsory treatment of those found not criminally responsible. Section 672.55(1) of the Criminal Code, *supra*, footnote 5, provides:

> No disposition made under s. 672.54 shall direct that any psychiatric or other treatment of the accused be carried out or that the accused submit to such treatment.

[52] *Supra*, footnote 46.

[53] *Supra*, footnote 1, at pp. 895 (S.C.R.), 42 (D.L.R.).

[54] In *R.* v. *Rogers* (1990), 61 C.C.C. (3d) 481, the British Columbia Court of Appeal considered whether the terms of an accused's probation order could require psychiatric treatment. In that case the accused was apprehended on a charge of possession of a knife for a purpose dangerous to the public peace, and pleaded guilty to the included offence of possession of a concealed weapon. He was sentenced to one day in jail, and fifteen months probation, the terms of which included a requirement that he "seek and take whatever psychiatric assessment or treatment that . . . [could] be arranged for . . . [him]"; *ibid.*, at p. 483. On appeal, the court found that a probation order which compels an accused to take psychiatric treatment or medication is an unreasonable restraint upon the liberty and security of the person. Moreover, such a term is contrary to the fundamental principles of justice as guaranteed by s. 7 of the Charter, *supra*, footnote 46 and, save in exceptional circumstances, cannot be saved by s. 1 (*ibid.*, at p. 488):

> In my opinion, it is the protection of the public which is the principal support for an order compelling the compulsory taking of treatment or medication. That is insufficient to save the order under s. 1 of the Charter.

Lamer C.J.C. did not refer to *Rogers* in his judgment.

Crown has the burden to prove that the dissociative state was caused by a disease of the mind. The Crown must thus establish that the policy reasons for labelling the accused's condition a disease of the mind exist. He reviewed the two approaches that have been taken to this policy component: the internal cause theory and the continuing danger theory. He rejected the internal/external distinction as being unhelpful in the context of sleep-walking, which could be characterized as being internally or externally caused. With respect to the relevance of the likelihood of recurrence, La Forest J. concluded that the presence of a continuing danger should make a judge more likely to find a disease of the mind, but that the absence of such danger should not preclude a finding of disease of the mind.

Finding the above concerns to be inconclusive, La Forest J. identified two further policy considerations: the likelihood that the condition could be feigned by an accused and the likelihood of opening the floodgates to numerous claims based on somnambulism.[55] Given the difficulty of feigning the symptoms necessary to establish such a defence, and its apparent rarity in the case law, he concluded that neither of these policy factors was of concern in this case. Thus, almost by a process of elimination, he decided that the accused was not suffering from a disease of the mind.

In our view, La Forest J.'s judgment can most usefully be characterized as reviewing the policy considerations which justify the Crown raising insanity/mental disorder over the wishes of the accused. In other words, it may not be enough for the Crown simply to prove that the accused had a mental disorder which constitutes a disease of the mind. Rather it should have to justify the outcome of that finding: hospitalization. However, La Forest J. referred only to the policy concerns in determining a disease of the mind without discussing the substance of the concept itself. These policy considerations do not in themselves determine the existence of disease of the mind: for that one must turn to the test set out by Dickson J. in *Cooper* v. *The Queen*:[56]

> In summary, one might say that in a legal sense "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.

The *Cooper* test provides the basis for determining the existence of a disease of the mind where the accused asserts an insanity/mental disorder defence and the policy concerns raised by La Forest J. can be seen as additional considerations where the Crown is raising the defence against the wishes of the accused. The Crown must show that the justification for potential incarceration of the accused is present. The two policy approaches identified

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[55] The likelihood of false claims seems more of an issue for the trier of fact in each case.

[56] [1980] 1 S.C.R. 1149, at p. 1159, (1980), 51 C.C.C. (2d) 129, at p. 144.

by La Forest J., the external/internal cause and the continuing danger approach, both attempt to address the same issue: is the accused likely to be a threat to the community in future and hence need hospitalization to prevent that threat?

With respect to the external/internal distinction, La Forest J. rejected it, almost summarily, for sleep-walking. As the internal/external distinction forces a court to examine the nature and reasonableness of an accused's reaction to a "normal" phenomenon,[57] La Forest J.'s summary rejection of the distinction in this context permitted the court to overlook Parks' abnormal reaction to the normal state of sleep. With respect to future cases, La Forest J. says nothing of the applicability of the distinction in, for example, psychological blow automatism, its most controversial context. He did indicate, however, that the internal cause theory is "not a universal approach to the disease of the mind inquiry"[58] and that it is meant to be used only "as an analytical tool, and not as an all-encompassing methodology".[59]

La Forest J.'s analysis of continuing danger is also unsatisfying. Both La Forest J. and Lamer C.J.C.'s judgments on this issue asked whether the accused is likely to have a *violent* episode of somnambulism again. There are two ways one could phrase the question regarding the likelihood of recurrence: (1) is the accused likely to sleep-walk again?[60] or (2) is the accused likely to exhibit violent behaviour while sleep-walking again?[61] It is easy to see that these questions may lead to different answers. The evidence in both *Parks* and *R.* v. *Burgess*[62] was that recurrence of violence was unlikely[63] and yet by asking different questions, different conclusions were reached on disease of the mind. One problem with focusing on the recurrence of violence in *Parks* is that the likelihood of the initial violent incident was also extremely remote and thus could not have been predicted. Whenever a legal determination is based on the prediction of something that is simply unpredictable, because its occurrence is so rare and poorly understood, one wonders what function the test serves except in the most obvious cases.

Under the old insanity provisions, applicable to Parks, the likelihood of *recurrent violence* was clearly a factor on the court's mind because a

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[57] In *R.* v. *Rabey*, *supra*, footnote 7, the decision of a woman not to pursue a romantic relation with Rabey; in *Parks*, sleep.

[58] *Supra*, footnote 1, at pp. 902 (S.C.R.), 47 (D.L.R.).

[59] *Ibid.*

[60] This is how the English Court of Appeal in *R.* v. *Burgess*, *supra*, footnote 22, phrased the question.

[61] This is how the *Parks* court phrased the question.

[62] *Supra*, footnote 22.

[63] Callwood, *op. cit.*, footnote 2, posits that the reason Parks did not seek bail for his offences was his own fear that he would hurt other members of his wife's family.

finding of not guilty by reason of insanity led to a indeterminate hospitalization. It was the accused's dangerousness, and not just the presence of mental illness, that would justify indeterminate detention at the behest of the Crown. However, the determination in *Parks* was not about whether the insanity defence as a whole was satisfied nor about the appropriate disposition for Parks. Rather, the issue was whether the accused suffered from a disease of the mind, only the first step of the criteria in section 16 of the Criminal Code.[64] In our view, in deciding whether the accused's condition qualifies as a disease of the mind, the focus should be on whether *the condition* which led to the violence is likely to recur, not on whether the violence *per se* is likely to recur. In fact, in Lord Denning's leading formulation of this factor he stated:[65]

> It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind.

Under the new mental disorder provisions not every accused found not criminally responsible will necessarily go to hospital since absolute and conditional discharges are also available.[66] Thus the likelihood of recurrent violence can now be considered at the disposition stage in determining whether or not the accused needs hospitalization rather than at the stage of determining responsibility for past actions.

La Forest J. rightly acknowledged that there will be people who believe that the result in Parks impairs "the credibility of our justice system".[67] He wrongly concluded that these people would necessarily reject the insanity/mental disorder defence as well.[68] People who are concerned about Parks receiving an outright acquittal might be less concerned about him being found not guilty by reason of insanity, which would then have resulted in his involuntary hospitalization, at least providing for the possibility of treatment for his sleep-walking. While we do not advocate that indeterminate hospitalization was the most appropriate result in this case, we question La Forest J.'s equation of these two verdicts.

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[64] *Supra*, footnote 5.

[65] *Bratty* v. *Attorney-General (Northern Ireland)*, *supra*, footnote 24, at pp. 412 (A.C.), 534 (All E.R.).

[66] See Criminal Code, *supra*, footnote 5, s. 672.54.

[67] *Supra*, footnote 1, at pp. 908 (S.C.R.), 52 (D.L.R.).

[68] He stated, *ibid.*, at pp. 908 (S.C.R.), 52 (D.L.R.):

> It may be that some will regard the exoneration of an accused through a defence of somnambulism as an impairment of the credibility of our justice system. Those who hold this view would also reject insane automatism as an excuse from criminal responsibility. However, these views are contrary to certain fundamental precepts of our criminal law: only those who act voluntarily with the requisite intent to commit an offence should be punished by criminal sanction. The concerns of those who reject these underlying values of our system of criminal justice must accordingly be discounted.

Conclusions

The failure of the Supreme Court to take the opportunity in *Parks* to delineate clearly the test for distinguishing between non-insane and insane automatism may be attributable, at least in part, to two factors. First, judges have historically been reluctant to label sleep-walking as a disease of the mind and have treated it as an exception in the internal/external cause dichotomy. Perhaps this is because, unlike other conditions that come before them in mental disorder cases, judges can identify with someone who sleep-walks. Norval Morris[69] points out that we all sleep and we have all experienced altered levels of consciousness in the process of sleep. Hence it may be easier for judges and juries to identify with losing control over one's actions in sleep-altered states than in some other forms of altered consciousness.

Secondly, *Parks* may simply have been an impossible case for any appellate court. The defence evidence was overwhelming and the Crown's case woefully inadequate. Once a jury accepted the claim, or at least had a reasonable doubt, that Parks was sleep-walking when he drove across town and killed his mother-in-law and almost killed his father-in-law, an appellate court could only have reversed this verdict by concluding that sleep-walking is a disease of the mind, a conclusion which, at the time of the decision, would almost certainly have led to the indeterminate detention of Parks in a psychiatric facility. The evidence indicated that, by the time the appeals were heard, Parks had made considerable efforts to pull his life together and thus there seemed little point in hospitalization.

The reluctance of the court to reach a conclusion that would have resulted in the indeterminate detention of Parks reflects the inadequacy of the old disposition provisions of the insanity defence. The new mental disorder provisions of the Criminal Code have more flexibility in disposition, allowing, in appropriate cases, for an absolute or conditional discharge. Thus, an accused found not criminally responsible need no longer automatically face indeterminate detention. This flexibility would have addressed the concerns of the majority in not hospitalizing Parks indefinitely and of the Chief Justice in allowing for some supervision of Parks in the future.

In conclusion, *Parks* can best be seen as a case with a very unusual fact pattern, decided under the old insanity provisions, and guided by an effort to avoid a seemingly unjust result for a particular accused. Consequently, the case is only of limited relevance to future cases in this area. We would point to La Forest J.'s review of policy concerns regarding disease of the mind as the most useful portion of the judgment, but would limit its relevance to instances where the Crown is asserting mental disorder against the wishes of an accused.

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[69] *Loc. cit.*, footnote 4, at p. 32.

ECCLESIASTICAL LAW—JURISDICTION OF CIVIL COURTS—GOVERNING DOCUMENTS OF RELIGIOUS ORGANIZATIONS—NATURAL JUSTICE: *Lakeside Colony of Hutterian Brethren* v. *Hofer.*

M.H. Ogilvie*

Introduction

Since the mid-sixteenth century, separation from the world has been a fundamental feature of those branches of the Christian church derived from Anabaptism, the biblically most literal movement within the Protestant Reformation. Some Anabaptist groups, such as the Mennonites, have nonetheless become substantially assimilated within the modern world as a result of the devastating impact of liberalism and secularism over the past century or so. Other groups, such as the Amish or the Hutterian Brethren, have successfully maintained their historic distance, requiring members to live in small, self-sufficient communities, holding all things in common, after the example of the primitive Christian church[1] and as a central theological tenet of their faith.

Yet, with fewer than 10,000 members, Hutterites in Canada have resorted to the civil courts with surprising frequency, perhaps to a greater extent per capita than other Christian denominations,[2] when internal community dispute resolution mechanisms fail. Obedience to the New Testament injunction of community of property, which is the root of all Hutterite civil litigation, apparently blinkers members to Paul's instruction to the early Christians in Corinth not to go to law before "unbelievers" but to resolve disputes within the Christian community.[3]

In *Lakeside Colony of Hutterian Brethren* v. *Hofer*,[4] representative plaintiffs for the Hutterian Lakeside Colony in Manitoba, sought a declaration that the defendants had ceased to be members, by virtue of self-excommunication, in response to internal disciplinary proceedings, and

* M.H. Ogilvie, Professor of Law, Carleton University, Ottawa.

[1] Acts 2:44.

[2] Reported cases which have gone to the Supreme Court of Canada include: *Barickman Hutterian Mutual Corp.* v. *Nault, Lafreniere and Zastre*, [1939] S.C.R. 223, [1939] 2 D.L.R. 225; *Walter* v. *Attorney-General of Alberta*, [1969] S.C.R. 383, (1969), 3 D.L.R. (3d) 1; *Hofer* v. *Hofer*, [1970] S.C.R. 958, (1970) 13 D.L.R. (3d) 1; *Lakeside Colony of Hutterian Brethren* v. *Hofer*, [1992] 3 S.C.R. 165, (1992), 97 D.L,R. (4th) 17, [1993] 1 W.W.R. 113 (sometimes referred to as *Lakeside Colony*). In addition, there are a number of unreported lower court decisions, as well as the use of judicial orders to eject members from communities or to restrain them from returning to communities.

[3] Cor. 6:1-8.

[4] *Supra*, footnote 2.

that they physically leave the Colony. The defendants argued that they remained members on the ground that their attempted expulsion was invalid because of an absence of natural justice in the Colony's disciplinary procedures. Reversing the decisions of both the Manitoba Queen's Bench and the Court of Appeal,[5] the Supreme Court of Canada found that the defendants had not received adequate notice and therefore were entitled to remain on the Colony. In giving judgment for the six member majority (McLachlin J. dissenting), Gonthier J. discussed three legal issues raised by the dispute: (i) the jurisdiction of civil courts over disputes within religious associations; (ii) the legal authority of and relationship among the governing documents of a religious institution; and (iii) the application of the rules of natural justice to dispute resolution procedures within religious institutions where no provision is otherwise made for them. Whether or not those issues were adequately resolved is the subject of this comment.

The Case

The Lakeside Colony was no stranger to problems prior to this case. When the Colony was on the verge of bankruptcy in 1979, the Schmieden-Leut Conference, to which the Lakeside Colony belongs, imposed three overseers from other colonies over Lakeside. The overseers succeeded in putting the Colony's financial affairs in order and remained in charge when a dispute arose with one of the defendants, Daniel Hofer Sr. In 1986, two of the overseers learned that another colony had been required to pay penalties for patent infringement for manufacturing hog-feeders, the licence for which was held by a non-colony company, C & J Jones Ltd. to which it had been assigned by the patent holder, another colony, the Crystal Springs Colony. The senior elder of the Conference, who had appointed the overseers, was also the minister and president of the Crystal Springs Colony and did not inform any of the Hutterite colonies that his colony received fifty per cent of the profits of the patent.[6]

Hofer asserted that he had invented the novel features of the feeders and therefore owned the patent, and despite instructions from the overseers refused to cease manufacturing hog-feeders. Jones Ltd. subsequently demanded damages for patent infringement from the Lakeside Colony which agreed to a settlement of $10,000.00. Believing his own Colony to be entitled to the patent, Hofer deceived the bank on which the cheque was drawn to stop payment on 20 January 1987. The overseers called an "annual

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[5] (1989), 63 D.L.R. (4th) 473, 62 Man. R. (2d) 194 (Man. Q.B.); (1991), 77 D.L.R. (4th) 202, 70 Man. R. (2d) 191 (Man. C.A.), Huband and Lyon JJ.A. for the majority and O'Sullivan J.A. dissenting.

[6] For a journalist's account of the restructuring of Hutterite life and the difficulties experienced in the colonies as a result of the activities of this senior elder, see "Jacob's Ladder", Saturday Night (April 1992), p. 30. See also, William Janzen, Limits on Liberty: The Experience of Mennonite, Hutterite and Doukhobor Communities in Canada (1990).

meeting" of the Colony on 21 January 1987 for later that same day, but there was no express notice of the agenda. All three courts agreed that Hofer's conduct was known both to Hofer and to the Colony to be the reason for calling the meeting. The meeting began with a discussion of the patent issue, but Hofer became sufficiently disruptive that he was asked to leave. While he was out of the meeting, the members agreed to discipline him by a mild form of shunning whereby he would be required to eat and worship separately until he repented. Hofer refused to accept the ruling when called back into the meeting and was told by the chairman that "he is no member, he is out of the church".[7]

The overseers hoped that Hofer would repent after a cooling off period of ten days and called another meeting for 31 January 1987. Hofer received no notice of a specific agenda for this meeting, although the three courts agreed that he knew that his conduct was the major item of the agenda. The meeting was called for noon, and after it, in the afternoon, the senior elder of the Conference was consulted and he recommended by letter that no higher hearing be given to Hofer, but that he "be separated" from the Colony. That letter was read to another Colony meeting on the evening of 31 January 1987, which Hofer again refused to attend, and the meeting decided that Hofer and his two sons who sided with him, "were no more members and out of the church".[8]

The Hofers subsequently remained on the Colony, living and worshipping apart from the community and gathering around them other community members who supported Hofer Sr. At a regularly scheduled meeting of the Conference ministers in February, it was decided to offer Hofer another meeting with these ministers to consider the matter. However, six days after that offer, Hofer and his two sons received a lawyer's letter asking them to vacate the Colony. When they did not do so, a statement of claim was filed on 25 February 1987. In light of this action, the Hofers declined to attend the profferred meeting and received no notices of subsequent Colony meetings to discuss the stand-off. Finally at the meeting of the Colony on 21 July 1988, the excommunication of Hofer, his two sons and one supporter was "ratified, sanctioned and confirmed".[9]

At trial, Ferg J. found that Hofer was excommunicated on either the 21 January or 31 January by virtue of his refusal to accept the discipline imposed on him, so that the Colony was left with no alternative but excommunication. The judge regarded the merits of the Colony's decision to be a matter for the Colony and that the Colony's own procedures were properly followed. Without deciding whether the rules of natural justice could be imported into the Colony's procedures, Ferg J. stated that Hofer

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[7] *Supra*, footnote 2, at pp. 205 (S.C.R.), 43 (D.L.R.), 141 (W.W.R.).

[8] *Ibid.*, at pp. 208 (S.C.R.), 45 (D.L.R.), 143 (W.W.R.).

[9] *Ibid.*, at pp. 215 (S.C.R.), 50 (D.L.R.), 148 (W.W.R.).

chose to waive opportunities to present his case by not attending meetings and therefore waived any other rights he may have.[10] While the trial judge found the disciplines of the Hutterites to be "harsh",[11] he thought them to be protected as freedom of religion, and that Hofer's freedom to live as he wished was also protected. Thus, Ferg J. ordered Hofer and his supporters to leave the Colony without any worldly goods, as is the Hutterite practice.

The majority in the Court of Appeal upheld this decision. Huband J.A. found that no formal vote of excommunication was taken, but that there was a common understanding that failure to submit to shunning resulted automatically in excommunication. Paradoxically, the court further found that excommunication occurred at the meeting on 21 January and was reaffirmed at the meeting on 31 January 1987. Apparently, the Court of Appeal did not think that Hofer should be given any time whatsoever after 21 January to consider his response or even to repent! The court regarded Hofer as fairly dealt with in the circumstances and was unwilling to interfere unnecessarily, provided the excommunication was reasonable and not based on a "whim or caprice".[12]

In contrast to the trial judge, the Manitoba Court of Appeal dealt with two issues in greater detail, the jurisdiction of civil courts in relation to internal disputes in religious associations and the importation of principles of natural justice into the procedures of religious organizations. On the basis of only two earlier cases,[13] the court stated that as a general rule courts should not become involved in resolving internal disputes unless civil rights or property rights are implicated. The courts should never adjudicate issues of faith or doctrine.[14] Where an issue, such as excommunication, impacts solely on a person's status within a religious organization, courts should not be involved, even where the excommunication procedures do not comply with the requirements of natural justice. Where a property issue is linked, courts are required to accept jurisdiction, as occurred, for example in *Hofer* v. *Hofer*,[15] in which the excommunicated plaintiffs sought a winding-up order for another Hutterite colony, together with an equitable division of the assets, and the courts both asserted jurisdiction and applied principles of natural justice. Huband J.A. thought *Lakeside Colony* to be a similar case insofar as the associated property issue was the defendants' counterclaim to be entitled to continue living on the Colony.[16]

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[10] *Supra*, footnote 5, at pp. 487 (D.L.R.), 204 (Man. R.) (Q.B.).

[11] *Ibid.*

[12] *Supra*, footnote 5, at pp. 224 (D.L.R.), 208 (Man. R.) (C.A.).

[13] *Ukrainian Greek Orthodox Church* v. *Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary (No. 2)*, [1939] 2 D.L.R. 494, [1939] 1 W.W.R. 481 (Man. C.A.); affd., [1940] S.C.R. 586, [1940] 3 D.L.R. 670, and *Hofer* v. *Hofer*, *supra*, footnote 2.

[14] *Supra*, footnote 5, at pp. 222 (D.L.R.), 207 (Man. R.) (C.A.).

[15] *Supra*, footnote 2.

[16] *Supra*, footnote 5, at pp. 234-235 (D.L.R.), 215-216 (Man. R.) (C.A.).

By analogy with *Hofer* v. *Hofer*,[17] the Manitoba Court of Appeal concluded that the defendants had no further claim on the communal property of the Colony once they were excommunicated and should be physically removed from the Colony, without any worldly goods. The court expressed considerable sympathy for Hofer Sr. and his supporters and thought it "manifestly inequitable"[18] for them to be forced out without a share of the value of the property to which they contributed.

In a wide-ranging dissenting judgment, O'Sullivan J.A. found that Hofer was denied natural justice. Hofer's expulsion was not on the agenda explicitly for any meetings and Hofer was disciplined while he was absent, and so informed after he rejoined meetings, without an opportunity to be heard. O'Sullivan J.A. also held that, since Hutterites do not own property individually, the plaintiffs had no property right on which to rely in invoking the jurisdiction of the court to expel Hofer. Although he did not make any decision about patent ownership which was the original reason for the dispute, he decided there was overwhelming evidence to support Hofer's position and that Hofer, acting in good faith and genuinely believing himself to be the inventor, correctly challenged the commercial projects in which the senior elder was engaging as inconsistent with the Hutterian understanding of the Christian life. The dissenting judge also considered the legal authority of and interrelationship of the governing documents of the Hutterian Brethren, concluding that the articles of association, not the federal incorporation act, interpreted in the light of the whole set of beliefs of the Hutterites should govern, but for their suspension by the overseers.

The majority of the Supreme Court of Canada agreed with O'Sullivan J.A.'s conclusion that Hofer had been denied natural justice and was illegally expelled from membership in the Lakeside Colony.

If Hofer was to overcome the Colony's position that he had been legally excommunicated, he had to show that, if there was some form of conduct, such as a vote, to expel him, the rules of natural justice had not been complied with prior to that final act. Therefore, in considering the factual issues, Gonthier J., for the majority, focused on two questions, was there a vote to expel and had the rules of natural justice been complied with in the pre-expulsion proceedings?

In relation to the former question, Gonthier J. noted three ways in which Hutterite practices rendered a definitive answer difficult: Hutterite discipline proceeds by a series of steps whereby contact with the member is withdrawn; then when "expelled", members are not asked to leave the colony immediately; and, even when finally asked, are not physically ejected, since Hutterites practice non-resistance. While this leaves a colony in a difficult position when an expelled member chooses not to depart, it did

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[17] *Supra*, footnote 2.

[18] *Supra*, footnote 5, at pp. 235 (D.L.R.), 216 (Man. R.) (C.A.).

not deter the Supreme Court from concluding that Hofer Sr. was expelled by the voting members of the Colony on 21 January 1987. The court further found definite acts of expulsion for his sons on 31 January 1987 and for his other supporters subsequently.[19]

In relation to the latter question, the Supreme Court focused on one element of natural justice, sufficient notice, and declined to consider the requirements of an unbiased tribunal and an opportunity to make representations.[20] With respect to Hofer Sr., the court found that no sufficient notice was given of his pending expulsion. For the 21 January meeting, Hofer knew that his recent behaviour was on the unwritten agenda but not his expulsion, of which he had only a few moments notice in the course of the meeting, not (in the opinion of the court) sufficient notice for a decision of this magnitude. Moreover, two of the voting members of the Colony, of which there were twelve, including Hofer and his two sons, had no notice that the expulsion was to be considered and were absent from the meeting. Instead, the court thought that the proper procedure to follow, once expulsion became an issue at the meeting, would have been to call a subsequent meeting with adequate notice to all members of the expulsion item on the agenda. The court further found that the ten day cooling period was to give Hofer time to repent, so that the meeting of 31 January was irrelevant. With respect to both Hofer's sons and other supporters, the court found that no notice had ever been given to them that their expulsions would be considered at any meeting of the colony. Moreover, the fact that the members regarded their expulsion to follow automatically that of Hofer, was no reason not to give them sufficient notice. Thus, all of the defendants remained as members of the Colony with a right to reside there.[21]

McLachlin J. found otherwise. In her view, the requirements of natural justice are flexible and the ultimate issue is whether the procedures followed are fair. Since the purpose of a notice requirement is to permit a person to make a defence, that purpose was satisfied because Hofer knew that self-expulsion would follow from his conduct and he had opportunities to defend himself. McLachlin J. thought that the entire process contemplated no role for a formal notice since the members did not make a decision, but that Hofer was obliged to decide whether to comply with the discipline by repenting. If formal notice serves no purpose, then a failure to give notice is not a breach of the rules of natural justice.[22] McLachlin noted that the meeting of 31 January substantially cured any notice defect in relation to the earlier meeting since Hofer was again offered the opportunity of reconciliation.[23] In conclusion, McLachlin J. regarded the Colony's dealings

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[19] *Supra*, footnote 2, at pp. 216-220 (S.C.R.), 50-54 (D.L.R.), 148-151 (W.W.R.).

[20] *Infra*, the text, commencing at footnote 64.

[21] *Supra*, footnote 2, at pp. 220-225 (S.C.R.), 54-58 (D.L.R.), 152-155 (W.W.R.).

[22] *Ibid.*, at pp. 230 (S.C.R.), 61 (D.L.R.), 159 (W.W.R.).

[23] *Ibid.*, at pp. 232-233 (S.C.R.), 62-63 (D.L.R.), 160-161 (W.W.R.).

with Hofer to be "open, considered and eminently fair".[24] She regarded the problem to be a fundamental and irreconcilable difference between the Hutterian tenet of peaceful submission and Hofer's "defiant spirit of independence".[25]

This construction of the events by McLachlin J. is problematical for several reasons. First, shunning essentially amounts to expulsion since the decision to shun leaves the person shunned with the sole option of accepting that decision with no further opportunity for discussion. Once made up, the mind of the Colony cannot afterward be changed except by the repentance of the person shunned. Secondly, the Hutterite practice of discussion and consensus is predicated upon a fair opportunity for all voting members to participate before a consensus is reached. Its democratic nature is much vaunted by the Hutterian Brethren. Therefore, a sudden decision in the absence of a voting member, to shun that member without prior notice of the decision and no subsequent opportunity to do anything other than repent, is contrary to Hutterian practice. In fact, it could be argued that the factual problem at the heart of the case is the head-on collision of two Hutterite practices: consensual decision-making by all voting members and shunning. When there is no compliance with the former, the object of the latter is placed in an impossible position. Thirdly, McLachlin J. appears to have overlooked the fact that expulsion by shunning was a last minute agenda item at the meeting of 21 January, originally called to review Hofer's conduct in respect to the patent. Fourthly, while shunning seems, *prima facie*, exclusive to Hutterian communities, on closer examination, shunning is a practice commonly indulged in, in many workplaces, such as offices, university departments or law firms, to drive out perceived nonconformists, whose nonconformity may result in doing a job better than or differently from, yet as successfully as, the others. Should dismissal proceedings ever occur, the defendant would, like Hofer, appear to be defiant or "uncollegial". Thus, if extended beyond the apparently peculiar facts of *Lakeside Colony*, McLachlin J.'s approach might result in great injustice.

McLachlin J.'s general approach to the dispute in *Lakeside Colony* was to resolve it with minimal judicial interference in the internal affairs of a closely-knit religious community, whereas the majority of the Supreme Court assumed interference to be within the jurisdiction of the civil courts. It remains, then, to examine the relationship of the civil courts to religious associations through the three substantive legal issues discussed by Gonthier J. for the court.

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[24] *Ibid.*, at pp. 232 (S.C.R.), 63 (D.L.R.), 161 (W.W.R.).

[25] *Ibid.*, at pp. 233 (S.C.R.), 63 (D.L.R.), 161 (W.W.R.). The analogy with Luther and Rome both overstates the importance of the dispute between Hofer and the Lakeside Colony and understates the importance of the dispute at the heart of the Reformation.

Civil Jurisdiction over Religious Associations

Both the Manitoba Court of Appeal and the Supreme Court of Canada expressed reluctance to exercise jurisdiction over questions of membership in a voluntary association, especially a religious one. Speaking for the Supreme Court, Gonthier J. restricted that jurisdiction in two ways. First, he was content to restate the opinion expressed over fifty years ago by Crocket J. in *Ukrainian Greek Orthodox Church* v. *Ukrainian Greek Orthodox Cathedral of St. Mary the Protectoress (No. 2)*:[26]

> ... it is well settled that, unless some property or civil right is affected thereby, the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order.

While this statement appears to be restricted to the use of civil courts to enforce church decisions, it was interpreted more widely by both appellate courts in *Lakeside Colony* to authorize civil courts to engage in a broader review, provided a property or civil right is involved in the expulsion of a member. The case actually involved a request for an injunction to restrain an excommunicated priest from officiating at church services and cited no earlier authorities.

In *Hofer* v. *Hofer*,[27] the Supreme Court of Canada found that the request for a winding-up order and distribution of a colony's assets provided the necessary element of property for actual intervention, and in *Lakeside Colony* the contractual right of members of the colony to live there as long as they are members justified the exercise of jurisdiction over the dispute. Indeed, because the contractual right involved the livelihood of the Hofers, it was said to be on the same footing as a property right.[28]

The second restriction placed on a court's jurisdiction by Gonthier J. was that courts should not review the merits of the decision to expel, but should simply determine "whether the purported expulsion was carried out according to the applicable rules with regard to the principles of natural justice, and without mala fides".[29] Since the *ratio decidendi* of *Lakeside Colony* is that ecclesiastical procedures are subject to the rules of natural justice, presumably the restriction is limited to curial review of the substantive merits of the decision. The necessity for either restriction on Canadian courts may be questioned.

The proposition that courts should decline jurisdiction over disputes about the expulsion of members where a property or civil right is not also at issue was first expressed in several late nineteenth century Ontario decisions

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[26] *Supra*, footnote 13, at pp. 591 (S.C.R.), 671 (D.L.R.).

[27] *Supra*, footnote 2.

[28] *Supra*, footnote 2, at pp. 174 (S.C.R.), 20 (D.L.R.), 118 (W.W.R.). See also: *Lee* v. *Showman's Guild of Great Britain*, [1952] 1 All E.R. 1175, at p. 1180 (C.A.), per Denning L.J.

[29] *Ibid.*, at pp. 175 (S.C.R.), 20-21 (D.L.R.), 119 (W.W.R.).

overlooked by the appellate courts in *Lakeside Colony*. Thus, courts declined jurisdiction because no civil right was thought to be at stake in *Dunnet* v. *Forneri*[30] where an order to restrain a minister from excommunicating a lay person and excluding him from the Eucharist was refused, and in *Pinke* v. *Bornhold*[31] where a member was expelled from membership on the ground of financial irregularities, while serving as a congregational trustee. Conversely, in *Tully* v. *Farrell*,[32] the court exercised jurisdiction to set aside the improper election of a church warden because female lessees of pews had voted (the right of pew holders to vote being a property right recognised by the civil law).

Subsequent cases involving the expulsion of members, of which there are many, although none were considered by any of the courts in *Lakeside Colony*, suggest that the substantive content of "property and civil rights" is either very narrowly circumscribed in application or regarded by many Canadian lower courts as irrelevant to the exercise of jurisdiction. In some categories of cases involving religious organizations generally, a property or civil right nexus is obvious, for example, disputes over church property held in trust[33] or clergy dismissal cases,[34] which raise contractual issues. Yet, courts have willingly decided a wide variety of cases involving lay discipline in which neither element is obviously present.[35]

Courts have sustained expulsions from membership for insufficient financial support;[36] non-attendance at worship;[37] financial irregularities while serving as trustee;[38] disruption of meetings;[39] "apostasy";[40] alleged writing of libelous letters about a priest;[41] and for no stated reason.[42] Courts have

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[30] (1877), 25 Gr. 199 (Ont. Ch.).

[31] (1904), 8 O.L.R. 575 (Ont. H.C.).

[32] (1876), 23 Gr. 49 (Ont. Ch.).

[33] See generally: M.H. Ogilvie, Church Property Disputes: Some Organizing Principles (1992), 42 U.T.L.J. 377.

[34] See generally: M.H. Ogilvie, Ecclesiastical Law—Jurisdiction of Civil Courts—Status of Clergy: *McCaw* v. *United Church of Canada* (1992), 71 Can. Bar Rev. 597. See also a later case: *Davis* v. *United Church of Canada* (1992), 92 D.L.R. (4th) 678, 8 O.R. (3d) 75 (Ont. Gen. Div.).

[35] The following paragraph and footnotes are taken from Ogilvie, *ibid.*, at pp. 607-608.

[36] *Patillo* v. *Cummings* (1915), 24 D.L.R. 775 (N.S.C.C.).

[37] *Ibid.*

[38] *Pinke* v. *Bornhold*, *supra*, footnote 31.

[39] *Cohen* v. *The Congregation of Hazen Avenue Synagogue* (1920), 47 N.B.R. (N.B. Ch.D.).

[40] *Christenson* v. *Bodner* (1975), 65 D.L.R. (3d) 549 (Man. Q.B.); *Zebrowski* v. *Jehovah's Witnesses* (1988), 87 A.R. 229 (Alta. C.A.).

[41] *Zawidoski* v. *Ruthenian Greek Catholic Parish of St. Vladimir and Olga*, [1937] 2 D.L.R. 509 (Man. K.B.).

[42] *Otis* v. *James* (1922), 22 O.W.N. 325 (Ont. H.C.).

also been willing participants in disputes with the laity over the right to burial in consecrated grounds;[43] access to church records;[44] internal elections to congregational offices;[45] and damages for lost business profits resulting from exclusion from a religious community.[46] In many cases, the courts intervened to overturn church decisions on the grounds of procedural irregularities.[47] In several cases, the courts declined to intervene either on the ground that there were no such irregularities[48] or that internal procedural routes had not been exhausted.[49] In only two cases, the earliest cases, *Dunnet* v. *Forneri*[50] and *Pinke* v. *Bornhold*,[51] did the courts decide that intervention was outside civil jurisdiction.

Prima facie, many of these cases do not involve a property or civil right as understood by the Supreme Court of Canada in *Ukrainian Greek Orthodox Church* v. *Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary (No. 2)*,[52] *Hofer* v. *Hofer*[53] or *Lakeside Colony* or by lawyers generally, that is, a right in the common law of property, contract, tort or restitution. On the other hand, as I have argued elsewhere,[54] there is, in these cases an underlying assumption, occasionally explicitly stated in lay discipline cases,[55] that lay discipline is based on contract. Religious associations have long been regarded by the common law to be voluntary associations and the relationships among members to be a multilateral contract.[56] Thus, it is arguable that the "civil right" which provides the

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[43] *Dame Henriette Brown* v. *Les curés et marguilliers de l'oeuvre et fabrique de Notre Dame de Montréal* (1874), L.R. 6 P.C. 157 (P.C.).

[44] *Wetmon* v. *Bayne*, [1928] 1 D.L.R. 848, [1928] 1 W.W.R. 519 (Alta. App. Div.).

[45] *Tully* v. *Farrell*, *supra*, footnote 32.

[46] *Heinrichs* v. *Wiens* (1916), 31 D.L.R. 94 (Sask. S.C.).

[47] *Dame Henriette Brown* v. *Les curés et marguilliers de l'oeuvre et fabrique de Notre Dame de Montréal*, *supra*, footnote 43; *Tully* v. *Farrell*, *supra*, footnote 32; *Patillo* v. *Cummings*, *supra*, footnote 36; *Heinrichs* v. *Wiens*, *ibid.*; *Cohen* v. *The Congregation of Hazen Avenue Synagogue*, *supra*, footnote 39; *Otis* v. *James*, *supra*, footnote 42; *Zawidoski* v. *Ruthenian Greek Catholic Parish of St. Vladimir and Olga*, *supra*, footnote 41; *Christensen* v. *Bodner*, *supra*, footnote 40.

[48] *Wetmon* v. *Bayne*, *supra*, footnote 44; *Zebrowski* v. *Jehovah's Witnesses*, supra, footnote 40.

[49] *Zebrowski* v. *Jehovah's Witnesses*, *ibid.*

[50] *Supra*, footnote 30.

[51] *Supra*, footnote 31.

[52] *Supra*, footnote 13.

[53] *Supra*, footnote 2.

[54] Ogilvie, *loc. cit.*, footnote 34.

[55] *Dunnet* v. *Forneri*, *supra*, footnote 30; *Dame Henriette Brown* v. *Les curés et marguilliers de l'oeuvre et fabrique de Notre Dame de Montréal*, *supra*, footnote 43.

[56] See, for example, *Lyster* v. *Kirkpatrick* (1866), 26 U.C.Q.B. 217, at p. 225 (C.A.), per Draper C.J.; *Dunnet* v. *Forneri*, *ibid.*, at pp. 205-206, per Proudfoot V.C.; *Johnson* v. *Glen* (1879), 26 Gr. 162, at p. 181 (Ont. Ch.), per Proudfoot V.C.

allegedly necessary legal nexus for the intervention of civil courts is this contract. If this is so, the search for a property or civil right to vindicate judicial intervention takes on a new meaning. Instead of looking for such a right as defined historically by the common law, one need merely recall that all members of religious organizations are *ipso facto* contractual parties with a contractual right of enforcement of all aspects of the contract, including its doctrinal or procedural provisions, or a remedy in lieu. It may be that the Supreme Court has missed this obvious justification for the exercise of jurisdiction because the Hutterite cases are, paradoxically, easy cases. When a fundamental theological tenet is community of property, property rights are inextricably linked to member expulsion; ritualistic expression of reluctance to become involved, but for an alleged property right issue, may easily replace original analysis.

Such a reconstitution of the juridical rationale for the exercise of jurisdiction would effectively eliminate any requirement for a future court to justify intervention in disputes in religious organizations. Contractual enforcement not only obviates judicial self-justification but also should quell the fear underlying judicial reluctance to become involved, that is, the fear of entrapment in doctrinal intricacies. In the first church discipline case in Canada, *Bishop of Columbia* v. *Cridge*,[57] Begbie C.J.B.C. stated that civil courts should not deal with exclusively spiritual matters, and to date, no cases of that kind have come before the courts. Indeed, it is open to serious doubt that many ever will. Even in England where an ecclesiastical court system has existed since the Middle Ages, it was estimated in 1840 that only about seven cases "even remotely [involving] any question of doctrine" had been heard in the previous three centuries.[58]

The closest courts might come to doctrine is simply to state what the doctrine may be of a particular religious association in order to resolve a dispute involving a temporal matter; for example, in disputes involving rights to church property when schism occurs, courts are required to state the principles, often theological, on the basis of which the property is held in trust, to determine to whom to award the property.[59] This does not require the dictation of theology to a church, but the hearing of evidence, usually written, about doctrinal standards when property was acquired. As a practical matter, Anglo-Canadian cases on doctrinal matters have been virtually non-

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[57] (1874), 1 B.C.R. (Pt. 1) 5, at p. 11 (B.C.S.C.). See also *Balkou* v. *Gouleff* (1989), 68 O.R. (2d) 574, at p. 576 (C.A.), per Catzman J.A., where the court could easily have stated what the doctrine was without dictating it to the church. The case demonstrates excessive judicial reluctance.

[58] Report to the House of Commons on Appeals in Doctrine and Discipline to the High Court of Delegates, Pp 1867-68, lvii, 75, xxi, cited in S.M. Waddams, Law, Politics and the Church of England. The Career of Stephen Lushington 1782-1873 (1992), p. 270, n. 1.

[59] Ogilvie, *loc. cit.*, footnote 33.

existent historically; as a practical matter today, it is inconceivable that ecclesiastical disputants would ever ask courts to make theology for a religious organization. Judicial fear of involvement in doctrinal disputes is both a red herring and a unique limitation on an otherwise unlimited jurisdiction to enforce the contractual obligations that bind members and religious associations together.

The second restriction imposed by the Supreme Court of Canada in *Lakeside Colony* on the courts, that is, that they should not review the merits of a decision to expel, may be reconsidered in light of the foregoing. The context in which this restriction was stated[60] shows that the court favoured judicial review of procedural, but not substantive issues. This restriction is both impractical and unnecessary, considered in the light of the previous discussion. The Hutterite cases demonstrate the impracticality of separating procedural and substantive matters. The consensual, non-aggressive style of decision-making, even in expulsion matters, practised by these communities is based on theological tenets of non-resistance and passivity as the appropriate Christian response to conflict. To import rules of natural justice into such procedures is to import an adversarial style of decision-making where none existed explicitly before. While the Hutterite cases are easy cases on the basis of which to demonstrate the impracticality of the distinction, all religious organizations would assert that to a greater or lesser extent, their procedural rules are theologically grounded.

Judicial intervention is necessarily intrusive. Therefore, the courts are faced with the stark choice either of becoming involved or of completely refraining from involvement. The latter choice condones the injustices which often characterise church tribunals, while the former attempts to alleviate them. Once a public policy choice of intervention is made, justice requires as few limitations as possible on the extent and nature of that intervention. If the sole limitation is on dictating doctrine, then the Supreme Court's second restriction is, like the first, drawn too narrowly. Judicial review of the merits should extend beyond procedure to substance but stop short of dictating the substance of the faith. Since doctrinal standards are written down in a variety of creeds, confessions, constitutions and theological books, the civil courts have a clear basis beyond which they should not venture. After all, the rules of natural justice are designed to ensure that these standards are upheld!

The Governing Documents of Religious Associations

Lakeside Colony appears to be the first case in which the Supreme Court of Canada considered the legal status of and interrelationships among the governing documents of a religious organization, as it had to do, in order to determine whether the expulsion of the Hofers was in accordance

[60] *Supra*, footnote 2, at pp. 175 (S.C.R.), 21 (D.L.R.), 119 (W.W.R.).

with the procedural practices of the Hutterites and in accordance with the rules of natural justice. The governing documents of religious organizations have rarely been considered by Canadian courts either in themselves or in relation to civil legislation and the common law. A rare recent case was *Re Incorporated Synod of the Diocese of Toronto and H.E.C. Hotels Ltd.*,[61] in which the Ontario Court of Appeal considered the relationship of a private incorporation act and a public general statute, concluding that the former took precedence over the latter in relation to the specific church for which the private act was provided.[62]

As institutions, religious organizations are simply very "messy" to deal with. Not only does each institution have its own set of governing documents but even within an individual institution, there are normally a variety of documents, both secular and theological, whose interrelationships are often left to the civil courts to sort out. Typically, governing documents may include any number of the following: federal private legislation; provincial private legislation (for the same religious institution); federal and/or provincial legislation for specific national or provincial parts of a religious institution; provincial private legislation for individual synods, dioceses, presbyteries, congregations, parishes or related eleemosynary organizations; articles of association, bylaws, both for national and local bodies; canon law; manuals of procedure and/or discipline; public general statutes, both federal and provincial, relating to religious organizations; confessions; creeds; statements of faith; theological treatises and ecclesiastical customs, which may differ from place to place. Typically, counsel for the parties in disputes involving religious organizations will pre-select for the courts the governing documents specific to the case, but courts must still be prepared to determine the hierarchical authority of these documents in relation to the facts before them and the possibility that counsel have omitted to argue relevant documents.

In *Lakeside Colony*, four sources of authority were at issue: a federal act incorporating the Hutterian Brethren;[63] the constitution of that church to which all Hutterite colonies subscribe; the articles of association of the Lakeside Colony; and the oral traditions and customs of the Hutterites. The court found that the federal act cast the top layer of the Hutterian Brethren Church in legislative form as a single incorporated body to respond to external threats to the Hutterite colonies generally. While the board of managers of the church had statutory authority over discipline pursuant to the act, the court found that because the corporation and the church were two distinct entities, the provisions of the constitution of the church

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[61] (1987), 44 D.L.R. (4th) 161, 61 O.R. (2d) 737 (Ont. C.A.).

[62] See generally: M.H. Ogilvie, The Legal Status of Ecclesiastical Corporations (1989), 15 Can. Bus. L.J. 74.

[63] S.C. 1951, c. 71.

relating to discipline took priority in relation to the question of who may discipline. The constitution provides that expulsion of a member should be determined by the particular colony and Lakeside Colony's own articles of association contained provisions in that regard, which were to be construed in keeping with the oral customs and traditions of the Hutterites. Finally, the court examined the articles, dealing with apparent inconsistencies in the light of Hutterite practice, to conclude that a vote to expel is required, even if a consensual rather than a formal vote is taken.

To reach this integration of the four sources of Hutterite authority relating to Hofer's expulsion, the court was several times forced to choose between apparently conflicting provisions and relied on oral tradition and custom to make each choice, assuming that these were implied terms of the Hutterite contract.[64] The court admitted the difficulties associated with this analytical process, especially given its external perspective, in contrast to the internal point of view of the Hutterites for whom tradition and custom are, in fact, the highest source of authority.[65] Legislation, constitutions and articles of association were, after all, required to interface with the Canadian civil authorities in relation to dealing with property and similar civil matters and of little import to daily life on a colony. The ultimate source then, of the court's self-admitted hesitancy in dealing with the authorities was the authorities themselves: they had accumulated over time, each added in response to a particular civil or religious issue, and therefore lacked synthesis. Even the Hutterites themselves were uncertain as to whether the corporation created by the legislation was identical with the sect enjoying continuous historical existence since formed by Jacob Hutter in the mid-sixteenth century.

Given these inherent difficulties in litigation involving religious organizations, the significance of the court's attempt to guide its adjudications by reference to these governing documents lies in its implicit assumption that these constituted contractual documents binding on the members and enforceable, *prima facie*, by the courts. The contractual analogy is seen in other types of disputes.[66] The contract consists of express terms, such as those listed above, and implied terms, the oral customs and traditions of the church. Membership is voluntary; even Hutterites are free to leave at any time although the economic terms of so doing are harsh, yet well-known. Judicial intervention is kept to a minimum by the determination of disputes in compliance with the contract. As with commercial contracts, the presumption is one of enforcement, with actual intervention or judicial contract making resorted to only in situations in which some vitiating factor such as illegality or unconscionability is present. The importation of the

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[64] *Supra*, footnote 2, at pp. 190-192 (S.C.R.), 32-33 (D.L.R.), 130-131 (W.W.R.).

[65] *Ibid.*, at pp. 190 (S.C.R.), 32 (D.L.R.), 130 (W.W.R.).

[66] Ogilvie, *loc. cit.*, footnotes 33, 34.

rules of natural justice might, therefore, be seen by analogy as a procedural intervention to ensure that justice is done between the parties.[67] Therefore, it is submitted that the contractual analogy could be developed in cases involving member expulsion to sustain both judicial intervention and minimal judicial intervention.

Natural Justice

The importation of the rules of natural justice into the procedures of religious organizations by the courts by way of judicial review is undeniably judicial interference with those institutions, many of which are governed by centuries-old procedures pre-dating the evolution of judicial review and natural justice, and lacking rules of natural justice. Simply to require these of religious organizations is to interfere, since the organizations themselves may not wish to have them, for reasons based on their doctrine or polity.

In *Lakeside Colony*, the Supreme Court of Canada acknowledged that the content and application of the principles of natural justice must be flexible, accounting for the circumstances in which they are applied.[68] The court stated that the three most basic rules of natural justice, notice, an opportunity to be heard and an unbiased tribunal, are required of religious organizations, although on the facts, the court thought it necessary to find only breach of the right to notice.

With respect to the nature and content of the notice requirement, the court held that sufficient notice includes not just notice that the member be informed of the cause for which he may possibly be expelled at the meeting, but that such notice also be timely and adequate.[69] Timely and adequate notice gives both the person under censure and the other members of the meeting time to consider the issues and to make appropriate arrangements to attend the meeting.[70]

Securing an unbiased tribunal is particularly difficult within the context of religious associations since almost any tribunal, no matter how constituted, will include persons familiar with the member and the issues, indeed having a special interest in the outcome. The Supreme Court refrained from further addressing the issue of how an unbiased tribunal might be struck because the parties presented no argument on the matter.[71] Nor did the court further comment on the right of *audi alteram partem*,[72] preferring instead to conclude that there was a breach of the right of notice. It may be suggested that

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[67] This argument is fully developed in Ogilvie, *loc. cit.*, footnote 34, at pp. 607, 614.

[68] *Supra*, footnote 2, at pp. 195 (S.C.R.), 36 (D.L.R.), 134 (W.W.R.), per Gonthier J.; at pp. 226 (S.C.R.), 59 (D.L.R.), 156 (W.W.R.), per McLachlin J.

[69] *Ibid.*, at pp. 196 (S.C.R.), 36 (D.L.R.), 134 (W.W.R.).

[70] *Cohen* v. *The Congregation of Hazen Avenue Synagogue*, *supra*, footnote 39.

[71] *Supra*, footnote 2, at pp. 197 (S.C.R.), 37 (D.L.R.), 135 (W.W.R.).

[72] *Ibid.*, at pp. 196 (S.C.R.), 37 (D.L.R.), 135 (W.W.R.).

removal of the dispute either to another colony or to a tribunal of ministers drawn from other colonies may provide an unbiased tribunal and still be within Hutterite custom, although somewhat unusual. That procedure is occasionally used in other religious organizations to ensure a tribunal as unbiased as possible, given the close nature of life within such institutions. It may well be that the practical incorporation of the rules of natural justice into the procedures of religious organizations will always be problematical.

While earlier lower court decisions in Canada have suggested that rules of natural justice be incorporated into internal ecclesiastical proceedings, as have courts in the United States and Scotland (although not yet England),[73] *Lakeside Colony* is the first Supreme Court case to have done so in relation to such institutions and should serve as a basis for their further application in the future.

Conclusion

The practical result of the decision of the Supreme Court of Canada in *Lakeside Colony of Hutterian Brethren* v. *Hofer* was to sustain Hofer's claim to be a member of the Colony with a correlative right to live and work there. Lakeside Colony remained a divided community. However, the Supreme Court also handed back to the Colony the right and the duty of resolving its own disputes. No court addressed the issue at the heart of the matter, Hofer's claim to the patent in the hog feeder, which conflicted with the contentious, new style of "management" introduced into the Hutterian Brethren Church by the present senior elder. The Hutterites have been left to themselves to determine their own future. Thus, while judicial intervention amounted to procedural interference, by requiring guarantees of fairness not necessarily inherent in Hutterite decision-making, it did not go to the substantive theological issues of the future nature of Hutterite institutional life in relation to property owning or polity.

This is usually the result when courts intervene in disputes involving religious organizations. At the end of the day, judicial intervention is considerably less insidious than first imagined. Provided the courts look to the contract on which the religious association is based, with a view to enforcement, curial interference with freedom of religion is virtually non-existent. It may be that the contract analogy is the best legal safeguard for freedom of religion in Canadian law for religious institutions.

Therefore, expressions of judicial reluctance to become involved are unnecessary, provided the courts acknowledge the one limitation beyond which they ought never to go, dictating theological norms in relation to the doctrine and polity of a religious organization. In any case, it is salutary to recall that much of the work of the Reformation was accomplished not by theologians or elders, but by the laity of Western Europe acting through

[73] These cases are cited in Ogilvie, *loc. cit.*, footnotes 33 and 34.

town councils, royal courts and parliaments to impose beneficial reforms on a church which had successfully resisted internal reformation for several centuries.

Once Martin Luther was asked why he set the hymns which he wrote for the worship of the newly Reformed church to some of the most popular songs of his day. Luther replied: "Why must the Devil have the best tunes?" Religious organizations which resent the intrusion of the civil courts should, to paraphrase Luther, ask themselves, "Why must the Devil have the best rules of procedure?".

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RES JUDICATA—RETROSPECTIVITY AND JUDICIAL CHANGE IN THE LAW: *Amopharm* v. *Harris Computer.*

Peter E.J. Wells and Chi-Kun Shi*

Introduction

The decision in *Morguard* v. *De Savoye*[1] brought an unexpected, yet nevertheless welcome change in the law respecting interprovincial enforcement of judgments. The case and the new approach it propounded were discussed in detail by Professor Joost Blom in a case comment in this Review.[2] The decision in *Amopharm Inc.* v. *Harris Computer Corp.*[3] raises a serious question of how this change in the law is to be managed and graphically illustrates the tension between the need for the common law to adapt to changes in society and yet simultaneously provide a dependable framework to guide the conduct of daily affairs. "Law must be stable, and yet it cannot stand still."[4]

Amopharm and Magypharm, Quebec corporations carrying on business in that province, purchased a computer system and software from Harris which was based in Ontario. By 1983, Amopharm and Magypharm claimed the system did not work, and Harris claimed it was not fully paid.

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* Peter E.J. Wells and Chi-Kun Shi, both of Lang Michener, Toronto, Ontario.

[1] [1990] 3 S.C.R. 1077, (1990), 76 D.L.R. (4th) 256.

[2] J. Blom (1991), 70 Can Bar Rev. 733.

[3] (1992), 93 D.L.R. (4th) 524, 10 O.R. (3d) 27 (Ont. C.A.).

[4] R. Pound, Interpretations of Legal History (1923), p. 1.

Amopharm and Magypharm sued in Quebec claiming for rescission of the contract and other relief. Harris was served in Ontario in accordance with the formal requirements of Quebec law. Harris elected not to appear in Quebec to dispute either jurisdiction or the merits. In September, 1987, the Quebec Superior Court granted rescission together with damages, interest and costs. In October, 1988 the Quebec plaintiffs sued Harris in Ontario on the Quebec judgment. Harris responded with a motion for summary judgment which was heard by Oyen J. On the law as it was understood at the time, before *Morguard*, Oyen J. dismissed the plaintiffs' action. Her decision was not appealed.

Thus restricted to Quebec, the plaintiffs proceeded to issue out writs of execution to attach funds owed to Harris by its other Quebec customers. Harris sprang into action and attacked the writs, but did not attack the judgment itself or question the jurisdiction of Quebec's Superior Court. While it demonstrated some procedural errors in the writs, these were corrected.

The Quebec plaintiffs then commenced new proceedings in Ontario alleging that Harris' attack on the writs amounted to attornment, and moved for summary judgment on the whole of the original claim. This motion came before McWilliam J. who dismissed the action. Apparently the motion material filed before McWilliam J. included all the affidavits and other material from the first action before Oyen J. This time the Quebec plaintiffs appealed, and between judgment at trial and the hearing of the appeal, the Supreme Court of Canada released its decision in *Morguard*. McWilliam J. had held (as all three judges in the Court of Appeal said he did correctly) that Harris' attack on the writs did not constitute attornment to the Quebec Superior Court. Having found that McWilliam J. had correctly decided the issue placed before him by the parties, the majority in the Court of Appeal then turned to consider the evidence from the first action (from the material filed before McWilliam J.) and the change in the law effected by *Morguard*.

The majority (Brooke and Doherty JJ.A.) held that the material filed before McWilliam J. (including the material from the first action) satisfied the *Morguard* test, and consequently allowed the appeal, granting judgment in Ontario to the Quebec plaintiffs:[5]

> In my opinion, in these unusual circumstances we should not decline to follow the judgment in *Morguard* solely because the pleadings sought relief on the ground of attornment. Further, in the unusual circumstances of the case, I do not regard the judgment of Oyen J. as a bar, nor the issue before us as *res judicata*. That decision depended on facts not in issue here and stood to be decided on different principles. I think we should enforce the judgment of the Superior Court of Quebec.
>
> There is no unfairness to the defendant in granting judgment unless it can be said that the defendant should not be caught by a change in the law and deprived of an opportunity to fight the case on its merits. There is no statement in an affidavit which suggests that the respondent has a good defence on the merits. The only indication

[5] *Supra*, footnote 3, at pp. 528g-529b (D.L.R.), 32b-f (O.R.).

> of the nature of its position is, as set out above, that it had not been properly paid. But it made no such claim in the courts of this province and declined the opportunity to make such a claim in Quebec.

This comment will examine both the issues of *res judicata* and the "unusual circumstances" which are said to explain this result.

It is important to note the effect of the majority decision. Brooke and Doherty JJ.A. found that "McWilliam J. held that the respondent had not attorned to the jurisdiction of the Quebec Court. In so doing he *correctly followed and applied* the judgment of Houlden J.A. in *Clinton* v. *Ford*".[6] In effect, the decision which had been appealed (that of McWilliam J.) was affirmed while the decision which had never been appealed (that of Oyen J.) was reversed.

Res Judicata

The requirements for *res judicata* have been summarized as:[7]

(i) that the alleged judicial decision was what in law is deemed such;

(ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;

(iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;

(iv) that the judicial decision was final;

(v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;

(vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*.

With respect to the proceedings before Oyen J.:

(i) the judgment on the motion for summary judgment was a judicial determination;

(ii) the Court of Appeal accepted as fact that it had been pronounced as alleged;

(iii) Oyen J. clearly had competent jurisdiction;

(iv) her decision was final; and

(vi) the parties were the same in both Ontario actions.

The distinction drawn by Brooke J.A. relates to item (v) of the requirements for *res judicata*—the identity of action or issue. Whether or not one can say that the facts which were determinative of the issue before

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[6] *Amopharm Inc.* v. *Harris Computer Corp.*, *supra*, footnote 3, at pp. 528a-b (D.L.R.), 31e (O.R.). (Emphasis added).

[7] G. Spencer Bower and A.K. Turner, Doctrine of Res Judicata (2d ed., 1969). The passage set out in the text has been quoted and applied in *Re Bullen* (1971), 21 D.L.R. (3d) 628, at p. 631 (B.C.S.C.) and *Duhamel* v. *The Queen* (1981), 131 D.L.R. (2d) 352, at p. 356, [1982] 1 W.W.R. 127, at pp. 131-132 (Alta. C.A.), aff'd, [1984] 2 S.C.R. 555, (1984), 14 D.L.R. (4th) 92.

Oyen J. were not in issue before the Court of Appeal, the fact remains that the cause of action in both cases was upon the Quebec judgment. Oyen J. decided that the Quebec judgment was not enforceable in Ontario and the effect of that decision was completely reversed by the Court of Appeal. One of the principles upon which *res judicata* rests is that no one should be twice troubled for one and the same cause of action (*nemo debit bis vexari pro una et eadam causa*). As well, there is the interest of the state in having an end to litigation (*interest republicae ut sit finis litium*). If the majority of the Court of Appeal are correct in *Amopharm* v. *Harris*, every party who obtained a judgment outside Ontario within the last twenty years[8] and subsequently failed to have it found enforceable in Ontario is perfectly free to sue again in light of the *Morguard* decision.

Not only does *res judicata* prevent the same cause of action being asserted a second time, it also applies, *except in special cases*, to prevent the parties from relitigating not only the points upon which the court was actually required by the parties to form an opinion but also all points which the parties, acting with reasonable diligence, might have brought forward for consideration. The first branch of *res judicata* is referred to as "cause of action estoppel" while the second is referred to as "issue estoppel". The exception for special cases is generally regarded as applying only to issue estoppel.

If there is any meaning to the branch of *res judicata* called cause of action estoppel, and indeed the maxim that no one should be twice troubled for one and the same cause, the answer to the problem raised in *Amopharm* v. *Harris* cannot be simply one of testing whether the doctrine of *res judicata* applies. The facts that existed when the matter was heard by Oyen J. were identical to those which were considered by the Court of Appeal (the intervention by Harris in Quebec with respect to the writs of execution having been held to be legally irrelevant). The only difference was that the common law rules for enforcement of extra-provincial judgments had changed. The question is, should this make a difference?

It has been suggested that in some cases a change in the law might prevent the application of *res judicata*. *Re Bullen*[9] is occasionally referred to in support of this proposition. With respect, *Re Bullen* does not stand for such proposition since *res judicata* was applied. However, the court did state in *obiter* that if the question in issue was the effect of restraints on anticipation and alienation, then *res judicata* would not have been a bar since such restraints had been made ineffective by statute following the first decision.

The Supreme Court of Canada in *Re Manitoba Language Rights*[10] clearly held the view that a holding that the laws of Manitoba were

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[8] See Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(c).

[9] *Supra*, footnote 7.

[10] [1985] 1 S.C.R. 721, at p. 757.

constitutionally invalid would not permit the re-opening of cases decided under those laws on the basis of *res judicata*. However, this too was *obiter*.

The conflict between the two cases is more apparent than real. The issue addressed in the *obiter* in *Re Bullen* was an impediment which prevented a married woman from selling real estate. Once the impediment was removed (either by the woman losing her status as a married woman or the subsequent abolition of such restraint) such sale became possible. Thus, any future sale would be permitted which previously would have been barred. However, nothing in *Re Bullen* suggests that the abolition of the restraint would have permitted anyone to revive a purported sale contracted when the restraint was legally effective and certainly not if the issue had been judicially determined. In other words, where the question for judicial determination is different, *res judicata* is no bar. On the other hand, in the hypothetical case canvassed in *Re Manitoba Language Rights* the issue of validity of the law would have been an issue determined, albeit implicitly, in all prior judicial decisions, and even if such decision were later shown to be wrong, the "wrong" answer would continue to bind the prior litigants.

In England the issue of change in the law and *res judicata* was addressed in *Arnold* v. *National Westminster Bank*.[11] The case concerned a lease which provided for rent review in 1983, 1988, 1993, 1998 and 2004. In the course of the 1983 review (which set rent for the period 1983-1988) a clause in the lease came to be construed. Only a limited right to seek review of the arbitrator's decision was available. Subsequent cases were accepted as establishing that the approach taken in the 1983 review was wrong in law. When the 1988 review was begun the tenants attempted by way of an action for a declaration to argue that the construction of the clause ought to be different than had been the case in the first review. The landlord moved to dismiss the claim for a declaration on the ground that the tenants were barred by issue estoppel from relitigating the question. Since the 1983-1988 period was not in issue it was not a case of cause of action estoppel. However, it was a case of issue estoppel but the court applied the exception for special cases. As expressed by Lord Keith of Kinkel:[12]

> The public interest in seeing an end to litigation is of little weight in circumstances under which, failing agreement, there must in any event be arbitration at each successive review date. Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the plaintiffs permission to reopen the disputed issue. Upon the whole matter I find myself in respectful agreement with the passage in the judgment of Sir Nicholas Browne-Wilkinson V.-C. where he said [1989] Ch. 63, 70-71:

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[11] [1989] Ch. 63, [1988] 3 All E.R. 977 (Ch. D.), affd. [1990] Ch. 573, [1990] 1 All E.R. 529 (C.A.), affd. [1991] 2 A.C. 93, [1991] 3 All E.R. 41 (H.L.).

[12] *Ibid.*, at pp. 110F-111C (A.C.), 51j-52d (All E.R.) (H.L.).

> "In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess. I can therefore see no reason for holding that a subsequent change in the law can *never* be sufficient to bring the case within the exception. Whether or not such a change does or does not bring the case within the exception must depend on the exact circumstances of each case."
>
> I am satisfied, in agreement with both courts below, that the instant case presents special circumstances such as to require the plaintiffs to be permitted to reopen the question of construction decided against them by Walton J., that being a decision which I regard as plainly wrong.

It was perhaps significant that a rent review for the 1988 to 1993 period was required in any event; the only question was whether certain principles to be used in such review were to be taken as settled between the parties.

Change in the Law

There is no doubt that the principles of the common law are constantly subject to examination by the courts and, over a period of time, they evolve. That said, a sharp change in the law such as occurred in *Morguard* is most commonly effected by statutory enactment. Where there has been such a sharp change in the law, it is inevitable that earlier identical or similar cases will have been finally decided differently. Having concluded in *Morguard* that the previous law was inadequate in the face of the realities of increased trade within a federal state, the Supreme Court of Canada elected to make a break with the past. The policy choice then is whether this break should begin, as in fact it did, with *Morguard* or whether we should attempt to remake history and extend this principle indefinitely into the past.

There is a presumption that the enactments of parliament do not operate retrospectively, unless by express words or necessary implication it appears that such was the intention of parliament. This principle is discussed by Driedger.[13] Driedger points out that the words retrospective and retroactive are used interchangeably in the reports and texts in the discussion of this principle, but he himself makes a distinction. He employs the word retroactive to describe a statute which makes the law different from what it was in fact during a period prior to its enactment, either because it is stated to be deemed to come into force at a time prior to its enactment, or it is expressly stated to be operative with respect to past transactions as of a past time. Driedger uses the term retrospective to describe a statute which attaches a new duty, penalty, or disability to an event which took place before its enactment. However, if a statute imposes a disability on the basis of status, it cannot be said to operate retrospectively if a disability attaches

[13] E.A. Driedger, Construction of Statutes (2nd ed., 1983), pp. 185-203.

to all persons of a particular status—even if the status had been acquired before the enactment creating the disability. For instance, if a higher scale of marginal income tax rates were added to the Income Tax Act to apply to all persons having a net worth in excess of $1,000,000 would anyone suggest it operated retrospectively when applied to persons who passed the threshold value before such amendment?

The distinction between legislation having retroactive effect and retrospective effect is this. While both attach new duties or penalties to conduct which occurred before the enactment of the legislation, retroactive legislation pretends to apply as if it had been the law in effect before it was actually enacted, while retrospective legislation only purports to apply from the date of its enactment, even though it attaches new duties or penalties from that date forward to conduct which predated its enactment.

Where a change in the common law is effected by a decision such as *Morguard* it has retrospective effect in that new duties or disabilities attach to past conduct. The rules are changed. But for the change in the law effected by the Supreme Court of Canada De Savoye's conduct would not have subjected him to the Alberta judgment in British Columbia (although he could have been sued on the mortgage itself in British Columbia). Since a judgment which effects a change in the law must, of necessity, be based upon facts which predate the judgment and thus the change in the law, such a judicial change must operate retrospectively. The question is, ought it to operate retroactively and make the law different from what it was in fact prior to the decision which effected the change? The only change in circumstances between the decision of Oyen J. and that of the Court of Appeal was the change in the law effected by *Morguard.* The effect of the Court of Appeal's decision was to revisit the issue that had been decided by Oyen J. on the basis of the "new" law which was not in effect when her decision had been made, and remake the decision as if *Morguard* had been the law at the time Oyen J. rendered her judgment.

The Supreme Court of Canada has considered the issue of the "effective date" of judicial changes to the law in the criminal cases of *R.* v. *Thomas*[14] and *R.* v. *Wigman.*[15] The test and its rationale were set out in *Wigman:*[16]

> The appropriate test is whether or not the accused is still in the judicial system. As expressed in the Crown's factum, this test affords a means of striking a balance between the "wholly impractical dream of providing perfect justice to *all* those convicted under the overruled authority and the practical necessity of having some finality in the criminal process".

In *Wigman,* the change in the law had occurred while Wigman's appeal to the Supreme Court of Canada was pending. In *Thomas,* the accused was not so lucky. He was convicted of second degree murder in 1984 on

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[14] [1990] 1 S.C.R. 713, (1990), 75 C.R. (2d) 352.

[15] [1987] 1 S.C.R. 246, (1987), 38 D.L.R. (4th) 530.

[16] *Ibid.*, at pp. 257 (S.C.R.), 538 (D.L.R.).

the basis of section 213(a) of the Criminal Code[17] and appealed to the British Columbia Court of Appeal. The only issue raised on the appeal was a complaint with respect to expert evidence—no constitutional issue was raised. On December 10, 1986, while Thomas' appeal was pending, *R.* v. *Vaillancourt*[18] was argued before the Supreme Court of Canada. The decision in *Vaillancourt* was reserved. While *Vaillancourt* was under reserve Thomas' appeal was argued and dismissed by the British Columbia Court of Appeal on January 26, 1987. The decision in *Vaillancourt*, which struck down section 213(d) of the Criminal Code, was released on December 3, 1987. In December, 1989 Thomas applied for leave and for an extension of time for his application. The court held that:[19]

> To be in the judicial system one of the following must apply:
>
> 1. an appeal has been launched to this Court;
> 2. an application for leave has been made within the time; or
> 3. an application for an extension of time is granted based on the criteria that normally apply in such cases.

The court also held that while an appellant should not be placed in a worse position than any other applicant, on the other hand an applicant "should not artificially be brought into the system".[20] As a result, Thomas' application for an extension of time and the application for leave which depended upon it were dismissed.

A particularly striking application of the *Wigman* principle can be seen in *R.* v. *Kivell*.[21] Kivell was co-accused with Allan Rodney on a charge of murder. Kivell pleaded guilty in 1984 and was convicted of second degree murder. Rodney pleaded not guilty and was convicted of second degree murder after a jury trial. He appealed and was granted a new trial so that he might have the opportunity to claim the benefit of the "new" law on "constructive murder" under section 213 of the Criminal Code on the basis of *Vaillancourt* which had been decided while his appeal was pending. In September 1990, the Supreme Court of Canada approved the British Columbia Court of Appeal's decision to grant Rodney a new trial. Within a month Kivell was before the British Columbia Court of Appeal, some six years after his guilty plea, seeking an extension of time to appeal his conviction. The application was denied on the basis of *R.* v. *Thomas*. The court said:[22]

> A line has been drawn which necessarily leaves anomalies; anomalies can, no doubt, in appropriate cases, be redressed by the granting of ministerial relief, but will not be eliminated by "moving the line". Were the line to be redrawn so as to accommodate this case the result, in my view, would certainly be to create other, and perhaps more significant, anomalies.

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[17] R.S.C. 1970, c. C-34. See new R.S.C. 1985, c. C-46, s. 230(a).

[18] [1987] 2 S.C.R. 636.

[19] *Supra*, footnote 14, at pp. 716 (S.C.R.), 355 (C.R.).

[20] *Ibid.*

[21] [1990] B.C.J. No. 2430 (C.A.).

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

While it may seem unfortunate that whether one obtains the benefit of "new" law is at least partly serendipitous, the only alternative to the *Wigman* test involves remaking history and requires that fundamental principles such as *res judicata* be ignored.

Conclusion

Where a change is effected in the common law by a judicial decision, such change acts retrospectively on cases "in the system" at the time of the decision. It does not act retroactively so as to affect cases which had gone through the system before the decision effecting the change. In effect, this is the result arrived at in *Arnold* v. *National Westminster Bank*,[23] which allowed application of the "correct" construction in future rent reviews but did not purport to interfere with the rent reviews which had previously been finally concluded. The majority decision in *Amopharm*, with respect, failed to consider adequately *res judicata*, and appreciate the retroactive effect of its decision.

It also appears that one of the factors considered significant by the majority was an apparent failure of Harris to suggest "that the respondent has a good defence on the merits".[24] Since the Ontario action was based on the Quebec judgment the "merits" concerned the enforceability of that judgment. The merits of the contract dispute were irrelevant to the plaintiffs' cause of action. Harris' contention was that the Quebec court lacked jurisdiction and that Amopharm had to establish its contract claim in Ontario and afford Harris an opportunity to defend "on the merits". If Harris genuinely lacked a "good defence on the merits", an Ontario action on the contract could have been the subject of a summary judgment motion. The extra delay and cost this might have occasioned to the Quebec plaintiffs surely does not justify stripping Harris Computer of a final judicial determination in Ontario that, if the plaintiffs had a complaint with the computer, they would have to litigate it "on the merits" in Ontario.

Not only does this decision do considerable violence to the principle of *res judicata*, in allowing an appeal from the judgment of McWilliam J. who was specifically found to have correctly decided the question placed before him, the decision also does considerable violence to the function of an appellate court:

> And law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.[25]

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[23] *Supra*, footnote 11.

[24] *Amopharm Inc.* v. *Harris Computer Corp.*, *supra*, footnote 3, at pp. 529a-b (D.L.R.), 32e (O.R.).

[25] W. Blackstone, Commentaries on the Laws of England (1765), Book I, p. 62.