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**THE SACRAMENTAL SEAL OF CONFESSION
FROM THE CANADIAN CIVIL LAW PERSPECTIVE**

by
Gregory J. ZUBACZ

A dissertation submitted to the Faculty of Canon Law
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ABSTRACT

In light of current legal developments, there is a need to analyze the interface between canon law and civil law with respect to the seal of confession. This study integrates the theology, history, canon law, and civil law in order to ascertain the status of the seal of confession as a privileged communication in the law of evidence and whether it is subject to disclosure in court.

The ethical basis may be founded on the exhortation to cover sin which appears in Scripture and patristic writings. After public confession fell into disuse, this ethic later crystallized into a rule, first of local application, then of universal application by the fifth century. By the thirteenth century, the Fourth Lateran Council affirmed its universal application and attached severe penalties to violations.

Throughout history, there has been always been an interaction between the canon law and civil law. First, the civil law seems to have reinforced the rule of secrecy. Later, when the Church became established, civil legislation appeared enforcing the rule of secrecy, or alternatively recognizing the canon law. With the Reformation, civil legislation and case law appeared threatening the integrity of the seal of confession, and the Church responded with reaffirmations and legislation forbidding the breach of the of confession.

The reason that the Church insists so strongly that the rule be upheld is that it is based on natural law, divine law, and positive law. It is critical that these three elements be clearly established and delineated in order to defend the rule concerning the seal of confession.

The civil law of evidence has not received the seal of confession uniformly as a privileged communication. In England, the privilege was denied, whereas in Ireland and the United States the privilege was upheld. The Commonwealth countries of Australia and New Zealand have adopted the rule in certain states but not in others.

The Canadian legal system is an offshoot of the English system. As a result, the English law was followed on the priest-penitent privilege, with the exception of provincial legislation in Québec and Newfoundland. However, in 1991, the Supreme Court implemented the *ad hoc* use of the Wigmore criteria, a set of four evidentiary tests which is used to adjudicate claims of privilege with respect to confidential communications. With this, the question as to whether confessional communications were privileged communications within the law of evidence was reopened.

The issue of whether the Catholic canon law in c. 983 *CIC*/1983 and c. 733 *CCEO* on the seal is sufficient to satisfy a claim of privilege has not yet been adjudicated, but it appears to satisfy the Wigmore criteria. The obligation of secrecy may conflict with the statutory reporting requirements for incidents of child abuse and communicable diseases. However, confessional secrecy may be a legitimate exercise in religious freedom due to the confessor being in a strong position to counsel a penitent to turn him or her self in to authorities and cease the behaviour, and thereby serves a public safety function. In any event, the Church has stated in no uncertain terms that where there is a conflict between the divine law and the civil law, the divine law is always to be followed.

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ABBREVIATIONS

1. — CANON LAW

<i>AAS</i>	<i>Acta Apostolicae Sedis</i>
c., cc.	canon, canons
<i>CCEO</i>	<i>Codex canonum Ecclesiarum orientalium</i> (1990)
CCLS	Canadian Canon Law Society
<i>CIC/1917</i>	<i>Codex iuris canonici</i> , 1917
<i>CIC/1983</i>	<i>Codex iuris canonici</i> , 1983
<i>CLD</i>	Canon Law Digest
CLSA	Canon Law Society of America
<i>CLSA AdOp</i>	Canon Law Society of America Advisory Opinion
<i>CLSA Proc</i>	Canon Law Society of America Proceedings
CLSGBI	Canon Law Society of Great Britain and Ireland
<i>CLSANZ Proc</i>	The Canon Law Society of Australia / New Zealand Proceedings
<i>Jur</i>	<i>The Jurist</i>
<i>ME</i>	<i>Monitor ecclesiasticus</i>
<i>Or</i>	<i>Origins</i>
p., pp.	page, pages
<i>PG</i>	J.-P. MIGNE (dir./ed.), <i>Patrologiae cursus completus</i> , series graeca
<i>PL</i>	J.-P. MIGNE (dir./ed.), <i>Patrologiae cursus completus</i> , series latina
<i>PS</i>	R. GRAFFIN (dir./ed.), <i>Patrologiae cursus completus</i> , series syriaca
<i>RR 1997</i>	<i>Roman Replies and CLSA Advisory Opinions</i> , 1997
<i>StC</i>	<i>Studia canonica</i>

ABBREVIATIONS

2. — CIVIL LAW

A.	Atlantic
Alta. Q.B.	Alberta Queen's Bench
A.C.	Appeal Cases
A.G.	Attorney General
A.J.	Alberta Judgments
Ala.	Alabama
Ala. S.C.	Alabama Supreme Court
Am.	American
Ann.	Annotated
Anon.	Anonymus [sic]
Ariz.	Arizona
Ark.	Arkansas
Beav.	Beavan
B.C.C.A	British Columbia Court of Appeal
B.C.S.C.	British Columbia Supreme Court
c.	Chapter
C.A.	Court of Appeal
Cal.	California
Cal. Rptr.	California Reporter
Ca. App.	California Appeals
C.C.A.	Court of Criminal Appeal
C.C.C.	Canadian Criminal Cases
C.C.Ct.	Central Criminal Court
C.C.L.C	Cox's Criminal Law Cases
C.C.P.	Court of Common Pleas
C.C.S.M.	Continuing Consolidation of the Statutes of Manitoba
C.D. Cal.	United States District Court, Central District of California
C.E.D.	Canadian Encyclopedic Digest
Cert.	Certiorari
Ch.	Chancery
Cir.	Circuit
C.J.	Chief Justice
C.N.L.R.	Canadian Native Law Reports
C.L.R.	Commonwealth Law Reports
C.O.	Council Order
Colo.	Colorado
Comp.	Compiled
Conn.	Connecticut
Cons.	Consolidated
C.S.	Cour Supérieure
D.C.	District of Columbia
Dears.	Dearsly

ABBREVIATIONS

Del.	Delaware
Dist.	District
D.L.R.	Dominion Law Reports
Edw.	Edward
Eng. Rep./E.R.	English Reports
Evid.	Evidence
F.	Federal
F. Supp.	Federal Supplement
Fla.	Florida
Fost. & F.	Foster and Finlason
Ga.	Georgia
Gen.	General
H.C.	High Court
H.C. of A.	High Court of Australia
H.L.	House of Lords
Haw.	Hawaii
Hen.	Henry
How. St. Tr.	Howell's State Trials
I.L.T. & Sol. J.	Irish Law Times and Solicitor's Journal
Ill.	Illinois
Ind.	Indiana
Iowa S.C.	Iowa Supreme Court
Ir. R.	Irish Reports
J.	Judge / Justice
Kan.	Kansas
K.B.	King's Bench
Ky.	Kentucky
Ky. C.A.	Kentucky Court of Appeals
L.R.I.	Law Reports of Ireland
L.T.R.	Law Times Reports
La.	Louisiana
M.R.	Master of the Rolls
M. & W.	Meeson and Welsby
Mass.	Massachusetts
Mass. S.C.	Massachusetts Supreme Judicial Court
Md.	Maryland
Me.	Maine
Me. S.J.C.	Supreme Judicial Court of Maine
Mich.	Michigan
Minn.	Minnesota
Minn. S.C.	Minnesota Supreme Court
Miss.	Mississippi
Mo.	Missouri
Mont.	Montana

ABBREVIATIONS

Mood.	Moody
N.B.	New Brunswick
N.C.	North Carolina
N.D.	North Dakota
N.D. Iowa	US District Court Northern District of Iowa
N.E.	North Eastern
N.H.	New Hampshire
N.J.	New Jersey
N.J. C.E.&A.	New Jersey Court of Errors and Appeals
N.M.	New Mexico
N.P.	<i>Nisi Prius</i>
N.S.	Nova Scotia
N.Y.	New York
N.Y.C.A.	New York Court of Appeals
N.Y. Ct. Gen. Sess.	New York Court of General Sessions
N.Y.S.	New York State
N.Y.S.C.	New York Supreme Court
Neb.	Nebraska
Nev.	Nevada
Nfld. S.C., T.D.	Newfoundland Supreme Court, Trial Division
Nu.	Number
O.A.C.	Ontario Appeal Cases
O.R.	Ontario Reports
Ohio App.	Ohio Appeals Court
Okla.	Oklahoma
Ont.	Ontario
Ont. C.A.	Ontario Court of Appeal
Or.	Oregon
P.	Pacific
P.D. & A.	Probate, Divorce, and Admiralty Division
P.E.I.	Prince Edward Island
P.M. Ct.	Police Magistrates Court
P.R.	Puerto Rico
Pa.	Pennsylvania
Pro.	Procedure
Q.B.	Queen's Bench
R.	<i>Rex/Regina</i>
R.F.L.	Reports on Family Law
R.I.	Rhode Island
R.J.	La Revue de Jurisprudence
R.J.Q.	Rapports Judiciaires de Québec
R.L.	La Revue Légale
R.R.N.W.T.	Revised Regulations of North West Territories
R.S.	Revised Statutes (of New Brunswick)

ABBREVIATIONS

R.S.A.	Revised Statutes of Alberta
R.S.B.C.	Revised Statutes of British Columbia
R.S.	Revised Statutes
R.S.C.	Revised Statutes of Canada
R.S.M.	Revised Statutes of Manitoba
R.S.N.B.	Revised Statutes of New Brunswick
R.S.N.L.	Revised Statutes of Newfoundland and Labrador
R.S.N.S.	Revised Statutes of Nova Scotia
R.S.N.W.T.	Revised Statutes of North West Territories
R.S.O.	Revised Statutes of Ontario
R.S.P.E.I.	Revised Statutes of Prince Edward Island
R.S.Q.	Revised Statutes of Quebec
R.S.Y.	Revised Statutes of Yukon Territory
Rev.	Revised
Rot. Parl.	Rolls of Parliament
S.C.	South Carolina
S.C.C./S.Ct.	Supreme Court of Canada
S.D.N.Y.	United States District Court Southern District of New York
S.D.	South Dakota
S.N.B.	Statutes of New Brunswick
S.N.L.	Statutes of Newfoundland
S.N.S.	Statutes of Nova Scotia
S.N.W.T.	Statutes of North West Territories
S.S.	Statutes of Saskatchewan
S.W.	South West
Sask. Pol. Mag. Ct.	Saskatoon Police Magistrates Court
Stat.	Statute(s)
Sup. Ct.	Superior Court
T.R.	Term Reports
Tas. S.R.	Tasmanian State Reports
Tenn.	Tennessee
Tex.	Texas
Tex. Civ. App.	Texas Civil Appeals Court
Tor. W. Ct.	Toronto Weekly Court
U.S.C.A.	United States Code Annotated
U.S.S.C.	United States Supreme Court
Unif.	Uniform
v.	versus
V.I.	Virgin Islands
Va.	Virginia
Vic. Sup. Ct.	Victoria Supreme Court
Vt.	Vermont
U.S.C.A.	United States Court of Appeals
W. Va.	West Virginia

ABBREVIATIONS

Wash.	Washington
Wash. App.	Washington Appeals
Wis.	Wisconsin
W.L.J.	Western Law Journal
Wyo.	Wyoming

INTRODUCTION

In today's litigious environment, the Church is faced with a wide spectrum of legal challenges touching on the very heart of her temporal existence, in particular her sacramental life, in the sphere of civil law. In light of this, having a clear and systematic statement of the canon law on all aspects of the seal of confession from a civil law point of view is critical for successful litigation outcomes. As J. Serritella notes, "The civil law can seldom follow the canon law, because the canon law can seldom be clearly established in a civil court."¹ Although Serritella acknowledges that this may be somewhat exaggerated, it is nevertheless true in many cases.

Attacks on the integrity of the seal of confession are nothing new, nor are attacks on confessors themselves. In the year 1393, it is reported that a priest by the name of John Nepomucen, the Vicar General to the Archbishop of Prague, was the confessor to the Queen of Bohemia. The King, Wenceslaus IV, suspicious of the Queen's faithfulness to him, demanded that the confessor disclose that which the Queen had revealed to him in the course of her confession. Upon refusing to do so, the confessor was tortured and drowned in the Moldau river. Today, he may be regarded as a martyr for the seal of the confessional.²

Unfortunately, the case of John Nepomucen is not a historical anomaly. There are many cases throughout history, from Russia to England to the United States, where priests were imprisoned and/or tortured and executed for upholding the seal of confession. In recent memory, under both Communism and Nazism, confessors have

¹ J. SERRITELLA, "The Code of Canon Law and Civil Law," in *The Catholic Lawyer*, 29 (1984), p. 206.

² See A. BUTLER, *The Lives of the Saints*, London, Burnes, Oates, and Washbourne, 1938, vol. 5, pp. 199-202.

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suffered torture and death rather than break the seal of confession. In March of 2007, the Vatican announced the beatification of Felipe Ciscar Puig, a priest martyred during the 1936 Spanish persecution for upholding the seal of confession. Such are the types of situations that priests have found themselves in because of the stringent demands placed on them as guardians of the seal of confession.

Today, political pressures are building in favour of legislation which would force confessors to break the seal in certain circumstances or suffer fines and imprisonment. For example, in a number of American states, there is legislation in progress which would require priests to report any information concerning child abuse heard in the confessional.

The Church and its clergy are a much reported subject in the secular media today, and this often includes matters related to the seal of confession. With these reports, one frequently sees misunderstandings about what is covered by the seal of confession and what is not. Commentators and writers often blur the distinction between communications covered by the seal of confession and non-sacramental confidential communications with clergy. Similarly, the nature and ethical basis of the seal of confession is often misunderstood. The same misunderstandings may sometimes appear in the court system.

There is a need for a comprehensive analysis of the place of the seal of confession within the Canadian law of privileged communications, one which fully takes into account the legal interface between testimonial privilege and statutory reporting requirements for child abuse and communicable diseases. This study will examine how the civil courts have resolved the competing values of society's need to know the truth versus the institutional and individual human need for personal privacy, particularly within the context of confidential religious communications. It will answer the

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fundamental question: Is the seal of confession protected from forced disclosure in Canadian civil law?

In finding an answer to this question, our inquiry will take into account the relevant theology, history, canon law, and civil law, since, for the purposes of our study, the four are inextricably intertwined and the lines between these disciplinary perspectives often overlap. It will ultimately examine the sacramental seal of confession as it has been treated in Canadian civil law in an attempt to determine whether communications between a priest and a penitent within the context of a sacramental confession are “privileged” (not subject to disclosure) with respect to the contents of that communication. Not only does the civil law need to be informed by a clear understanding of the canon law, the Church also needs an accurate perspective on its rights and obligations at civil law with regard to the seal of confession. This dissertation will attempt to serve as a window between the canon law and the civil law.

The first two chapters may be seen in the Aristotelian sense of form and substance. Chapter One examines the form, that is to say, the rule itself, and the historical events, decisions, and legislation that allowed it to crystallize into the rule as it is known today. The foundations of the seal of confession will be examined with respect to the scriptural basis and patristic contributions, as well as the three major watersheds in the history of the canon, these being the letter of Pope Leo I, Gratian’s *Decretum*, and the Fourth Lateran Council. This will be followed with an assessment of the post-Lateran conciliar affirmations and legislation. Both the Latin and Eastern code provisions will be examined in detail in Chapters One and Two, since both bodies of Christians are found in Canada and are equally subject to the Canadian law on this aspect of Church

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communications. An understanding of the historical contexts in which the seal of confession developed helps to demonstrate the interaction between civil law and canon law. In this regard, we will analyse the *Spiritual Regulation* of Peter the Great in Russia in 1720. The *Spiritual Regulation* will be examined prior to the chronologically earlier *Garnet's Case*, since the latter formed part of the Canadian jurisprudence which is the focus of this dissertation, while the former influenced the development of the Eastern canon law only, but did not form part of Canadian jurisprudence.

Chapter Two penetrates the form and looks to the very content of the seal of confession. This Chapter will concentrate on the *ius vigens* (literally, the “living law,” or current meaning and import). We will undertake a structural analysis using the categories set out in classical legal philosophy, these being the natural law, divine law, and positive ecclesiastical law. The ontology of the rule and the ethical foundations of the secret of confession will be considered. A natural law analysis is an important part of this *ius vigens* study, since the rule of confessional secrecy is founded on several dimensions of the natural law. As will be observed in the Third Chapter, civil legal systems that are more closely aligned with natural law rather than strictly positive law appear to have received the seal of confession more readily. With regard to the divine law, the various theories derived from divine law will be analysed, including the Thomistic analysis of the seal of confession found in the *Summa theologiae*. Lastly, a comprehensive positive law analysis will conclude the Chapter in order to arrive at a concise statement of the canon law on the seal of confession, the various eventualities and circumstances that it applies to, and the canons related to its application. These foundations are critical before embarking on the civil law analysis since, as will be seen, the civil law does not always

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adequately take into account the full import of the canon law, and sometimes works directly against it.

In the Third Chapter we turn to an examination of the civil law, beginning with the doctrine of privilege. Thereafter, we will look at the place of the seal of confession in the major common law systems of the world and will consider the jurisprudence antecedent to the Canadian law. We will attempt to explain why civil laws appeared during the Reformation which openly presented an attack on the integrity of the seal of confession. We will categorize and explain the shift in legal philosophy in the *ratio decidendi* of the civil law jurists which saw an apparently entrenched rule of evidence become a lost privilege. In particular, we will look at the Reformation period and the major civil law initiatives which opened the seal of confession to examination by the state, these being the English Reformation legislation and jurisprudence such as *Garnet's Case* in England in 1606. Next, we will consider the civil legal history of the sacerdotal privilege in other common law systems which had their roots in the English system, namely Ireland, the United States, Australia, and New Zealand. All of these common law jurisdictions were cited or noted in Canadian law with varying degrees of relevance and influence. The law and jurisprudence from these jurisdictions will also be examined in contrast and comparison to the English law, and in order to gain a deeper understanding of other approaches taken by members of the judiciary of the West in non-English jurisdictions who saw fit to rule in favour of the secrecy of the confessional. Also, the Wigmore criteria will be taken into account, since they provide the framework for the legal calculus necessary to make determinations of privilege.

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In the Fourth Chapter we will examine the legislation and common law of Canada. We will delineate the constitutional documents which are relevant to our analysis, in particular the *Charter of Rights of Freedoms*, as well as the provincial legislation and supporting jurisprudence protecting confessional communications. This latter legislation is currently found only in the jurisdictions of Québec and Newfoundland. Next, we will undertake an examination of the possible theoretical foundations on which the privilege could receive standing in the courts. The main subject of our examination will be the Supreme Court of Canada case of *R. v. Gruenke*, and in particular a consideration of the two streams of civil jurisprudence which flow from it and the impact of this case on the law in Canada. We will consider the post-*Gruenke* jurisprudence, as well as legislative solutions to the legal uncertainty which the case law may present. Additionally, statutory reporting requirements in the areas of child protection and communicable diseases are an important area which leave questions which to date have remained unanswered and which we will attempt to address. All of these components should give us an answer to our main question: Are confidential religious communications subject to disclosure in the law of Canada?

To summarize, we will attempt to answer the following questions in this study:

- 1) What is the historical origin of the seal of confession as we know it in the current canon law?
- 2) What is the relationship between the civil law and the canon law *vis-à-vis* the seal of confession?
- 3) What is its basis in natural law, divine law, and positive law?

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- 4) How was it received in the post-Reformation civil law of non-Canadian common law jurisdictions?
- 5) How does the Canadian civil law differ from the law of the other common law jurisdictions?
- 6) What is the current law on the seal of confession with regard to testimony in Canadian courts?
- 7) Do statutory reporting requirements for incidents of child abuse and communicable diseases require a confessor to report these matters to authorities?
- 8) What is the Church's position where the canon law and civil law conflict?

By way of concluding comment, it should be noted that this is an academic exercise which is intended to theorize about the recognition of a point of canon law in Canadian civil law and jurisprudence. It is not intended as a substitute for legal advice, nor does it constitute legal advice in and of itself. The ideas and conclusions expressed herein are strictly our considered opinions and theories, and are based upon the research sources which were available at the time of writing this dissertation and selected according to our discretion.

CHAPTER ONE

HISTORICAL ELEMENTS OF THE SEAL OF CONFESSION

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The sacramental seal of confession is simply the obligation on the part of the confessor to keep secret the information disclosed to him by the penitent within the context of the sacrament of penance. This institute of the “sacramental seal of confession” is steeped in history. Its concept and the positive laws governing it have undergone a gradual evolution through several centuries. For example, the modern phraseology which pairs the words “seal” and “confession” (*sigillum*, “seal,” and *confessionis*) appeared for one of the first times in the fourth century in the East in the canons of Gregory the Illuminator (257-332)¹ and in the West around the beginning of the eleventh century.²

The principal issue that will be considered in this Chapter, therefore, is the historical evolution of the institute of the “seal of confession” beginning from its appearance in the early Church until the formulation of positive law governing its different aspects. Accordingly, the subject matter of this Chapter will be divided into four main sections. First, we will examine the scriptural and patristic contributions to the sacramental seal of confession. Second, we will consider the canonical developments prior to the Fourth Lateran

¹ See H. DENZINGER, *Ritus orientalium Coptorum, Syrorum et Armenorum in administrandis sacramentis, ex Assemanis, Renaudotio, Trombellio aliisque fontibus authenticis collectos, prolegomenis notisque criticis et exegeticis instructos concurrentibus nonnullis theologis ac linguarum orientalium peritis*, Graz, Akademische Druck-u, Verlaganstalt, 1961, p. 101.

² See B. KURTSCHIED, *Das Beichtiegel in seiner geschichtlichen Entwicklung*, Freiburg, Herder, 1912, p. 1; English trans. *A History of the Seal of Confession*, trans. by T. MARKS, ed. by A. PREUSS, Saint Louis, Herder, 1927, p. 1. He refers to Nicholas of Clairvaux, but cites Peter Damian. Here we read: “Videat autem ne unquam de his quae sub signaculo confessionis accepit, aliquam faciat mentionem, vel alicui loquenti consentiat” (PETRUS DAMIANUS, *Sermo LVIII, de S. Andrea Apostolo*, in J.-P. MIGNE [ed.], *Patrologiae cursus completus, sive Bibliotheca universalis, integra uniformis, commoda, oeconomica omnium SS. patrum, doctorum scriptorumque ecclesiasticorum qui ab aevo apostolico ad Innocentii III tempora floruerunt*, Series latina, Parisiis, Apud editorem, 1844-1864, vol. CXLIV, p. 833).

Council, especially the early theological and canonical developments leading to the seal of confession. Third, we will examine the legislation of the Fourth Lateran Council and subsequent legislation, in particular the conciliar and papal documents, which will serve as primary sources of the legislation on the subject. Fourth, we will consider the development of the seal of confession in the Eastern Churches, with a special emphasis on its place in the Byzantine Rite. This approach is crucial to a proper understanding of the interaction between the ecclesiastical legislation and the current civil law jurisprudence on the issue. The main purpose of this Chapter is to provide a proper historico-canonical context within which the institute of the “seal of confession” as expressed in c. 983 of the 1983 Code³ and c. 733 of the Eastern Code⁴ emerged and not to present an elaborate historical and theological treatise on the sacrament of confession and the seal itself which has already been undertaken by previous authors. However, we note that the canonical history and the theological basis of the seal of confession and the sacrament of confession are intimately linked.

1.1 — SCRIPTURAL AND PATRISTIC CONTRIBUTIONS

Although the seal of confession as we know it within the present canonical context has no direct foundation in Sacred Scripture, there are exhortations to *cover* sin, together with exhortations to *expose* sin which we will consider below. There are also patristic writings which predate the seal and which suggest that knowledge of sin should be kept secret.

³ See *Codex iuris canonici*, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus, Libreria editrice Vaticana, 1989; English trans. *Code of Canon Law*, Latin-English Edition, New English Translation, Prepared under the auspices of the CLSA, Washington, DC, CLSA, 1999; hereafter the English translation of the canons of the 1983 Code will be from this source.

⁴ See *Codex canonum Ecclesiarum orientalium*, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus, Libreria editrice Vaticana, 1995; English trans. *Code of Canons of the Eastern Churches*, Latin-English Edition, New English Translation, Prepared under the auspices of the CLSA, Washington, DC, CLSA, 2001; hereafter the English translation of the canons of the Eastern Code will be from this source.

Therefore, in the following two sections we will briefly examine some of the major Scriptural and patristic writings which relate to the seal of confession. It should be noted that confession was not always enumerated in the lists of sacraments, which helps to explain the convoluted history of what later came to be called a sacrament.

1.1.1 – Scripture

There are numerous references in Scripture with respect to the confession of sin, and none of these necessarily suggest *private* confession.⁵ It is not surprising, therefore, that there is no direct foundation for the seal of confession associated with these passages nor elsewhere in Scripture. However, for the purposes of this study, one area of interest to us are passages concerning the covering of sin.⁶

The covering of sin appears directly or indirectly a number of times in Scripture. It has a distant echo in the Pentateuch story of Noah, who, in a sinful state, was covered by his sons Shem and Japheth who dared not see their father. This is in contrast to Ham who saw his father naked and told his brothers what he saw, thereby incurring a curse (Gen. 9:18-27). In the Psalms, the private nature of sin and the need for a secret forum for the forgiveness of sins is suggested. There, the psalmist writes: “Wash away my hidden faults” in Psalm 19:12, and Psalm 32:1 we read: “How blessed are they whose offences are forgiven, whose sins are blotted out (covered).” The Wisdom literature contains exhortations and warnings concerning discretion and secrecy with respect to others’ sins and secrets. These include: “Whoever

⁵ Individual oral confession of sin is mentioned in Lev. 5:5, Num. 5:7, Prov. 28:13, Matt. 3:6/Mark 1:5, Acts 19:18, James 5:16, and 1 John 5:19; private individual confession directly to God alone is mentioned in Lev. 26:40, Ps. 32:5, and 38:18; confession by the Israelites as a nation is mentioned in Lev. 16:21, 1 Sam. 7:6, Ezra 10:1, 11; Neh. 1:6, 9:1-3, and Dan. 9:20.

⁶ Scripture texts are taken from H. WANSBROUGH, (ed.), *The New Jerusalem Bible*, New York, NY, Doubleday, 1985, xv, 2108 p.

covers an offence promotes love” (Prov. 17:9); “To conceal a matter, this is the glory of God” (Prov. 25:2); “[D]o not disclose another’s secret” (Prov 25:9). New Testament references are dearth. There is a reference in 1 Peter 4:8 where we read “... love covers over many a sin.”

These statements, however, may be contrasted with the following command in Matthew 18:15-17:

If your brother does something wrong, go and have it out with him alone, between your two selves. If he listens to you, you have won back your brother. If he does not listen, take one or two others along with you: whatever the misdemeanour, the evidence of two or three witnesses is required to sustain the charge. But if he refuses to listen to these, report it to the community; and if he refuses to listen to the community, treat him like a gentile or a tax collector.

These two streams of exhortations and statements in Scripture, one suggesting that the sins of others should be covered and the other that they should be revealed, may possibly be reconciled. Theoretically, the exhortations to cover sin might be applied to situations where there would be some kind of expectation of privacy. In the alternative, where there is no expectation of privacy such as where a sin is already public, or the sinner has in some way forfeited his right to privacy by his own actions, then the statements in Scripture which concern public exposure of sin would be operative. The ethic of covering sin appears to have been taken up by many patristic writers.

1.1.2 – Patristic Writings

In apostolic times, private confession was largely unknown. During this period, there is evidence that some form of public confession and public penance was practiced. With respect to public confession, we see a number of writings which either exhort or refer to this

practice.⁷ There is also evidence of public penances being imposed for secret sins.⁸ In the East in the middle of the third century, presbyters were appointed as diocesan or eparchial penitentiaries to hear confessions of penitents, although this practice was later suppressed.⁹

By the fifth century, some patristic writings began to appear which discouraged public confessions,¹⁰ and there are also writings from this period which suggest secrecy

⁷ For example, in the first-century *Didache*, it is mentioned in Chapter IV, § 14: "In the Congregation thou shalt confess thy transgressions and shalt not come to thy prayer with an evil conscience" ("Ἐν ἐκκλησίᾳ ἔξομολογήσῃ τὰ παραπτώματά σου, καὶ οὐ προσελύσῃ ἐπιπροσευχὴν σου ἐν συνειδήσει πονηρᾷ" [H. DE ROMESTIN [ed.], *The Teaching of the Twelve Apostles*, Oxford, Parker, 1884, pp. 70-71]) and in Chapter XIV § 1: "And on the Lord's Day, come together and break bread, and give thanks after confessing your transgressions, that your sacrifice may be pure" ("Κατὰ κυριακὴν δὲ Κυρίου συναχθέντες κλάσατε ἄρτον καὶ εὐχαριστήσατε προσέξομολογησάμενοι τὰ παραπτώματα ὑμῶν, ὅπως καθαρὰ ἡ θυσία ὑμῶν ᾗ" [DE ROMESTIN, *The Teaching of the Twelve Apostles*, pp. 84-85]). Also see TERTULLIANUS, *Liber de pœnitentia*, C. XII, in *PL*, vol. I, pp. 1242-1244 (his use of the word "ἔξομολογήσασθαι" is properly translated as "confiteri," from "confiteor," meaning to confess); CLEMENS I, *Epistola II ad Corinthios*, C. VIII, in J.-P. MIGNE (ed.), *Patrologia graeca, Patrologiae cursus completus, sive Bibliotheca universalis, integra uniformis, commoda, oeconomica omnium SS. patrum, doctorum scriptorumque ecclesiasticorum qui ab aevo apostolico ad Innocentii III tempora floruerunt*, Series graeca, Parisiis, Apud editorem, 1856-1866, vol. I, pp. 320-348; IRENAEUS, *Contra haereses*, Cap. XIII, §5, in *PG*, vol. VII-I, p. 537; AUGUSTINUS, *Sermo LXXXII*, in *PL*, vol. XXXVIII, p. 511; and AMBROSIUS, *De pœnitentia*, Lib. I, Cap. XVI, in *PL*, vol. XVI, p. 493, Lib. II, Cap. III, in *ibid.*, p. 501, and Cap. X, in *ibid.*, p. 518. In the Eastern Church, specifically see ORIGENES, *Selecta in Psalmos — Homilia II in Psal. XXXVII*, no. 6, in *PG*, vol. XII, p. 1386; and the Coptic historian SOZOMENUS, *Historia ecclesiastica*, Lib. VII, in *PG*, vol. LXXVII, p. 1460.

⁸ See Canons 2 and 7, in BASILIUS, *Epistolarum classis II, Epist. CXCIX*, in *PG*, vol. XXXII, pp. 672-673; and GREGORIUS, NYSSENUS EPISCOPUS, *Epistola canonica ad S. Letoium Melitines Episcopum*, in *PG*, vol. XLV, p. 229.

⁹ For a brief history of the office of penitentiary in Constantinople including its suppression by Nectarius, see SOCRATES, *Historia ecclesiastica*, Lib. V, Cap. XIX, "Περὶ τῶν ἐπὶ τῆς μετανοίας πρεσβυτέρων, ὅπως τηρικαῦτα περιγέβησαν," in *PG*, vol. LXVII, pp. 613-620. See also SOZOMENUS, *Historia ecclesiastica*, Lib. VII, in *PG*, vol. LXVII, p. 1460. For further commentary, see A. CUSCHIERI, *The Sacrament of Reconciliation: A Theological and Canonical Treatise*, Lanham, University Press of America, 1992, pp. 285-286, A. ROBERTS and J. DONALDSON (eds.), *The Ante-Nicene Fathers*, vol. 7, Peabody, Hendrickson Publishers, 1994, p. 666, and T. OAKLEY, *English Penitential Discipline and Anglo-Saxon Law in Their Joint Influence*, New York, Longmans Green, 1923, p. 59. Kurtzschid maintains that there is little evidence for public penance in the East after the fifth century. See KURTSCHEID, *A History of the Seal*, p. 37. J. Erickson, however, suggests that the historical evidence supports the assertion that the practice of public penance continued in Constantinople and the Christian East despite the common assumption that the suppression of the public penitentiary by Nectarius had ended public penance. According to him, the real turning point in the Christian East came when confession lost its public character and was substituted by the monastic practice promoted by John the Faster in the mid-ninth century, which he compares to the Irish penitential system. See J. ERICKSON, "Penitential Discipline in the Orthodox Canonical Tradition," in *St. Vladimir's Theological Quarterly*, 21 (1977), pp. 195, 198-199. For an interpretation of the canons of John the Faster, see NIKODEMOS THE HAGIORITE, *Exomologetarion: A Manual of Confession*, trans. G. DOKOS, Thessaloniki, Greece, Uncut Mountain Press, 2006, 475 p.

should be maintained under certain circumstances. In the Western Church, Augustine wrote the maxim, "... [C]orrect secret sins in secret."¹¹ R. Mortimer, however, cautions that "... [I]n the writings of Augustine there is no evidence for the existence of a private penance with absolution."¹² In the Eastern Church, a number of writings also began to emerge which appear to have encouraged the secrecy of confession.¹³ One sees similar exhortations in the Syriac tradition.¹⁴ The Coptic-Alexandrian tradition in the teachings of the Desert Fathers of

¹⁰ See, for example, CHRYSOSTOMUS, *De Lazaro Concio IV*, in *PG*, vol. XLVII, p. 1012. In another passage Chrysostom links the priesthood to the sacrament of confession, and although it seems to allude to a private confession, it cannot in and of itself be taken as evidence of this practice. He says: "Show the wound to the priest; that is the part of one who cares for him, and provides for him, and is anxious on his behalf" ("Ταῦτα καὶ ἰατροὶ ποιοῦσι πολλάκι· δυσαρέστως γὰρ ἔχοντας τοὺς κάμνοντας καταφιλοῦντες, παρακαλοῦντες ἀναπείθουσι σωτήριον δέξασθαι φάρμακον· οὕτω καὶ σὺ ποιήσον· τῷ ἱερεὶ δεῖξον τὸ ἔλκος, τοῦτό ἐστι κηδομένου, τοῦτο προνοοῦντος, τοῦτο φροντίζοντος" [CHRYSOSTOMUS, *Ad populum antiochenum*, Homil. III, in *PG*, vol. XLIX, p. 54; English trans. in P. SCHAFF and H. WACE [eds.], *Nicene and Post-Nicene Fathers*, vol. 9, Peabody, Hendrickson Publishers, 1994, p. 360]).

¹¹ "[C]orripienda sunt secretius, quæ peccantur secretius..." (AUGUSTINUS, *Sermo LXXXII*, in *PL*, vol. XXXVIII, p. 511).

¹² See R. MORTIMER, *The Origins of Private Penance in the Western Church*, Oxford, Clarendon Press, 1939, p. 110.

¹³ For example, Gregory of Nyssa writes that secret theft may be reconciled by secret confession: "Ὁ δὲ δι' ὑφαίρεσεως λανθανούσης σφετεριζόμενος τὸ ἀλλότριον, εἴτα δι' ἐξαγορεύσεως τὸ πλημμέλημα αὐτοῦ τῷ ἱερεὶ φανερώσας, τῇ περὶ τὸ ἐναντίον τοῦ πάθους σπουδῇ θεραπεύσει τὴν ἀρρώστιαν· λέγω δὲ διὰ τοῦ τὰ προσόντα παρέχειν τοῖς πένησιν, ἵνα τῷ προέσθαι ἃ ἔχει, φανερός γένηται καθαρεύων τῆς κατὰ πλεονεξίαν νόσου. Εἰ δὲ μηδὲν ἔχει, μόνον δὲ τὸ σῶμα ἔχει, κελεύει ὁ Ἀπόστολος διὰ τοῦ σωματικοῦ κόπου τὸ τοιοῦτον ἐξιλάσασθαι πάθος" (GREGORIUS NYSSENUS, *Epistola canonica*, in *PG*, XLV, p. 233). In his *De poenitentia*, Ambrose alludes to the possibility of private confession made only to one person: "That you should be ashamed to entreat Him Who knows you fully, when you are not ashamed to confess your sins to a man who knows you not?" ("[E]t pudeat te Deo supplicare, quem non lates; cum te non pudeat peccata tua homini, quem lateas, confiteri?" [AMBROSIUS, *De poenitentia*, Liber II, Cap. X, in *PL*, vol. XVI, p. 518; English trans. in SCHAFF AND WACE, *Nicene and Post-Nicene Fathers*, vol. 10, p. 356]).

¹⁴ For example, Aphraates the Persian Sage (280-345) has the following exhortation to confessors in his *Discourse* "To him who shows you his wounds apply the healing penance. Exhort him who is ashamed to lay bare the injury, that he may not conceal it from you. Do not expose him who manifests it to you, lest on his account the innocent also be held guilty by haters and enemies" ("Quicumque vobis suum vulnus detexerit, ei remedium imponite pænitentiae; eum autem qui infirmitatem suam manifestare erubuerit, ne hanc a vobis abscondat adhortamini; cumque ipsam vobis revelaverit, nolite eam publicare, ne propter illum ab inimicis et ab iis qui nos oderunt, innocentes in culpa esse iudicentur" [APHRAATIS, *Demonstratio VII. De pænitentibus*, in R. GRAFFIN, *Patrologia syriaca, complectens opera omnia SS. patrum, doctorum scriptorumque catholicorum*,

the fourth and fifth centuries maintained that sin should be covered.¹⁵ Similar expressions of this theology are found in the Sinaite tradition as well.¹⁶

1.2 — CANONICAL DEVELOPMENTS PRIOR TO LATERAN IV

The definitive canonical legislation on the seal of confession did not emerge until the Council of Lateran IV held in 1215. However, there were notable developments in canonical thinking and reactions to historical circumstances which have a bearing on its development prior to the thirteenth century. Herein we will consider the interaction between civil law and the Church's legislation on the matter, the letter of Leo the Great on the seal of confession, Eastern canonical developments, the decline of public penance, and the emergence of legislative prototypes for the seal of confession, all of which preceded Lateran IV. We will examine these antecedents briefly in the following section.

quibus accedunt aliorum acatholicorum auctorum scripta quae ad res ecclesiasticas pertinent quotquot syriace supersunt secundum codices praesertim londinenses, parisienses, vaticanos, Paris, Firmin-Didot, 1894-1926, vol. I, pp. 318-319; English trans. in KURTSCHIED, *A History of the Seal Confession*, p. 44]). T. Jansma indicates that this was written c. 336. See T. JANSMA, "Aphraates Demonstration VII §§ 18 and 20: Some Observations on the Discourse on Penance," in *Parole de l'Orient*, 5 (1974), p. 21. Asterius of Amasea (+ 400?) in his *Homilia XIII* wrote that one should have the courage to tell the priest one's secret sins as one would show a physician a concealed wound. The priest would then be able to offer a cure while at the same time safeguarding the reputation of the penitent: "... δειξον αὐτῷ ἀκερυθρίαστως τὰ κεκρυμένα γύμνησον τῆς ψυχῆς ἀπόρρητα, ὡς ἰατρῷ πάθος δεικνύων κεκαλυμμένον, αὐτὸς ἐπιμελήσεται καὶ τῆς εὐσχημοσύνης καὶ τῆς θεραπείας" (ASTERIUS, *Homilia XIII*, *Adhortatio ad poenitentiam*, in *PG*, vol. XL, p. 369). Ephraem the Syrian (306-373) and Abraham of Kidun (+390?) also have similar writings.

¹⁵ See APOPHTHEGMATA PATRUM, *De Abbate Ammonas*, §10, in *PG*, vol. LXV, pp. 122-123; *De Abbate Macario*, §52, 274; and *De Abbate Pæmen*, §64, 338. There is also a reference to an early canonical restriction in the monastic Rule attributed to St. Anthony (251-366). In c. 25 of the *Regulae ac praecepta*, St. Anthony stipulated that no hermits were to confess to any men other than those who can save their souls, which would have most likely excluded public confession: "Ne propales cogitationes tuas cunctis hominibus, sed solum iis qui possunt salvare animam tuam" (ANTONIUS, *Regulae ac praecepta*, in *PG*, vol. XL, p. 1070).

¹⁶ See BARSANUPHIUS ET IOANNIS, §239, in NICODEMUS OF THE HOLY MOUNTAIN (ed.), *Erotapokreisis*, reissued by S. SCHOINAS, Volos, 1960.

1.2.1 – Influence of Civil Law on Confessional Practice

There is historical evidence that attests to the fact that the civil law may have exerted an influence on the form and procedure attached to the rite of penance. For example, M. Dudley and G. Rowell note, “[I]t is not unreasonable to suppose that, just as certain aspects of civil law were beginning to influence theological interpretations of the atonement, so these same influences came to be felt liturgically in the practice of the penitential discipline.”¹⁷ This interaction between civil law and canon law may have contributed to decline in the public element of confessional practice. This phenomenon is noted by P. Lopez-Gallo in the following statement:

... [T]here is abundant evidence, however, that by the end of the fourth century, there was a decline in the discipline of public penance, especially when persecutions started to abate and the Decree of Milan (313 A.D.) issued by Constantine the Great, recognized the juridic personality of the Christian Church. From that time on arose a marked insistence on the right of the penitent not to be betrayed as a result of his confession and on the corresponding obligation of the confessor in relation to the sins confessed.¹⁸

The influence of civil law on canon law can be seen in the earliest known *canonical* precursor to the sacramental seal of confession found in the fourth-century canons of Basil.¹⁹ The relevant text appeared at a time when public penance was still in use, but the text indicated an emerging trend toward private confession. Canon 34 stated:

¹⁷ See M. DUDLEY and G. ROWELL (eds.), *Confession and Absolution*, London, S.P.C.K., 1990, p. 136. For a general consideration of the interaction of canon law and civil law, see E. CAPARROS, “Criminal Law Protection of the Human Rights in Civil and Religious Societies,” in P. DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law: Proceedings of a Conference Held at the Pontifical University of the Holy Cross, Rome, March 25-26, 2004*, Montréal, Wilson & LaFleur, 2005, pp. 203-212.

¹⁸ See P. LOPEZ-GALLO, “Are Confidential Communications Protected by Common Law Privilege?” in *Monitor ecclesiasticus*, 121 (1996), p. 310.

¹⁹ For a study of the civil law on adultery and some of Basil’s canonical responses, see F. CAYRÉ, “Le divorce au IV^e siècle dans la loi civile et les canons de saint Basile,” in *Échos d’Orient*, 19 (1920), pp. 295-321.

As for women who have committed adultery and have confessed it out of reverence or because they have been more or less conscience-stricken, our Fathers have forbidden us to publish the fact, lest we afford some occasion for the death of the remorseful one; but they ordered that such women are to stand without communion until they have completed the term of their penitence.²⁰

D. Cumming states that the purpose of the canon was to protect a woman's personal security and good name even before the civil law by maintaining secrecy:

[T]he Fathers have ordered that she is not to be given publicity ... lest people see her ... and discover of course the fact that she has sinned and before all other sins they will impute to her the criminal offense of adultery, and thus that penance will be the cause of her death. For when her husband learns about it, perhaps he will kill her, in accordance with that passage of Solomon's saying: "Full of jealousy is the anger of her husband."²¹

B. Kurtscheid translates the phrase *ἵνα μὴ θανάτου αἰτίαν παράσχωμεν ἐλεγχθείσας* of this canon as, "... [I]n order that we may not offer an occasion for capital punishment,"²² and not as we find it in the above translation. Regardless, this canon suggests that even in the fourth century the Church may have already been sensitive to the ramifications of revealing confessions of criminal matters such as adultery, especially given that the civil laws, in addition to its own penalties, permitted the husband in certain circumstances to kill his adulterous wife.

Another development with regard to private confession emerged during the Council of Elvira in 303. At that council, a non-public system of confession began to evolve.²³ Until

²⁰ "Τὰς μοιχευθείσας γυναῖκας καὶ ἐξαγορεύουσας δι' εὐλάβειαν ἢ ὅπως οὖν ἐλεγχόμενας, δημοσιεύειν οὐκ ἐκέλευσαν οἱ πατέρες ἡμῶν, ἵνα μὴ θανάτου αἰτίαν παράσχωμεν ἐλεγχθείσας· ἵστασθαι δὲ αὐτὰς ἄνευ κοινωνίας προσεταῖξαν, μέχρι τοῦ συμπληροῦσθαι τὸν χρόνον τῆς μετάνοιας" (BASILIUS, *Epistolarum classis II, Epist. CXCLIX*, in *PG*, vol. XXXII, p. 728; English trans. in D. CUMMING [trans.], *The Rudder*, Chicago, The Orthodox Christian Educational Society, 1957, pp. 817-818). Also see O. WATKINS, *A History of Penance: Being a Study of the Authorities*, (A) *For the whole Church to A.D. 450* (B) *For the Western Church from A.D. 450 to A.D. 1215*, vol. 1, New York, B. Franklin, 1961, p. 475.

²¹ CUMMING, *The Rudder*, p. 818.

²² KURTSCHIED, *A History of the Seal*, p. 47.

²³ See MORTIMER, *The Origins of Private Penance*, p. 45.

the time of the letter of Pope Leo the Great (r. 440-461), however, there was no formal legislation on the seal of confession in the form we have it today. In fact, what is evident in the writings examined up to this point is an ethic of confessional secrecy which gradually evolved into a custom, and which subsequently received formal legislative force.

Sensitivity on the part of the Church towards the use of information privately revealed in confession can be seen in c. 141 of the regional African Council of Carthage held in the year 418 or 419. This canon indicated that a confessor-bishop was forbidden to use information obtained in confession to support an excommunication unless it could also be substantiated by witnesses.²⁴

1.2.2 – Letter of Leo the Great

The first major development in the seal of confession occurred in 459 when Pope Leo the Great wrote a letter, which may perhaps be regarded as the first papal decree on the seal.²⁵ In his letter to the bishops of Campania, Samnium and Picenum, Leo condemned the practice of written publication of secretly-confessed sins. Kurtzschid observes, however, that

²⁴ See CUMMING, *The Rudder*, p. 706; see also ERICKSON, "Penitential Discipline in the Orthodox Canonical Tradition," p. 196.

²⁵ "I decree also that this presumption contrary to apostolic regulation, which I learned recently is being committed by some by illegal usurpation, is to definitively cease. With respect to penance, it is certainly not required of the faithful that the nature of individual sins be written down and recited in public, since it suffices that guilt on consciences be indicated to priests alone in secret confession. For although that fullness of faith may seem laudable, which for fear of God, is not afraid of embarrassment before men, nevertheless, because those who seek penance may fear that their sins will be made public, such an unapproved custom is to cease, because many would be deterred due to shame or the fear of legal prosecution from the salutary remedy of penance" ("Illam etiam contra apostolicam regulam præsumptionem, quam nuper agnovi a quibusdam illicita usurpatione committi, modis omnibus constituo submoveri. De pænitentia scilicet, quae a fidelibus postulatur, ne de singulorum peccatorum genere, libello scripta professio publice recitetur; cum reatus conscientiarum sufficiat solis sacerdotibus indicari confessione secreta. Quamvis enim plenitudo fidei videatur esse laudabilis, quæ propter Dei timorem apud homines erubescere non veretur, tamen quia non omnium huiusmodi sunt peccata, ut ea qui pænitentiam poscunt, non timeant publicare, removeatur improbabilis consuetudo, ne multi a pænitiæ remediis arceantur, dum aut erubescunt aut metuunt inimicis suis sua facta reserari, quibus possunt legum constitutione percelli" [LEO, *Epistola CLXVIII*, in *PL*, vol. LIV, pp. 1210-1211]).

at the time of this fifth-century condemnation, "... [P]ublic confession of secret sins had long ceased to be in vogue."²⁶

Leo condemned the practice of publishing secretly confessed sins for several reasons. First, the shame and the possibility of legal consequences on those approaching the sacrament is noted: "... [M]any will be deterred from the remedy of penance as long as shame or fear of legal prosecution would follow disclosure of facts ..."²⁷ There is no doubt that the distress caused by confessing one's private sins and then by the public humiliation resulting from criminal and civil proceedings was psychologically and spiritually devastating for both the person confessing and his or her family. The second reason was the sufficiency of secret confession to priests for the remission of sins. In other words, revelation of sins to a priest in the secrecy of confession rendered their public disclosure unnecessary.

A significant reason adduced by Leo for condemning the practice of publishing privately confessed sins was fear of enemies or legal consequences as Kurtscheid suggests. What seems evident in Basil's c. 34 and in Leo's letter is the Church's fear of exposing penitents to public prosecution. Kurtscheid nevertheless cautions that this does not mean Leo was the one who *introduced* the concept of the seal of confession or the practice of private confessions.²⁸ These were already in evolution by the time Leo wrote his letter. He certainly affirmed them through his letter for the stated reasons of which the most notable was the penitent's protection from criminal prosecution by the state.

²⁶ See KURTSCHIED, *A History of the Seal*, p. 53.

²⁷ "... [N]e multi a pœnitentiæ remediis arceantur, dum aut erubescunt aut metuunt inimicis suis sua facta reserari, quibus possint legum constitutione percelli" (LEO, *Epistola CLXVIII*, in *PL*, vol. LIV, p. 1211).

²⁸ See KURTSCHIED, *A History of the Seal*, p. 55.

After the issuance of the letter by Leo, confessional practices became more private in character.²⁹ However, the practice of public penance for secret sins continued in the West for some time.³⁰ There was no major canonical developments relating to confessional secrecy in the West until the 9th century.

1.2.3 – Developments in the East

In the East, there were several developments in this matter from legal and theological perspectives. Canon 20 of the Second Synod of Dwin in Armenia (554) condemned any priest who revealed what was disclosed during confession.³¹ John Climacus (525-605) emphasized the need for the secrecy of confession in order to maintain the morale of penitents: “We nowhere find that God reveals the sins which have been confessed, lest through such a revelation the penitents be disheartened and rendered incurable in their disease.”³²

Canon 27 attributed to Nicephorus (758-829) who became the Patriarch of Constantinople in 815 appeared around the ninth century. This canon exhorted confessors in clear and unequivocal terms to maintain confidentiality concerning the contents of confession:

A Father Confessor ought to forbid divine Communion to those persons who confess secret sins to him, but he ought to let them enter the church; and *he ought not to reveal their sins*,

²⁹ See OAKLEY, *English Penitential Discipline*, p. 60.

³⁰ See KURTSCHIED, *A History of the Seal*, p. 57.

³¹ See *ibid.*, p. 56.

³² “Οὐδαμοῦ Θεὸς ἐξομολογήσεως ἀκούσας, δημοσιεύσας φαίνεται, ἵνα μὴ τοὺς ἐξωμολογημένους διὰ τοῦ θριάμβου ἀνακόψῃ, καὶ λοιπὸν αὐτοὺς ἀνίατα νοσεῖν παρασκευάζῃ” (IOANNIS CLIMACI, *Liber ad pastorem*, Cap. XIII, in PG, vol. LXXXVIII, p. 1196; English trans. in KURTSCHIED, *A History of the Seal*, p. 56).

but ought to advise them gently to remain repentant and to keep praying; and he ought to adjust the amercements to befit each one of them according to his best judgment.³³

Canon 222 of Nicephorus reads as follows:

[St. Nicephorus replies] that it is a sacrilege to expel someone from a church in such a manner that spiritual fathers bear witness to what they have learned in secret, and accordingly, for that reason, they are designated as detestable, excommunicated and anathematised by their very testimony. For it is absolutely forbidden for a mediator to say or in any way manifest those things that belong to confession.³⁴

This canon is foundational in the Eastern canonical tradition and for this reason it is listed amongst the *fontes* for c. 733 of the *CCEO*.

1.2.4 – The Decline of Public Penance

Although public confessions had largely ceased by the fifth century, the practice of public penance remained. The practice of public penance for secret sins is reflected in various writings up to the seventh century,³⁵ as well as in numerous conciliar affirmations.³⁶

However, this practice began to slowly be replaced by penances more private in nature as

³³ “Τοὺς ἁγία πταίσματα ἐξομολογουμένους, τῆς μὲν κοινωνίας ἀπείρηειν δεῖ τὸν δεχόμενον τὴν ἐκείνων ἐξομολόγησιν· εἰς δὲ τὴν ἐκκλησίαν αὐτοὺς εἰσέρχεσθαι μὴ κωλύειν, μηδὲ θριαμβεῦειν τὰ κατ’ αὐτούς· ἀλλ’ ἐπιεικῶς τοὺς νοθετεῖν, τῇ μετανοίᾳ προσανέχειν καὶ προσευχῇ· καὶ οἰκονομεῖν τὰ προσήκοντα τοῖς ἐπιτίμια, κατὰ τὴν ἐκάστου προαίρεσιν” (NICEPHORUS CP., in PG, vol. C, p. 858; English trans. in *The Rudder*, p. 967; italics added to the English text; note also Canon 29 which has a similar exhortation).

³⁴ “Ἱεροσολίαν γ) εἶναι τὸν ἀθετισμὸν ὅτι πνευματικοὶ μαρτυρήσαντες περὶ τῶν ἐν ἀπορρήτῳ γνωστῶν, ἀνίεροι, ἀφωρισμένοι, καὶ ἀναθεματισθέντες τῇ αὐτῇ μαρτυρίᾳ· οὐ γὰρ θέμιτον τὰ τῆς ἐξομολογήσεως λέγειν ἢ ὅπωςδὴποτε φανεροῦν” / “[S. Nicephorus rescripts] sacrilegium esse exclusionem ab ecclesia ideo factam quod spirituales patres testati sint ea quae secreto norunt, quum execrabiles, excommunicati et anathemate per ipsum testimonium perculsi sint. Nam nefas est quae confessionis sunt dicere aut quocumque pactor manifestare” (NICEPHORUS CP., in J.-B. PITRA, *Iuris ecclesiastici graecorum historia et monumenta iussu Pii IX. Pontificis Maximi*, tom. II, Romae, Typis Collegii Urbani, 1846-1868, p. 347).

³⁵ See, for example, LEO, *Epistola CLXVII*, in PL, vol. LIV, p. 1209; SIDONIUS, *Epistola I.IV*, in PL, vol. LVIII, p. 519; DIONYSIUS EXIGUUS, in PL, vol. LXVII, pp. 139ff., 154-155; FULGENTIUS FERRANDUS, *Brevatio Canonum*, in PL, vol. LXVII, pp. 950ff., 957; CRESCONIUS, in PL, vol. LXXXVIII, pp. 829ff.; QUESNELLIANA, in PL, vol. LVI, p. 899; *Capitula Martini Episcopi Bragensis*, in PL, vol. LXXXIV, pp. 23ff.

³⁶ See KURTSCHIED, *A History of the Seal*, pp. 60-62.

seen in a number of writings³⁷ and councils.³⁸ By the ninth century, private penance for secret sins seems to have become more prevalent, although public penance for public sins remained.³⁹

The decline in practice of public penance coincided with a corresponding increase in private auricular confession, the only practice known in the Celtic tradition. This practice became widespread on the European continent through the ministry of itinerant Celtic priests. Gradually, private confession supplanted the more complex and public Mediterranean system of penance⁴⁰ because of its pastoral appeal as "... [T]he Irish offered pardon to them in a new form with no public and permanent humiliation attached to it."⁴¹ In support of this, the Irish "Speckled Book" described revealing the secret of confession as an unforgivable offense.⁴² This is consistent with the original reason why public penance was avoided in the Celtic tradition, that is, to avoid the humiliation of Anglo-Saxon converts.⁴³ The Anglo-Saxon

³⁷ See AUGUSTINUS, *Sermo CCCLI*, in *PL*, vol. XXXIX, p. 1545; GENNADIUS, *De Ecclesiasticis Dogmatibus*, in *PL*, vol. XLII, pp. 1217ff.; POMERIUS, *Vita Contemplativa*, in *PL*, vol. LIX, p. 452; CAESARIUS, *Sermo CIV*, in *PL*, vol. XXXIX, p. 1948; CAESARIUS, *Sermo CCLXI*, in *PL*, vol. XXXIX, p. 2227.

³⁸ See KURTSCHIED, *A History of the Seal*, p. 64.

³⁹ See *ibid.*, pp. 69-76.

⁴⁰ See KURTSCHIED, *A History of the Seal*, p. 76; L. ÖRSY, *The Evolving Church and Sacrament of Penance*, Denvill, Dimension Books, 1978, pp. 34, 37; see also K. DOOLEY, "From Penance to Confession: The Celtic Contribution," in *Bijdragen*, 43 (1982), pp. 390-411; W. COSGRAVE, "How Celtic Penance Gave us Personal Confession," in *Doctrine and Life*, 41 (1991), pp. 412-422; H. CONNOLLY, *The Irish Penitentials and Their Significance for the Sacrament of Penance Today*, Blackrock, Four Courts Press, 1995, p. 18; "The Sacrament of Penance in the Early Irish Church," in *The Irish Ecclesiastical Record*, 1/1 (1865), pp. 477-486.

⁴¹ See L. ÖRSY, *The Evolving Church and Sacrament of Penance*, p. 37.

⁴² See W. TIEMANN and J. BUSH, *The Right to Silence: Privileged Clergy Communication and the Law*, 2nd ed., Nashville, Abingdon Press, 1983, p. 36.

⁴³ See KURTSCHIED, *A History of the Seal*, p. 54.

priests contributed to the spread of private confession which became the norm by the twelfth century.⁴⁴

1.2.5 – Early Legislative Prototypes of the Seal of Confession

Between the fifth and ninth centuries, there was no explicit penal legislation on the seal of confession, although there were exhortations to maintain confessional secrecy.⁴⁵ The capitulary of Charlemagne (742-814) *Capitula originis incertae* of 813 appears to be one of the first enactments which established the violation of the seal of confession as a crime.⁴⁶ Later, the French Council of Douci (874) prohibited revelation of sins by signs or actions.⁴⁷

The first explicit ecclesiastical penal legislation in the Western Church appeared around the tenth century in c. 105 of the *Poenitentiale Summorum Pontificum*. This canon provided for removal from office and exile for violation of the seal.⁴⁸ Other legislation against revelation of sins is found in the eleventh century *Ordines* of the *Codex cassinensis*, the *Codex valicellanus*.⁴⁹ The Alpine Synod of Rouen also decreed strict maintenance of the

⁴⁴ See *ibid.*, p. 76.

⁴⁵ See, for example, PAULINUS, *Liber exhortationis ad Henricum Foroiuliensem*, Cap. LII, in *PL*, vol. IC, p. 257; ALCUIN, *Epistola CCV*, in *PL*, vol. C, p. 502; IONNAS, *De institutione laicali*, in *PL*, vol. CVI, p. 156.

⁴⁶ See KURTSCHIED, *A History of the Seal*, p. 79.

⁴⁷ “Omnes tam clerici quam laici vel feminae confitentes secreta confessione sacerdotibus peccata sua et ea dignae paenitentia satisfactione deflentes nequaquam sunt prodendi et peccata eorum nulli a sacerdote quacumque significatione manifestanda, nisi soli Domino in secreta oratione, pro quibus et pro suis iugiter intercedat peccatis” (cited in KURTSCHIED, *A History of the Seal*, p. 86).

⁴⁸ “Si quis sacerdos palam fecerit et secretum penitentie usurpaverit et quavis homo intellexerit et declaratum fuerit quem celare debuerit, ab omni honore suo in cunctum populum deponatur et diebus vite sue peregrinando finiat” (cited in KURTSCHIED, *A History of the Seal*, p. 86).

⁴⁹ See KURTSCHIED, *A History of the Seal*, pp. 88, 103.

secrecy of confession.⁵⁰ Archbishop Lafranc of Canterbury (r. 1070-1089) treated even the arousal of suspicion against a penitent by a confessor as both a violation of the seal of confession as well as a grave sin.⁵¹ Canon 23 of the eleventh book of the *Collectio* of Anselm of Lucca (1036-1086) was also a definitive statement on the seal of confession.⁵²

The legislative patchwork described above laid the foundation for Gratian's (+1179) famous *Concordia discordantium canonum* of 1140, which served to "... [P]lace the strict obligation of the seal beyond doubt."⁵³ Gratian's synthesis of the law remained as the *locus classicus* of the pre-Lateran IV laws on the serious obligation of maintaining the sacramental seal. Gratian's synthesis reads as follows:

A priest before all else should beware concerning the sins of someone that are confessed to him, that he not recite to anyone that which was confessed, not to relatives, nor to strangers, so as to avoid scandal. Now if he should do this, he is to be deposed, and all the days of his life he is to wander ignominiously as one without a home.⁵⁴

Various other writings began to flourish following Gratian which stressed the grave necessity of maintaining the secrecy of confession. We also see more legislation concerning

⁵⁰ "Ne quis presbyter vel monachus publice peccantem criminali peccato ad paenitentiam nisi iubente episcopo suscipiat. Occulte peccantem confitentem quidem suscipiat, sed paenitentiam non nisi eam, quam episcopus determinaverit, iniungat. Sic tamen, ut iure confessionis secreto peccantis persona nulli detegatur" (cited in KURTSCHIED, *A History of the Seal*, pp. 90-92).

⁵¹ See *De celanda confessione*, in *PL*, vol. CL, pp. 625-628.

⁵² "Ut sacerdos, si confessionem paenitentis manifestaverit, deponatur: Caveat ante omnia sacerdos, ne de his, qui peccata sua confitentur, alicui recitet quod ea confessus est, non propinquis, non extraneis, nec, quod absit, pro aliquo scandalo. Nam si hoc fecerit, deponatur et omnibus diebus vitae suae ignominiosus peregrinando pergat" (*Collectio Anselmi*, in *PL*, vol. CXLIX, p. 525).

⁵³ KURTSCHIED, *A History of the Seal*, p. 103.

⁵⁴ "Sacerdos ante omnia caueat, ne de his, qui ei confitentur peccata sua, recitet alicui quod ea confessus est, non propinquis, non extraneis, neque, quod absit, pro aliquo scandalo. Nam si hoc fecerit, deponatur, et omnibus diebus vitae suae ignominiosus peregrinando pergat" (secunda pars, d. VI, c. 2, *de paenitentia*; English trans. in D. BREWER, "The Right of the Penitent to Release the Confessor from the Seal: Considerations in Canon Law and American Law," in *Jur*, 54 [1994], p. 426).

the seal of confession toward the close of the twelfth century. The Synod of Dioclea in Dalmatia (1197) declared that a presbyter who revealed what was said in confession was to be deprived of his office as well as of his benefice.⁵⁵ The diocesan statutes of the Parisian Bishop Odo (r. 1197-1208) contained an ordinance for the strict observance of the seal of confession.⁵⁶ Similar prohibitions may be found in the twelfth century writings of Nicholas of Clairvaux (+1176),⁵⁷ Robert Pulleyn (+1150),⁵⁸ Peter Cantor (+1197),⁵⁹ and Peter Blois (1135-1203).⁶⁰

1.3 — THE FOURTH LATERAN COUNCIL AND SUBSEQUENT CANONICAL ISSUES

The Fourth Lateran Council (1215) confirmed the preceding legislation on the sacramental seal. Canon 21 of the Council contains the definitive statement on the secrecy of the seal, and dispels all doubts about its nature and application. The last part of the canon states:

Let him take the utmost care, however, not to betray the sinner at all by word or sign or in any other way. If the priest needs wise advice, let him seek it cautiously without any mention of the person concerned. For if anyone presumes to reveal a sin disclosed to him in

⁵⁵ "Districtius inhibemus, ne aliquis sacerdos filii sui vel filiae spiritalis privatam confessionem alicui revelare praesumat. Quodsi facere convictus fuerit, officio et beneficio ecclesiastico perpetuo spoliatur" (cited in KURTSCHIED, *A History of the Seal*, fn. 77).

⁵⁶ "Nullius ira, vel odio, vel etiam metu mortis in aliquo audeat [sacerdos] revelare confessionem signo vel verbo ullis, generaliter vel specialiter, ut dicendo: Ego scio quales estis. Et si revelaverit, absque misericordia debet degradari" (cited in KURTSCHIED, *A History of the Seal*, fn. 78).

⁵⁷ See *Sermo II de Beato Andrea*, in *PL*, vol. CXLIV, p. 833, and *Sermo in dedicatione ecclesiae*, in *PL*, CXLIV, p. 901.

⁵⁸ See *Sententiae*, 1, VI, c. 51, in *PL*, vol. CXLXXXVI, p. 898.

⁵⁹ See *Verbum abbreviatum*, cc. 65 and 144, in *PL*, vol. CCV, pp. 199 and 344.

⁶⁰ See *De paenitentia vel satisfactione a sacerdote iniungenda*, in *PL*, vol. CCVII, p. 1091.

confession, we decree that he is not only to be deposed from his priestly office but also to be confined to a strict monastery to do perpetual penance.⁶¹

That the seal is inviolable is clear from the phrase *Caveat autem omnino [sacerdos], ne verbo aut signo aut alio quovis modo aliquatenus prodat peccatorem*.⁶² Noteworthy is that at this stage in the development of legislation on the seal of confession, it was permissible for the confessor to seek advice concerning a particular confession, provided that there was no danger of identifying the penitent.

The Council attached penal sanctions to any violation of the seal, that is, the penalty of deposition of the priest from office and either exile or confinement. The penalties identified in c. 21 were *ferendae sententiae* and applicable only to the confessor. Deposition from office meant either actual loss of the office, or in the case of a priest without an office or benefice, he would be barred from assuming any office in the future. The penalty of confinement to a "strict monastery" was a mitigation of the former punishment of "perpetual peregrination" (exile) mentioned in previous canons. "Penance" involving fasting and prostrations was also imposed on the priest guilty of violating the seal of confession.⁶³

The Fourth Lateran Council brought in the foundational ecclesiastical law on the seal of confession, and subsequent legislative refinements did not introduce substantial changes to

⁶¹ "Caveat autem omnino [sacerdos], ne verbo vel signo vel alio quovis modo prodat aliquatenus peccatorem, sed si prudentiori consilio indiguerit, illud absque ulla expressione personae caute requirat, quoniam, qui peccatum in poenitentiali iudicio sibi detectum praesumpserit revelare, non solum a sacerdotali officio deponendum decernimus, verum etiam ad agendam perpetuam poenitentiam in arctum monasterium detrudendum" (LATERAN COUNCIL IV, Canon 21, *Omnis utriusque sexus*, in N. TANNER [ed.], *Decrees of the Ecumenical Councils*, vol. 1, London, Sheed and Ward; Washington, Georgetown University Press, 1990, p. 245).

⁶² KURTSCHIED, *A History of the Seal*, p. 115.

⁶³ See *ibid.*, pp. 303-305.

this model of legislation. However, the application of the Fourth Lateran Council's legislation gave rise to later controversies. These controversies centred on the application of the seal to sins intended to be committed in the future, the use of knowledge obtained from confession, persons subject to the seal, communications subject to the seal, and release from the seal. The theological writings of Aquinas appear to answer most, but not all, of these fundamental questions, and have been adopted by many later writers accordingly.

1.3.1 – Application of the Sacramental Seal to Future Acts

One of the controversies that emerged from the legislation of the Fourth Lateran Council on the seal of confession was whether the seal applied to future sins, especially the sin of treason. There were three main schools of thought on this issue. The first, composed mainly of canonists and known as the Classical school, considered confession of a future intention, particularly if it involved propagation of heresy, as non-sacramental and, therefore, subject to disclosure to prevent serious future harm. This view was supported by Pope Innocent IV (r. 1243-1254). The second group consisted of the Gallicanists who argued that treason was an exception to the rule, and therefore, did not fall under the sacramental seal. This view was in conformity with the *Ordonnance* of Louis XI (1423-1483) which required disclosure of treasonous plots, and subsequent capital punishment for failing to do so.⁶⁴ A similar ordinance emerged in English common law during Norman times which will be discussed in greater detail in Chapter Three.

The main difference between the Classical school and the Gallican school on the revelation of confessed future crimes consists in the fact that the former did not regard such

⁶⁴ See *ibid.*, p. 153.

matter as sacramental, and that an indication of remorse would normally suffice to maintain the secret. The Gallican school, however, saw the revelation of treasonous plots as an *exception* to the sacrament. The thinking of this school seems to have exerted its influence later on the French, English, and Russian civil law on the seal of confession, because the Gallican position (in addition to the Classical position) appears to have been adopted by the Protestant and Orthodox legislators of the 17th and 18th centuries.

The third group, led by the Thomists, regarded confession of a future intention as covered by the seal of confession, a position reinforced by the teaching of Pope Alexander III (r. 1159-1181). Aquinas had stated:

Some say that the priest is not bound by the seal of confession to hide other sins than those in respect of which the penitent promises amendment; otherwise he may reveal them to one who can be a help and not a hindrance. But this opinion is erroneous, since it is contrary to the truth of the sacrament; for just as, though the person baptized be insincere, yet his Baptism is a sacrament, and there is no change in the essentials of the sacrament on that account, so confession does not cease to be sacramental, although he that confesses does not purpose amendment. Therefore, this notwithstanding, it must be held secret; nor does the seal of confession militate against charity on that account, because charity does not require a man to find a remedy for a sin which he knows not: and that which is known in confession, is, as it were, unknown, since a man knows it, not as man, but as God knows it. Nevertheless in the cases quoted one should apply some kind of remedy, so far as this can be done without divulging the confession, e.g. by admonishing the penitent, and by watching over the others lest they be corrupted by heresy. He can also tell the prelate to watch over his flock with great care, yet so as by neither word nor sign to betray the penitent.⁶⁵

⁶⁵ "Ad primum ergo dicendum, quod quidam dicunt, quod sacerdos non tenetur servare sub sigillo confessionis nisi peccata de quibus pœnitens emendationem promittit; alias potest ea dicere ei qui potest prodesse et non obesse. Sed hæc opinio videtur erronea, cum sit contra veritatem sacramenti. Sicut enim baptismus est sacramentum, quamvis quis fictus accedit; nec est mutandum propter hoc aliquid de essentialibus sacramenti; ita confessio non desinit esse sacramentalis, quamvis ille qui confitetur, emendationem non proponat; et ideo nihilominus sub occulto tenenda est. Nec tamen sigillum confessionis contra caritatem militat; quia caritas non requirit quod apponatur remedium peccato quod homo nescit. Illud autem quod sub confessione scitur, est quasi nescitum, cum non sciat ut homo, sed ut Deus. Tamen aliquod remedium adhibere debet in prædictis casibus quantum potest sine confessionis revelatione, sicut monendo eos qui confitentur, et aliis diligentiam apponendo ne corrumpantur per hæresim. Potest etiam dicere prælato, quod diligentius invigilet super gregem suum: ita tamen quod non dicat aliquid per quod verbo vel nutu confitentem prodatur" (*Sent. IV, d. XXI, q. III, s. I*; English trans. in *The "Summa theologia" of St. Thomas Aquinas*, vol. 18, 2nd rev. ed., THE FATHERS OF THE ENGLISH DOMINICAN PROVINCE [trans.], London, Burns, Oates, & Washbourne Ltd., 1928, p. 192).

The Thomistic view on the disclosure of future sins and treasonous plots was eventually accepted by the majority of canonists and ultimately by the Catholic Church. Kurtscheid notes that this was the “correct view” on the application of the seal of confession to future sins.⁶⁶ What was disclosed in a confession should not be regarded as non-sacramental simply because the penitent had no intention of refraining from a future crime or sin. Therefore, the content of such a confession was covered by the seal of confession.

1.3.2 – Use of Knowledge Obtained in Confession

The preceding discussion focussed on the legitimacy and consequences of *revealing* confessional matter for the good of a third party, particularly society and the state. The second dispute over the declaration of the Fourth Lateran Council concerned the use of the knowledge obtained in confession by the confessor against the penitent. The main question was whether a confessor could vote against a penitent who was seeking an office, and whether a confessor could thwart a penitent’s intentions.

The first school of thought, the Thomists, maintained that it was permissible to use the knowledge obtained in confession. According to Thomas Aquinas, a confessor may use such knowledge against the penitent provided that the confessional matter is not revealed. This situation could include, for example, voting for the removal of a subordinate from office for a reason unrelated to confession, or not voting for a particular penitent in an election:

... [T]he abbot should advise the prior to resign his office, and if the latter refuse, he can absolve him from the priorship on some other occasion, yet so as to avoid all suspicion of divulging the confession.

⁶⁶ See *ibid.*, p. 169.

Reply Obj. 4. A man is rendered unworthy of ecclesiastical preferment by many other causes beside sin, for instance by lack of knowledge, age, or the like: so that by raising an objection one does not raise a suspicion of crime or divulge the secret of confession.⁶⁷

There were, however, a number of authors who opposed the use of confessional knowledge. The Jesuit Superior Claudius Aquaviva (1581-1615) forbade superiors to use the knowledge obtained in confession against subordinates for fear of endangering their freedom of conscience.⁶⁸ In a bull promulgated on 26 May 1593, Pope Clement VIII (r. 1592-1605) extended this prohibition to *all* religious. The pope decreed that subordinates ordinarily should not confess to their superiors.⁶⁹

After Pope Clement VIII's decree, the debate concerning non-religious superiors continued. The debate was put to rest by the 1682 Decree of Innocent XI (r. 1676-1689) which unequivocally condemned and forbade the use of the matter of the sacrament which was in any way harmful or burdensome to the penitent:

[Proposition]: "It is lawful to use knowledge obtained in confession, provided it is done without any direct or indirect revelation, and without burden upon the penitent, unless some much greater evil follows from its nonuse, in comparison with which the first would be rightly held of little account," an explanation or limitation then being added, that it is to be understood concerning the use of the knowledge obtained from confession with burden to the penitent, any revelation whatsoever being excluded, and in the case in which a much greater burden to the same penitent would follow from its nonuse.

⁶⁷ "... [V]el cum aliquis Abbas scit per confessionem alicujus Prioris sibi subjecti peccatum, cujus occasio inducit ipsum ad ruinam, si ei prioratum dimittat; unde debet ei auferre propter debitum pastoralis curæ; auferendo autem videtur confessionem publicare. 4. Praeterea, aliquis sacerdos per confessionem alicujus, quam audit, potest accipere conscientiam quod sit praelatione indignus. Sed quilibet tenetur contradicere promotioni indignorum, si sua intersit. Cum ergo contradicendo suspicionem inducere videatur de peccato, et sic quodammodo confessionem revelare; videtur quod oporteat quandoque confessionem revelare" (*Sent. IV*, d. XXI, q. III, a. I, 4; English trans. in *The "Summa theologica,"* p. 193).

⁶⁸ See *Instructio V, De notitia habita per confessionem*, in KURTSCHIED, *A History of the Seal*, pp. 212-216; also see L. HONORÉ, *Le secret de la confession: étude historico-canonique*, Paris, Giraudon, 1924, pp. 81-98.

⁶⁹ See *Decretum Sanctissimus Dominus*, in KURTSCHIED, *A History of the Seal*, p. 216.

[*Censure*]: “that the stated proposition, as far as it admits the use of said knowledge with the burden upon the penitent, must be altogether prohibited, even with the aforesaid explanation or limitation.”⁷⁰

Several decrees supporting Pope Innocent XI’s decree followed. Of particular importance is an Instruction issued in 1915 by the Holy Office which admonished priests to avoid giving the impression that they were using their experience as confessors when mentioning any confession-related matter.⁷¹ The impact of this Instruction will be discussed in further detail in Chapter Two.

1.3.3 – Persons Subject to the Seal of Confession

As will be discussed in further detail in Chapter Two, priests endowed with the faculty to hear confessions are certainly required by law to maintain strict silence about confessional matter. Even priests who unlawfully hear confessions are bound by this obligation. However, the practice of lay confession and the use of interpreters and consultants led to a debate as to whether the seal of confession covered communications made to these individuals. Some authors took the position that the seal of confession indeed extended to lay confessors, others did not. The Thomistic view on the subject was presented as follows:

Yet, as one who is not a priest, in a particular case has a kind of share in the power of the keys, when he hears a confession in a case of urgency, so also does he have a certain share in

⁷⁰ “[*Propositio*]: ‘Scientia ex confessione acquisita uti licet, modo fiat sine directa aut indirecta revelatione et gravamine paenitentis, nisi aliud multo gravius ex non usu sequatur, in cuius comparatione prius merito contemnatur’, addita deinde explicatione sive limitatione, quod sit intelligenda de usu scientiae ex confessione acquisitae cum gravamine paenitentis, seclusa quacumque revelatione, atque in casu, quo multo gravius gravamen eiusdem paenitentis ex non usu sequeretur. “[*Censura*]: Dictam propositionem, quatenus admittit usum dictae scientiae cum gravamine paenitentis, omnino prohibendam esse, etiam cum dicta explicatione sive limitatione” (SACRED CONGREGATION OF THE HOLY OFFICE, Decree, 18 November 1682, in H. DENZINGER, *Kompendium der Glaubensbekenntnisse und kirchlichen Lehrentscheidungen*, ed. by P. HÜNNERMANN, Freiburg im Breisgau, Herder, 1991, §2195; English trans. in H. DENZINGER, *The Sources of Catholic Dogma*, trans. by R. DEFERRARI, Saint Louis, Herder, 1957, p. 331).

⁷¹ See SACRED CONGREGATION OF THE HOLY OFFICE, Instruction, *Naturalem et divinam*, 9 June 1915, in *Il Monitore ecclesiastico*, 29 (1917), pp. 199-201.

the act of the seal of confession, and is bound to secrecy, though, properly speaking, he is not bound by the seal of confession.⁷²

Most authors agreed that lay persons voluntarily hearing confessions were not bound by the seal of confession. By the middle of the 16th century, the majority of authors had largely adopted the Thomistic position and agreed that lay confessors were bound by natural silence only, and not sacramental silence.⁷³ Interpreters and outside consultants were considered bound to secrecy not by virtue of the seal but by natural law and respect for the sacrament.⁷⁴ Penitents themselves were not considered bound by the seal of confession. The common view also held that in a spirit of charity and justice, penitents should be silent on any counsel they might have received from their confessors. All of these historical positions will be discussed in further detail in Chapter Two.

1.3.4 – Communications Covered by the Seal

The object of confession is the sins which a penitent confides to the confessor within the context of confession. We read the following in Aquinas:

The seal of confession does not extend directly to other matters than those which have reference to sacramental confession, yet indirectly matters also which are not connected with sacramental confession are affected by the seal of confession, those, for instance, which might lead to the discovery of a sinner or of his sin. Nevertheless, these matters also must be most carefully hidden, both on account of scandal, and to avoid leading others into sin through their becoming familiar with it.⁷⁵

⁷² “Tamen sicut aliquis qui non est sacerdos, in aliquo casu participat aliquid de actu clavis, dum confessionem audit propter necessitatem; ita etiam participat de actu sigilli confessionis, et tenetur celare; quamvis, proprie loquendo, sigillum confessionis non habeat” (*Sent. IV.*, d. XXI, q. III, a. I, 3; English trans. in *The “Summa theologica,”* pp. 195-196).

⁷³ See KURTSCHIED, *A History of the Seal*, p. 251.

⁷⁴ See *ibid.*, p. 263.

⁷⁵ “Ad secundam quæstionem dicendum, quod sigillum confessionis non directe se extendit nisi ad illa quæ cadunt sub sacramentali confessione; sed indirecte id quod non cadit sub sacramentali confessione, etiam ad confessionis sigillum pertinet, sicut illa per quæ posset peccator vel peccatum deprehendi. Nihilominus

Thus, the seal of confession extended also to any information related in some way to the sins confessed. Canonists have for the most part followed the general Thomistic principle that the seal of confession covers the actual sins which motivated the confession, and any related information which, if disclosed, would reveal the content and penitent of the confession.⁷⁶

1.3.5 – Release from the Seal of Confession

Aquinas states that no one, not even the Holy Father, can release a confessor from the seal of confession: “The Pope cannot permit a priest to divulge a sin, because he cannot make him know it as a man, whereas he that confessed it, can.”⁷⁷ However, according to Aquinas, the penitent may release the confessor from the obligation of the seal:

Now, the penitent can make the priest know, as a man, what he knew before only as God knows it, and he does this where he allows him to divulge it: so that if the priest does reveal it, he does not break the seal of confession. Nevertheless he should be aware of giving scandal by revealing the sin, lest he be deemed to have broken the seal.⁷⁸

The majority of authors have adopted this position or variations of it.⁷⁹ However, a large minority of authors disagree that a confessor can be released from the seal of confession.⁸⁰

One argument put forward against release from the seal of confession is that no one, not even

etiam illa summo studio sunt celanda, tum propter scandalum, tum propter pronitatem quæ ex consuetudine accidere posset” (*Sent. IV*, d. XXI, q. III, a. I, q. 3, s. 2; English trans. in *The “Summa theologica,”* p. 194).

⁷⁶ See *ibid.*, pp. 266-267.

⁷⁷ “Ad primum ergo dicendum, quod Papa non potest licentiarum eum ut dicat; quia non potest facere ut sciat ut homo; quod potest qui confitetur” (*Sent. IV*, d. XXI, q. III, a. II, s. 1; English trans. in *The “Summa theologica,”* p. 197).

⁷⁸ “Potest autem pœnitens facere ut illud quod sacerdos sciebat ut Deus, sciat etiam ut homo; quod facit dum eum licentiat ad dicendum; et ideo si dicat, non frangit sigillum confessionis. Tamen debet cavere scandalum dicendo, ne fractor sigilli prædicti reputetur” (*Sent. IV*, d. XXI, q. III, a. II; English trans. in *The “Summa theologica,”* p. 197).

⁷⁹ See KURTSCHIED, *A History of the Seal*, pp. 292-297; BREWER, “The Right of the Penitent to Release the Confessor from the Seal: Considerations in Canon Law and American Law,” p. 473.

⁸⁰ See *ibid.*, pp. 286-291.

the penitent, has the right to waive the divine law or ecclesiastical law on which the seal is based, and the only way a confessor could reveal confessional matter is to have the sins repeated to him outside the confessional. Another argument is that revealing confessional matter with the permission of the penitent might embolden secular courts to pressure confessors to reveal what is disclosed in confession. This would put both penitent and confessor into a difficult position. The release from the seal of confession remains a disputed area with respect to the history of the seal of confession and has not to date been resolved by any canon law.

1.4 — THE SEAL OF CONFESSION IN THE EASTERN CATHOLIC CHURCHES

The development of the notion of the seal of confession and the legislation regarding it sometimes reveal some historico-cultural contributions. Therefore, in this section we will provide a brief historical and legislative conspectus of the seal of confession in the life of Eastern Churches *sui iuris* which are in communion with the Roman Catholic Church and function in Canada.

1.4.1 – Post-Reformation Developments

The legislation in the Eastern Churches on the seal of confession began to appear in their conciliar documents and work around 500 years after the Fourth Lateran Council. It was in this period when these Churches began to come into communion with Rome. In these Churches, there was already an established tradition with respect the inviolability of the seal. The development of the seal of confession in the East parallels that in the West as noted earlier. The decrees of Lateran IV were applied to the Eastern Catholic Churches through their synodal declarations. Therefore, the understanding of the seal of confession in the East and in the West is substantially similar, although some differences are evident.

The obligation to maintain the secrecy of confession was well-established in the penitential practice of the Syrian tradition (Antiochene rite). This is attested to in the *Penitential of Dionysius Barsalibi*.⁸¹ The Maronite Church affirmed the seal of confession at the 1736 provincial Synod of Mount Lebanon.⁸² The decrees of this Synod were approved *in forma specifica* by Pope Benedict XIV in 1741 through the Constitution *Singularis*.

The Coptic Church (Alexandrian Rite) has traditionally maintained the seal of confession.⁸³ In 1898 the Egyptian Synod of Alexandria integrated the seal of confession into the canons of the Coptic tradition.⁸⁴ It was approved by the Holy See *in forma communi* on 23 April 1899.

The Armenian Church was one of the earliest Churches in the history of Christendom to codify strict silence on the confessional matter on the part of the confessor. Gregory the Illuminator, the first bishop of Armenia, enacted an early canon on the seal of confession.⁸⁵ The Second Synod of Dwin, during the reign of Katholikos Nerses II (548-557) entrenched

⁸¹ Coll. II, c. 51: "Sacerdos, qui confessionem alicujus divulgaverit, sacerdotio excidat" (*Ritus orientalium*, I, §1, p. 101).

⁸² "Sigillum Sacramentale: Non solum naturali et ecclesiastico, sed etiam divino iure tenetur sacerdos ad sigillum sacramentale religiosissime servandum, ut nihil eorum, quae ad confessionem pertinent, nec directe nec indirecte, sive impertitus fuerit sive denegaverit absolutionem, possit retere. Si quis autem sacerdos poenitentis confessionem, aut verbis, aut signis, conditionem, locum, tempus vel aliam circumstantiam significando, seu alio quovis modo revelare ausus fuerit, non solum deponatur ab Officio sacerdotali, verum etiam ad agendam perpetuam poenitentiam in arctum monasterium detrudatur" (SYNOD OF LEBANON, §2, II, Ch. IV, 15, 1736, in COMMISSIO AD REDIGENDUM CODICEM IURIS CANONICI ORIENTALIS, *Codificazioni canonica orientale*, *Fonti*, fasc. 11, §1411, Romae, Tipografia poliglotta Vaticana, 1933).

⁸³ "Testatur etiam Bernatus, sacerdos Copticos sedulo cavere, ne jejunia extraordinaria imponant, sed talia tantum, ad quae aliunde poenitentes obligantur, dicere solitos, secus peccata aliis innotescere posse, unde ejusmodi nonnisi pro peccatis enormibus et plane scandalosis injungere" (*Ritus orientalium*, I, §1, p. 101).

⁸⁴ See SYNOD OF ALEXANDRIA, S. II, Ch. III, Art. V, 1898, which is cited as a source of c. 733 of CCEO; see also *Fonti*, fasc. 8, §6.

⁸⁵ Canon 22: "Si quis sacerdos sigillum confessionis fregerit, privetur officio, atque gradu ministrorum, et peccata non confitentium ei attribuantur" (*Ritus orientalium*, I, §1, p. 101).

the seal of confession in the conciliar history of that Church with a special decree.⁸⁶ The text of the canon specifically prescribed that the penalty of excommunication was to be applied.⁸⁷ This was confirmed also at the 1342 Armenian Synod convened by Pope Benedict XII (r. 1334-1342).⁸⁸

The Plenary Armenian Church Synod of 1911 held in Rome, convoked at the request of Pius X and led by the Patriarch of Cilicia, Paul Peter XII Terzian (+1931), also addressed the issue of secrecy with respect to sacramental confession. The decrees of the Synod were approved in *forma communi* in 1913 by Pope Benedict XV. It was also at this Synod that the seal of confession became a canonical prescript for the Armenian Catholic Church and it is now included as a source of c. 733 of *CCEO*.⁸⁹

We should mention here the Decree of 13 April 1807 from the Sacred Congregation of the Holy Office addressed to the Chaldean Church. This decree cites the Decree of Pope Innocent III on the sacramental seal as the source of the law for the Chaldean Church on the seal of confession. It exhorts bishops to be vigilant over the seal of confession so that confessors would not dare to reveal sins heard in a confessional, and to punish delinquents with appropriate penalty.⁹⁰

⁸⁶ See KURTSCHIED, *A History of the Seal*, p. 56.

⁸⁷ Canon 18: "Si quis sacerdos peccata confitentium patefecerit, excommunicatus deponatur et omnino deleatur ex ordine sacerdotali" (*Ritus orientalium* I, §1, p. 101).

⁸⁸ See I. DOENS, "Armenian Canon Law," in *Parole de l'Orient*, 5 (1974), p. 468.

⁸⁹ See *Acta et decreta Concilii nationalis Armenorum, Romae habiti, ad sancti Nicolai Tolentinatis anno Domini 1911*, Romae, Typis polyglottis Vaticanis, 1913, pp. 238-239; SYNOD OF ARMENIA, Art. 470, 1911, cited as a source for c. 733 of *CCEO*; also see *Fonti*, fasc. 7, §§694-696.

⁹⁰ "Sigillum sacramentale. Caute invigilent Episcopi, ne confessarii peccata in paenitentiali iudicio detecta revelare praesumant; et contra delinquentes pro criminis gravitate procedant ad normam sacrorum

Two Byzantine Rite Churches, namely Romanian and Ukrainian, held synods in which the seal of confession was affirmed within their respective canonical traditions. The Romanian Church, in its 1872 First Provincial Synod of Alba-Julia and Fagaras articulated the seal of confession as follows:

Sacramental seal. With the seal of confession being absolutely inviolable, all confessors must be cautious so that all that is heard in confession is kept in silence and nothing is revealed, whatever the circumstances of the situation, even if the confessor's life is in danger.⁹¹

Since Ukrainian Catholics, as they are currently known, represent one of the largest bodies of Eastern Catholics in the West, particularly in North America, we will analyse a case which helps explain the origins of the seal of confession in the Ukrainian Catholic Church. This analysis will also demonstrate the influences that the civil law may have on canon law.

The Orthodox Kyivan Metropolia came into full communion with Rome in 1596 with the Union of Brest.⁹² It became what is known today as the Ukrainian Catholic Church. On its part, the Ukrainian Church in its Synod of Zamość, which took place in 1720, harmonized some practices which varied in different parts of Ukraine. This Synod also bridged differences in important aspects of theology and practice that divided the Ukrainian Catholic Church and the Latin Church. The Synod's resolution on the seal of confession, contained in

Canonum, ac praesertim Decretalis Innocentii III in cap. «*Omnis utriusque sexus*» de Paenitentia et Remissionibus" (SACRED CONGREGATION OF THE HOLY OFFICE, Decree, Art. XVII, 13 April 1807, in *Fonti*, fasc. 2).

⁹¹ "Sigillum sacramentale. Quum sigillum sacramentale absolute inviolabile sit, attendant omnes confessarii, ut de cunctis in confessione auditis profundum servent silentium, nihilque eorum revelent, quibuscumque in adiunctis versarentur, etiam si eorum vita in discrimen adduceretur" (SYNOD OF ALBA-JULIA AND FAGARAS, Title V, Ch. V, 3, 1872, *Quum*, in *Fonti*, fasc. 10, §1101).

⁹² See, generally, A. WELYKYJ (ed.), *Documenta Unionis berestensiensis eiusque auctorum (1590-1600)*, Romae, PP. Basiliani, 1970, xvi, 540 p.

its decrees dated 23 October 1720, used what appears to be a paraphrasing of the canonical decree of Lateran IV, the last 10 words in the Latin text of each being almost identical. The first paragraph of this resolution reads:

Sacramental Seal. If any priest either by word, sign, condition, location, time or any other significant circumstance or any other manner reveals what he has heard in confession, we decree that he is not only to be deposed from his priestly office but also to be confined to a strict monastery to do perpetual penance.⁹³

The decree of the Synod of Zamość serves as a source for the legislation on the seal of confession in the new Eastern Code and appears in the *fontes* for c. 733.

1.4.2 – The Seal of Confession in the Catholic Kyivan Metropolitan Church

We will present here a brief case study of the legislation on the seal of confession in the Catholic Kyivan Metropolitan Church. This case study is intended to further demonstrate the interaction between civil law and canon law, and to elucidate how the Orthodox and Catholic Churches may have developed different practices towards the seal of confession. What follows concerns the historico-legal developments in the Russian Empire and the Catholic Kyivan Metropolitan Church's largely contemporaneous response which underlie the Church's own canonical legislation. At this point in history, it should be noted that the churches in Ukraine were essentially caught between the Polish-Lithuanian Commonwealth which controlled the parts of Ukraine to the right bank of the Dnieper River, and the Russian Empire which controlled the parts of Ukraine to the left bank including Kyiv.

⁹³ "Sigillum sacramentale. Si quis sacerdos paenitentis confessionem aut verbis aut signis, conditionem, locum, tempus, vel aliam circumstantiam significando, seu alio quovis modo revelare ausus fuerit, non solum deponatur ab officio sacerdotali, verum etiam ad agendam perpetuam paenitentiam in arctum monasterium detrudatur" (SYNOD OF ZAMOŚĆ, Title III, §5, 1720, *Si quis*, in *Fonti*, serie I, fasc. 11, §696). For further information with respect to the penitential work of this Synod, see J. BILANYCH, *Synodus Zamostiana an. 1720 (eius celebratio, approbatio et momentum)*, Romae, PP. Basiliani, 1960, pp. 63-66.

1.4.2.1 – The Events Preceding the Synod of Zamość

During the seventeenth century, many churches were assuming a national character by submitting themselves more and more to state control. This approach led, in the case of many churches, to a loss of independence from the state, as was the case with the Russian Orthodox Church.⁹⁴ This, in turn, left those churches which resisted such state-church assimilation with the challenging task of defending the “higher claims of Christianity.”⁹⁵ The papacy itself was part of this resistance.

At the end of the seventeenth century, there emerged serious theological debates and disagreements between Russian Orthodox theologians who favoured the traditional Orthodox teachings and Orthodox intellectuals who apparently held theological positions which leaned more toward Roman Catholic theology. The latter were regarded by the former as “Latinizers” and “papists,” and these included well-known theologians like Stefan Yavorskii of the Kyiv Academy.⁹⁶ For example, there was disagreement among the two groups of theologians concerning the doctrine on *epiklesis*, and J. Cracraft notes that such a “[D]ispute was symptomatic of Muscovite resistance to the increasing penetration of their church by Ukrainians of Yavorskii’s type ...”⁹⁷ The Synod of Zamość took place amidst tension between three main groups: Ukrainian Orthodox who supported a more Latin orientation, Ukrainian Orthodox who supported a more Protestant approach, and Ukrainian-

⁹⁴ See J. CRACRAFT, *The Church Reform of Peter the Great*, Stanford, Stanford University Press, 1971, p. viii.

⁹⁵ See *ibid.*

⁹⁶ See *ibid.*, p. 123.

⁹⁷ See *ibid.*

Belorusans (i.e., Ruthenian) churchmen who were in communion with Rome and thus – because of the strictures of the day – bound to take a Latin approach. In addition to these tensions in theological circles, certain other factors also precipitated the Synod of Zamość.

First, while it is unknown exactly when Tsar Peter's decision to open the seal of confession was made, it is historically established that the decision for church reform was made in 1718, and that Peter commissioned Feofan Prokopovich as the chief architect of the *Spiritual Regulation* that same year.⁹⁸ Prokopovich supported the Tsarist (Russian) approach to theological questions. Second, it was also known to the Basilians that a member of their Order, who had defected and harboured anti-Catholic leanings, was in the service of the tsar and worked on the *Spiritual Regulation*. Third, there were several incidents which preceded Zamość and these led to the questioning of the integrity of the seal of confession. These included the Bulavin revolt of 1707-1708. After this revolt and toward the end of the Northern War, Peter fostered the idea of introducing legislation on the possibility of breaking the seal of confession.⁹⁹ There were also at least two well-publicised trials of confessors who had not disclosed plots against the state. In 1701, Grishka Talitskii confessed to his confessor his intent to distribute leaflets denouncing Peter as the Antichrist, and his confessor absolved him of his intended sin. The confessor was tried for not disclosing to the state the intended crime and was executed for it.¹⁰⁰ The second incident occurred in 1718 which involved a loosely-organized conspiracy led by Tsarevich Aleksei, Peter's son. Included in this

⁹⁸ See *ibid.*, p. 60.

⁹⁹ G. FREEZE, *The Russian Levites: Parish Clergy in the Eighteenth Century*, Cambridge, Harvard University Press, 1977, p. 29.

¹⁰⁰ See CRACRAFT, *The Church Reform of Peter the Great*, pp. 240-241.

conspiracy was Aleksei's confessor, Jacob Ignatiev. It seems Aleksei had confessed to his confessor that he wished his father was dead. Aleksei testified that he had disclosed his wish to his confessor during confession, and the confessor admitted the disclosure under interrogation. Both Aleksei and his confessor were tried, convicted and executed.¹⁰¹

A pervasive atmosphere of suspicion reigned during this era toward Catholicism and papacy, which were seen as inimical to both the Russian State and the Orthodox Church. The missionary endeavours of the Jesuits were also viewed with suspicion by the Slavs.¹⁰²

Prior to the Synod of Zamość, that is, on 8 February 1716, Tsar Peter ordered the Senate to command all provincial governors and bishops to announce that yearly confession was obligatory, and failure to comply with the order would result in fines. Clergy were to compile lists of those who refused to comply and report them to the Senate Chancery.¹⁰³

1.4.2.2 – The *Spiritual Regulation* of Peter the Great

The *Spiritual Regulation* was signed in St. Petersburg on 25 February 1720 by the senators and the bishops (including the Russian Orthodox bishops of the Ukrainian sees of Kyiv, Chernigov, Peryaslavl, and Mogilev).¹⁰⁴ The *Appendix* to the *Spiritual Regulation* was drafted in 1720 by Prokopovich under the close supervision of Tsar Peter himself, and it was

¹⁰¹ See *ibid.*, p. 241. It should also be noted that just two years after the Synod of Zamość, that is, in 1722, there was the trial of a monk named Varlaam Levin, who, like Talitskii, denounced that the tsar was the Antichrist. He too was tried and executed, and his confessor was punished and dismissed from the priesthood.

¹⁰² See *ibid.*, p. 51.

¹⁰³ See *ibid.*, p. 76.

¹⁰⁴ See CRACRAFT, *The Church Reform of Peter the Great*, pp. 157-159, 220. For a consideration of the canonical theories of church and state which were at the basis of the *Spiritual Regulation* and Peter's reforms, see J. BASIL, "The Relations Between the Church and the State in Late Imperial Russia: Views of the Canonists," in *Orientalia christiana periodica*, 59 (1993), p. 153.

originally intended for inclusion in the *Regulation* itself.¹⁰⁵ However, it went through a series of changes until the final version was printed in Moscow on 14 June 1722. Thus it was added to the second edition of the *Spiritual Regulation*.¹⁰⁶ Sections 11 and 12 of the *Appendix* to be examined below were pre-published in advance in the form of special announcement on 17 May 1722.¹⁰⁷

The *Appendix* to the *Spiritual Regulation* contained the first formal Russian civil legislation requiring the opening of the seal of confession in certain instances, mainly treason and spreading of scandals. It also prohibited the propagation of stories of false miracles. A brief explanation of the key texts of this legislation follows.

First, the general rule concerning the sacramental seal of confession was retained in the civil legislation with an echo of some earlier canonical precedents. Paragraph 9 of the *Appendix* stipulates that a priest who violates the seal of confession should be dismissed from the priesthood and tried in a lay tribunal for breaking the seal of confession: "And yet there is even a greater misdeed: if a priest reveals in a quarrel the sins of his spiritual son. For this, he shall be divested of the priesthood, and he shall be referred to a lay tribunal for corporal punishment in accordance with the determination of the matter."¹⁰⁸ Paragraph 15 of the

¹⁰⁵ See CRACRAFT, *The Church Reform of Peter the Great*, p. 233.

¹⁰⁶ See *ibid.*, p. 235.

¹⁰⁷ See *ibid.*, p. 240.

¹⁰⁸ "9. А еще большее злодѣйство есть ежели священникъ открыть ссорѣ хрѣхи сына духовного, за сие лишень да будетъ священства, да и суду мирскому преданъ в тѣлесное наказанне по разсуждению дѣла" (P. VERKHOVSKOI, *Uchrezhdenie Dukhovnoi Kollegii i Dukhovnyi Reglament: K Voprosu ob Otnoshenii Tserkvi i Gosudarstva v Rossii* [The Establishment of the Spiritual College and the Spiritual Reglament: On the Question of Church-State Relations in Russia], Rostov-on-Don, 1916, republished Westmead, England, Gregg International Publishers, 1972, p. 85; English trans. in A. MULLER [trans.], *The Spiritual Regulation of Peter the Great*, Seattle, University of Washington Press, 1972, p. 60).

Appendix reaffirms the secrecy of confession (at least within the context of visitation of the sick) and differentiates the sacrament of confession from the other sacraments which have a more public character. Paragraph 15 directs the priest to hear the confession of a sick person in private, while he should celebrate the Holy Mysteries in the presence of the other members of the household, and other parishioners who know the sick person.¹⁰⁹

Second, the *Appendix* makes two exceptions in paragraph 11 to the general rule on the seal of confession. Because of its importance to canon law and civil law, we will consider this paragraph in its entirety by dividing it into the specific requirements of the law, the criminal procedure, and the policy and justifications attached to it. The first section of paragraph 11 states a number of criteria a confessor should follow in reporting matters related to the state heard in confession:

If someone in confession informs his spiritual father of some illegality that has not been committed, but that he yet intends to commit, especially treason or mutiny against the Sovereign or against the state, or evil designs upon the honor or well-being of the Sovereign and upon His Majesty's family, and in informing of such a great intended evil, he reveals himself as not repenting but considers himself in the right, does not lay aside his intention, and does not confess it as though it were a sin, but rather, so that with his confessor's assent or silence he might become confirmed in his intention—what can be concluded therefrom is this: When the spiritual father, in God's name, enjoins him to abandon completely his evil intention, and he, silently, as though undecided or justifying himself, does not appear to have changed his mind, then the confessor must not only not honor as valid the forgiveness and remission of the confessed sins, for it is not a regular confession if someone does not repent of all his transgressions, but he must expeditiously report concerning them, where it is fitting, pursuant to His Imperial Majesty's personal *ukase*, promulgated on the twenty-eighth day of April of the present year, 1722, which was published in printed form with reference to these misdeeds, in accordance with which it is ordered to bring such malefactors to designated places, exercising the greatest speed, even as the result of statements concerning His Imperial Majesty's high honor and damaging to the state.¹¹⁰

¹⁰⁹ See MULLER, *The Spiritual Regulation of Peter the Great*, p. 67.

¹¹⁰ “11. Если кто при исповѣди объявить духовному отцу своему нѣкое не сдѣланное, но еще къ дѣлу намѣренное от него воровство, наипаче же измѣну, или бунтъ на Государя, или на Государство, или злое умышление на честь, или здравіе Государево и на фамилію. Его Велечества: а объявляя толокое намѣраемое зло, покажетъ себе, что не раскаявается, но ставить себѣ въ истинну, и намѣренія своего не отлагаетъ, и не яко грѣхъ исповѣдуетъ, но паче дабы тако согласіемъ, или молчаніемъ духовника своего въ намѣреніи своемъ утвердился. Что отсюда познать мощно: естли позелить ему духовный отецъ

The second section deals with the procedure to be followed in reporting a confession. It also describes the arrest, documentation, interrogation, and investigation procedures to be followed by the Russian state authorities when such incidents are reported by confessors. Although this paragraph provides some protection for confessors when disclosure of sacramental matter is made, it does not seem aimed so much at protecting the confessor or the penitent as limiting public knowledge of the treason or slander:

Wherefore a confessor, in compliance with the provisions of that personal *ukase* of His Imperial Majesty, must immediately report, to whom it is appropriate, such a person who thus displays in confession his evil and unrepentant intention. However, in that report, the salient points of what has transpired in confession shall not be disclosed, since in accordance with that *ukase*, it is prohibited to interrogate such malefactors, who appear in connection with making the aforementioned damaging statements, anywhere except in the Privy Chancery or in the Preobrazhensky Central Administrative office. But in that report shall only be stated secretly that such a person, indicating therein his name and rank, harbors evil ideas and impenitent intent against the Sovereign or against the rest of what was referred to above, from which he desires that there be great harm: Therefore he must be apprehended and placed under arrest without delay. And whereas, by that same personal *ukase* of His Imperial Majesty, it is ordered to send the informers also, under surety furnished by guarantors, or if there are no guarantors, under escort in honorable arrest, to the aforementioned Privy Chancery or the Preobrazhensky Central Administrative Office for proper arraignment of those malefactors, accordingly a priest who has reported that matter, after giving surety for himself, shall proceed, upon being dispatched, to the prescribed place without postponement or evasion. And there, where investigation is made into such misdeeds, he shall report specifically, without any concealment or indecision, everything that was heard regarding that evil intention.¹¹¹

именем Божиимъ отстать всеконѣчнѣ от намѣренія своего злаго, а онѣ молча и аки бы сумняся, или оправдая себя въ томѣ не премѣненъ явится: то должень духовникъ не тако его за прямо исповѣданная грѣхи прощенія и разрѣшенія не сподоблять [: не есть бо исповѣдъ правильная, аще кто не всѣхъ беззаконій своихъ кается:] но и донести вскорѣ о немъ гдѣ надлежить, слѣдуя состоявшемуся апреля 28-го числа нынѣшняго 1722-го года імянному Его Императорского Величества указу, каковъ о такихъ злодѣехъ печатными листы публикованъ” (VERKHOVSKOI, *Dukhovnyi Reglament*, pp. 85-86; English trans. in MULLER, *The Spiritual Regulation of Peter the Great*, p. 61).

¹¹¹ “По которому и за слова, до высокой Его Императорского Величества чести касающыяся, и Государству вредителные, таковыхъ злодѣевъ въ самой скорости імая въ опредѣленные мѣста приводить повелѣно, чего ради такового, кто злое и нераскаянное свое намѣреніе на исповѣди покажетъ тотъ часъ по содержанію онаго Его Императорского Величества імянного указа кому надлежить должень духовникъ объявить: Однако же въ томъ объявленіи важности того, на исповѣди показаннаго не открывать: понеже по оному указу, такихъ злодѣевъ которые и въ вышеозначенныхъ злыхъ словахъ явятся нигдѣ кромѣ тайной канцеляріи, і преображенскаго приказу роспрашивать не повелѣно, но токмо въ томъ объявленіи тайно сказать, что такой то человекъ [: показавъ тѣмъ чинъ и імя:] имѣеть злую на Государя или на прочее что выше сего помянуто, мысль и не раскаянное намѣреніе, от чего великой

The third section of paragraph 11 explains the policy rationale based on Scripture, Tradition, and canon law, and appears in the text in the style used in drafting Russian Imperial laws of that time. The rationale is described as follows:

For, by this report, the confessor does not disclose a genuine confession and does not transgress the canons, but rather fulfills the Lord's teaching, spoken thus: "If thy brother sin against thee, go and show him his fault, between thee and him alone. If he listen to thee, thou hast won thy brother," etc. "If he refuses to listen, tell it to the church."

Wherefore it can be concluded that when the Lord commands to notify the Church even over a brother's sin in a matter involving only a single wrong, or in a matter touching on something similar to that, in which a person does not repent and remains disobedient, then how much more is it obligatory to report and inform about an evil design against the Sovereign or against the body of the Church and about the harm desired therefrom. With respect to that, every confessor should recall that at ordination a bishop personally enjoins in the following manner every priest in the charter of ordination given to him by the bishop in accordance with ancient patristic tradition: "With deliberation you shall bind and loose the sins of those confessing their sins according to the canons," etc., and "According to our episcopal blessing and command, the more serious and difficult offenses shall be brought to us." Since it was established in the past for a confessor thus to bring to a bishop the more serious and difficult offenses that have already been confessed with repentance, then how much more is it appropriate to inform concerning an impenitent intention and evil design against the Sovereign or against the state. By this notification, the confession is not impaired, since the declaration of an intended crime, which the person confessing does not desire to abandon and does not regard as a sin on his part, is not a confession, nor even part of a confession, but is an insidious contrivance for the seduction of his own conscience, leading to perdition for those malefactors and doom for their confessors who conceal such evil intention, which indeed was clearly demonstrated not only in years past, but even this year. With respect to this, the Most Holy Synod's own announcement to the spiritual and priestly rank, promulgated on the seventeenth day of May of the present year, 1722, specific explanations were provided for the benefit of those who are directed to take such measures and the propriety of such notification was adequately substantiated therein.¹¹²

вредъ быть хочеть: за что безъ всякаго медленія пойманъ и за арестованъ быть долженъ. И понеже по оному Его Императорского Величества імянному указу, и доносителей для надлежащаго такихъ злодѣевъ обличенія, въ помянутые тайную канцелярію, или преображенской приказъ, за поруками, или буде порукъ не будетъ за провожатыми, под честнымъ арестомъ высылать повелѣно. Того ради и священникъ объявивъ оное и давъ по себѣ поруку, ѣхать по высылкѣ въ указное мѣсто неотложно, и не отбывательно. И тамо уже гдѣ о такихъ злодѣйствахъ слѣдованіе бываетъ, все о ономъ зломъ намѣреніи слышанное объявить імянно, безъ всякаго прикрывательства, и сомнѣнія" (VERKHOVSKOI, *Dukhovnyi Reglament*, p. 86; English trans. in MULLER, *The Spiritual Regulation of Peter the Great*, p. 61).

¹¹² "Ибо симъ объявленіемъ духовникъ не объявляетъ совершенной исповѣди, и не преступаетъ правилъ, но еще исполняетъ ученіе Господне, тако реченное: аще согрѣшишь къ тебѣ братъ твой, иди и обличи его между тобою, и тѣмъ еднѣмъ; Аще тебе послушаетъ приобрьль еси брата твоего, и проч.: аще же не послушаетъ повѣждъ церкви, и от сего можно разсуждать, что когда уже такъ о братни согрѣшеніи, до единой точію обиды, или до подобнаго той касающемся, въ которомъ кто не кается, и пребываетъ не послушливъ, повѣдать церкви Господь повелѣваетъ, то колми паче о злодѣйственномъ на Государя или на тѣло церкви умысленіи, и о хотящемъ от того быть вредъ доносить и объявлять

The first rationale for the rule was based on Matthew 18:15-17. If this is the scriptural foundation for reporting future acts of treason and related offenses, then it would seem that the sacramental seal itself would be undermined by this application of Matthew. Therefore, this reasoning and justification (which seems to follow the Classical school on future sins) for the civil law on the seal of confession is incorrect and it is merely a justification for forcing revelation of confessional secrecy.

The reference in this section of paragraph 11 is to the incident that took place in January of 1722 which involved a parish priest in St. Petersburg. The priest concerned had heard the confession of an individual who had revealed in the act of confession that he had “treasonous” designs and intentions against the Russian royalty. The individual had, under torture, disclosed the fact that he had confessed such intentions to the parish priest. When this information came to light, it was discovered that the parish priest had not reported it to the authorities. Therefore, the priest was summoned by royal edict to Moscow. The priest

должно есть: къ тому ж и сіе кійждо духовникъ да памятуеть, что всякому іерею рукоположившей архіерей въ данной ему от себя ставленной грамотѣ по древнему отеческому преданію завѣщает от своего лица тако: исповѣдавшихъ ему своя совѣсти вязати, и рѣшити грѣхи разсудно, по правиломъ и прочая: и по нашему архіерейскому благословенію же, и повелѣнію, вящшыя же и неудоборазсудныя вины намъ приносить да иматъ, и аще тако вящшыя и неудоборазсудныя вины съ раскаяніемъ уже исповѣданныя до архіерея духовнику приносить издревле уставися, то колми паче о нераскаянном намѣреніи, и злодѣйственномъ на Государя или на Государство умышленіи объявлять надлежитъ. И сімъ объявленіемъ не порокуется исповѣдь, понеже объявленіе беззаконія намѣренного, котораго исповѣдающійся отстать не хошетъ, и въ грѣхъ себѣ не вмѣняетъ, не есть исповѣдь ниже часть исповѣди, но коварное къ прелщенію совѣсти своей ухищреніе на конечную тѣмъ злодѣемъ погибель, и духовникомъ ихъ таковое злодѣйственное намѣреніе прикрывающымъ на пагубу, что уже и в самомъ дѣйствѣ, не точію въ прошлыхъ лѣтѣхъ, но и в семь году явно показалос, о чемъ въ собственномъ от святѣйшаго Синода духовному и священному чину объявленіи, каково маіа 17-го дня нынѣшняго 1722-го года, напечатано, и имѣть коемуждо повелѣно, имянно изъяснено, и о надлежащемъ такихъ случаевъ донесеніи довольно подтверждено” (VERKHOVSKOI, *Dukhovnyi Reglament*, pp. 86-87; English trans. in MULLER, *The Spiritual Regulation of Peter the Great*, pp. 62-63).

assumed he was called in for a promotion, instead was beheaded and his head displayed on a spike in a public square in Moscow.¹¹³

This incident is crucial for understanding the motivations behind the *Appendix*. It indicates the seriousness in the mind of Tsar Peter and his court regarding the offence of concealing a confession of treasonous activity. The importance of this incident is evident from the fact that it is explicitly mentioned in the text of the *Appendix*. It also confirms the necessity of the canonical enactment of Zamość.

Another rationale for the law on opening the seal of confession appears further in the section. It states that a declaration of an intention to commit a future crime or sin is not the proper matter of a true sacrament.¹¹⁴ This is the crux of the legislation.

Paragraph 11 was supported by an amendment attached as a note in paragraph 5 of the *Appendix*. It seems this amendment was drafted by Tsar Peter himself. This paragraph prescribed an oath for all candidates for priestly ordination in addition to the general oath of loyalty. Through this oath the candidates for priesthood promised to violate confessional secrecy in matters related to the state:

Besides the above-mentioned oath, [the candidate] must take an oath of loyalty to the Sovereign, and must report any opposition as well as those things he is commanded by these regulations to report, even though someone relates them in confession, yet neither repents nor abandons his intention: this is clearly explained below under point 11.¹¹⁵

¹¹³ See W. PALMER, *The Patriarch and the Tsar*, London, Trübner, 1871-1876, p. 1648.

¹¹⁴ See MULLER, *The Spiritual Regulation of Peter the Great*, p. 62.

¹¹⁵ “При вышеписанной присягѣ долженъ і в вѣрности Государю своему присягу чинить и объявлять всякую противность, также которые правилами велѣно объявлять дѣла кто хотя и прі исповѣди скажетъ, но не раскаевается, и намѣренія своего не отлагаетъ, какъ ниже сего под числом 11: ясно показано” (VERKHOVSKOI, *Dukhovnyi Reglament*, p. 84; English trans. in CRACRAFT, *The Church Reform of Peter the Great*, p. 238).

Paragraph 11 was supported also by a “special announcement” made on 17 May 1722, in which the entire text of paragraph 11 was reproduced, along with the stories of Talitskii, Aleksei, and Levin, noted earlier.¹¹⁶

Cracraft observes, although not taking account of the previous historical debates over the subtleties of confessional practice, that paragraph 11 was simply a means to further Tsar Peter’s political ends. He notes:

... [T]hus, with perverse logic, it was argued that black was white, that something a priest had heard in confession had not been heard in a ‘true confession’, that the uttering, in confession, of what could be construed as a treasonous remark, was ‘neither a confession nor part of a confession’. The political motives underlying the drafting and issuing of this injunction are obvious.¹¹⁷

One of the motives for enacting the law of paragraph 11 was Tsar Peter’s desire to impress and save face with the Westerners whose opinions he valued. This paragraph was also intended to minimize superstitious practices that were becoming more common in the Orthodox Church.¹¹⁸

The *Appendix* also contained a law obliging priests to disclose confessions which included past scandals. This prescript was found in paragraph 12. It read:

Not only must priests inform of an evil that seeks to be put into action, but also of a scandal that has already been perpetrated against the people. For example: when someone, having imagined it somewhere in some way or having hypocritically contrived it, spreads the news of a false miracle and the ordinary, indiscriminating people accept it as real. Later, if such a fabricator discloses that to be a fantasy of his in confession, but does not display repentance for it and does not promise to make it known publicly (so that the ignorant may not accept that lie as real), that lie, being accepted as real through ignorance, will be added to the number of genuine miracles and in time will for everyone become firmly established in memory and renown. Therefore a confessor must inform of that, where it is fitting, without

¹¹⁶ See CRACRAFT, *The Church Reform of Peter the Great*, pp. 240-241.

¹¹⁷ See *ibid.*, p. 240.

¹¹⁸ See *ibid.*, p. 243.

delay, so that such a falsehood may be halted and the people, beguiled by that lie, might not sin through ignorance and accept that lie as real.¹¹⁹

The following reason for the law was stated in the policy section:

For, by use of such false miracles, not only is contumely of one kind or another perpetrated, but God's commandment, "You shall not take the name of the Lord, your God, in vain," is violated. Those who recount such miracles use God's name in a lie, so that it is not glorified by them, but is taken in vain. And upon the piety of Orthodox believers descends censure from those of other faiths. Accordingly it is most necessary to halt such illegal and impious activity; and confessors, as was mentioned herein, must inform of such cases without concealment and immediately.¹²⁰

Thus, the civil law contained in the *Appendix* introduced two major exceptions to the seal of confession, treason and deception causing scandals. This legislation was bolstered by the newly introduced law of obligatory confessions, which Erickson regards as a Western legal import into the Orthodox practice which did not include that obligation until the seventeenth century.¹²¹

¹¹⁹ "12. Не токмо намѣренное зло, которое въ дѣйство произвестися хошетъ, должны священники объявлять, но и здѣланной уже народной соблазнъ напримѣръ: ежели кто вымысливъ гдѣ какимъ либо образомъ или притворно учинивъ, розгласить ложное чудо, которое от простаго и малоразсуднаго народа приѣмлется за истинну: и потомъ такой вымыслитель, тотъ свой вымысль на исповѣди объявить, а раскаянія на то не покажетъ, и опубликовать того, [: дабы не вѣдующій той лжи за истинну не принимал] не общается, а та ложь по невѣднію за истинну приѣмлемая, къ числу истинныхъ чудесъ приобщается, и от времени всѣмъ въ знаніе и въ память утверждатся будетъ: то духовникъ долженъ гдѣ надлежитъ без всякаго медленія, о томъ объявить: дабы такая лжа была пресѣчена, и народъ тою лжею прелщенный невѣдніемъ не погрѣшалъ, а лжи за истинну не принималъ" (VERKHOVSKOI, *Dukhovnyi Reglament*, p. 87; English trans. in MULLER, *The Spiritual Regulation of Peter the Great*, pp. 62-63).

¹²⁰ "Понеже таковымъ ложныхъ чудесъ употребленіемъ, не тоію какое либо иное чинится безстрашіе, но и заповѣдь Божія, [: не приѣмли имене Господа Бога твоего всуе :] дерзостно разоряется, ибо въ тѣхъ вымышленныхъ чудесахъ, Божіе воспоминается имя которое тѣми, яко лжею, не прославляется, но яко всуе приѣмлется, а на благочестіе происходитъ от инославныхъ порицаніе: чего ради такое законопреступное и благочестію вредительное дѣйство, весьма пресѣцать надлежитъ, и духовники о такихъ случаяхъ, какъ выше сего воспоминаемо, объявлять не скрытно, и не укоснительно должны суть" (VERKHOVSKOI, *Dukhovnyi Reglament*, p. 87; English trans. in MULLER, *The Spiritual Regulation of Peter the Great*, p. 63).

¹²¹ See ERICKSON, "Penitential Discipline in the Orthodox Canonical Tradition," p. 205.

Peter's structural reforms (the implementation of the Spiritual College) associated with the *Spiritual Regulation* were endorsed by the Eastern patriarchs (except Serbia's Metropolitan).¹²² The provisions were later carried over into the Russian Imperial criminal legislation of 1857, s. 598:

598. If a man, in confession, discloses to his confessor the existence of a plot against the honour and health of the Sovereign, or of intention to excite rebellion and treason, and whilst he makes this disclosure does not show repentance nor the intention of desisting from it, but mentions it in confession solely in order that, by the consent or silence of his confessor, he may be more confirmed in his criminal design, then the confessor is to give information of this immediately, seeing that such is not a legitimate confession, because the penitent does not repent of all his iniquities.¹²³

This section seems to follow the Classical school. Section 599 contains a related provision:

599. Nevertheless, it is the duty of the confessor, in giving such information, not to reveal in detail what has been disclosed to him in confession, but only to say that such an [sic] one, naming him, and mentioning his condition, has an evil design against the Sovereign or State, and persists in it without repenting. In consequence of this information, the suspected person must be immediately apprehended and put under arrest. After he has been arrested, and the criminal process against him has begun, the confessor is bound to reveal all that he has heard concerning the criminal design, without any sort of reticence, in all details.¹²⁴

¹²² See CRACRAFT, *The Church Reform of Peter the Great*, pp. 224-225.

¹²³ "598. Если кто при исповѣди объявить духовному отцу своему объ умыслѣ на честь и здравіе Государя, или о намѣреніи произвести бунтъ и измѣну, и объявляя о томъ, не покажетъ раскаянія и намѣренія оное отложить, по единственно исповѣдуетъ о семъ, дабы согласіемъ или молчаніемъ духовника въ преступномъ намѣреніи своемъ болѣе утвердиться; то духовному отцу доносить о томъ немедленно, такъ какъ таковая исповѣдь не есть правильная, ибо исповѣдывающійся не о всѣхъ беззаконіяхъ своихъ кается" (Сводъ Закон., ed. 1857, tom. xv, Зак. Суд. Уголови. Кн. ii, Разд. iii, p. 113; English trans. in C. TONDINI DE QUARENGHI, *The Pope of Rome and the Popes of the Oriental Orthodox Church*, London, Longmans Green, 1871, p. 104).

¹²⁴ "599. Однакожь надлежитъ духовнику, въ томъ объявленіи, не открывать именно показанное на исповѣди, по токмо въ ономъ сказать, что такой-то, показавъ его има и званіе, имѣетъ слой умысль противъ Государя или Государства и перасканное къ тому намѣреніе; въ слѣдствіе сего извѣщенія, подозрѣваемый немедленно долженъ быть взятъ подъ стражу. По взятіи же его и начатіи уголовного слѣдствія, духовникъ обязанъ все о томъ зломъ намѣреніи слышанное объявить безъ всякой утайки во всей подробности" (Сводъ Закон., ed. 1857, tom. xv, Зак. Суд. Уголови. Кн. ii, Разд. vii, p. 113; cited with English translation in TONDINI DE QUARENGHI, *The Pope of Rome and the Popes of the Oriental Orthodox Church*, p. 105). This exception having been noted, the criminal laws otherwise seemed to continue to respect the canonical obligation of confessional secrecy. For example, Pavlov notes a legal interpretation by the Appeal Department of the Government Senate in 1894 which stated that the evidence of a confessor should not be accepted as reliable with respect to spiritual matters which do not involve treason. See PAVLOV, *Nomokanon pri Bol'shom Trebnike*, p. 264.

1.4.2.3 – The Bifurcation of Russian Orthodox and Catholic Canon Law

Until the time of the *Spiritual Regulation* of Tsar Peter which made exceptions to confessional secrecy, A. Pavlov states that the canonical tradition of the Orthodox Churches had upheld the seal of confession as a grave obligation as evidenced in the writings of the Metropolitan Dimitri Rostovsky:

According to our *Nomokanon*, a priest who reveals the sins that were revealed to him during confession is subject to a twofold punishment: canonical and criminal. The first one consists of a 3-year prohibition from the ministry. This punishment is determined based on an apocryphal regulation of “the Seventh Synod”, which is attributed to St. Ephrem the Syrian in similar collections. However, in reality, this regulation originates from the latest church practice described above. The second punishment, criminal, is striking with its exquisite cruelty: it is determined by some “civil” (i.e. temporal) law. This law ordered that the tongue of any priest who discloses sins revealed to him in confession should be torn out from behind. We could not find this particular law in any of the codes of Byzantine civil laws. Most likely, the authors of the *Nomokanon* applied the law of *Prokhiron* about false oath and perjury (tit. 39, cap 46, c. 870) to the priests who violated the Sacrament of Confession. In fact, the authors considered the priest’s sin even more severe and found it necessary to replace the mere “cutting out the tongue” with “digging out the tongue from behind”. It is not without a reason that the latest Greek canonical jurists compared this punishment to be equal to a death penalty.¹²⁵

Following the promulgation of the *Regulation*, Pavlov notes that two changes to the canonical tradition came about, one with respect to punishment, and one with respect to

¹²⁵ “По нашему Номоканону, духовникъ за объявление грѣховъ, открытыхъ ему на исповѣди, подвергается двоякому наказанію: церковному и уголовному. Первое состоитъ въ трехлѣтнемъ запрещеніи священнослуженія : такъ опредѣляетъ Номоканонъ на основаніи какого-то апокрифическаго правила „седмого собора“, которое въ другихъ подобныхъ сборникахъ приписывается св. Ефрему Сирину, но на самомъ дѣлѣ обязано своимъ происхожденіемъ выше описанной позднѣйшей церковной практикѣ. Второе – уголовное наказаніе поражаетъ своею изысканною жестокостію : оно опредѣлено по какому-то „гражданскому“, т. - е. свѣтскому закону, который предписывалъ вырывать сзади языкъ у духовника, разглашающаго о грѣхахъ, открытыхъ ему на исповѣди. Такого закона мы не могли найти ни въ одномъ изъ извѣстныхъ сборниковъ византійскихъ гражданскихъ законовъ. По всей вѣроятности, составители Номоканона примѣнили къ духовникамъ, нарушающимъ тайну исповѣди, законъ Прохирона (ок. 870 г.) о ложной присягѣ и клятвопреступничествѣ (tit. 39, cap. 46), при чемъ, признавая означенный грѣхъ духовника болѣе тяжкимъ, нашли нужнымъ замѣнить опредѣленное въ этомъ законѣ простое отрѣзаніе языка „ископаніемъ того же органа создади“. Позднѣйшіе греческіе канонисты не безъ основанія равняли это наказаніе съ смертною казнію” (A. PAVLOV, *Nomokanon pri Bol'shom Trebnike*, Moscow, Lissera and Heshelya, 1897, pp. 253-254; English trans. by Nina Derkach). For a general history of confession in the Orthodox tradition see A. ALMAZOV, “Tainaja Ispovid” in A. KOCHUBINSKAGO (ed.), *Zapiski imperatorskago novorossyskago universitetata*, Odessa, Tipografii Shtaba Odessnago Voennago Okruga, Tiraspol'skayan, 1894, vols. 63-65.

obligations. With regard to the sanctions attaching to a breach of the seal of confession,

Pavlov states:

It is very doubtful that this cruel and apocryphal (doubtful) "civil" law of our *Nomokanon* was ever executed. At least, we do not find any trace of its execution here in Russia. Quite the contrary, there are regulations in the "Rules for Parish Clergy" published in 1722 as an addition to the Ecclesiastical Regulation of Peter the Great. These are absolutely inconsistent with this article of the *Nomokanon*. Namely, the priest who "reveals the sins of his spiritual son" should be forbidden from the ministry and passed to temporal court for "corporal punishment based on the judgment on the case" (rule 9). Here, compared to *Nomokanon*, on the one hand the degree of canonical punishment is increased, and on the other hand – cruel criminal torture (which is required by the *Nomokanon* in any case of violation of the sacrament) is replaced with simple corporal punishment, depending on the details of every separate case.¹²⁶

The second major change concerned the obligations which attached to a confessor:

However, the most important deviation from the Regulations of *Nomokanon* consists of two exceptional cases when the priests are not only allowed, but also encouraged to fulfill their official responsibility of informing their temporal higher authorities about things that are revealed in confession. These cases are: 1) if during the confession someone confesses to a priest his/her malicious intentions towards the sovereign or intent to revolt; and at the same time does not show any signs of true repentance and stays persistent in his/her intentional crime (rule 11); 2) if someone confesses in tempting people by the propagation of false rumors about some (imaginary) wonder that he/she saw; and that he/she, in spite of the priest's warnings, does not agree to destroy this temptation through public confession about the falsity of his/her words (rule 12).¹²⁷

¹²⁶ "Сомнительно, чтобы столь жестокий и, вдобавок, апокрифический „гражданский“ закон нашего Номоканона когда-либо и где-либо практиковался. По крайней мере мы не находим никакого следа его действия у нас в России. Напротив, в „правилах причта церковного“, изданных в 1722 г. в дополнение к Духовному Регламенту Петра Великого, даны постановления, совершенно несогласные с настоящей статьей Номоканона, именно постановлено: священника, „открывающего в ссоре грехи сына своего духовного“, лишать священства и предавать светскому суду „в телесное наказание по разсуждению дѣла“ (прав. 9). Тут, сравнительно с Номоканоном, с одной стороны, увеличена мера канонического наказания духовнику, нарушающему тайну исповѣди, с другой – лютая уголовная казнь, какой требует Номоканон во всяком случае нарушения этой тайны, замѣнена простымъ телеснымъ наказаніемъ, соразмѣряемымъ съ особенностями каждаго отдѣльнаго случая" (PAVLOV, *Nomokanon pri Bol'shom Trebnike*, p. 254; English trans. by Nina Derkach).

¹²⁷ "Но самое важное отступление правилъ Регламента отъ Номоканона состоитъ въ указаніи двухъ исключительныхъ случаевъ, когда священникамъ не только дозволяется, но и вѣняется въ непремѣнную служебную обязанность доносить свѣтскому начальству о томъ, что будетъ открыто имъ на исповѣди. Случаи эти извѣстны: 1) если кто при исповѣди объявитъ духовному отцу объ умыслѣ на честь и здоровье государя или о намѣреніи произвести бунтъ и измѣну и, объявляя о томъ, не покажетъ несомнѣнныхъ признаковъ искренняго [sic] раскаянія, напротивъ останется упорнымъ въ своемъ злоумышленіи (прав. 11); 2) если кто сознается въ произведеніи народнаго соблазна распространеніемъ ложнаго слуха о какомъ-либо (небываломъ) чудѣ, котораго онъ будто бы былъ свидѣтелемъ, и, несмотря на увѣщанія священника, не согласится уничтожить соблазнъ публичнымъ признаніемъ въ лживости

The *Spiritual Regulation* thus marks the beginning of a change in the Orthodox tradition with respect to the seal of confession. As we will see in Chapter Three, it appears to have followed the French and English models of making civil law exceptions for treason. The Russian Orthodox Church had to make allowance for these exceptions, whereas the Catholic Church continued to treat the seal of confession as a grave and absolute obligation without any exceptions. It marks a bifurcation between this aspect of the canonical traditions between these two Churches with regard to confessional secrecy.¹²⁸

1.4.2.4 – The Synod of Zamość

In light of the above, we now turn to the Synod of Zamość. A decision was made to hold a synod which was confirmed in 1715 by the Basilian Metropolitan Leo Kyshka with permission of the Pope. It was held in Zamość (located in the province of Kholm, and at that time part of the Polish-Lithuanian Commonwealth) in October 1720, seven months after the *Regulation* was signed. However, as the historical evidence presented above suggests, although the Synod of Zamość was not expressly convened in reaction to the *Spiritual Regulation*, the timeliness of the decree on the seal of confession may have been influenced by the historical events that preceded the Synod and the anticipated civil legislation against the seal in the territories that were part of the Russian Empire. The events which followed Zamość at least affirm the wisdom of holding this Synod when it was convened in 1720. Additionally, the promulgation of the seal of confession underscores the fact that the Catholic

своихъ разглашеній (прав. 12)” (PAVLOV, *Nomokanon pri Bol'shom Trebnike*, p. 255; English trans. by Nina Derkach).

¹²⁸ For an example of some of the differences between modern-day Orthodox and Catholic practice with respect to the seal of confession, see J. DOUGLAS, “The Sacrament of Penance in Present-day Orthodoxy,” in *Diakonia*, 4 (1969), pp. 220-221, and DUDLEY and ROWELL, *Confession and Absolution*, p. 125.

and Orthodox canon law has apparently moved in somewhat different directions with respect to the obligation of confessional secrecy.

The legislation enacted by the Synod of Zamość entrenched the seal in the canon law of the Catholic Kyivan Metropolitan Church. There were no significant legislative developments in this Church until the Code of Canons of the Eastern Churches was promulgated in 1990. The prescripts of this Code will be analysed in the following Chapter.

CONCLUSION

With respect to the historical exposition of the different epochs of the seal of confession which we have thus undertaken, a number of conclusions can be drawn. First, with respect to the scriptural basis, there is no direct evidence for seal of confession indicated in biblical writings. However, the covering of sin appears to be a compelling ethical basis even though it is nowhere linked with the biblical exhortations to confess sin.

Second, in terms of the patristic source, the corpus of writings contain the early stages of the theology of a seal of confession, which gradually evolved into canonical expressions of the secret of confession. The canonical expressions were, in turn, reinforced by the interest of the state in knowing the contents of confession. The Church saw the need to protect the penitent against such intrusion by decreeing confessional secrecy.

Third, the pre-Lateran canonical developments led to the formulation of the seal of confession through various laws. However, the pre-Lateran legislation was mostly regional in scope and the application of the law on the seal of confession by local authorities was not consistent.

Fourth, the Lateran and post-Lateran canonical developments show the maturation of the seal of confession in the form of a universal declaration, unequivocal in its nature and

without exception. There were some debates concerning certain aspects of the seal following the Fourth Lateran council, but these were largely resolved. Despite political pressures in some countries to open the seal of confession after the Reformation, the Church has always stood in defense of the inviolability of the seal.

Fifth, all Eastern Catholic Churches have adopted the legislation on the seal. The civil law initiatives of Tsar Peter of Russia in the early eighteenth century may have influenced the entrenchment of the seal in the Ukrainian Catholic Church, as our case study suggests. At the same time, the approach toward the seal of confession in the Byzantine Catholic and Orthodox Churches appears to have bifurcated.

Finally, it seems evident from the data analysis in this Chapter that the seal of confession is not a present-day phenomenon but a product of historical evolution in theological and legal reflections. There is also evidence that the seal of confession was influenced to some extent by, *inter alia*, the civil laws of Byzantium, Rome, France, and Russia. Given this background, we now turn to an examination of the present legislation on the seal of confession from the perspective of the natural law, divine law, and positive law.

CHAPTER TWO

IUS VIGENS ON THE SEAL OF CONFESSION

INTRODUCTION

In Chapter One we traced the historical evolution of the sacramental seal of confession up to the 1917 Code. This brief historical review of the sacramental seal of confession has revealed that the obligation has been influenced by various sources and circumstances. In this Chapter, we will analyze the foundational sources of the sacramental seal with respect to divine, natural and positive ecclesiastical law. We will also consider the present canonical norms on the matter.

We will first look into the natural law basis of the sacramental seal. The natural law may be defined as "... [A] body of moral principles which reason itself teaches, and which are binding on all men."¹ In this sense, it is a law which is intrinsic to human nature. In other words, it is simply that sense of fairness and justice which all individuals carry innately by way of their own natural moral reasoning.² The natural law basis of confessional secrecy may be seen from two perspectives. The first perspective includes the right which a person has to one's own good reputation or one's own good name. The second natural law perspective involves the right to the protection of one's secrets as a matter of personal privacy.

Next, we will examine the positive divine law basis of the seal of confession. Natural law and divine law are always consistent. The positive divine law is one that is

¹ See R. HOLAND, *Natural Law and Legal Practice*, New York, Benziger, 1899, p. 48. Also see, generally, T. WASSMER and S. LONG, art., "Natural Law," in CATHOLIC UNIVERSITY OF AMERICA, *The New Catholic Encyclopedia*, Second Edition, Washington, DC, Thomson Gale, 2003, vol. X, pp. 179-196.

² See H. ROMMEN, *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. T. HANLEY, Indianapolis, Liberty Fund, 1998, p. 63.

either explicitly revealed in Scripture or one that is derived through the interpretation of Scripture or theology. *Black's Law Dictionary* describes divine laws simply as "... [T]hose ascribed to God."³ The divine law aspect of the seal of confession will be analyzed under six points: statements in Scripture, the sign of the sacrament, confessional knowledge as divine knowledge, the obligation to avoid scandal, the divine law against judging, and the obligation to protect the common supernatural good.

After this, we will consider the present positive ecclesiastical law on the seal of confession. We find the description of positive law in *Black's Law Dictionary* as: "... [A] law actually or specifically enacted or adopted by proper authority for the government of an organized jural society."⁴ It is a law that is created by some human law-giver for the good of a particular community for a specific purpose. The present positive ecclesiastical law is contained in the 1983 Code of Canon Law and in the 1990 Code of Canons of the Eastern Churches. The relevant canons of these Codes will be studied under three aspects, namely their interpretation, application and consequences of their violation.

2.1 — THE NATURAL LAW BASIS OF THE SEAL OF CONFESSION

Confessional secrecy has a foundation in natural law.⁵ In particular, it is intimately related to one's right to a good name or good reputation and to the preservation of

³ H. BLACK, *Black's Law Dictionary: Definitions and Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 5th ed., St. Paul, West Publishing Co., 1979, p. 430. Also see, generally, P. MEAGHER, art., "Law, Divine Positive," in CATHOLIC UNIVERSITY OF AMERICA, *The New Catholic Encyclopedia*, vol. VIII, pp. 395-396.

⁴ BLACK, *Black's Law Dictionary*, p. 1046.

⁵ "Quo jure fundetur. 1° Jus assignari solet non tantum *ecclesiasticum*, sed etiam *naturale*, ita ut ex natura rei secretum illud servandum sit, non tantum ut secretum naturale quodlibet, sed etiam ut *secretum commissum* et quidem ex strictissima justitia ac religione, cum, data doctrina catholica de necessitate sacramenti et lege sigilli sacerdotibus imposita, peccator censendus sit non confiteri peccatum suum nisi sub hac absolute conditione quod nemini unquam et ex ullo praetextu manifestabitur" (P. GALTIER, *De*

committed secrets. Generally secrets are divided into three main species, natural, promised, and committed secrets. Many authors further subdivide committed secrets into contractual and professional secrets.⁶ Some other authors add a fourth species of “sacramental secrets.”⁷

2.1.1 – Right to One’s Good Name (Reputation)

Every human being has a *prima facie* right to a good reputation. Aertnys and Damen define reputation as follows: “Reputation is usually defined as the common assessment about the life and habits of someone.”⁸ It is grounded in the need to maintain some degree of privacy with respect to one’s own character flaws and human failings. As Bucceroni states, to expose a person’s personal weaknesses without a valid reason would be a sin against justice:

“Slander is a serious sin against justice by virtue of the class of sin to which it belongs, because it is opposed to the right that the other person has to his own reputation and good name, through the absence of which a person is prevented from doing many

paenitentia tractatus dogmatico-historicus, Editio novissima, Romae, Pont. Universitatis Gregorianae, 1956, n. 545); see also A. BALLERINI, *Opus theologicum morale in Busenbaum Medullam*, Editio 2a, Prati, Giachetti, 1892-1894, vol. V, n. 899; D. PRÜMMER, *Manuale theologiae moralis secundum principia S. Thomae Aquinatis*, Editio sexta et septima aucta et secundum novum Codicem iuris canonici recognita, Friburgi Brisgoviae, Herder, 1933, vol. III, n. 445; M. CONTE A CORONATA, *Institutiones iuris canonici ad usum utriusque cleri et scholarum*, I, *De sacramentis, tractatus canonicus*, Romae, Marietti, 1943, vol. I, n. 381(a); A. VERMEERSCH, *Theologiae Moralis - principia, responsa, consilia*, Quarta editio, Roma, Pontificia Università Gregoriana, 1948, vol. III, n. 462; F. CAPPELLO, *Tractatus canonico-moralis de sacramentis*, Taurinorum Augustæ, Marietti, 1926, vol. II, n. 879; E. REGATILLO and M. ZALBA, *Theologiae moralis summa iuxta constitutionem apostolicam «Deus scientiarum Dominus»*, Matriti, Biblioteca de Autores Cristianos, 1954, vol. III, n. 488.

⁶ See, for example, H. NOLDIN et al., *Summa theologiae moralis*, Editio XXXIII, Oeniponte, Feliciani Rauch, 1961, vol. II, *De praeceptis*, n. 666(c); J. AERTNYS and C. DAMEN, *Theologia moralis secundum doctrinam S. Alfonsi de Liguori*, Editio decimasexta, Taurinorum Augustæ, Marietti, 1950, vol. I, n. 1002.

⁷ See, for example, VERMEERSCH, *Theologiae moralis*, vol. II, n. 647.

⁸ “Fama solet definiri: communis existimatio de vita et moribus alicuius” (AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1009).

things well. Therefore it is a sin against justice, and for this reason falls into the category of a mortal sin."⁹

Everyone needs to secure their good name for their very survival and that of their dependents.¹⁰ Hence, a person may be said to "own" his or her good name.¹¹ Every society also has an interest in not being disturbed through the revelation of the secrets of its individual members.¹² However, this personal and social interest may, at times, be

⁹ "Detractio est peccatum oppositum iustitiae et ex genere suo grave. Prob., quia opponitur iuri quod alter habet ad suam famam, seu bonum nomen, per cuius defectum impeditur homo a multis bene agendis; ergo est peccatum oppositum iustitiae, et ex suo conceptu generico mortale. 1. ad Cor. 6., 10" (I. BUCCERONI, *Institutiones theologiae moralis secundum doctrinam S. Thomae et S. Alphonsi*, Editio sexta, Romae, Ex typographia Pontificia in Instituto Pii IX, 1914, vol. II, n. 1487); R. KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, JUD diss., Romae, Pontificia Universitas Lateranensis, 1975, p. 5.

¹⁰ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 3. Noldin notes: "Inconvenientia, qua contra bonum pacis et tranquillitatis sequerentur, si occulti defectus passim manifestarentur, haec sunt: proximus officio suo utiliter fungi non posset, omnem auctoritatem amitteret, bono conversationis careret, proxime coniuncti ignominia afficerentur, ipse vero magno praesidio contra maiora vitia privaretur" (NOLDIN, *Summa theologiae moralis*, n. 643).

¹¹ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 4. Ownership may be coupled with the concept of possession of a good name by some authorities. One needs only to be the object of a false accusation for his or her reputation to be compromised, since in this sense he or she is no longer in peaceful or legitimate possession of it any more. It is almost as if someone else owned it. Bucceroni says "For, if an accusation is false, *who can be said to be in peaceful and legitimate possession of his own reputation?*" ("Nam cum crimen sit falsum, *quis in pacifica et legitima possessione est suae famae*" [BUCCERONI, *Institutiones theologiae moralis*, n. 1487; italics added]). Other authors agree: "Violatur ius proximi, ideoque revera laeditur iustitia, quia peccator occultus possidet adhuc *bonam famam, a qua possessione non potest expelli nisi ex titulo iusto*" (PRÜMMER, *Manuale theologiae moralis*, vol. II, n. 189; italics added). Canon 220 of CIC/1983 uses similar terminology: "No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy" ("Nemini licet bonam famam, qua quis gaudet, illegitime laedere, nec ius cuiusque personae ad propriam intimitatem tuendam violare"). Canon 23 of CCEO also uses the word "gaudet."

¹² "2. Unusquisque *ius habet in suam famam, non solum veram sed etiam falsam*. Fama enim est bonum externum propria industria partum: atqui in bonum externum et proprium per se quilibet plenum ius et dominium exercet (n. 365). — Ius in famam falsam non directe ex ipso iure hominis desumitur, sed ex inconvenientibus, quae contra bonum commune sequerentur, si passim occultos aliorum defectus publicare liceret" (NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, n. 643); also see VERMEERSCH, *Theologiae moralis*, vol. II, c. IV. *Iniuriae circa convictum sociale*, n. 555(b).

superseded by the need for revealing a secret for the good of the community or for the good of an individual.¹³

2.1.2 – Right to Protection of One's Secrets

An individual also has a right to have personal secrets protected. We will briefly consider in this section the nature of these secrets and their relationship with the seal of confession.

Secrets may be natural, promised, contractual, professional, and those committed specifically to priests. The seal of confession could subsume these secrets. On the other hand, secrets acquired by priests inside or outside the confessional could fall under these categories, depending on the nature of the secret.

2.1.2.1 – Natural Secrets

Natural secrets are those secrets which bind in justice and charity, and are grounded in the right to not unjustly suffer harm, annoyance, or embarrassment.¹⁴ They

¹³ “De revelatione criminis occulti. 1. Ex iusta causa licitum est manifestare crimen occultum, dummodo servantur debitae condiciones. Eiusmodi causa iusta est bonum commune, vel bonum privatum sive revelantis sive audientium sive ipsius delinquentis. Ius enim in famam falsam cessat, quando bonum sive publicum sive privatum promovetur, eo quod occulti aliorum defectus manifestentur” (NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, n. 650). Noldin cites several examples, including fraternal correction and revelation of marriage impediments. See also PRÜMMER, *Manuale theologiae moralis*, vol. II, n. 192; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 5.

¹⁴ “666. Praenotiones. 1. *Secretum* subiective est obligatio rem aliquam occultum non manifestandi; obiective est ipsa res vel notitia occulta et occultanda. (*Secretum*) *Naturale*, cuius obligatio sine contractu ex sola rei natura oritur, quia scilicet res, quam aliquis casu cognovit, manifestari non possit, quin alius rationabiliter sit invitus. 667. De *Secreto Naturali*. 1. *Secretum naturale* obligat vel *ex iustitia* vel *ex caritate*, proinde sub gravi in re gravi, ubi nempe proximus ex eius revelatione vel gravi tristitia vel gravi iniuria afficitur. Unum vero alterumve secretum minoris momenti revelare veniale peccatum non excedit. In dubio (positivo), utrum secretum sit parvi an magni momenti, illud citra grave peccatum revelari nequit, quia revelans se exponit periculo non solum graviter peccandi sed simul grave damnum inferendi; principium ergo probabilismi in hoc casu applicari nequit” (NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, nn. 666, 667); also see VERMEERSCH, *Theologiae moralis*, vol. II, nn. 647(a), and 649; AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1002, 1°; BUCCERONI, *Institutiones theologiae moralis*, n. 1537; and PRÜMMER, *Manuale theologiae moralis*, vol. II, n. 175(1).

exist for this reason alone, and not for any extrinsic reasons such as an obligation arising from promise, a contract, or a professional relationship.¹⁵

Natural secrets may be violated by simple disclosure or by their illegitimate *use*. This principle would apply also to the other secrets described below. Such secrets may be subject to revelation when there is a threat of serious harm.¹⁶ They may also be revealed with the consent of the person concerned. Furthermore, the obligation to maintain secrecy may cease if the matter becomes public.¹⁷

2.1.2.2 – Promised Secrets

Thomas Aquinas recognized the role of promised secrets in a confessional context in his Second Objection:

Further, sometimes one person tells another a secret, which the latter receives under the seal of confession. Therefore, the seal of confession extends to other matters having no relation to confession.¹⁸

He responds to the Second Objection as follows:

A confidence ought not easily be accepted in this way: but if it be done, the secret must be kept in the way promised, as though one had the secret through confession, though not through the seal of confession.¹⁹

¹⁵ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 7.

¹⁶ “Secretum naturale *manifestare licet*, ubi sine gravi incommodo servari non potest, quod quidem incommodum maius esse debet, si secretum ex iustitia obligat” (NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, n. 667[2]); also see PRÜMMER, *Manuale theologiae moralis*, vol. II, n. 180; AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1004, 1°; BUCCERONI, *Institutiones theologiae moralis*, n. 1542; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 10.

¹⁷ See AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1004(a); KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 10.

¹⁸ “Præterea aliquando aliquis dicit alicui aliquod secretum, et ille recipit sub sigillo confessionis. Ergo sigillum confessionis se extendit ad illa quæ non sunt de confessione” (*Sent. IV*, d. XXI, q. III, art. I, quæst. II).

¹⁹ “Ad secundum dicendum, quod homo non de facili debet recipere aliquid hoc modo; si tamen recipiat, ex promissione tenetur hoc modo celare ac si in confessione haberet, quamvis sub sigillo confessionis non habeat” (*Sent. IV*, d. XXI, q. III, art. I; English trans. in *The “Summa theologica,”* vol. 18, p. 194).

A promised secret rests on the free promise made by the recipient of the information. The request from the one committing the secret to another may be explicit or tacit.²⁰ In this case, the promise is made *after* the information is received (in contrast to contractual secrets). Promised secrets should be kept on the basis of fidelity (to one's word) and charity.²¹ Such secrets could be revealed in order to avert harm,²² or when the person who commits the secret consents to its disclosure, or the obligation to maintain secrecy no longer holds if and when the matter becomes public knowledge.²³

2.1.2.3 – Committed Secrets

Secrets which are more formalized and usually carry some form of sanction for their revelation are committed secrets (also known as “contractual” or “entrusted secrets”).²⁴ The distinction between a promised secret and a contractual secret consists in

²⁰ “*Promissum tantum, cuius obligatio oritur ex promissione superaddita de re ante iam cognita. Haec promissio in adiunctis dupliciter diversis dari potest: vel enim de re, quam antea iam noverat, alteri promittit secretum, vel de re, quam ab altero sine secreto acceperat, postea promittit secretum. De secreto promisso. 1. Secretum promissum qua tale vel ex mera fidelitate sub levi, vel ex iustitia et quidem in re gravi etiam sub gravi obligat, prout promittens se obligare intendit sive ex fidelitate sive ex iustitia; ordinarie tamen solum ex fidelitate obligat*” (NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, nn. 666[1][b] and 668); also see VERMEERSCH, *Theologiae moralis*, vol. II, nn. 647(b) and 649; AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1002, 2°; BUCCERONI, *Institutiones theologiae moralis*, n. 1536; PRÜMMER, *Manuale theologiae moralis*, vol. II, n. 175(2).

²¹ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 7.

²² “*Secretum promissum non obligat: a. ubi sine gravi incommodo proprio vel alieno servari nequit, nisi quis expresse se aliter obligaverit; b. quando res absque promissione manifestari debuisset: ad id enim, quod illicitum est, per promissionem nemo se obligare potest*” (NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, n. 668[2]); also see PRÜMMER, *manuale theologiae moralis*, vol. II, n. 180; AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1004, 2°; BUCCERONI, *Institutiones theologiae moralis*, n. 1542; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 10.

²³ See AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1004(a); KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 10.

²⁴ “*Commissum vel rigorosum, cuius obligatio oritur ex pacto, quo quis rem antea sibi ignotam ab alio accipiat solum sub condicione et promissione expressa vel tacita servandi secretum. Secretum commissum obligat ex iustitia et proinde sub gravi in materia gravi, quia haec obligatio oritur ex promissione utrimque onerosa. Insuper bonum commune postulat, ut omnibus praesto sit opportunitas*

the fact that in a contractual secret the promise to remain silent is made *prior* to sharing the information pursuant to a bilateral contract.²⁵ The agreement to share the information and to maintain secrecy about it may be either implicit or explicit.²⁶

Contractual secrets bind in justice.²⁷ They may be revealed in order to prevent some harm, but the potential harm from disclosure must outweigh the potential harm from not revealing the secret.²⁸ The obligation to maintain secrecy concerning a committed secret may cease if the source of the information freely consents to its revelation or the committed information has already become public.²⁹

2.1.2.4 – Professional Secrets

A professional secret (also known as an “official secret”) is a species of entrusted secret in the strictest sense.³⁰ These secrets are normally related to professional

quaerendi consilium vel auxilium necessarium; atqui hoc commodo privarentur homines, nisi ob *gravem* obligationem huius secreti de eius observatione certi essent” (NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, nn. 666[1][c] and 669); also see VERMEERSCH, *Theologiae moralis*, vol. II, nn. 647(c) and 649; AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1002, 3°; BUCCERONI, *Institutiones theologiae moralis*, n. 1538; PRÜMMER, *Manuale theologiae moralis*, vol. II, n. 175(3); KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 10.

²⁵ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 10.

²⁶ See *ibid.*

²⁷ “*Contractus rite initus obligat ex iustitia*. Ratio est, quia contractu confertur jus quoddam; omni autem iuri respondet obligatio eiusdem generis” (AERTNYS and DAMEN, *Theologia moralis*, I, n. 859, I); also see NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, n. 539 (commutative justice specifically); CORONATA, *Institutiones iuris canonici*, vol. I, n. 381(a).

²⁸ See NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, n. 670; also see PRÜMMER, *Manuale theologiae moralis*, vol. II, n. 180; AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1004, 3°; BUCCERONI, *Institutiones theologiae moralis*, n. 1542; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 10.

²⁹ See AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1004; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 10.

³⁰ “*Obligatione secreti officiosi tenentur consiliarii, medici, obstetrices, advocati, theologi etc., quibus vi officii vel consilii vel auxilii petendi causa revelantur secreta*. Nonnulli huc referunt etiam amicos

relationships.³¹ Any secret of this nature binds the holder of it in both justice and charity.³² They are based on both the common good and the need for individuals to communicate openly with professional advisors.³³ Kennedy remarks that most of the secrets a priest acquires come by way of his extra-confessional ministry.³⁴

Professional secrets may be revealed in very limited circumstances to prevent some threatened harm. However, in comparison to other secrets, the potential harm required to reveal such a secret must be substantial, and therefore revelation of these secrets is rare.³⁵ Professional secrets may be revealed with the legitimate consent of the

et propinquos, quibus iure amicitiae et propinquitatis auxilii vel solatii causa manifestantur secreta. Obligatio secreti commissi *strictior et gravior* est quam secreti promissi, et obligatio secreti officiosi gravior est quam obligatio secreti privatim commissi. Secretum enim commissum ex iustitia obligat, secretum vero promissum ordinarie solum ex fidelitate; secretum vero commissum officiosum etiam tum obligat, quando secus res manifestari debuisset, quia bonum commune postulat, ut hoc secretum exceptis paucis casibus illaesum servetur. Ideo secretum commissum officiosum ne iudici quidem aut superiori legitime interroganti aperire licet, et interrogatus cum restrictione respondere debet se nihil scire, quod scilicet revelare possit" (NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, nn. 666[1][c][β], and 669[a]). Also see VERMEERSCH, *Theologiae moralis*, vol. II, n. 647(c) and 649; AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1002, 3°; PRÜMMER, *Manuale theologiae moralis*, vol. II, n. 175(3); KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 8.

³¹ For example, the various law societies in Canada have strict rules regarding professional secrets. The Canadian Bar Association states the following ethical rule in its *Code of Professional Conduct*: "The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law, or otherwise permitted by this Code." The basis of this rule is stated in the first Guiding Principle: "1. The lawyer cannot render effective service to the client unless there is full and unreserved communication between them. At the same time the client must feel completely secure and entitled to proceed on the basis that without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held secret and confidential" (THE CANADIAN BAR ASSOCIATION, *Code of Professional Conduct*, Ottawa, Carswell, 1988, p. 13). This rule has been adapted and implemented by the various provincial law societies of Canada.

³² See PRÜMMER, *Manuale theologiae moralis*, vol. II, n. 179.

³³ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 9.

³⁴ See *ibid.*, p. 12.

³⁵ See NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, n. 670; also see PRÜMMER, *Manuale theologiae moralis*, vol. II, n. 180; AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1004, 3°;

person concerned, or the obligation to maintain secrecy ceases when the committed information becomes public.³⁶

2.1.2.5 – Secrets Acquired by Priests

This is a special category of committed secret.³⁷ Although the confessional secret could be included within the ambit of a professional secret, it is rooted in a *raison d'être* substantially different from that of a professional secret. Although Kennedy bases it on the same rationale as professional secrets (the maintaining of societal confidence in professional advisors), he notes:

A penitent confessing to a priest is not merely a client consulting a professional person; he is considerably more than that. He is a sinner offering to his Creator an act of humble sorrow and a plea for forgiveness. He is, in short, placing an act of worship, and his confidential communications, forming a part of that act of worship, are, on that account, unique among secrets. Violation of a penitent's confidence, therefore, in deterring others from making such communications, would deter them from full and free penitential acts of worship. Since natural worship of God is the highest act of which man is capable in the natural order, to deter men from such acts is to deter them from a good far greater than that served by all other professional secrets, including the non-confessional secrets of a priest. The violation of the confessional secret, then, viewed from the natural level alone, is to be guarded against with greater diligence than violations of all other secrets.³⁸

From this discussion, it is reasonable to conclude that the revelation of a confessional secret is not subject to the rules of revelation which govern other categories of secret.

BUCCERONI, *Institutiones theologiae moralis*, n. 1542; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 11.

³⁶ See AERTNYS and DAMEN, *Theologia moralis*, vol. I, n. 1004(a); KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 10.

³⁷ "Sacramentale, quod ex omni et sola confessione sacramentali manat, et solum neque exceptionem, neque materiam levem in revelatione directione admittit. Cum partes conveniunt de secreto quasi confessionis, frustra vim sacramentalis communicationis suis confidentiis tribuere tentarent. Sed maxima qua possunt vi obligationem intendunt" (VERMEERSCH, *Theologiae moralis*, vol. II, n. 647[d]).

³⁸ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 14.

2.2 — THE DIVINE LAW ASPECT OF THE SEAL OF CONFESSION

The consensus amongst canonists and theologians is that the seal of confession is derived from divine law.³⁹ The violation of the seal of confession is, therefore, contrary to the virtues of religion and justice.⁴⁰ The basis of the divine law aspect of the seal of confession in the virtue of religion is twofold: both the good of the sacrament and the reverence owed to the sacrament.⁴¹

How is the seal of confession derived from divine law? Up until the time of Scholasticism there was little systematic doctrinal development of the divine law basis of the seal of confession.⁴² However, with the gradual evolution of sacramental theology, some six different theories of the divine law origin of the seal of confession emerged, each with a different basis. These theories consider as their basis the Scriptures, the nature

³⁹ "Generice loquendo (seu abstrahendo a distinctionibus sigilli stricte dicti et late dicti necnon a modis inviolabilitatis) legem sigilli esse de jure divino atque absolute inviolabilem, est tam communis et firma theologorum doctrina, ab ipsa Ecclesiae praxi et sensu roborata, ut contraria sententia hodie nec caute nec tuto sustineri queat, adeoque videatur mereri censuram propositionis *temerariae*" (E. DORONZO, *Tractatus dogmaticus de poenitentia*, Milwaukee, Bruce Publishing Co., 1949-1953, vol. II, p. 785). See also F. SCHMALZGRUEBER, *Jus ecclesiasticum universum brevi methodo ad discentium utilitatem explicatum seu lucubrationes canonicae*, Romae, Rev. Cam. Apostolicae, 1845, vol. XI, n. 74; GALTIER, *De poenitentia tractatus dogmatico-historicus*, n. 545, 2° and n. 546; BALLERINI, *Opus theologicum morale*, vol. V, n. 899; CORONATA, *Institutiones iuris canonici*, vol. I, n. 381(a); VERMEERSCH, *Theologiae moralis*, vol. III, n. 461; CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 879; and REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 488.

⁴⁰ "Malitia violationis sigilli ... est: contra *virtutem religionis* qua ipsa lex sigilli statuta est ad consulendum reverentiae sacramento debitae, et haec violatio parvitatem materiae non admittit, sed est semper peccatum grave ex toto genere suo, si violatio est directa. Admittitur vero parvitas materiae etiam in violatione quatenus est contra *virtutem religionis*, quando agitur de violatione indirecta" (CORONATA, *Institutiones iuris canonici*, vol. I, n. 381[a]). The following authors also add justice: VERMEERSCH, *Theologiae moralis*, vol. III, n. 462; CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 879; ROOS, *The Seal of Confession*, pp. 82-84.

⁴¹ See AERTNYS and DAMEN, *Theologia moralis*, vol. II, n. 455.

⁴² See CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 935; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 18.

of the sacrament, the knowledge acquired in confession as divine knowledge, avoidance of scandal, avoidance of judgement, and protection of the common supernatural good.

2.2.1 – Scripture as the Divine Law Basis of the Seal of Confession

As noted in the previous Chapter, although Scripture mandates that sins should be confessed, there are no direct statements in Scripture which require that confessional matter be kept secret. Some authors nevertheless argue that the seal is *inherent* in the sacrament, which itself is based on the Scriptures. For example, G. Vazquez adopted this position⁴³ as did a number of subsequent authors.⁴⁴

The theory that the divine law basis of confessional secrecy is somehow inherent in the obligation to confess sins was however rejected for lack of direct Scriptural evidence and foundation by a number of authors. These include F. Suarez⁴⁵ and J. De Lugo.⁴⁶ Also, it does not explain the practice of public confession in the early Church.

⁴³ “Mihi verò videtur, & esse quoddā praeceptum, quod naturali ratione sequitur ex ipsa institutione, & esse aliud positivum divinum, quod magis, aut latius obligat superadditum voluntate Dei ipsi institutioni, nec ex illa sequitur: primum praeceptum est, quod deducitur ex ratione Durandi negativum, ne scilicet fiat iniuria secreto confessionis, quia secretum confessionis est, & hoc est religionis praeceptum, contra quod fit sacrilegio, quod est commissionis praeceptum” (G. VAZQUEZ, Quæst. XCIII, Art. IV, Dub. I, n. 10).

⁴⁴ For example, Ballerini says: “Obligatio non oritur ex lege ecclesiastica; novit enim Ecclesia, se non posse ab ea dispensare neque immediate oritur ex ipsa sacramenti natura, quod potuisset idem manens publice administrari ac reapse potest, quoties consentiat poenitens: sed est ex lege positiva Christi, qui voluit hoc ius salvum semper esse poenitentibus, ut eorum confessio, esset secreta. Hoc ius non viget, nisi existente sacramentali confessione” (BALLERINI, *Opus theologicum morale*, vol. V, n. 899).

⁴⁵ “Non esse mere positivum praeceptum hoc.—Objectio.—Solvitur.—Tertio fit valde verisimile ex dictis, praeceptum hoc, quamvis supernaturale sit et divinum, non tamen esse mere positivum superadditum huic sacramento, quale est, verbi gratia, in Eucharistia praeceptum præmittendi confessionem ante communionem; sed esse quasi connaturale et intrinsecum ipsi sacramento prout de facto institutum est, ita ut ex quodam jure naturali intrinseco ipsi sacramento, et per necessariam consecutionem ex ejus institutione oriatur, quam illationem jam declaravi. Dicit aliquis, Christum Dominum potuisse hoc sacramentum instituere quoad totam substantiam et effectum ejus, non imponendo confessori totam hanc obligationem. Respondeo primo, quamvis hoc admittamus, fortasse non potuisse illud instituere cum tota necessitate et obligatione, quam nunc imposuit poenitentibus ad integre et omnino aperiendam conscientiam suam confessori, quin ex illa resultaret hoc sigillum. Vel certe, si de absoluta potentia potuit, non tamen secundum convenientem modum providentiæ; et ideo de facto ita fecit hanc institutionem, ut haberet hanc

2.2.2 – The Nature of the Sacrament as the Basis of the Seal

Aquinas explains that the very nature of the sacramental sign is divine in nature.

In the preamble of his reply to the first four objections he states:

On the contrary, The Decretal says (De pœnit. et remiss. Cap. Omnis utriusque sexus): "Let the priest beware lest he betray the sinner, by word, or sign, or in any other way whatever."

Further, the priest should conform himself to God, Whose minister he is. But God does not reveal the sins which are made known to Him in confession, but hides them. Neither, therefore, should the priest reveal them.

I answer that, Those things which are done outwardly in the sacraments are the signs of what takes place inwardly: wherefore confession, whereby a man subjects himself to a priest, is a sign of the inward submission, whereby one submits to God. Now God hides the sins of those who submit to Him by Penance; wherefore this also should be signified in the sacrament of Penance, and consequently the sacrament demands that the confession should remain hidden, and he who divulges a confession sins by violating the sacrament.⁴⁷

obligationem conjunctam; illam vero talem fuisse, consensus et traditio Ecclesiæ satis docent, et convenientiam ejus probat experientia perpetua, qua constat, et hunc rigorem fuisse utilissimum, et nunquam (quod sciamus) occurrisset casum, in quod aliud expederet" (F. SUAREZ, D. XXXIII, *De sigillo confessionis*, Sec. I, n. 10).

⁴⁶ "Pater Vasquez q. XCIII. art. IV. dub. I. num. 10 dicit, necessarium fuisse præceptum superadditum Christi ad talem obligationem inducendam: cui consentit Pater Coninch in præsentis, disp. IX. dub. II qui num. 34 affert pro se Henriquez lib. VI. c. XIX. num. 3. Sed immerito: quia ipse contrariam sententiam ibi tradit, ut videbimus. Probant: quia ex institutione sacramenti pœnitentiæ solum oriebatur obligatio servandi secretum in gratiam pœnitentis, quando ipse dignus esset quod servaretur; et hoc propter reverentiam sacramenti: quod autem non servaretur, quando ipse pœnitens non esset dignus, v. g. quia non vult desistere a prodicione reipublicæ, quam machinatur; non esset contra reverentiam sacramenti; nec enim de hoc possent pœnitentes rationabiliter conqueri, aut ea de causa retrahi ab hoc sacramento" (J. DE LUGO, D. XXIII, *De sigillo confessionis*, Sec. I, n. 6).

⁴⁷ "Sed contra est quod dicit *Decret.*, de pœnit. et remis., cap. «Omnis utriusque sexus : Caveat sacerdos ne verbo vel signo vel alio quovis modo prodat aliquatenus peccatorem.» Præterea, sacerdos debet Deo, cujus est minister, conformari. Sed Deus peccata quæ per confessionem panduntur, non revelat, sed tegit. Ergo nec sacerdos revelare debet.

Solutio I.—Respondeo dicendum ad primam quæstionem, quod in sacramentis ea quæ exterius geruntur, sunt figura rerum quæ interius contingunt; et ideo confessio qua quis sacerdoti se subjicit, signum est interioris qua quis Deo subjicitur. Deus autem peccatum illius qui se sibi subjicit per pœnitentiam, tegit; unde et hoc oportet in sacramento pœnitentiæ significari; et ideo de necessitate sacramenti est quod quis confessionem celet; et tamquam violator sacramenti peccat qui revelat" (*Sent. VI, d. XXI, q. III, art. I*; English trans. in *The "Summa theologia,"* vol. 18, pp. 191-192).

This explanation is not without its critics. For example, Kennedy remarks that "... [In] this world, no sin, whether or not confessed, is revealed by God. His concealment is in no way conditioned upon their being confessed in the sacramental tribunal of Penance."⁴⁸ Others point out that the seal was unknown in the early Church when confessions and penances were public affairs. Therefore, many authors, such as De Lugo,⁴⁹ Galtier,⁵⁰ Suarez,⁵¹ and Kennedy⁵² conclude that confessional secrecy is *not* inherent to the sacramental sign on this basis. Nevertheless, some modern authors, such as F. Loza, continue to maintain the position that the seal is implicit in the institution of the

⁴⁸ KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 21.

⁴⁹ "Alii secundo dicunt, rationem esse: quia revelatio opponeretur significationi ipsius sacramenti: nam Deus in hoc sacramento tegit peccata pœnitentis, juxta illud: *Beati, quorum remissæ sunt iniquitates, et quorum tecta sunt peccata*, et hoc ipsum significatur per secretum, quod sacerdoti imponitur. Quam rationem indicavit S. Thom. in IV. dist. XXI. quæst. 3. art. 1, quæstiunc. 1. in corpore. Alii eam impugnant, alii defendunt: sed est mera congruentia moralis: alioquin, neque ex licentia pœnitentis posset revelari confessio, si hoc esset contra significationem sacramenti. Nec ullo modo probatur, talem significationem esse essentialem huic sacramento, cum verba formæ solum significant absolutionem et remissionem; et aliunde non sit contra substantiam hujus sacramenti, quod confessioni sit publica, ut suo loco visum est" (DE LUGO, D. XXIII, *De sigillo confessionis*, Sec. I, n. 2).

⁵⁰ "Haec ratio thomistis O. P. probari solet; at communius cum Durando (*In IV*, dist. 21, q. 4), Suarez (*disp.* XXXIII. s. I, n. 6), Lugo (XXIII, s. 1, n. 2) et aliis, judicatur indicare ad summum aliqualem convenientiam. Significatio enim in qua vim facit non est de *essentia sacramenti*, ut constat vel hoc solo quod sacramentalis confessio potest esse publica" (GALTIER, *De paenitentia tractatus dogmatico-historicus*, n. 547 [a]).

⁵¹ "*Tertia ratio.—Non esse sufficientem rationem.*—Tertiam rationem assignat divus Thomas, quia talis revelatio est contra significationem hujus sacramenti, illamque falsam reddit, et ideo semper continet grave sacrilegium. Antecedens patet, quia per hoc sacramentum ita Deus remittit peccatum, ut omnino tegat illud, et hoc significatur per hoc sigillum. Quam rationem impugnant late Durand., Scot., et alii; et e contrario illam defendunt Capreol., Soto, etc. Ego vero censeo esse quidam aliqualem congruentiam, non tamen sufficiens fundamentum ad obligationem; quia illa significatio non est substantialis in hoc sacramento, neque hoc ulla ratione vel auctoritate probatur. Maxime quia non est de substantia hujus sacramenti, quod secrete fiat, ut supra ostendi" (SUAREZ, D. XXXIII, *De sigillo confessionis*, Sec. I, n. 5).

⁵² See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 22.

sacrament.⁵³ Kennedy raises another objection to considering confessional secrecy as part of the sacramental sign. He says that if the seal of confession is dependent upon the efficacy of the sacrament, it would not bind in the absence of absolution or if the sacrament was for some reason invalid. Therefore, the sacramental seal cannot be tied to the essential nature of the sacrament, which demands validity.⁵⁴ Kennedy also raises another objection to Aquinas' argument. He asks how a penitent could release the confessor from confessional secrecy if it is tied to the very nature of the sacrament.⁵⁵

2.2.3 – Confessor's Knowledge as Divine Knowledge

Aquinas indicates the following in his reply to the Second Objection:

The precept concerning the secret of confession follows from the sacrament itself. Wherefore just as the obligation of making a sacramental confession is of Divine law, so that no human dispensation or command can absolve one therefrom, even so, no man can be forced or permitted by another man to divulge the secret of confession. Consequently if he be commanded under pain of excommunication to be incurred *ipso facto*, to say whether he knows anything about such and such a sin, he ought not to say it, because he should assume that the intention of the person in commanding him thus, was that he should say what he knew as a man. And even if he were expressly interrogated about a confession, he ought to say nothing, nor would he incur the excommunication, for he is not subject to his superior, save as a man, and he knows this not as a man, but as God knows it.⁵⁶

⁵³ See F. LOZA, Commentary on c. 983, in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, Montréal, Wilson & Lafleur, 2004, vol. III/1, p. 817.

⁵⁴ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 22.

⁵⁵ See *ibid.*; De Lugo and Suarez noted the same objection. See DE LUGO, D. XXIII, *De sigillo confessionis*, Sec. I, n. 2; Suarez said: "Item, quia alias nec de licentia pœnitentis liceret revelare hoc secretum. Non est ergo obligatio hæc per se imposita propter significationem, sed propter rem ipsam, ut sacramentum ipsum convenienter tractetur et conservetur" (SUAREZ, D. XXXIII, *De sigillo confessionis*, Sec. I, n. 5).

⁵⁶ "Ad secundum dicendum, quod præceptum de confessione celanda consequitur ipsum sacramentum; et ideo sicut præceptum de confessione sacramentali facienda est de jure divino, et non potest aliqua dispensatione vel jussione humana homo ab eo absolvi: ita nullus ad revelationem confessionis potest ab homine cogi vel licentari. Unde si præcipiatur sub pœna excommunicationis latæ sententiæ, quod dicat si aliquid scit de peccato, non debet dicere; quia debet æstimari quod intentio præcipientis sit, si sciat ut homo. Sed etiam expresse de confessione interrogatus, non deberet dicere; nec excommunicationem incurreret; quia non est subjectus superiori suo nisi ut homo; hoc autem non scit ut homo, sed ut Deus" (*Sent. IV*, d. XXI, q. III, art. I; English trans. in *The "Summa theologica,"* vol. 18, pp. 192-193).

The reasoning underlying the obligation of not revealing confessional secrets is reiterated by Aquinas in his answer as to whether or not a penitent may release a confessor from the seal of confession:

I answer that, There are two reasons for which the priest is bound to keep a sin secret: first and chiefly, because this very secrecy is essential to the sacrament, in so far as the priest knows that sin, as it is known to God, Whose place he holds in confession: secondly, in order to avoid scandal.⁵⁷

A number of authors have adopted this position, including Innocent III,⁵⁸ Galtier (who cites Innocent III),⁵⁹ Coronata,⁶⁰ Cappello,⁶¹ Loza⁶² and Pope John Paul II.⁶³ The current

⁵⁷ "Solutio.— Respondeo dicendum, quod duo sunt propter quæ sacerdos tenetur peccatum occultare. Primo et principaliter, quia ipsa occultatio est de essentia sacramenti, inquantum scit illud ut Deus, cujus vicem gerit ad confessionem. Alio modo propter scandalum vitandum" (*Sent. IV*, d. XXI, q. III, art. II; English trans. in *The "Summa theologica,"* vol. 18, p. 197).

⁵⁸ "Nam quacunque hora peccator fuerit conversus et ingemuerit, «omnium iniquitatum ejus non recordabor (*Ezech. xviii*).» ait Dominus. Caveat ergo sacerdos, cui confiteor peccator, non ut homini, sed ut Deo, ne forte post confessionem auditam recordetur peccati: Hoc est ne verbo vel signo innuat se scire delictum, quia non dicitur, ut vitulus adducatur *ad ostium tabernaculi* coram homine, sed *coram Domino*. Gravius enim peccat sacerdos, qui peccatum revelat, quam homo qui peccatum committit" (INNOCENTIUS III, *Sermo primus, In consecratione pontificis*, in *PL*, vol. CCXVII, p. 652).

⁵⁹ "Et re vera, praeceptum sigilli consequi ipsum sacramentum sic probari potest. Declaratio peccati in confessione non fit nisi in ordine ad veniam a Deo impetrandam, proindeque non fit sacerdoti nisi qua est formaliter Dei minister. Hoc autem posito, paenitens censendus est ipsi Deo locutus proindeque servasse ibi beneficium silentii erga hominem qua talem: homini enim qua tali certe noluit se prodere; confessarius vero abuteretur ministerio sacro si, extra forum illum, in quo solo est Dei minister ad remittenda peccata, deferret, ut homo, quod, ut homo, omnino nescit" (GALTIER, *De paenitentia tractatus dogmatico-historicus*, n. 547).

⁶⁰ "Quae proinde confessarius qua talis in audienda confessione percipit non scit ut homo seu scientia humana, sed scientia divina, quia ei manifestata sunt ut vices Dei gerenti et proinde cuilibet interroganti de his rebus respondere potest se nihil scire" (CORONATA, *Institutiones iuris canonici*, vol. I, n. 381[a]).

⁶¹ "Hac sententia sive explicatione admissa, facile intelligitur cur sigillum sacramentale nullam omnino patiatur exceptionem; cur ad omnia ac singula extendatur quae dicta sunt confessario non ut homini sed *ut Deo*, i.e. in ordine ad absolutionem recipiendam; cur in alia confessione possit sacerdos, etiam sine licentia poenitentis, loqui de auditis in praecedentibus confessionibus" (CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 885 [d]).

⁶² See LOZA, Commentary on c. 983, p. 817.

⁶³ See JOHN PAUL II, Address to the Apostolic Penitentiary, Confessors, Priests, and Seminarians, "Seal of Confession Must be Kept," 12 March 1994, in *The Pope Speaks*, Jan./Feb. (1995), p. 14.

canon in *CCEO* also adopts this Thomistic view of the confessor's knowledge as divine knowledge as a basis for the seal of confession.⁶⁴ However, Kennedy, on the basis of arguments offered by some authors contrary to the above view of Aquinas, concludes that the reasoning presented in its support is inadequate. He states:

Strong objection can be made, however, to the denial of human knowledge of confessional matters on the part of the confessor. Though a confessor acts as a representative of God, it is precisely as a man that he does so. It is precisely as man that he is minister of the sacrament, that he judges the penitent worthy or unworthy of absolution, and that he utters the words of absolution, though, in doing all of these things he exercises a divine power and authority given him through ordination. It seems inaccurate, then, to say that he has no human knowledge of matters in the confessional, for it is precisely on the basis of human knowledge that he judges the penitent and administers the sacrament.⁶⁵

Thus, it seems Kennedy is suggesting that Aquinas' reasoning represents more of a metaphor than a juridic reality.

2.2.4 – Divine Law Against Scandal

Another aspect of the divine law origin of the seal of confession developed by Aquinas in his reply to the First Objection concerns the issue of scandal and it is expressed by him in the following terms:

I answer that, the seal of confession does not extend directly to other matters than those which have reference to sacramental confession, yet indirectly matters also which are not connected with sacramental confession are affected by the seal of confession, those, for instance, which might lead to the discovery of the sinner or his sin. *Nevertheless these matters also must be most carefully hidden, both on account of scandal and to avoid leading others into sin through their becoming familiar with it.*⁶⁶

⁶⁴ See PONTIFICIA COMMISSIO CODICI IURIS CANONICI ORIENTALIS RECOGNOSCENDO, *I canoni sulla Penitenza e sull'Unzione degli infermi*, in *Nuntia*, 6 [1978], p. 59. Also see G. NEDUNGATT (ed.), *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, *Kanonika*, 10, Rome, Pontificio Istituto Orientale, 2002, p. 526.

⁶⁵ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 23; his opinion is based on DE LUGO, D. XXIII, *De sigillo confessionis*, Sec. I, n. 2; SUAREZ, D. XXXIII, *De sigillo confessionis*, Sec. I, n. 4; KURTSCHIED, *A History of the Seal*, p. 272.

⁶⁶ "Ad secundam quæstionem dicendum, quod sigillum confessionis non directe se extendit nisi ad illa quæ cadunt sub sacramentali confessione; sed indirecte id quod non cadit sub sacramentali confessione, etiam ad confessionis sigillum pertinet, sicut illa per quæ posset peccator vel peccatum deprehendi.

This passage follows the injunction in Matt. 18:6 regarding avoidance of scandal. It is accepted by a number of authors as one of the divine law foundations of the seal of confession.⁶⁷ However, the grave obligation of the seal of confession seems to call for a stronger scriptural basis, and in any event, the avoidance of scandal does not explain public confession nor release from the seal.

2.2.5 – Avoidance of Judgement as a Divine Law Basis

If what is disclosed in confession were revealed, the penitent would be subjected to a multiplicity of judgments and penalties for sins already definitively and conclusively forgiven. This divine law basis is supported by B. Lanfranc (Archbishop 1070-1089) who likens the forgiveness of sins through confession to the finality of the washing away of sins in baptism.⁶⁸ However, he recognizes the weakness of this argument in cases where absolution is not received.⁶⁹ J. Duns Scotus (1266-1308) argues that if the priest were to reveal the contents of confession, the finality of any judgment rendered in the sacrament of penance would be negated. On the basis of the biblical texts of Jn. 20:23 (“If you forgive the sins of any, they are forgiven”) and Matt.18:18 (“Truly, I say to you, whatever

Nihilominus etiam illa summo studio sunt celanda, tum propter scandalum, tum propter pronitatem quæ ex consuetudine accidere posset” (*Sent. IV*, d. XXI, q. III, art. I; English trans. in *The “Summa theologica,”* vol. 18, p. 194; italics added).

⁶⁷ See PRÜMMER, *Manuale theologiae moralis*, vol. III, n. 445.

⁶⁸ “Sacramento confessionis violat, quia nec poenitentem in confessione baptizatum credit; ipsumque secundum baptismum, id est confessionem, quantum in ipso est, destruit, nec unitatem conscientiae custodit, nec Deum in suis judiciis convenisse veretur” (LANFRANCUS, *Lib. De celanda confessione*, in *PL*, vol. CL, p. 628).

⁶⁹ “Si vero is qui confitetur in culpa perseverat, et etiam anathema est is cui confessum est, cum Domino usque ad exitum Judam patiatur; nec etiam in illos aliquando [aliquam omnino vel] per se vel per aliquem vindictam exerceat, qui sibi denuntiati sunt in crimine, vel per confitentium malitiam vel simplicitatem, ne sacramenta confessionis violentur. Sunt enim quidam qui non arbitrantur indulgentiam consequi, nisi sociorum suorum nomina detexerint” (ibid., p. 629).

you bind on earth shall be bound in heaven, and whatever you loose on earth shall be loosed in heaven”), he suggests that the whole nature of the sacrament is to render a judgment once and for all.⁷⁰ Galtier uses the finality argument as well, but he also recognizes its shortcoming in cases where absolution is not given or the sacrament is invalidly administered.⁷¹ Kennedy notes that this position failed to receive much support from other authors.⁷²

2.2.6 – Protection of the Common Supernatural Good

Kennedy regards the protection of the common supernatural good as the strongest and the most widely-accepted explanation of the seal of confession from a divine law point of view.⁷³ He states that Duns Scotus convincingly argued that the essential purpose of the seal of confession is to prevent others from being deterred from approaching the

⁷⁰ “Item secundo sic: Christus statuit arbitrium poenitentiae esse ultimum in terris quantum ad illud crimen confessum; quod patet ex illo verbo Matth. 16. *Quodcumque solveris super terram, erit solutum et in caelis*, id est, finaliter et ultimate approbatum; et Joan. 20. *Quorum remisieritis peccata*, etc. supple in iudicio divino finaliter remissa approbantur; ergo peccat contra legem Christi quicumque aliquid in isto foro discussum, et ibi finaliter terminatum deducit ad alium forum publicum; sed revelans, quantum in se est, facit, quod deduci possit ad alium forum; ergo etc.” (J. DUNS SCOTUS, *Liber IV sententiarum*, d. XXI, q. II, concl. II, in *Opera omnia*, Editio nova juxta editionem Waddingi XII tomos continentem a patribus franciscanis de observantia accurate recognita, Parisiis, Vivès, 1894, vol. 18, p. 737).

⁷¹ “c) Melius adhuc, ut videtur, Scotus in ratione secunda: statuit arbitrium poenitentiae esse ultimum in terris quantum ad illud crimen confessum; quod patet ex illo verbo Matthaei: *Quodcumque solveris super terram, erit solutum et in caelis*, id est finaliter et ultimate approbatum; et Joannes: *Quorum remisieritis peccata remittuntur*, etc., supple [=id est] in iudicio divino finaliter remissa approbantur. Ergo peccat contra legem Christi quicumque aliquid in isto foro discussum et ibi finaliter terminatum deducit ad alium forum publicum; sed revelans quantum in se est, facit quod deduci possit ad alium forum. Ergo. d) Attamen nec ita ratio datur cur sigillum, ex voluntate Christi obliget cum tanto rigore quo dictum est, ubique et semper, etiam ubi peccata confessa tamen non sunt absolutione remissa. Hinc necessitas deveniendi ad eam rationem quam S. Thomas indicat: «quia ipsa occultatio peccati est de essentia sacramenti, inquantum sacerdos scit illud ut Deus, cujus vicem gerit in confessione» (*Suppl.* q. 11, a. 4 c). «Illud quod sub confessione scitur est quasi nescitum, cum illud non sciat aliquis ut homo, sed ut Deus» (ibid., a. 1, ad 1m et f. ad 2m)” (GALTIER, *De poenitentia tractatus dogmatico-historicus*, n. 547 [c,d.]).

⁷² See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 20.

⁷³ See ibid., p. 24.

sacrament because of the threat of public revelation of their sins.⁷⁴ In a similar vein, Ballerini maintains that the obligation of secrecy is for both the good of the sacrament itself and the prevention of others from being deterred from its reception.⁷⁵

This argument is based on moral and practical necessity as opposed to the Thomistic argument based on the essence of the sacramental sign.⁷⁶ Kennedy notes that the divine law aspect of the common spiritual good parallels the natural law aspect of the common good. Both are founded in the common need to maintain secrecy in order to allow people to make frank private disclosures; likewise, both aspects emphasize the common good as the basis of the secrecy, rather than the needs of an individual penitent.⁷⁷ However, the major difference between the natural and divine law basis of confessional secrecy consists in the fact that natural law secrets yield to the good of the community in certain cases. The divine law secret, however, knows no exception since the *spiritual* good of the community can never cede to the individual and temporal needs of the community.⁷⁸

⁷⁴ Scotus says: "Quilibet Christianus tenetur non dare occasionem alteri, qua revocetur a lege Christi; sed lex Christi est de confessione facienda, ut est ostensum *dist.* 17. igitur quilibet in lege Christi tenetur non retrahere aliquem a confessione facienda: sed revelans confessionem occasione data, retrahit aliquos a confessione; ergo, etc." (*Sent. IV*, d. XXI, q. II, concl. II).

⁷⁵ "Ratio obligationis est bonum poenitentium et reverentia sacramento debita, ne scilicet difficilior et odiosa reddatur confessio et sic deterreantur homines a sacramento. Quoniam cessat quodlibet huiusmodi damnum, si ipse poenitens facultatem faciat loquendi aut revelandi, dicta obligatio cum tali limitatione intelligitur: nisi poenitens ipse facultatem loquendi concedat" (BALLERINI, *Opus theologicum morale*, vol. V, n. 899); see also PRÜMMER, *Manuale theologiae moralis*, vol. III, n. 445.

⁷⁶ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, pp. 23-24.

⁷⁷ See *ibid.*, pp. 24-25.

⁷⁸ See *ibid.*, p. 25. Also see M. FELTIN, "The Universal Common Good," in *The Catholic Lawyer*, 3 (1957), pp. 257-259.

This variant of the theory of the divine law basis of the seal of confession appears to answer all exceptions. First, it explains the reason for the existence of the seal even when absolution is not given or the sacrament is invalid. A penitent would be deterred from confessing if he or she is not assured of either of these two elements. Second, the theory based on moral necessity takes into account situations where a penitent releases a confessor from the seal of confession. In this instance, the penitent cannot be deterred because it is the penitent who controls the matter of the seal of confession. Third, this theory renders the seal of confession compatible with the early penitential practice of public confessions which did not see then the necessity of secrecy in light of the “penitential zeal” of early Christians.⁷⁹ The good of the community apparently did not demand secrecy in those times. Fourth, the moral necessity theory explains the strictness of the seal.⁸⁰ In light of these arguments, Kennedy notes that some authors, while not accepting this theory as a basis for the emergence of the seal of confession, still accept it at least as the reason behind its strictness.⁸¹

2.2.7 – Limitations on Secrets

As noted earlier, secrets have limitations. In other words, there are no absolute secrets *per se*; even the seal of confession may be released by the penitent, at least

⁷⁹ See KURTSCHIED, *A History of the Seal*, pp. 283-284.

⁸⁰ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 25.

⁸¹ For example, Galtier states: “*Statuitur factum.*— Sigillum esse de jure divino indicat sane praxis Ecclesiae non agnoscendi ulli potestati, etiam Summi Pontificis, in ulla occasione aut ex ullo motivo, jus dispensandi ab hac lege. Quod confirmatur ex eo quod illud secretum servandum docetur in quolibet casu, cum maximis etiam incommodis, etiam tunc cum aliud secretum esset revelandum. Et re vera, ut recte advertit Tournely, nullum est bonum quod, ut accidit pro aliis secretis, praevalere possit bono servati sigilli” (GALTIER, *De paenitentia tractatus dogmatico-historicus*, n. 546). Also see KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 26.

according to modern authors like Kennedy.⁸² The right to one's good name may also be limited by the rights of others. Secrets may cease to bind when persons concerned consent to their disclosure, when secrets become public knowledge, or when they are revealed to avert some harm.⁸³ Even the seal of confession is not absolute. As discussed in the previous Chapter, a confessor may reveal it with the express permission of the penitent. In this sense, even confessional secrecy cannot be regarded as absolute.⁸⁴

Natural law secrets, however, differ in one very important aspect from divine law secrets. A secret deriving from divine law cannot be revealed except when the person concerned freely consents to its revelation, whereas a natural law secret is subject to revelation in certain situations even without the permission of the person concerned.

2.3 — THE SEAL OF CONFESSION IN THE CODES OF CANON LAW

It is, of course, trite to say that the seal of confession is also of positive law.⁸⁵ W. Woestman notes that the ecclesiastical positive law on the seal of confession reflects the

⁸² See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 9.

⁸³ See NOLDIN, *Summa theologiae moralis*, vol. II, *De praeceptis*, nn. 667(2): De secreto naturali, 668(2): De secreto promisso, 670(1-4): Secretum commissum licite revelari potest; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, pp. 9-12. An example of professional disclosure is in the Canadian Bar Association's *Code of Professional Conduct*, which indicates the following exceptions to the rule of professional secrecy for solicitor-client privilege: disclosure specifically authorized by the client, disclosure where the lawyer's conduct is in issue, disclosure to prevent a crime, and disclosure required by law. See CANADIAN BAR ASSOCIATION, *Code of Professional Conduct*, pp. 14-15.

⁸⁴ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 9.

⁸⁵ For an affirmation of this statement, see PRÜMMER, *Manuale theologiae moralis*, vol. III, n. 445; BALLERINI, *Opus theologicum morale*, vol. V, n. 899; CORONATA, *Institutiones iuris canonici*, vol. I, n. 381(a); VERMEERSCH, *Theologiae moralis*, vol. III, n. 461; AERTNYS and DAMEN, *Theologia moralis*, vol. II, n. 455; REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 488.

divine positive law, and is upheld through the application of canonical sanctions.⁸⁶ As noted earlier, the natural law is implicit in the principles of secrets and, therefore, is also reflected in the positive law.

In this section we will consider the positive law of the seal of confession as found in the 1917 Code, the 1983 Code, and the Code of Canons of the Eastern Churches. Our focus will be on the three aspects of the positive law, namely the general principles (provisions) applicable to the seal itself, the specific canons on the seal, and the penal sanctions for its violation.

2.3.1 – The 1917 Code

The 1917 Code will be reviewed here for four reasons. First, it will provide historical continuity between the sources of the 1917 Code and of those which underlie the present Codes. Second, the majority of canonical writings preceding the present Codes are on the 1917 Code. Third, most of the doctrinal and jurisprudential principles on the matter derived from the interpretation of the canons of the 1917 Code can be applied to the legislation of the 1983 Code. Fourth, the text of c. 733 of the Eastern Code, although based on the Constantinopolitan canonical tradition, uses wording which (except for one word) is identical to the text of c. 889 of 1917 Code. The interpretations derived from the 1917 Code therefore should be applicable with respect to understanding the canons of the Eastern Code.

⁸⁶ See W. WOESTMAN, *Sacraments: Initiation, Penance, Anointing of the Sick: Commentary on Canons 840-1007*, Third Edition, Ottawa, Saint Paul University, 2004, p. 273.

2.3.1.1 – General Provisions

In this section we will deal with the interpretation and application of c. 889 of the 1917 Code, some specific canons on the violation of the seal of confession and the sanctions applicable to such violation.

2.3.1.1.1 – Interpretation of c. 889, §1

Canon 889 of *CIC/1917* affirmed in no uncertain terms the inviolability of the sacramental seal of confession in substantially identical terms as did c. 21 of the Fourth Lateran Council, but made a clear distinction between priests and non-priests:

§1. The sacramental seal is inviolable; therefore a confessor will diligently take care that neither by word nor by sign nor in any other way or for any reason will he betray in the slightest anyone's sin.⁸⁷

The natural-divine law basis of the seal of confession seems to be implied in this part of the canon. The phrase “sacramentale sigillum” is used in the canon in order to emphasize the obligation of the confessor (the subject of the seal) to conceal both the identity of the penitent and the confessed sin(s) (sin being the object of the seal).⁸⁸ This is complemented by the phrase “prodat aliquatenus peccatorem” taken from “prodere peccatorem” mentioned in the Lateran decree, a phrase interpreted as revealing: a) to a third party, b) the identity of the penitent, and c) the confessed sin.⁸⁹ Any revelation

⁸⁷ Canon 889: “§1. Sacramentale sigillum inviolabile est; quare caveat diligenter confessarius ne verbo aut signo aut alio quovis modo et quavis de causa prodat aliquatenus peccatorem” (*Codex iuris canonici*, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, praefatione Petri Card. Gasparri et indice analytico-alphabetico auctus, Romae, Typis polyglottis Vaticanis, 1917, p. 251; English trans. in *The 1917 Pio-Benedictine Code of Canon Law*, E. PETERS [trans.], San Francisco, Ignatius Press, 2001, p. 315; hereafter the translation of the canons of the 1917 Code will be from this source).

⁸⁸ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 51.

⁸⁹ “*Conf.* quia peccata ipsa sine expressione personae non cadunt sub sigillum confessionis; nam sigillum confessionis est iuris divini, ita, ut nemo praeter poenitentem in illo dispensare possit, ut docent

without these three components taken together would not strictly be a violation of the seal of confession.

The two phrases taken together could mean the following: First, authors such as Regatillo and Zalba have argued that, strictly speaking, there is no seal of confession nor its violation where the disclosure of the sin is between the penitent and the confessor, that is to say, revelation of the sin to the sinner; however, the confessor cannot speak with the penitent outside the confession about matters known through confession without the express and free consent of the penitent, because if this were to happen the confession would be odious to the penitent.⁹⁰ Not all authors are not in agreement with this view.⁹¹ Second, revelation of the penitent's sin *without* revealing the identity of the penitent would not constitute violation of the seal.⁹² However, any conversation outside the confession about matters confessed within the context of the sacrament of reconciliation

communiter TT. et canonistae; atqui circa revelationem peccati dispensat concilium generale, *c. cit.* et statuit, licere sacerdoti consilii causa revelare alteri peccatum, quod in confessione audiit; igitur dicto *cap.* solum prohibetur revelatio peccati in confessione auditi per ordinem, et relationem ad confitentem, quando scilicet ita revelatur peccatum, ut exinde etiam is, qui peccavit, noscatur; talis autem non est, cum e.g. aliquis dicit: *tale, vel tale peccatum mortale audiui in confessione*: imo etiam viri graves talia solent dicere absque scrupulo, teste Navar. *l. cit.*" (SCHMALZGRUEBER, *Jus ecclesiasticum universum*, n. 74); see also ROOS, *The Seal of Confession*, p. 17; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 32.

⁹⁰ "Quoad poenitentem ipsum proprie non existit sigillum sacramentale neque eius violatio, prout a Codice intelligitur, i.e., quatenus est obligatio non prodendi peccatum cum poenitente. Tamen confessarius nequit ei loqui extra confessionem de cognitis ex confessione, sine eius expressa et libera licentia. Nam odiosa fieret confessio" (REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 489).

⁹¹ "Habetur huiusmodi violatio si confessarius: si sine licentia cum poenitente de eiusdem confessione extra eam loquatur" (CORONATA, *Institutiones iuris canonici*, vol. I, n. 385[r]); see also CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol II, n. 882 (5).

⁹² "Sed Codex clare distinguit inter sigillum, et usum notitiae ex confessione habitae. Proprie est secretum servandum circa omnia per confessionem sacramentalem cognita, quorum revelatio peccatum simul et poenitentem prodere possint a poenitente dicta in ordine ad absolutionem" (REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 486); also see ROOS, *The Seal of Confession*, pp. 21-23; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 32.

without the permission of the penitent and disclosure of sin would fall within the scope of the prescript on the *use* of confessional knowledge mentioned in c. 890 rather than within the parameters of the definition of violation of the seal.⁹³

The phrase “ne verbo aut signo aut alio quovis modo” refers to the two major types of revelation prohibited by the canon. The first part of the phrase, “ne verbo,” constitutes *direct* revelation of the penitent and of the confessed sin. The second part, “aut signo aut alio quovis modo” constitutes *indirect* revelation, that is, through words or actions or some other form of communication which would risk revelation or create suspicion directed toward the penitent or the sins confessed.⁹⁴ Coronata lists several possible indirect violations.⁹⁵ These two forms of violation are covered under CIC/1917 c. 2369 to be discussed later in this Chapter.

The phrase “quavis de causa” found in the canon under consideration was not in the decree of the Lateran Council. It was a later addition intended to affirm that revelation of matters heard in confession was not justified even to prevent harm to the penitent, a third party, the state, or society in general.⁹⁶

⁹³ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 32.

⁹⁴ “Violatur sigillum *directe* vel *indirecte*. *Directe*, revelatis his quae sigillo subsunt, si aut poenitens indicatur, aut ex his quae revelantur probabiliter innotescere possit. *Indirecte* violatur, cum quis nihil quidem revelat, sed ex his quae dicit aut facit, aut nec dicit nec facit, probabilem alicuius poenitentis suspicionem iniicit vel poenitentem quoquo modo aggravat” (CORONATA, *Institutiones iuris canonici*, vol. I, n. 384[d]); also see KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 32.

⁹⁵ See CORONATA, *Institutiones iuris canonici*, vol. I, n. 385(e).

⁹⁶ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 32.

2.3.1.1.2 – Application of c. 889, §1

In this section we will consider briefly six aspects of c. 889, §1 in its application to concrete situations, which are: 1) the prescript on non-disclosure, 2) the need for sacramentality, 3) error on the part of the penitent, 4) reserved cases, 5) matter covered by the seal of confession, and 6) permission to reveal the contents of confession.

First, the general prescript never permitted a confessor to disclose what was said within the context of confession. This rule did not allow the use of the “probability” principle (“probabilism”) in the case of confessional secrecy.⁹⁷ According to Alphonsus Liguori (1696-1787), where there is doubt about the existence of the seal, the matter is always resolved in favour of upholding the seal.⁹⁸

Second, the confession must be “sacramental” to create the seal of confession. To be sacramental, according to classical definition, a confession must consist of three things: a) a self-accusation on the penitent’s part of a sin; b) to a competent priest; c) with the intention of receiving absolution.⁹⁹

⁹⁷ “*Neque permittit usum probabilismi contra sacramentum; sive agatur de dubio iuris, ut si probabile sit apud doctores talem rem esse materiam sigilli; sive agatur de dubio facti, ut si probabile sit tale peccatum sciri ex sola confessione. In utroque casu servandum est sigillum; nam non agitur de solo licito vel illicito, sed de damno fidelium necessario vitando; et de cavendo odio sacramenti*” (REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 488); see also AERTNYS and DAMEN, *Theologia moralis*, vol. II, n. 456; CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 888. For a discussion on probabilism (erring in favour of liberty in doubt) versus probabiliorism (erring in favour of the law in doubt), see ROOS, *The Seal of Confession*, pp. 25-26.

⁹⁸ “... [N]on est licitum uti opinione probabili in praejudicium juris certi quod alter possidet; poenitens autem possidet jus ne occasione suae confessionis ullum patiaturs gravamen” (ALPHONSUS LIGUORI, *Theologia moralis*, Editio nova a P. Leonardi Gaudé edita, Romae, Typographia Vaticana, 1905-1912, vol. IV, n. 633). See also ROOS, *The Seal of Confession*, p. 26.

⁹⁹ “Confessio sacramentalis est accusatio propriorum peccatorum a poenitente facta sacerdoti competenti, ad eorum absolutionem obtinendam” (REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 532); see also AERTNYS and DAMEN, *Theologia moralis*, vol. II, n. 455(IV); CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 880(3); VERMEERSCH, *Theologiae moralis*, vol. III, n. 467.

A confession made with any other intention or motive would negate the sacramentality of the confession.¹⁰⁰ A simulated confession or one designed simply to embarrass, ridicule, extort money from, or tempt the confessor would not constitute a sacramental confession.¹⁰¹ Also, mere spiritual counselling or psychological testing would not constitute a sacramental confession.¹⁰²

The absence of certain factors not included in the classical definition, such as lack of contrition,¹⁰³ incomplete disclosure of confessional matter or untruthfulness,¹⁰⁴ failure to receive absolution, caused, for example, by an interruption,¹⁰⁵ or lack of satisfaction,¹⁰⁶ would not negate the sacramentality of the confession, and consequently, the obligation entailed in the seal of confession.

¹⁰⁰ See ROOS, *The Seal of Confession*, p. 24.

¹⁰¹ "Hinc inferitur, quando poenitens confitetur sine ulla intentione absolutionis obtinendae, non oriri sigilli obligationem. ... Unde, licet ipse poenitens protestetur, se loqui sub sigillo, nihil refert, si vere constat non accedere ad finem obtinendi absolutionem; quod, vel ex ipsius dictis constare potest, vel ex factis, si appareat, accessisse solum animo inducendi confessarium ad aliquod peccatum" (DE LUGO, D. XXIII, *De sigillo confessionis*, Sec. II, n. 43); see also AERTNYS and DAMEN, *Theologia moralis*, vol. II, n. 455(IV); VERMEERSCH, *Theologiae moralis*, vol. III, n. 467; CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 881, 10; ROOS, *The Seal of Confession*, p. 24; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 41.

¹⁰² See VERMEERSCH, *Theologiae moralis*, vol. III, n. 467; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 41; T. PAPROCKI, "Possible Violation of the Seal of Confession," in A. ESPELAGE (ed.), *CLSA AdOp*, 1995-2002, Washington, DC, CLSA, 2002, pp. 293-295.

¹⁰³ See ROOS, *The Seal of Confession*, p. 23; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 41.

¹⁰⁴ See ROOS, *The Seal of Confession*, p. 24; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 41.

¹⁰⁵ See CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, nn. 880(3), 881, 892; ROOS, *The Seal of Confession*, p. 23; T. BOUSCAREN and A. ELLIS, *Canon Law: A Text and Commentary*, Milwaukee, Bruce Publishing Co., 1957, p. 937; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 41.

¹⁰⁶ See ROOS, *The Seal of Confession*, p. 23.

Third, the application of the seal of confession might depend on error on the part of the penitent. The obligation of secrecy would exist in cases where a priest hears the confession of a penitent who was unaware that the confessor lacked the requisite faculty (for example, due to suspension, interdict, excommunication) to hear confessions.¹⁰⁷ However, if the penitent were *aware* that the confessor did not have the requisite faculty to validly absolve him or her, then the confession would not be considered sacramental, and the seal of confession would not apply.¹⁰⁸

Authors disagree on the application of the seal of confession when a penitent unknowingly confesses to a layman. Some maintain that the seal of confession arises from such "confessions," because they are ordered toward the reception of the sacrament. Others hold that sacramentality of confession is possible only through the intervention of a priest.¹⁰⁹ The latter opinion appears to be more probable because the law stipulates that a sacramental confession must be made to a priest. However, the obligations arising from

¹⁰⁷ "*Quilibet* confessarius ad sigillum obligatur, sive approbatus sive non approbatus, seu carens iurisdictione, etiam excommunicatus, suspensus vel interdictus, etiam depositus vel degradatus" (CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 890, 1°). See also KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 42.

¹⁰⁸ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 42.

¹⁰⁹ "Controvertitur, num teneatur confessarius *fictus*, v. g. *laicus* (idem dicas de clerico, subdiacono et diacono), qui se confessarium simulaverit aut pro confessario habitus fuerit, et cui poenitens bona fide reipsa confessus sit. Plures affirmant (Noldin, III, n. 409; Génicot-Salsmans, II, n. 395), quia confessio a poenitente fit *in ordine ad absolutionem*, ac proinde viget ratio plenissimae securitatis quam huiusmodi accusatio semper requirit. Alii negant, quia in casu ordo ad absolutionem *obiectivae* non existit, cum is *sine ministro* haberi nequeat, imo ne concipi quidem possit; nec intentio sacramenti efficit ut sacramentum re vera habeatur. Iam vero sigillum sacramentale non oritur ex mera intentione sacramenti. Ergo. Omnino diversus, aiunt patroni huius sententiae, est casus illius qui audit quod in *vero* sacramenti usu alteri confessario narratur (Cfr. D'Annibale, III, n. 357; Vermeersch, III, n. 507). Haec opinio verior est. At profecto etiam *fictus* confessarius tenetur servare silentium de auditis a tali poenitente. Nam, deficiente lege sigilli, non ideo cessat obligatio *iustitiae* orta ex quasi - contractu" (CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 890, 1°). See also ROOS, *The Seal of Confession*, pp. 48-54; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 42.

natural law would certainly govern the secrets revealed in such circumstances. However, if someone *knowingly* confesses to a layman, then the seal of confession would not arise, though the natural law obligations should still be binding on the person hearing such disclosures.

Fourth, with regard to reserved cases (for example, to local Ordinaries, the Apostolic Penitentiary, the Holy Father), *CIC/1917* required that the appropriate faculties be obtained prior to absolution. In such cases, the superiors who grant the faculties are also bound by the seal of confession.¹¹⁰ Correspondence to the Apostolic Penitentiary is required to be securely sealed to safeguard secrecy.¹¹¹ In cases where the confessor, with the consent of the penitent, consults a third person, such as a theologian or some other expert, this person is bound by the obligation of confessional secrecy (though not necessarily the seal of confession itself).¹¹²

¹¹⁰ "Superior a quo petitur facultas absolvendi a reservatis, sive facultas petatur ab ipso poenitente, sive a confessario: habetur enim necessaria praeparatio confessionis. Item Superior, cui se sistet poenitens iam absolutus ab aliquo reservato, ut recipiat mandata: habetur complementum confessionis. In utroque casu Superior constituit unum tribunal sacramentale cum confessario (Suarez, disp. 33, sect. 4, n. 3; Lugo disp. 23, n. 34; Coninck disp. 9, dub. 3, n. 47). Si nullum est periculum ne poenitens a Superiore agnoscat, confessarius non indiget poenitentis licentia ad petendam facultatem absolvendi. Si tale periculum adest, et agitur de peccato reservato sine censura, confessarius simplex hodie potest directe ab eo absolvere, ac proinde non est cur facultas tunc petatur" (CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 892, 2^o). Also see PRÜMMER, *Manuale theologiae moralis*, vol. III, n. 443; VERMEERSCH, *Theologiae moralis*, vol. III, n. 463(2); CORONATA, *Institutiones iuris canonici*, vol. I, n. 383; AERTNYS and DAMEN, *Theologia moralis*, vol. II, n. 458; BUCCERONI, *Institutiones theologiae moralis*, vol. III, n. 838; REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 490, 1^o; ROOS, *The Seal of Confession*, pp. 55-56; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 43.

¹¹¹ See PENITENTIARIA APOSTOLICA, *Monitum*, [undated], in *AAS*, 27 (1935), p. 62.

¹¹² "Doctor, theologus vel canonista, seu quicumque a confessario consulitur cum licentia poenitentis, in sui agnitionem consentientis. Ratio est, quia notitia ex confessione hausta communicari per se non permittitur nisi cum onere adnexo tacendi. Dicimus per se, quia poenitens quandoque huiusmodi onus non imponit aut sigilli obligationem relaxat. Contraria opinio, quae tenet doctorem non teneri sigillo, cum eius cognitio non sit ex confessione, probabilis non videtur extra casum praedictum. Licentia a poenitente concessa, plura colloquia permittit, donec iudicium sacramentale fuerit completum (S. Alph., IV, n. 648; Ball.-Palm., vol. V, 638). Practice si adeundus sit aliquis cui restitutio fieri debeat, vel quocum pax

Fifth, the matters covered by the seal of confession are summarized as follows by

Kennedy:

Thus, the obligation of confessional secrecy extends to: (a) all matters confessed as sins, whether or not objectively sinful or merely thought by the penitent to be sinful, and whether mortal or venial, past or future, public or occult; (b) all details or circumstances whether objectively relevant or not, which are related to explain or clarify sins confessed; (c) motivating causes of sins (for example, the injustice of another which moved a penitent to anger); (d) a penitent's accomplices in sin; (e) imperfections confessed as sins or mentioned in explanation of sins; (f) natural defects of a penitent related in order to better explain the sins confessed; (g) natural occult defects not related by the penitent but observed by the confessor (for example, scrupulosity); (h) virtues or divine gifts mentioned by the penitent in order to explain his sins; (i) advice sought from the confessor concerning sins or temptations confessed; (j) the *fact* that the penitent confessed, if revelation of that fact would raise suspicion about the penitent's need to confess; (k) the fact of denial or deferment of absolution; (l) the fact of the granting absolution if circumstances are such as to arouse suspicion that others were denied absolution; and, (m) the penance imposed, except where it is minimal.¹¹³

Kennedy contrasts this summary with a long list of matters which are *excluded* from confessional secrecy:

The obligation of confessional secrecy does not extend to: (a) Details or circumstances which are matters of public knowledge the disclosure of which would not in any way harm the penitent or arouse suspicion of sins confessed (for example, the fact that a penitent is a married person, or a priest); (b) motives of sin which are publicly known facts (for example, someone's promotion to high office), a disclosure of which would in no way harm or give rise to suspicions concerning the penitent; (c) natural defects which are matters of public knowledge (for example, a penitent's deafness); (d) virtues and divine gifts not related by the penitent in explanation of his sins; (e) advice sought which is not related to any confessed sin or temptation; (f) the *fact* of confession, where disclosure would not raise suspicions about the need of confession; (g) the fact of granting of absolution, where disclosure will not arouse suspicions concerning other penitents; (h) a minimal penance, disclosure of which is simply tantamount to stating that

ineunda sit, expediet ut confessarius maiorem obtineat facultatem qua res solo secreto naturali observata maneat; et regulariter ea tantum conditione i. e. cum onere sigilli huiusmodi mandatum acceptet (Cfr. Lugo, disp. 23, n. 29; Lehmkuhl, II, n. 596; Vermeersch, vol. III, n. 507)" (CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 892, 30); also see VERMEERSCH, *Theologiae moralis*, vol. III, n. 463(6); AERTNYS and DAMEN, *Theologia moralis*, vol. II, n. 458; BUCCERONI, *Institutiones theologiae moralis*, vol. III, n. 838; REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 490, 10; ROOS, *The Seal of Confession*, pp. 56-58; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 43.

¹¹³ KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, pp. 46-47; see also VERMEERSCH, *Theologiae moralis*, vol. III, nn. 464-466; CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, nn. 897-906; CORONATA, *Institutiones iuris canonici*, vol. I, n. 382; PRÜMMER, *Manuale theologiae moralis*, vol. III, n. 444(c); BUCCERONI, *Institutiones theologiae moralis*, vol. III, n. 844-860; ROOS, *The Seal of Confession*, pp. 27-48.

a particular person went to confession; and (i) statements completely irrelevant to confession.¹¹⁴

Kennedy notes that while confessional secrecy would not apply in these circumstances, the obligation of *professional* secrecy would nevertheless continue to apply.¹¹⁵

The confessor may discuss, *within the context of confession*, a penitent's sins which were disclosed to him in previous confessions.¹¹⁶ Likewise, he may discuss the sins confessed before the penitent actually leaves the confessional, since there is still a "moral unity" with the confession itself.¹¹⁷

If some defect needs to be corrected in the sacramental confession for which the confessor is at fault, and which requires mentioning the matters confessed, the confessor may raise it in subsequent confessions without the permission of the penitent. However, to do so outside the confessional context, the confessor must seek the permission of the

¹¹⁴ KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 47; see also VERMEERSCH, *Theologiae moralis*, vol. III, nn. 464-466; CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, nn. 897-906; CORONATA, *Institutiones iuris canonici*, vol. I, n. 382; PRÜMMER, *Manuale theologiae moralis*, vol. III, n. 444(c); BUCCERONI, *Institutiones theologiae moralis*, vol. III, n. 844-860. E. Healy also says that a general statement to the effect that a penitent confessed a venial sin would not amount to a breach of the seal of confession, since this merely says that a penitent went to confession, and not whether there was a *need* to go to confession. The rationale given is that disclosure that a penitent went to confession would not deter other penitents, since it says nothing of the *need* to go to confession, just the fact that confession occurred. See E. HEALY, "The Seal of Confession," in *Review for Religious*, 2 (1943), p. 178. Roos concurs with this opinion and states that to say that a person confessed a venial sin amounts to nothing more than to say that the penitent went to confession: see ROOS, *The Seal of Confession*, p. 27. Pope John Paul II has also distinguished between revelation of mortal and venial sins, and has stated that "Especially with regard to grave sins, a priest cannot speak of them in even the most general terms; regarding venial sins in no way can he reveal the species, much less the individual act" (JOHN PAUL II, "Seal of Confession Must be Kept," p. 14).

¹¹⁵ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 46.

¹¹⁶ See ROOS, *The Seal of Confession*, p. 64.

¹¹⁷ See *ibid.*

penitent.¹¹⁸ Nevertheless, if the defect does not involve disclosure of any matters confessed, such as the failure to give absolution, then the penitent's permission is not required.¹¹⁹

Sixth, the following principles emerge from the interpretation of the canon with respect to the permission of the penitent to reveal matters disclosed within the context of a sacramental confession:

a) Although there is disagreement amongst canonists as to whether a penitent may release a confessor from the seal of confession, those authorities that do accept the proposition that a confessor can be released from the seal make a number of provisos with respect to consent to release from the seal. A number of authors maintain that the obligation of secrecy does not bind if the penitent explicitly (not implicitly) and freely consents to release the matters confessed.¹²⁰ Consent *may*, however, be implied in cases where the penitent speaks outside confession to the confessor about matters he or she previously confessed.¹²¹ Even when consent is given, the confessor does not have to reveal the matter if scandal cannot be avoided.

b) If a confessed sin is repeated by the penitent to the confessor outside the context of the confession, it renders the act non-sacramental and, therefore, the seal no

¹¹⁸ See *ibid.*, pp. 72-73; BOUSCAREN and ELLIS, *Canon Law*, p. 937.

¹¹⁹ See ROOS, *The Seal of Confession*, p. 73.

¹²⁰ "*Licentia poenitentis requiritur expressa et prorsus libera*" (AERTNYS and DAMEN, *Theologia moralis*, vol. II, n. 455[3]). See also REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 492 (b) 1º and 2º; ROOS, *The Seal of Confession*, pp. 69-70; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 49.

¹²¹ See AERTNYS and DAMEN, *Theologia moralis*, vol. II, n. 455(3); REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 492 (b); KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 49.

longer applies.¹²² Nevertheless, many authors maintain that a confessor can be released from the obligation of confessional secrecy with merely the penitent's explicit permission, and not necessarily repetition of the confessed matters outside or the confessional.¹²³

c) The consent given by the penitent to the confessor in order to seek outside advice or counsel on a particular confessed matter does not render the confession non-sacramental. Therefore, the confessor remains bound by the seal of confession in relation to all matters confessed except the specific matter for which the permission is given to disclose it to others.¹²⁴ In any event, when the express consent of the penitent has been obtained for requesting requisite faculties from competent superiors or to seek advice of a third person (such as an expert in a certain field), the relevant confessional matter(s) can be disclosed to those persons without revealing the penitent's identity.¹²⁵

d) The penitent has the right to revoke the permission he or she has given to the confessor to disclose the confessional matter. However, the revocation must be done prior to disclosure of the matter by the confessor to a third person.¹²⁶

¹²² See SUAREZ, D. XXXIII, *De sigillo confessionis*, Sec. V, n. 4; ROOS, *The Seal of Confession*, pp. 65-66; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 48.

¹²³ See DE LUGO, D. XXIII, *De sigillo confessionis*, Sec. V, nn. 136-137; SUAREZ, D. XXXIII, *De sigillo confessionis*, Sec. V, n. 4; VERMEERSCH, *Theologiae moralis*, vol. III, n. 469; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 48.

¹²⁴ See DE LUGO, D. XXIII, *De sigillo confessionis*, Sec. V, nn. 136-137; SUAREZ, D. XXXIII, *De sigillo confessionis*, Sec. V, n. 4; VERMEERSCH, *Theologiae moralis*, vol. III, n. 469; ROOS, *The Seal of Confession*, pp. 66-68; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 48.

¹²⁵ See ROOS, *The Seal of Confession*, pp. 70-72.

¹²⁶ See REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 492(b), 3^o; ROOS, *The Seal of Confession*, p. 69.

2.3.1.1.3 – Interpretation of c. 889, §2

The second paragraph of c. 889 reads:

§2. Interpreters are likewise bound by the obligation of preserving the sacramental seal, as well as those who in any way come into knowledge of the confession.¹²⁷

Kennedy distinguishes between §1 and §2 of c. 889. He argues that what is contained in paragraph 2 does not strictly pertain to the “seal of confession” as does paragraph 1; it rather expresses a broader obligation of “confessional secrecy.”¹²⁸ According to Roos and other authors, however, what was mentioned in c. 889, §2 may be considered as being part of the “canonical seal,” although not in the strict sense of a priest-penitent relationship, but in a “broad sense.”¹²⁹

The basis for the positive law of c. 889, §2 is in both natural and divine positive law. Kurtzschid maintains that it was based primarily in natural law with a divine law foundation in the reverence owed to the sacrament.¹³⁰ Other authors hold that the divine law basis of c. 889, §2 could be rooted also in the common supernatural good, since revelation of matters governed by confessional secrecy (as opposed to the seal) might deter others from approaching the sacrament.¹³¹

¹²⁷ “§2. Obligatione servandi sacramentale sigillum tenentur quoque interpretes aliique omnes ad quos notitia confessionis quoquo modo pervenerit.”

¹²⁸ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 31.

¹²⁹ See ROOS, *The Seal of Confession*, pp. 17, 75; BOUSCAREN and ELLIS, *Canon Law*, p. 937.

¹³⁰ See KURTSCHEID, *A History of the Seal*, p. 261; also see KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 33.

¹³¹ “Obligatione servandi sacramentale sigillum tenentur quoque INTERPRES ALIIQUE OMNES ad quos notitia confessionis quoquo modo pervenerit. Ita can. 889. §2. Ratio est, quia secus non satis provisum esset poenitentibus ne possent a confessione deterri; unde recte infertur Christum extendisse sigillum ad omnes istos” (AERTNYS and DAMEN, *Theologia moralis*, vol. II, n. 457); also see KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 33.

2.3.1.1.4 - Application of c. 889, §2

Canon 889, §2 contained several elements which need further explanation. These are: interpreters, writers and writings, accidental acquisition of confessional knowledge, and forfeiture of the right to silence.

First, the canon stipulated that interpreters are bound by confessional secrecy. However, this stipulation must be interpreted strictly within the context of confession. Thus interpreters used for the preparation of confession would not be covered by the canon.¹³² Nevertheless, they would still be bound by the natural law on obligations related to secrets.¹³³

Second, the canon included also those who write or assist in writing the sins of a penitent.¹³⁴ Some authors restrict the application of this prescript only to the writing of sins done *during* the actual confession.¹³⁵ However, even if this view were to be correct, the writings prepared prior to confession itself would still be covered by the natural law on secrets.

Those who read written confessions or lists of sins to be read in confession by a third party, or written confessions somehow lost by the confessor, are bound by the

¹³² "Interpres sigillo tenetur tantum, si in ipsa confessione adhibitus fuit; non si solum antea ad confessionem praeparandam; idem dic de eo qui confessionem rudis vel impotis scribat, si charta existimatur ut actualis vel inchoata aut continuata confessio" (REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 490, 1^o). Also see ROOS, *The Seal of Confession*, p. 55.

¹³³ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 44.

¹³⁴ See CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 892, 1^o; VERMEERSCH, *Theologiae moralis*, vol. III, n. 463(3,7); CORONATA, *Institutiones iuris canonici*, vol. I, n. 383; BUCCERONI, *Institutiones theologiae moralis*, vol. III, n. 838; ROOS, *The Seal of Confession*, p. 59; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 44.

¹³⁵ See VERMEERSCH, *Theologiae moralis*, vol. III, n. 463(3).

confessional secrecy.¹³⁶ However, *aides-memoires* prepared in advance of confession, and written confessions lost by the penitent due to his or her own carelessness are not protected by the obligation of confessional secrecy.¹³⁷

Third, the inadvertent acquisition of confessional knowledge would be covered by confessional secrecy in the following cases: a) a person who overhears a confession;¹³⁸ b) a person who reads a letter sent in a reserved case;¹³⁹ c) a person to whom confessional matter is revealed in any way, for any reason, directly or indirectly, and even if unaware at the time of the revelation that the matter was confessional in nature.¹⁴⁰ Thus, if a confessor inadvertently discloses confessional matter to someone, that person is bound by confessional secrecy.¹⁴¹

Fourth, in certain circumstances, a third party may not be bound by the obligation of confessional secrecy. For example, if a penitent confesses so loudly that all those standing or waiting around the confessional hear the sins confessed, these persons would

¹³⁶ See ROOS, *The Seal of Confession*, pp. 61-62.

¹³⁷ See *ibid.*, pp. 61-63.

¹³⁸ See CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 893, 4o; ROOS, *The Seal of Confession*, pp. 58-59; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 44.

¹³⁹ See CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 895, 7o; ROOS, *The Seal of Confession*, p. 162.

¹⁴⁰ "Omnes quibus aliquid, directe vel indirecte, culpabiliter vel inculpabiliter, revelatum sit de materia sigilli. Nam res in confessione manifestata onus sigilli adnexum habet, quod onus prius afficit rem ipsam ac deinde personam; quae res si aliis forte manifestetur, ad ipsos semper transit *cum eodem onere*" (CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 893, 5o). Also see KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 44.

¹⁴¹ See ROOS, *The Seal of Confession*, pp. 59-60.

not be bound by confessional secrecy, although the natural obligation to maintain secrets would still apply to them.¹⁴²

2.3.1.2 – Related Provisions

There are several canonical provisions in the 1917 Code that are related to these general norms, and they need further explanation for proper application of the law on confessional secrecy. These provisions concern the use of confessional knowledge, interpreters, and evidence in trials.

First, c. 890 stated the general principle governing the use of confessional knowledge as follows:

§1. Any use to the detriment of the penitent of knowledge acquired by confession is entirely prohibited to the confessor, even excluding the danger of revelation.

§2. Both Superiors at the time and confessors who become Superiors after they resign, who have notice concerning sins from confession, cannot use this knowledge in any way for external governance.¹⁴³

The word “omnino” of c. 890, §1 means “anything whatsoever,” no matter how grave the situation.¹⁴⁴ The phrase “cum gravamine poenitentis” is meant to apply to speaking to the penitent outside of confession or some other action which may embarrass or disturb the penitent in any way whatsoever.¹⁴⁵ However, the use of confessional knowledge must constitute a “gravamen” to the penitent in order to violate the prescript

¹⁴² See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 45.

¹⁴³ Canon 890: “§1. Omnino prohibitus est confessario usus scientiae ex confessione acquisitae cum gravamine poenitentis, excluso etiam quovis revelationis periculo.

“§2. Tam Superiores pro tempore existentes, quam confessarii qui postea Superiores fuerint renuntiati, notitia quam de peccatis in confessione habuerint, ad exteriorem gubernationem nullo modo uti possunt.” For commentary on c. 890, see VERMEERSCH, *Theologiae moralis*, vol. III, n. 461.

¹⁴⁴ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 34.

¹⁴⁵ See ROOS, *The Seal of Confession*, pp. 97-103; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 34.

of the canon, which would, therefore, exclude private actions, such as praying for the penitent.¹⁴⁶

The 1915 Instruction *Naturalem et divinam* from the Holy Office (discussed in Chapter One) has a broader stipulation on the use of confessional knowledge than what we find in the 1917 Code. That Instruction states that any mention whatsoever of any confessional knowledge, in any circumstance, was strictly forbidden.¹⁴⁷ A number of authors maintain that this Instruction continues to be in force even after the promulgation of the 1917 and 1983 Codes.¹⁴⁸ This should be the case, since declarations relating to faith and morals do not change. In light of the Instruction, then, the precept concerning the use of confessional knowledge would apply to cases beyond those implied in the canon. It would include making reference to *any* confessional knowledge, even if it does not necessarily constitute a “gravamen.”¹⁴⁹

¹⁴⁶ See ROOS, *The Seal of Confession*, pp. 103-104; BOUSCAREN and ELLIS, *Canon Law*, p. 937.

¹⁴⁷ The latter part reads: “Haec animo reputans Suprema haec Sacra Congregatio Sancti Officii muneris sui esse ducit *omnibus locorum Ordinariis ordinumque regularium et quorumcunque religiosorum institutorum Superioribus*, graviter onerata eorum conscientia, in Domino recipere, ut huiusmodi abusus, si quos alicubi deprehendant, prompte atque efficaciter coercere satagant; atque in posterum tam in scholis theologicis quam in *casus moralis*, quas vocant, conferentiis et in publicis et in privatis ad clerum allocutionibus et adhortationibus sacerdotes sibi subditos sedulo edoceri curent, ne quid unquam, occasione praesertim sacrarum missionum et exercitiorum spiritualium, ad confessionis sacramentalis materiam pertinens, *quavis sub forma et quovis sub praetextu*, ne obiter, quidem et nec *directe* neque *indirecte* (excepto casu necessariae consultationis iuxta regulas a probatis auctoribus traditas proponendae) in suis seu publicis seu privatis sermonibus attingere audeant” (SACRED CONGREGATION OF THE HOLY OFFICE, Instruction *Naturalem et divinam*, pp. 200-201).

¹⁴⁸ See E. CAPARROS, M. THÉRIAULT (+), and J. THORN (+) (eds.), *Code of Canon Law Annotated*, Montréal, Wilson & Lafleur, 2004, p. 757; also see S. WOYWOD, *A Practical Commentary on the Code of Canon Law*, New York, Wagner Inc., 1957, pp. 496-497.

¹⁴⁹ See CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 908; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, pp. 36-38. Regatillo and Zalba do not seem to agree with this: see REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 496.

Canon 890, §2 reiterated in substance the law contained in the bull of Clement VIII discussed in the previous Chapter. According to Kennedy, this canon is of divine law, and constitutes the second part of the canonical rule on confessional secrecy.¹⁵⁰ Both present and future superiors were prohibited from using confessional knowledge provided it constituted some *gravamen*.¹⁵¹ Since c. 890 concerns strictly confessional secrecy, it seems to forbid only *confessors* from using confessional knowledge, and not non-confessors.¹⁵²

The substance of the decrees and instructions discussed previously concerning the use of knowledge by superiors of seminarians or novices was incorporated into c. 891 as follows:

The master of novices and his associate and the Superior of a Seminary or college shall not hear the sacramental confessions of the students living with them in the same house unless the students for a grave and urgent cause suggest it on their own accord.¹⁵³

Canon 903 allowed the use of interpreters in a confession. This canon states: "Whoever cannot otherwise confess is not prohibited if they want from confessing through an interpreter, taking care against abuse and scandal with due regard for the prescription of Canon 889, §2."¹⁵⁴

¹⁵⁰ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 34.

¹⁵¹ See ROOS, *The Seal of Confession*, pp. 104-105.

¹⁵² See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, pp. 34-35.

¹⁵³ Canon 891: "Magister novitiorum eiusque socius, Superior Seminarii collegiive sacramentales confessiones suorum alumnorum secum in eadem domo commorantium ne audiant, nisi alumni ex gravi et urgente causa in casibus particularibus sponte id petant."

¹⁵⁴ Canon 903: "Qui aliter confiteri non possunt, non prohibentur, si velint, per interpretem confiteri, praecavendo abusus et scandala, firmo praescripto can. 889, §2."

Canon 1755, §2, 1^o *exempted* the following from testimony: “Pastors and other priests in what concerns things manifested to them by reason of sacred ministry outside of sacramental confession ...”¹⁵⁵ According to Kennedy, although the canon itself did not expressly declare it, most commentators hold that the person who disclosed the information to the priest may release him from the obligation, and that the obligation would cease if the professional obligation to keep the confidence ceased to exist on moral grounds.¹⁵⁶ This argument would, therefore, suggest that this canon has a natural law basis.

Canon 1757, §3, 2^o declared confessors *incapable* of giving testimony concerning *all* matters *known* from confession:

Priests in what pertains to all things that they know from sacramental confession, even if they were absolved of the bond of the seal; indeed, what was heard in any way or in any manner upon the occasion of confession cannot be received even as an indication of the truth.¹⁵⁷

A priest may not give evidence in regard to confessional matters, *even* with the consent of the penitent, in order to protect the common spiritual good, since there is always a risk of misunderstanding.¹⁵⁸ The phrase “occasione confessionis” of the canon means that it applied not just to what was heard directly in the confession, but to *all*

¹⁵⁵ Canon 1755 §2, 1^o: “Parochi alique sacerdotes quod attinet ad ea quae ipsis manifestata sunt ratione sacri ministerii extra sacramentalem confessionem ...”

¹⁵⁶ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 58.

¹⁵⁷ Canon 1757 §3, 2^o: “Sacerdotes, quod attinet ad ea omnia quae ipsis ex confessione sacramentali innotuerunt, etsi a vinculo sigilli soluti sint; imo audita a quovis et quoquo modo occasione confessionis ne ut indicium quidam veritatis recipi possunt.”

¹⁵⁸ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 59.

matters heard on the occasion of confession whether as part of the actual sacramental confession or not.¹⁵⁹

Canon 2027, §2, 1° declared a confessor *inadmissible* as a witness in the process of beatification and canonization.¹⁶⁰ Although this canonical provision was not carried into the 1983 Code, confessors are still not permitted as witnesses.¹⁶¹

2.3.1.3 – Penal Sanctions

In this section we will study the major penal provisions concerning the seal of confession in *CIC/1917*. This will include general principles, direct violations, indirect violations, violations by lay persons, and judicial trials.

First, the general principles governing violations of confessional secrecy are stated in c. 2369 as follows:

§1. A confessor who presumes to violate directly the sacramental seal remains in an excommunication most specially reserved to the Apostolic See; but one who only indirectly [violates the seal] is liable to the penalties mentioned in Canon 2368, §1.

§2. Whoever accidentally violates the prescription of Canon 889, §2, is struck with a salutary penalty for the gravity of the deed, which can even be excommunication.¹⁶²

¹⁵⁹ “Quare haec incapacitas tenet omnes qui ut interpretes vel casu fortuito, vel simulatione recipiendi confessionem, notitiam quamcumque hauserint, nec restringitur ad sola peccata tribunali poenitentiae subiecta, nec incapacitas tollitur per quamvis solutionem a vinculo sigilli a poenitente factam” (F. WERNZ and P. VIDAL, *Ius canonicum*, Romae, Universitatis Gregorianae, 1927, vol. VI, n. 466 [e]). Also see KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 60.

¹⁶⁰ Canon 2027, §2, 1°: “Excluduntur a munere testis confessarii, relate ad ea quae ex confessione vel eius occasione noverunt (cfr. c. 1757, § 3, 2°); qui ipso iudicio collaborant, sc. postulator, advocatus aut procurator in causa, iudex (c. 2027).” See also A. VERMEERSCH and I. CREUSEN, *Epitome iuris canonici*, Romae, H. Dessain, 1956, vol. III, n. 315 (4); KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 60.

¹⁶¹ See SACRED CONGREGATION FOR THE CAUSES OF SAINTS, Norms, 7 February 1983, in *AAS*, 75 (1983), n. 20, p. 399; also see WOESTMAN, *Sacraments*, p. 275.

¹⁶² Canon 2369: “§1. Confessarium, qui sigillum sacramentale directe violare praesumpserit, manet excommunicatio specialissimo modo Sedi Apostolicae reservata; qui vero indirecte tantum, obnoxius est poenis, de quibus in can. 2368, §1.

“§2. Quicumque praescriptum can. 889, §2 temere violaverit, pro reatus gravitate plectatur salutari poena, quae potest esse etiam excommunicatio.”

Canon 2369 distinguished between three different types of violation of the seal of confession, namely *direct*, *indirect*, and *accidental*.

The *direct violation* mentioned in §1 may occur when “a confessor speaks or acts in such a way that the *finis operis* of his action is a clear disclosure of the sinner and his sin.”¹⁶³ In other words, the direct goal of the confessor’s action is to communicate the information received in confession.

The phrase “*manet excommunicato*” makes it clear that a *latae sententiae* penalty is intended by the law.¹⁶⁴ And the phrase “*specialissimo modo*” expresses the strictest reservation known in canon law¹⁶⁵ and underscores the seriousness of the offence.

The verb “*praesumpserit*” implies full knowledge, freedom of will, and intention to directly violate the seal of confession.¹⁶⁶ This meaning is explained in c. 2229, §2:

If the law has the words: *presumes, dares, knowingly, deliberately, recklessly, acting advisedly*, and other similar [phrases] that convey full knowledge and deliberation, any diminishment either on the part of the mind or on the part of the will brings about a diminishment of imputability [regarding] an automatic penalty.¹⁶⁷

¹⁶³ See ROOS, *The Seal of Confession*, p. 80; BOUSCAREN and ELLIS, *Canon Law*, p. 937; REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 493.

¹⁶⁴ “Quid dicendum ubi Codex verba «*manet excommunicatio*» adhibet, ut in c. 2369, §1? Per se poena f. s. infligitur; «*manet*» enim futurum tempus indicare potest et ministerium iudicis tali verbo non clare excluditur, quod vi c. 2217, § 2 de poena l.s. omnino requiritur. Attamen quando poena quae «*reum manere*» dicitur, simul declaratur reservata, intellegenda est latae sententiae, quia ab omni usu forensi alienum est ut Superiori iudicis reservetur absolutio censurae quae a iudice infligitur. — Argumentum ex indice Codicis afferre nolumus, cum non sit authenticus et in opus ceterum praeclarum error de re controversa irrepere potuerit” (VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. III, n. 408, 4°). Also see WOYWOD, *A Practical Commentary on the Code of Canon Law*, p. 557; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 54.

¹⁶⁵ See c. 2253 of CIC/1917.

¹⁶⁶ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 55; BOUSCAREN and ELLIS, *Canon Law*, p. 937.

¹⁶⁷ Canon 2229, §2: “Si lex habeat verba: *praesumpserit, ausus fuerit, scienter, studiose, temerarie, consulto egerit* aliave similia quae plenam cognitionem ac deliberationem exigunt, quaelibet, imputabilitatis imminutio sive ex parte intellectus sive ex parte voluntatis eximit a poenis latae sententiae.”

Interpreting this canon, Kennedy states that its prescript would apply to c. 2369 as such:

What is meant is a defect in knowledge or volition not so great as to remove serious moral guilt, but sufficient to prevent the crime from being "perfect" or "full" both as to knowledge and as to freedom of consent. Such defects of intellect may be permanent or temporary. Those which might be relevant to a confessor's direct violation of the canonical seal include weakness of mind, inebriation, ignorance or error in regard to the law or penalty, negligence, grave fear, passion, knowledge, condition, and state of mind.¹⁶⁸

Thus, in cases of diminished knowledge and freedom, c. 2369 would apply, but the imputability would be lessened by these circumstances in accordance with c. 2229, §2. It did not contemplate a situation where serious moral guilt is totally absent when there is diminished knowledge or freedom, since in such a case, there would be no *crimen*.¹⁶⁹

The "direct violation" of the "sacramental seal" entails the severest form of canonical penalty. Therefore, the phrase "sigillum sacramentale" must be given a narrow interpretation by restricting its scope to a revelation by a confessor of both a) the penitent and b) the confessed sins.¹⁷⁰ To constitute the crime, the information disclosed need not be new information to the person to whom it was disclosed; the disclosure itself is the crime.¹⁷¹ Regatillo and Zalba cite several examples in which there may not be a direct violation, though such actions might constitute poor judgment. For example, a simple mention of a penitent coming to the confessor for confession would not constitute a direct

¹⁶⁸ KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 56. In this regard, Kennedy cites cc. 2201, §§3, 4 (incapacity to commit a delict due to drunkenness or mental debility), 2202, §§1-3 (ignorance of the law), 2203, §1 (due diligence), 2205, §§2,3 (grave fear), 2206, and 2218, §1 (equitable application of penalties).

¹⁶⁹ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 57.

¹⁷⁰ See CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 910(1); ROOS, *The Seal of Confession*, pp. 77-78; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 52.

¹⁷¹ See ROOS, *The Seal of Confession*, p. 79.

violation (unless there were other circumstances, such as a recent crime); praising a penitent for confessing only venial sins; or saying that a penitent was given absolution.¹⁷²

Canon 2369 did not include the forbidden use of confessional knowledge within the scope of direct violation of the sacramental seal. The use of knowledge prohibited by this canon does not carry a penalty and is not considered a delict *per se*.¹⁷³

As noted earlier, any doubt of law or of fact must be resolved *in favour* of the obligation of the seal. Conversely, any doubt of law or of fact concerning the application of penalties in c. 2369 must be resolved *against* their application.¹⁷⁴ Due to the importance of these principles for the application of penalties attached to direct violation of the sacramental seal, we will explain them briefly here below.

First, regarding doubt of law, c. 2233, §1 of *CIC/1917* indicated with respect to *ferendae sententiae* penalties that “No penalty can be imposed unless it is certain that the delict was committed and that it is not legitimately prescribed.”¹⁷⁵ Kennedy notes that this

¹⁷² “*Resolves: Non frangit sigillum, saltem directe: a) qui dicit: “Fabius mihi confessus est,” nisi forte in specialissimis adiunctis, v. gr., si dicat: clam, hora intempesta, in quibus audientis suspicari possint de gravi delicto. Nec per se qui unum e poenitentibus laudet quod sola venialia habeat; sed inde per accidens oriri potest violatio indirecta circa alios poenitentes, qui non laudantur. Nec qui dicit: “Absolvi Liviam”; sed ne indirecte sigillum violat pro iis qui non fuerunt absoluti, si interrogetur, remittat interrogantes ad poenitentes. Vel si praevideatur necessitas monendi alios de communione danda, v. gr., aegrotis, petat a poenitente licentiam, dicendo vis ut moneam talem de communione tibi danda?”* (REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 493).

¹⁷³ “Cum Codex violationem sigilli seu *revelationem* (c. 889) ab *usu scientiae* sacramentalis sine *revelatione* (c. 890) clare distinguat, in c. 2369 de sola *revelatione* rei in ordine ad *absolutionem* manifestatae agi dicemus. Quare poenas hic statutas non contrahat qui cum poenitente de eius confessione, sine licentia, loquatur; qui ob scientiam sacramentalem poenitenti in electione suffragium deneget, etc.” (VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. III, n. 572 [II]). Also see ROOS, *The Seal of Confession*, pp. 76, 105-106; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 52.

¹⁷⁴ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 52.

¹⁷⁵ Canon 2233, §1: “Nulla poena infligi potest, nisi certo constet delictum commissum fuisse et non esse legitime praescriptum.”

principle is applicable also to *latae sententiae* penalties although they are not directly stated in the relevant canons. Canon 2233, §1 must be understood in light of c. 15 which read as follows:

Laws, even invalidating and incapacitating ones, do not bind when there is a doubt of law; when there is a doubt of fact, the Ordinary can dispense from them, provided it concerns a law from which the Roman Pontiff is wont to dispense.¹⁷⁶

Kennedy applies these canons to c. 2369 as follows:

Insofar as a doubt of law may be involved in a particular case, canon 15 states the general principle that in all doubts of law no merely ecclesiastical law is binding. While the law of confessional secrecy, as we have seen, is by no means a “merely” ecclesiastical law, the penalties attached to its violation *are* merely ecclesiastical law. Hence, if there is some doubt as whether a particular person is bound to confessional secrecy (i.e., a layman who poses as a confessor), or doubt as to whether a particular matter is covered by the obligation of confessional secrecy (e.g., natural defects of a penitent *observed* by the confessor during the confession), both would be “doubts of law” and, consequently, the penalties of canon 2369 would not apply.¹⁷⁷

Second, c. 19 provided the general principle that should guide the interpretation of penal law. This canon read: “Laws that establish a penalty, or that restrict the free exercise of a right, or that contain an exception to the law, are subject to strict interpretation.”¹⁷⁸ This principle in fact is reflected in c. 2219, §1 which stipulates: “In penalties, the more benign interpretation is to be followed.”¹⁷⁹ According to Kennedy, both these canons would prevent c. 2369, §1 from being applied to cases where there is a

¹⁷⁶ Canon 15: “Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti potest Ordinarius in eis dispensari, dummodo agatur de legibus in quibus Romanus Pontifex dispensare solet.”

¹⁷⁷ KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 53.

¹⁷⁸ Canon 19: “Leges quae poenam statuunt, aut liberum iurium exercitium coarctant, aut exceptionem a lege continent, strictae subsunt interpretationi.”

¹⁷⁹ Canon 2219, §1: “In poenis benignior est interpretatio facienda.”

“... [M]oral obligation to follow the ‘safer’ opinion in disputed matters of confessional secrecy.”¹⁸⁰

An indirect violation is that “... [W]hich results from an action which in itself is not the disclosure of sin and sinner, but which creates a resulting danger that an awareness of, or at least a suspicion about, the sinner and his sin will ensue.”¹⁸¹ Regatillo and Zalba cite several examples of indirect violations: a confessor is asked whether a penitent has received absolution, and the confessor denies it; a confessor hears a small number of confessions, and then refers to a sin confessed on that occasion; a confessor says that a particular sin which he has heard in confession is common in a particular community, unless the community is very large and the sin is of public knowledge; or a confessor of a small community tells the retreat preacher in a small community the defects that need to be corrected, or if the community is large the defects of a few.¹⁸²

There are a few expressions in the second part of c. 2369, §1 which need further explanation. The pronoun “qui” in the canon refers specifically to “confessarium” and not to non-confessors.¹⁸³ Hence, it would include any priest hearing confession, even one

¹⁸⁰ KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 53.

¹⁸¹ ROOS, *The Seal of Confession*, p. 81; REGATILLO and ZALBA, *Theologiae moralis summa*, III, n. 493.

¹⁸² “*Violaret saltem indirecte: a) Qui diceret se non absolvisse peccatorem etiam publicum, qui se iacet di absolutione recepta. Interrogatus de aliquo: respondeat: Quaere ab illo. Si quem non absolverit et minister in missa interroget: recito Confiteor pro communione istius, respondeat: Vide num accedat. b) Si auditis paucis poenitentibus, refert peccatum ab uno accusatum. c) Si dicis in aliquo loco grassari tale peccatum, ex confessione notum, nisi sit publicum et locus valde amplius (saltem 3,000 incolarum). d) Si confessarius parvae communitatis cum direttore exercitiorum communicaret defectus correctione dignos; vel etsi communitas sit numerosa, sed defectus paucorum*” (REGATILLO and ZALBA, *Theologiae moralis summa*, vol. III, n. 493).

¹⁸³ “*Can. 2369. §1. Confessarium, non «interpretem, aliosque omnes ad quos notitia confessionis quoquo modo pervenerit» (can. 889, §2), sed sacerdotem a) qui sacramentalem confessionem recepit, et sigillum sacramentale in cit. can. explicatum, directe «verbo, signo, prodens peccatorem» qua talem in*

without proper jurisdiction to hear the confession, but not a lay person.¹⁸⁴ This conclusion is supported also by the fact that the *ferendae sententiae* penalties attached to the delict set out in c. 2368, §1 apply only to confessors:

Whoever commits the crime of solicitation mentioned in Canon 904 is to be suspended from the celebration of Mass and from hearing sacramental confessions and even, for the gravity of the delict, is to be declared incapable of receiving them, is to be deprived of all benefices, dignities, active and passive voice, and is to be for all of these declared incapable, and in more serious cases is to be also subject to degradation.¹⁸⁵

It is worth noting here that in c. 2369, §1 there is no reference to the possibility of excusing one from *ferendae sententiae* penalties in case of diminution of knowledge or will in the commission of the delict. The silence in the canon seems to imply that because the matter under discussion concerns *ferendae sententiae* penalties the judge has the discretion in considering those factors in the application of the penalty.¹⁸⁶

The second paragraph of c. 2369 did not establish any particular penalty for non-confessors who directly or indirectly violate confessional secrecy. This was left to the

confessione, *violare* seu frangere illud, idest, ut ait Conc. Later. in cap. «Omnis utriusque sexus» 12 (V, 38): «peccatum in poenitentiali iudicio sibi detectum revelare» *praesumpserit* ita ut desit «quaelibet imputabilitatis imminutio sive ex parte intellectus (excepta «ignorantia affectata sive legis sive solius poenae») sive ex parte voluntatis» (can. 2229, §§ 1, 2), talem delinquentem *manet*, quia ipso facto incurritur, *excommunicatio specialissimo modo Sedi Apostolicae reservata*; b) *qui vero* supple «confessarius» *indirecte tantum*, scilicet: «verbo, signis, aliove quovis modo» quidquam incaute agens, quo «prodat peccatorem,» attamen subintelligendo ex contextu: «sigillum sacramentale revelare praesumpserit,» per quod verbum designatur huius indirectae violationis plena deliberatio, *obnoxius est poenis* ferendae sententiae omnibus, *de quibus in can. 2368, §1, cum gradatione ibidem declarata*; quibus «verbis facultativis,» potiusquam «praeceptivis» in can. praec. adhibitis, «utitur canon» praesens (can. 2223, §§ 2, 3) (A. BLAT, *Commentarium textus Codicis iuris canonici*, Romae, Collegio «Angelico,» 1924, vol. V, n. 211); also see KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 56.

¹⁸⁴ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 54.

¹⁸⁵ Canon 2368 §1: «Qui solicitationis crimen de quo in can. 904, commiserit, suspendatur a celebratione Missae et ab audiendis sacramentalibus confessionibus vel etiam pro delicti gravitate inhabilis ad ipsas excipiendas declaretur, privetur omnibus beneficiis, dignitatibus, voce activa et passiva, et inhabilis ad ea omnia declaretur, et in casibus gravioribus degradationi quoque subiiciatur.»

¹⁸⁶ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 57.

discretion of the trial judge.¹⁸⁷ The use of the adverb “temere” in this paragraph parallels the verb “praesumpserit” in the first paragraph. This verb implies sufficient knowledge and freedom of will to commit the delict and incur the *ferendae sententiae* penalty.¹⁸⁸

Some important principles can be identified here with respect to the penal law on evidence at trials according to *CIC/1917*. First, the competent judge in cases of violation of the seal of confession was the ordinary.¹⁸⁹ Second, it was *probably* not necessary to have the penitent’s express permission to hold a trial in case of violation of the sacramental seal.¹⁹⁰ Third, the judge in a trial could encounter two types of situations with respect to evidence. In the first situation, the priest accused of the delict could freely admit his guilt, and this would constitute sufficient evidence of the delict. The second situation could involve admission of the violation, but the priest could claim either to have heard the matter outside the confessional, or had the penitent’s permission to reveal the matter. In these situations, the onus of proof falls on the confessor.¹⁹¹ Kurtscheid notes that in the past cases involving direct violation of the sacramental seal were rare, with about 17 reported incidents up to the early part of the 20th century.¹⁹²

¹⁸⁷ See *ibid.*

¹⁸⁸ See BLAT, *Commentarium textus Codicis iuris canonici*, vol. V, n. 211; KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 58.

¹⁸⁹ See M. CONTE A CORONATA, *Institutiones iuris canonici, ad usum utriusque cleri et scholarum*, Taurini, Marietti, 1935, vol. IV, n. 2150. See also KURTSCHIED, *A History of the Seal*, p. 311.

¹⁹⁰ See KURTSCHIED, *A History of the Seal*, p. 311.

¹⁹¹ See *ibid.*, pp. 312-313.

¹⁹² See *ibid.*, p. 313.

2.3.2 – The 1983 Code of Canon Law

The principal legal norms governing the sacramental seal of confession have been reiterated in the 1983 Code of Canon Law, with only some minor changes. The Apostolic Letter *Sacramentorum sanctitatis tutela* promulgated *motu proprio* by Pope John Paul II in 2001, has added additional norms on the violation of the seal of confession.

The *Rite of Penance (Ordo poenitentiae)* promulgated in 1974 stated the following norm on the sacramental seal: “As the minister of God the confessor comes to know the secrets of another’s conscience, and he is bound to keep the sacramental seal of confession absolutely inviolate.”¹⁹³ This concise statement may be said to be a synthesis of all of the theological and canonical developments which had gradually crystallized into the law on the sacramental seal of confession as we know it today. The *Rite of Penance (Ordo poenitentiae)* is a primary source document cited in the *fontes* for c. 983, §1 of the 1983 Code of Canon Law.

In this section, we will analyze the general provisions in the 1983 Code of Canon Law on the seal of confession and related canons.

2.3.2.1 – General Provisions

The inviolability of the sacramental seal is stated in c. 983 of the 1983 Code. This canon reads:

§1. The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason.

¹⁹³ “Confessarius, sciens se uti Dei ministrum secretam fratris sui conscientiam congnovisse, officio sigillum sacramentale sanctissime servandi tenetur” (*Rituale Romanum, ex decreto sacrosancti oecumenici Concilii Vaticani II instauratum, auctoritate Pauli PP. VI promulgatum, Ordo poenitentiae*, Typis polyglottis Vaticanis, 1974, p. 15; English trans. in *Rite of Penance*, Ottawa, Canadian Catholic Conference, 1975, p. 14).

§2. The interpreter, if there is one, and all others who in any way have knowledge of the sins from confession are also obliged to observe secrecy.¹⁹⁴

Simply stated, the seal of confession entails the obligation of secrecy on the part of a confessor which forbids disclosure of all matter learned in the course of a sacramental confession. It arises from a self-accusation of sin with an intent to obtain absolution.

The rationale for the rule of secrecy is twofold. The first rationale is subjective and it is rooted in the practical need to maintain privacy. Privacy is necessary to foster the candid disclosure of otherwise embarrassing personal conduct and to obtain absolution of sins in accordance with the Church's teaching. The second rationale is objective, and it is based on the obligation of the sacrament itself.¹⁹⁵ Thus, the obligation to maintain the sacramental seal is founded on both the good of the penitent and of the sacrament.

The provisions of the 1983 Code differ from those found in the 1917 Code on two very minor points: First, the phrase "nefas est" (akin to an warning against committing a crime) replaces the phrase "caveat diligenter," thereby placing an apparently stronger emphasis on the seriousness of the duty of the confessor. F. Loza interprets this phrase as "... [I]mpious, sacrilege, execrable, against everything human and divine, something of supreme iniquity."¹⁹⁶ Second, the phrase "prodat aliquatenus peccatorem" found in the

¹⁹⁴ Canon 983: "§1. Sacramentale sigillum inviolabile est; quare nefas est confessario verbis vel alio quovis modo et quavis de causa aliquatenus prodere paenitentem.

"§2. Obligatione secretum servandi tenentur quoque interpres, si detur, necnon omnes alii ad quos ex confessione notitia peccatorum quoquo modo pervenerit."

¹⁹⁵ See WOESTMAN, *Sacraments*, p. 272.

¹⁹⁶ LOZA, Commentary on c. 983, p. 818. Moriarty, however, questions the weight that should be assigned to this phrase: see R. MORIARTY, "Violation of the Confessional Seal and the Associated Penalties," in *Jur*, (1998), pp. 158-159.

1917 Code is replaced with “*aliquatenus prodere paenitentem*” which reveals a more pastoral approach: from “sinner” to “penitent.”

Loza succinctly states the essential matter which is covered by the modern law on the seal of confession:

- any grave sin, confessed even “in genere,” known only from confession;
- venial sins, concretely and specifically confessed, known only from confession;
- denial of absolution: the seal of confession obligates “*ex confessione*,” because it was heard, even if absolution is not granted;
- grave imposed penitence: this would be an implicit revelation of the grave sin confessed;
- the circumstances confessed about the penitent and about the sins (for example, the time, the place, the way, the condition of the penitent or of the partner), that identify the sin and/or the penitent “*aliquatenus*”: directly or indirectly;
- sins of other people that the penitent—eventually, spontaneously or even illegitimately—might have revealed in confession; for example, the partner (cf. c. 979).¹⁹⁷

It should also be noted that generally the confessor should not speak to the penitent about any sins previously confessed, unless the penitent on his or her own initiative raises them.¹⁹⁸

It is clear that the general principles on the seal of confession presented in both Codes are *substantially* identical. Therefore, we can say that the legitimate interpretations of c. 889 of the 1917 Code can be applied equally to c. 983 of the 1983 Code.¹⁹⁹ It should be noted also that, in their interpretations of c. 983, modern authors generally distinguish between the seal of confession applying to confessors and the secret of confession

¹⁹⁷ LOZA, Commentary on c. 983, p. 819.

¹⁹⁸ See *ibid.*, p. 820.

¹⁹⁹ See, for example, WOESTMAN, *Sacraments*, pp. 272-276; J. BEAL, J. CORIDEN, T. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, Paulist Press, 2000, pp. 1163-1165; CUSCHIERI, *The Sacrament of Reconciliation*, pp. 288-321; *Code of Canon Law Annotated*, p. 756.

applying to all others.²⁰⁰ Likewise, although the seal does not apply to penitents, penitents should nevertheless keep remain concerning confessional communications.²⁰¹

2.3.2.2 – Related Provisions

The prohibition of the 1983 Code on the disclosure of confessional matter extends also to the *use* of knowledge acquired during confession. Canon 984, which is substantially the same as c. 890 of the 1917 Code, stipulates as follows:

§1. A confessor is prohibited completely from using knowledge acquired in confession to the detriment of the penitent even when any danger of revelation is excluded.

§2. A person who has been placed in authority cannot use in any manner for governance the knowledge about sins which he has received in confession at any time.²⁰²

Two important values underlie this canon. First, the sanctity of the sacrament and second, the dignity and security of the penitent. The use of knowledge of the confessional matter to the detriment of the penitent even if there is no danger of revealing the sins and the identity of the penitent is prohibited. Therefore, the use of confessional matter in the appointment, promotion, or election of a person is prohibited. This approach of the law reveals the utmost importance the Church gives to the sacrament of confession and to the

²⁰⁰ See WOESTMAN, *Sacraments*, p. 277; LOZA, Commentary on c. 983, p. 818, and V. DE PAOLIS, Commentary on c. 1388, in *Exegetical Commentary*, vol. IV/1, p. 525; *Code of Canon Law Annotated*, p. 756; *New Commentary*, p. 1164; G. SHEEHY et al. (eds.) *The Canon Law, Letter & Spirit: A Practical Guide to the Code of Canon Law*, prepared by CLSGBI in association with CCLS, Collegeville, The Liturgical Press, 1995, p. 799.

²⁰¹ “It is obvious, however, at least by implicit agreement, that out of a duty of fairness and, I would say, out of noble regard for the priest confessor, he in turn must keep silent about what the confessor, trusting in his discretion, discloses to him during sacramental confession” (JOHN PAUL II, “Seal of Confession Must be Kept,” p. 15).

²⁰² Canon 984: “§1. Omnino confessario prohibetur scientiae ex confessione acquisitae usus cum paenitentis gravamine, etiam quovis revelationis periculo excluso.

“§2. Qui in auctoritate est constitutus, notitia quam de peccatis in confessione quovis tempore excepta habuerit, ad exteriorem gubernationem nullo modo uti potest.”

dignity and security of penitents.²⁰³ Some authors maintain that even the use of knowledge to the *benefit* of the penitent is not permitted, since it is impossible to safely determine such matters with certainty.²⁰⁴ With respect to the means of acquisition of knowledge of sins, Loza notes:

Such knowledge may have been acquired in any way or from any medium: from themselves (involuntarily or maliciously), or from other people (for example, due to the violation of the strict seal, or by the revelation of the penitential secret by a third party). The cognitive link between the news of the sins and the origin of such knowledge “ex confessione” is always required.²⁰⁵

The only difference between the 1917 Code and the 1983 Code on the use of knowledge obtained within the context of confession is the change from “superiores” in the 1917 Code to “qui in auctoritate” in the 1983 Code. This suggests that the present prescript is broader in application and is meant to cover all possible situations involving those who exercise authority over a penitent.

Canon 985 of the 1983 Code is the equivalent of c. 891 of the 1917 Code. The text of c. 985 reads as follows:

The director of novices and his associate and the rector of a seminary or other institute of education are not to hear the sacramental confessions of their students residing in the same house unless the students freely request it in particular cases.²⁰⁶

The only difference between this canon and that of the 1917 Code is the omission of the phrase “ex gravi et urgenti causa” in the present canon. This omission seems to

²⁰³ See *New Commentary*, pp. 1164-65; *The Canon Law, Letter & Spirit*, p. 536; *Code of Canon Law Annotated*, p. 757, which suggest that *Naturalem et divinam* should continue to be taken into account when applying this canon.

²⁰⁴ *The Canon Law, Letter & Spirit*, p. 536.

²⁰⁵ LOZA, *Commentary on c. 983*, p. 822.

²⁰⁶ Canon 985: “Magister novitiorum eiusque socius, rector seminarii aliusve instituti educationis sacramentales confessiones suorum alumnorum in eadem domo commorantium ne audiant, nisi alumni in casibus particularibus sponte id petant.”

suggest greater freedom on the part of the penitent to choose confessors.²⁰⁷ However, the present norm does not in any way mitigate the prohibition against the superiors' use of the confessional knowledge against their subordinates.²⁰⁸ Also, the fact that the students may request it only "in casibus particularibus" suggests that it is not meant to be a regular occurrence.

Canon 990 governs the use of interpreters. It states: "No one is prohibited from confessing through an interpreter as long as abuses and scandals are avoided and without prejudice to the prescript of can. 983, §2."²⁰⁹ This norm is substantially identical to c. 903 of the 1917 Code.

Canon 1548, §2, 1°, the equivalent of c. 1755, §2, 1° of the 1917 Code, exempts the following from testifying in a trial: "clerics regarding what has been made known to them by reason of sacred ministry."²¹⁰ This norm is broader than the provision of c. 1755, §2, 1° of the 1917 Code in two ways. First, the phrase "parochi alique sacerdotes" is replaced by "clerici," which would include also deacons. Second, because deacons are included in the exemption, the phrase "extra sacramentalem confessionem" is replaced with the phrase "ratione sacri ministri," which implies matters that are disclosed within the context of a pastoral relationship.

²⁰⁷ See WOESTMAN, *Sacraments*, p. 278.

²⁰⁸ See *ibid.*; *New Commentary*, p. 1165; *Code of Canon Law Annotated*, p. 756; *The Canon Law, Letter & Spirit*, p. 537.

²⁰⁹ Canon 990: "Nemo prohibetur quominus per interpretem confiteatur, vitatis quidem abusibus et scandalis atque firmo praescripto can. 983, §2."

²¹⁰ Canon 1548, §2, 1°: "clerici, quod attinet ad ea quae ipsis manifestata sunt ratione sacri ministerii..."

Canon c. 1550, §2,2° is the equivalent of c. 1757, §3,2° of the 1917 Code. It identifies the matter that cannot be produced as evidence in a trial:

The following are considered incapable: priests regarding all matters which they have come to know from sacramental confession even if the penitent seeks their disclosure; moreover, matters heard by anyone and in any way on the occasion of confession cannot be accepted even as an indication of the truth.²¹¹

The only visible difference between this canon and its predecessor in the 1917 Code is the use of the phrase “etsi poenitens eorum manifestationem petierit” in place of “etsi a vinculo sigilli soluti sint.” This difference does not change the substance of the norm.

2.3.2.3 – Penal Sanctions

The violation of laws governing the seal of confession is subject to a variety of canonical sanctions in the 1983 Code. We will briefly identify these in this section. First, we will consider the sanctions attached to direct and indirect violations. Second, we will analyze the canons which support the penal sanctions. Third, we will examine the 2001 Apostolic Letter *Sacramentorum sanctitatis tutela*.

The absolute prohibition against the violation of the sacramental seal is matched by the most severe penalty attached to such a violation. Canon 1388 states this penalty as follows:

§1. A confessor who directly violates the sacramental seal incurs a *latae sententiae* excommunication reserved to the Apostolic See; one who does so only indirectly is to be punished according to the gravity of the delict.

²¹¹ Canon 1550, §2, 2°: “Incapaces habentur: sacerdotes, quod attinet ad ea omnia quae ipsis ex confessione sacramentali innotuerunt, etsi poenitens eorum manifestationem petierit; immo audita a quovis et quoquo modo occasione confessionis, ne ut indicium quidem veritatis recipi possunt.”

§2. An interpreter and the others mentioned in can. 983, §2, who violate the secret, are to be punished with a just penalty, not excluding excommunication.²¹²

Regarding direct violations, those who hear the revelation need not personally know the penitent.²¹³ Moreover, a direct violation occurs even if the penitent is deceased.²¹⁴

V. De Paolis provides the following interpretation of the distinction between direct and indirect violations in the current canon:

Direct violation of the sacramental seal occurs when a confessor reveals the object of the sacramental seal together with the name of the person who committed the sin. *Indirect* violation occurs when the matter revealed is the object of the seal together with the circumstances, which carry the danger of revealing the name of the sinner or raising suspicion about him or her.²¹⁵

The primary object of the seal is all sins confessed; the secondary object is other confidential information known only through confession.²¹⁶ Depending on the circumstances, revelation by a confessor of the mere fact of confession or absolution *without* revelation of the object itself would not constitute a direct violation of the seal.²¹⁷

Indirect violation may occur when both the sin and sinner “can be deduced from the words, gestures, deeds, or omissions of the confessor: the greater the possibility of deduction, the closer indirect violation will be to direct violation and the more serious the

²¹² Canon 1388: “§1. Confessarius, qui sacramentale sigillum directe violat, in excommunicationem latae sententiae Sedi Apostolicae reservatam incurrit; qui vero indirecte tantum, pro delicti gravitate puniatur.

“§2. Interpres alique, de quibus in can. 983, §2, qui secretum violant, iusta poena puniantur, non exclusa excommunicatione.”

²¹³ See W.WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 2nd rev. ed. and updated, Ottawa, Saint Paul University, 2003, p.132.

²¹⁴ See *ibid.*

²¹⁵ DE PAOLIS, Commentary on c. 1388, p. 526; also see *Code of Canon Law Annotated*, p. 1078.

²¹⁶ See WOESTMAN, *Ecclesiastical Sanctions*, p. 132.

²¹⁷ See *ibid.*, pp. 132-133.

offence.”²¹⁸ Although there is no canonical penalty for the use of confessional knowledge, it may in certain circumstances constitute an indirect revelation.²¹⁹

Loza indicates the following with respect to direct and indirect violations:

Such distinction is relevant in the penal sphere (c. 1388 §1); but is irrelevant regarding that which is sanctioned in the norm: “nefas est confessario... aliquatenus prodere paenitentem.” Any violation of the seal—direct or indirect—is wholly prohibited and is heinous.²²⁰

It should also be noted that direct violation requires that the confessor commit the delict deliberately, whereas indirect violation only requires that the confessor commit the delict negligently.²²¹ Both direct and indirect violations result from some wilful act. However, the object of the will in the two delicts is different. In a direct violation, the confessor directly intends disclosure of both the object of the confession and identity of the penitent. In an indirect violation, the intention is directed more at the object of the seal, with the *risk* of revelation of identity by the confessor.²²²

Many authors take the position that a confessor can be released from the seal of confession by the penitent, in which case the confessor would not incur any penalty for relating information received in the confessional.²²³ However, other authors maintain that

²¹⁸ *Code of Canon Law Annotated*, p. 1078; also see LOZA, *Commentary on c. 983*, p. 818.

²¹⁹ See WOESTMAN, *Ecclesiastical Sanctions*, p. 132.

²²⁰ LOZA, *Commentary on c. 983*, p. 818.

²²¹ See *The Canon Law, Letter & Spirit*, p. 536.

²²² See CUSCHIERI, *The Sacrament of Reconciliation*, p. 307.

²²³ See JOHN PAUL II, “Seal of Confession Must be Kept,” p. 14; WOESTMAN, *Ecclesiastical Sanctions*, p. 133.

a penitent may *not* release a confessor from the obligation of the seal of confession.²²⁴

Those who support the possibility of releasing the confessor generally maintain that the confession itself need not be repeated, but the authorization must be explicit and clear.²²⁵

With regard to releasing the confessor from the seal of confession, there are two arguments that may be put forward as to why a confessor may be released from the seal of confession from the point of view of modern canon law. The first is the use of the word “prodere” in c. 983, §1, which is invariably translated as “betray.” How can the confessor betray a penitent, when the penitent has, for his own personal reasons and self-interests, released him from the seal? Where is the betrayal, the violation of trust that would bring the confessor’s action in relating matters previously heard under the seal of confession, but now released, within the provisions of this canon?

The second argument involves the application of the legal maxim, “whatever is not expressly forbidden, is permitted.” Nowhere is it expressly forbidden to release a confessor from the seal of confession. One would expect that for matters touching on a grave obligation such as the seal of confession there would be some statement in the body of canon law which forbids such a practice.

A more detailed consideration of release from the seal of confession is beyond the scope of our study since it does not play a significant role in Canadian law. This may be contrasted with the law of the United States where each state has waiver provisions for

²²⁴ See, for example, *The Canon Law, Letter & Spirit*, p. 535.

²²⁵ See JOHN PAUL II, “Seal of Confession Must be Kept,” p. 14; LOZA, *Commentary on c. 983*, p. 820; WOESTMAN, *Sacraments*, p. 275; BREWER, “The Right of the Penitent to Release the Confessor from the Seal,” pp. 424-476; W. WOESTMAN, “A Penitent Gives Confessor Permission to Reveal Sins,” in K. VANN & J. DONLON (eds.), *RR 1997*, Washington, DC, CLSA, 1997, pp. 70-72; D. DEIBEL, “The Oregon Case in Review,” in *The Priest*, August 18, 1998, pp. 17-20; *New Commentary*, p. 1681.

confessional secrecy. Hopefully the next editions of the Codes of Canon Law will put this issue to rest with an express declaration regarding release from the seal of confession. Until then, it remains a disputed point of law amongst canonists.

One who *directly* violates the seal of confession is liable to the penalty of automatic excommunication whose remission is reserved to the Apostolic See. The penalty for indirect violation is *ferendae sententiae* and this is left to the discretion of the Congregation for the Doctrine of the Faith. In other words, it is the Congregation which determines the penalty proportionate to the gravity of the delict.²²⁶

Prior to 30 April 2001, when a *latae sententiae* excommunication was incurred as a result of direct violation of the seal, the matter had to be referred to the Apostolic Penitentiary according to the letter *Pro memoria* issued on 24 October 1983 by that Dicastery.²²⁷ In section 3 of that letter, the following criteria for assessing the direct violation of the seal of confession were indicated:

Direct violation of the sacramental seal (c. 1388): It is proper to indicate whether the violation was the result of a developed intention, that is, with full advertence and deliberate consent, or rather from inadvertence (in priest confessor, now a penitent troubled by strong scruples); whether the ones hearing (priest? lay persons? prudent people? talkative people?) understood it to be a violation of the seal or not, whether or not some material or moral injury befell penitents because of the violation of the seal. It is also useful to know something concerning the usual actions of the accused, that is, whether previously he conducted himself most cautiously in observing secrecy of these things, or did he seem rather to be a man of an imprudent and unstable nature.²²⁸

There are, in the 1983 Code, canons which concern the application of penal law. Although a penalty for the violation of the seal of confession is imposed like any other

²²⁶ See WOESTMAN, *Ecclesiastical Sanctions*, p. 133.

²²⁷ PAENITENTIARIA APOSTOLICA, Letter, *Pro memoria*, 24 October 1983, in *CLD*, vol. 11, pp. 49-52.

²²⁸ *Ibid.*, p. 51.

penalty in accord with the norms of cc. 1341-1353, there are some canons that are specifically relevant to the application of penalties for delicts involving the sacramental seal. These are: c. 15 on doubt of law and fact (equivalent to cc. 14 and 2233 of *CIC/1917*), and c. 18 on strict interpretation of penal law (equivalent to cc. 19 and 2219 of *CIC/1917*).

Other canons relevant to the application of penal law on delicts involving the sacramental seal are c. 1321 (deliberate and accidental violations of the law, equivalent to *CIC/1917* cc. 2199 and 2203) and c. 1322 (incapacity due to lack of reason, equivalent to c. 2201, §1 of *CIC/1917*). Canon 1323 (which excuses certain persons from penalties); c. 1324 (which mitigates penalties); c. 1324, §2 (drunkenness), and c. 1324, §3 (heat of passion, equivalent to c. 2206 of *CIC/1917*), are also applicable to the violation of the sacramental seal of confession.

The Apostolic Letter *Sacramentorum sanctitatis tutela*, issued on 30 April 2001,²²⁹ has introduced some important norms in penal law. Through this apostolic letter, Pope John Paul II promulgated the substantive and procedural norms governing *Graviora delicta*. The Letter grants exclusive competence to the Congregation for the Doctrine of the Faith to judge in the external forum the delict of direct violation of the seal of confession,²³⁰ while the Apostolic Penitentiary remains competent to deal with the

²²⁹ JOHN PAUL II, Apostolic letter, *Sacramentorum sanctitatis tutela*, 30 April 2001, in *AAS*, 93 (2001), pp. 737-739.

²³⁰ Art. 3, 3°: "Delicta contra sanctitatem sacramenti Pœnitentiæ, Congregationi pro Doctrina Fidei cognoscendo reservata, sunt: violatio directa [et indirecta] sigilli sacramentalis, de qua in can.1388, §1 Codicis Iuris Canonici et in can. 1456, §1 Codicis Canonum Ecclesiarum Orientalium."

internal forum aspects of the delict.²³¹ Subsequent to the promulgation of the Apostolic Letter *Sacramentorum sanctitatis tutela*, that is on 7 February 2003, the Holy Father decreed reservation of the delict of indirect violation of the seal of confession to the Congregation for the Doctrine of the Faith.²³² It may have been added to support confessors who might be pressured to indirectly violate the seal in civil courts.²³³

According to *Sacramentorum sanctitatis tutela*, ordinaries who receive a report of a reserved delict are to complete a preliminary investigation in accord with the norm of law and communicate the matter to the Congregation, which will then issue instructions as to how to proceed.²³⁴ Ordinaries are to follow the standard provisions for investigations (*CIC/1983 c. 1717; CCEO c. 1468*).²³⁵ Cases which have been referred directly to the

²³¹ Art. 1, §1: "Congregatio pro Doctrina Fidei, ad normam art. 52 Constitutionis Apostolicæ *Pastor bonus*, cognoscit delicta graviora tum contra mores tum in sacramentorum celebratione commissa atque, ubi opus fuerit, ad canonicas sanctiones declarandas aut irrogandas ad normam iuris, sive communis sive proprii, procedit, salva competentia Pænitentiariæ Apostolicæ et firma manente *Agendi ratione in doctrinarum examine*."

²³² See *Decisiones Summi Pontificis*, in CCLS, *Newsletter*, Vol. XXVIII, No. 1 (Summer 2003), p. 9. It was during an audience granted to Cardinal Ratzinger on 7 February 2003 that the Holy Father decreed the inclusion of indirect violation of the seal of confession among the *graviora delicta* reserved to the CDF. For further discussion on the issue, see C. SCICLUNA, "The Procedure and Praxis of the Congregation of the Doctrine of the Faith Regarding *Graviora Delicta*," in Dugan, *The Penal Process*, p. 237.

²³³ See P. COGAN, "The Sacrament of Reconciliation: Issues, Praxis, and the Future," in *CLSA Proc*, 66 (2004), p. 89.

²³⁴ Art. 13: "Quoties Ordinarius vel Hierarcha notitiam saltem verisimilem habeat de delicto reservato, investigatione prævia peracta, eam significet Congregationi pro Doctrina Fidei quæ, nisi ob peculiariora rerum adiuncta causam sibi advocet, Ordinarium vel Hierarcham ad ulteriora procedere iubet, firmo tamen iure appellandi contra sententiam primi gradus tantummodo ad Supremum Tribunal eiusdem Congregationis."

²³⁵ See R. OLIVER, "*Sacramentorum sanctitatis tutela*: Overview and Implementation of the Norms Concerning the More Grave Delicts Reserved to the Congregation for the Doctrine of the Faith," in *CLSA Proceedings*, 65 (2003), p. 161.

Congregation are investigated by the Congregation itself.²³⁶ It should be noted that in order to safeguard secrecy, the name of the accuser may not be revealed unless the accuser expressly consents.²³⁷ Once the preliminary investigation is complete, cases are to be adjudicated through judicial process (*CIC*/1983 c. 1721, or the extra-judicial process in c. 1720 if dispensed; *CCEO* c. 1472, or c. 1486 if dispensed).²³⁸ The period of prescription is 10 years.²³⁹

On 23 September 1988, the Congregation for the Doctrine of the Faith had decreed the extension of the *latae sententiae* excommunication to those who recorded through technical instruments or made known through instruments of social communication matters disclosed within the context of sacramental confession.²⁴⁰ The penalty applies whether or not the confession is fictitious, and even if the penitent has

²³⁶ Art. 14: "Si casus ad Congregationem directe deferatur, investigatione prævia haud peracta, munera processui præliminaria, quæ iure communi ad Ordinarium vel Hierarcham spectant, ab ipsa Congregatione adimplentur."

²³⁷ Art. 20, §3: "Animadvertendum tamen est ut quodvis periculum violandi sigillum sacramentale omnino vetitur." Prior to the promulgation of *Sacramentorum sanctitatis tutela*, Pope John Paul II had expressed his sympathy for the accused confessor and the difficult position in which he finds himself due to the silence imposed upon him, and stated that "let the faithful who approach the Sacrament of Penance consider that in accusing the priest confessor they are attacking a defenseless man: the divine institution and Church law bind him in fact to total silence *usque ad sanguinis eifusionem*" (JOHN PAUL II, "Seal of Confession Must be Kept," p. 14).

²³⁸ Art. 17: "Delicta graviora Congregationi pro Doctrina Fidei reservata, nonnisi in processu iudiciali persequenda sunt." For further details on procedure, see SCICLUNA, "The Procedure and Praxis of the Congregation of the Doctrine of the Faith," pp. 240-243.

²³⁹ Art. 5, §1: "Actio criminalis de delictis Congregationi pro Doctrina Fidei reservatis præscriptione extinguatur decennio." For further discussion on this matter, see D. CITO, "Prescription in Penal Matters," in Dugan, *The Penal Process*, pp. 192-193.

²⁴⁰ CONGREGATION FOR THE DOCTRINE OF THE FAITH, Decree, 23 September 1988, in *AAS*, 80 (1988), p. 1367; *CLD*, 12, pp. 809-810. This decree reintroduced the 1973 declaration *Allo scopo* of CDF which forbade recordings and publication of confessions. See CONGREGATION FOR THE DOCTRINE OF THE FAITH, Declaration, *Allo scopo*, 23 March 1973, in *AAS*, 65 (1975), p. 678; *CLD*, 8, p. 1214. The prescript of this declaration was not included in the 1983 Code.

recorded his own confession. Also, the words recorded may be those of the penitent or of the confessor. In some places, there is a practice of videotaping first confessions of children as means of marking this important sacramental rite of passage. The wording of the Decree seems to be aimed at the matter of confession, not the visual fact of confession. Accordingly, we presume that as long as the confessional communications themselves are inaudible on the videotape, then the terms of this Decree are not violated.

Subsequent to the promulgation of the Apostolic Letter *Sacramentorum sanctitatis tutela*, the Holy Father has re-affirmed this sanction. It is currently a delict reserved to the Congregation for the Doctrine of the Faith on 7 February 2003.²⁴¹

2.3.3 – The Eastern Code

The Eastern Catholic Churches have developed their own traditions regarding the sacrament of penance.²⁴² However, one of the key unifying principles which underlies

²⁴¹ Art. 3, 4°: “captio quovis technico instrumento facta aut evulgatio socialis communicationis instrumentis operata earum quæ in sacramentali confessione a confessario vel a pœnitente dicuntur.” Also see *Decisiones Summi Pontificis*, p. 9.

²⁴² See M. ARRANZ, “Les formulaires de confession dans la tradition byzantine: les sacrements de la restauration de l’ancien euchologe Constantinopolitain,” in *Orientalia Christiana Periodica*, 58 (1992), pp. 423-459; 59 (1993), pp. 63-89, 357-386; M. ARRANZ, “Les prières pénitentielles de la tradition byzantine: les sacrements de la restauration,” in *Orientalia Christiana Periodica*, 57 (1991), pp. 87-143, 309-329; 58 (1992), pp. 23-82; M. ARRANZ, *I Penitenziali Bizantini*, *Kanonika*, 3, Rome, Pontificio Istituto Orientale, 1993, 207 pp.; M. ARRANZ, *Put’Pokayaniya Tainstvo Pokayaniyav v Vizantiyskoy Traditsii, Istoricheskiy op’yt*, Rome, 1999, Samizdat, 354 pp.; T. BECQUET, “La pratique de la confession chez les slaves,” in *Irenikon*, 1 (1926), pp. 343-349; I. DALMAIS, “Le sacrement de pénitence chez les Orientaux,” in *La maison Dieu*, 56 (1958), pp. 22-29; I. DALMAIS, “La pénitence dans le rit byzantin selon les livres liturgiques paléoslaves,” in *Irenikon*, 7 (1930), pp. 577-588; C. KOROLEVSKII, “The Administration of the Sacrament of Confession in the Byzantine Rite,” trans. by J. DOYLE, in *Stoudion*, (1925), pp. 36-45, 87-110, 125-126; L. LIGIER, “Le sacrement de pénitence selon la tradition orientale,” in *Nouvelle revue théologique*, 89 (1967), pp. 940-967; L. LIGIER, “Dimension personnelle et dimension communautaire de la pénitence en Orient,” in *La maison Dieu*, 90 (1967), pp. 155-188; F. NIKOLASCH, “The Sacrament of Penance: Learning from the East,” in *Concilium*, 7-1 (1971), pp. 65-75; A. RAES, “Les Rites de la Pénitence chez les Arméniens,” in *Orientalia Christiana Periodica*, 13 (1947), pp. 648-655; A. RAES, “Le rite de la confession chez les Malankars,” in *Orientalia Christiana Periodica*, 16 (1950), pp. 448-459; H. SCERRI, “Piste per una teologia del sacramento della penitenza in due preghiere penitenziali dell’Eucologio Patriarcale Costantinopolitano (secoli VII, XI),” in *Nicolaus*, Fasc. 1-2, (2000), pp. 425-438.

these traditions and unites them with the Latin tradition is the seal of confession. As noted in Chapter One, this came about through the conciliar activity of these Churches in the last 500 years.

In the following section, we will consider the general provisions of *CCEO*, the related canons, and the penal sanctions. Where necessary we will compare the norms of *CCEO* with those of the 1983 Code.

2.3.3.1 – General Provisions

The principal norm of *CCEO* on the seal of confession is stated in c. 733 which reads as follows:

§1. The sacramental seal is inviolable; therefore the confessor must diligently refrain either by word, sign or any other manner from betraying the penitent for any cause.

§2. The obligation of observing secrecy also binds an interpreter if one is present, and also all others to whom knowledge of the sins from confession comes in any way.²⁴³

The 1980 *Schema* of *CCEO* on divine worship and sacraments had presented this norm in its draft form in c. 63, §1 as follows:

The sacramental seal is inviolable; therefore a confessor will diligently take care that neither by word nor by sign nor in any other way or for any reason will he betray in the slightest a sinner for any cause.²⁴⁴

The only difference between the text of c. 63, §1 of the 1980 *Schema* and that of the promulgated c. 733, §1 of *CCEO* is the change of *peccatorem* to *paenitentem*, and an

²⁴³ Canon 733: “§1. Sacramentale sigillum inviolabile est; quare caveat diligenter confessarius, ne verbo aut signo aut alio quovis modo et quavis de causa prodatur aliquatenus paenitentem.

“§2. Obligatione secretum servandi tenentur quoque interpres, si datur, necnon omnes alii ad quos ex confessione notitia peccatorum quoquo modo pervenerit.”

²⁴⁴ Canon 63, §1: “Sacramentale sigillum inviolabile est; quare caveat diligenter confessarius ne verbo aut signo aut alio quovis modo et quavis de causa prodatur aliquatenus peccatorem” (PONTIFICIA COMMISSIO CODICI IURIS CANONICI ORIENTALIS RECOGNOSCENDO, “Schema canonum de cultu divino et praesertim de sacramentis,” in *Nuntia*, 10 [1980], p. 30).

additional comma after the Latin noun “confessarius.” Apart from this minor change, the text of *CCEO* c. 733 is identical to the 1917 Code.

There is slight difference between the Latin and Eastern Codes. It is in the expression “*caveat diligenter*” (“diligently take care”) of *CCEO* c. 733, §1, which seems to be an admonition rather than the severe prohibition “*nefas est*” (“absolutely prohibited”), used in c. 983, §1 of the Latin Code. The text of the second paragraph of *CCEO* c. 733 is identical to that of c. 983, §2 of the Latin Code. Aside from the minor difference noted above, it seems the prescripts of both Codes are identical. D. Brewer makes the following observation on this point:

[C]anon 733 of the Code of Canons of the Eastern Churches does not use the words *nefas est*. Indeed, with the exception of one word change—*peccatorem* to *paenitentem*—§1 of the canon is exactly the same as the 1917 canon. It is unlikely the lawgiver, who is the same for both codes, intended any significance on the words *nefas est* in the Latin canon that would indicate a difference in the nature of the seal in the Latin and Eastern Churches.²⁴⁵

The norm on the seal of confession contained in the Eastern Code is the same as it is in the Latin Code, although the Latin Code appears to state it more emphatically. Hence the principles derived from the analysis and interpretation of the 1917 and 1983 Codes can be applied to *CCEO* c. 733. Since the norm on the sacramental seal of confession is of divine law, interpretations and applications cannot differ, notwithstanding the different phraseology.

2.3.3.2 – Related Provisions

Canon 734 of *CCEO* rules on the use of knowledge obtained in a sacramental confession, and it reads as follows:

²⁴⁵ BREWER, “The Right of the Penitent to Release the Confessor from the Seal,” p. 448.

§1. A confessor is absolutely prohibited the use of the knowledge acquired from confession when it might harm the penitent, even if every danger of revelation is excluded.

§2. One who is placed in authority can in no way use for external governance knowledge about sins that he has received in confession.

§3. Directors of institutes of education ordinarily do not administer the sacrament of penance to their students.²⁴⁶

The text of paragraph 1 is identical to c. 984, §1 of the 1983 Code and therefore both should have the same meaning. Apart from some stylistic differences, the texts of c. 984, §2 of the 1983 Code and *CCEO* c. 734, §2 are identical. The third paragraph of *CCEO* c. 734 is even less prescriptive than c. 983 of the 1983 Code. It simply suggests strongly that directors are not to administer the sacrament of penance to their students, and this suggestion is restricted to the students of their institute: “*instituti educationis*.” A. Cushman notes that while *CCEO* does not make the same distinctions as *CIC*/1983 does, the term “*moderatores*” would include assistant directors of institutes.²⁴⁷ Individuals subject to *CCEO* would do well to heed the civil reporting legislation requirements, which will be discussed in Chapter Four.

Canon 990 of the 1983 Code permits the use of an interpreter in confessing one's sins. However, this prescript is not found in *CCEO*. Nevertheless, because *CCEO* c. 733, §2 speaks of an interpreter, the legislator might have considered such a norm

²⁴⁶ Canon 734: “§1. Omnino confessario prohibetur scientiae ex confessione acquisitae usus cum paenitentis gravamine, etiam quovis revelationis periculo excluso.

“§2. Qui in auctoritate est constitutus, notitia, quam de peccatis in confessione quovis tempore excepta habet, ad externum regimen nullo modo uti debet.

“§3. Moderatores instituti educationis sacramentum paenitentiae suis alumnis ordinarie ne ministrent.”

²⁴⁷ See CUSCHIERI, *The Sacrament of Reconciliation*, p. 321.

unnecessary, since such a norm could just as well be included in the liturgical books of the Churches *sui iuris* following the principle of subsidiarity.

Canon 1229, §2, 1^o²⁴⁸ of *CCEO* exempts clerics from testifying in a trial with regard to matters known by reason of their sacred ministry (c. 1548, §2, 1^o of *CIC*/1983). Canon 1231, §2, 2^o²⁴⁹ declares confessors *incapable* of testifying in a trial (c. 1550, §2, 2^o of *CIC*/1983).

2.3.3.3 – Penal Sanctions

The Holy Office had previously decreed that the sanctions of *CIC*/1917 c. 2369 applied to all Oriental Rite Catholics.²⁵⁰ The current c. 1456 of *CCEO* now declares the possible penalties for violations of the seal of confession. This canon states:

§1. A confessor who has directly violated the sacramental seal is to be punished with a major excommunication, with due regard for can. 728, §1, n. 1; however, if he broke this seal in another manner, he is to be punished with an appropriate penalty.

§2. A person who has attempted in any way to gain information from confession or has given such information to others, is to be punished with a minor excommunication or a suspension.²⁵¹

This canon reflects the approach the Eastern Churches have traditionally taken with respect to imposition of canonical penalties. For example, *CCEO* contains no *latae*

²⁴⁸ Canon 1229, §2, 1^o: “[... ab obligatione respondendi eximuntur]: clerici quod attinet ad ea, quae ipsis manifestata sunt ratione sacri ministerii ...”

²⁴⁹ Canon 1231, §2, 2^o: “Incapaces ad testimonium ferendum habentur: sacerdotes, quod attinet ad ea omnia, quae ipsis ex confessione sacramentali innotuerunt, etsi paenitens eorum manifestationem petiit; immo audita a quovis et quoquo modo occasione confessionis ne ut indicium quidem veritatis recipi possunt.”

²⁵⁰ SACRED CONGREGATION OF THE HOLY OFFICE, Decree, 21 July 1934, in *AAS*, 26 (1934), p. 550; also see WOYWOD, *A Practical Commentary on the Code of Canon Law*, p. 557.

²⁵¹ Canon 1456: “§1. Confessarius, qui sacramentale sigillum directe violavit, excommunicatione maiore puniatur firmo can. 728 §1, n. 1; si vero alio modo hoc sigillum fregit, congrua poena puniatur.

“§2. Qui notitias ex confessione habere quoquo modo conatus est vel illas iam habitas aliis transmissit, excommunicatione minore aut suspensione puniatur.”

sententiae penalties. This is true even in the case of violation of the seal of confession. This unique pastoral approach towards delinquents is rooted in the historical and cultural backgrounds in which the Eastern Churches evolved, an issue which is beyond the scope of our present inquiry. On the basis of the above observations, the following differences between *CCEO* and *CIC/1983* may be noted.

First, c. 1456 of *CCEO* prescribes the penalty of “excommunicatio maior” for direct breach of the seal of confession. The penalty of “major excommunication” is described in detail in *CCEO* c. 1434. This penalty is not automatic, but is to be applied within the context of a trial.

Second, other violations which do not necessarily constitute direct violation of the sacramental seal do not have a penalty specified in law. Instead, they incur “congrua poena” to be determined by competent authority in each concrete case.

Third, the second paragraph of c. 1456 of *CCEO* creates two delicts, the first is any attempt to gain information from confession, and the second is giving the information obtained in confession to others. Both these delicts are punishable with the minor excommunication described in c. 1431 of *CCEO*. The second paragraph seems to incorporate the CDF’s 1988 Decree on electronic acquisition and publication of confessional matter. This penal norm of *CCEO* might be applicable to certain unique situations not covered by the 1983 Code. One situation could involve a civil judge, a member of an Eastern Rite Church, who might incur this penalty if he were to inquire in

court into confessional matters.²⁵² The same may be said for an Eastern Catholic lawyer who cross-examines a priest, or a reporter who questions a confessor about a confession, or anyone who even makes an inquiry of this nature of a confessor.

The penalty for delicts related to the confessional seal is imposed in accord with the penal procedural norms outlined in *CCEO* cc. 1401-1435. However, certain canons have particular importance to the application of penalties for delicts involving sacramental secrecy. These include c. 1496 concerning doubt of law and fact (equivalent to cc. 14 and 2233 of *CIC/1917*), and c. 1500 concerning strict interpretation of penal law (equivalent to cc. 19 and 2219 of *CIC/1917*). Other specific canons are: c. 1414 (persons only subject to penalties for deliberate violations, equivalent to *CIC/1917* cc. 2199 and 2203), c. 1415 (extenuating circumstances to be taken into account), and 1416 (recidivism).²⁵³ In view of the medicinal nature of penalties in the Eastern tradition, *CCEO* does not expressly list, as does *CIC/1983*, factors such as drunkenness, ignorance, fear or passion that excuse or mitigate the penalties. Instead, these are to be determined in each individual case.

Canon 1456 of *CCEO* specifically mentions c. 728 §1, 1°, which reserves the absolution of the sin of direct violation of the sacramental seal to the Apostolic See. It should be noted that it is the absolution of the sin of violation of the sacramental seal that is reserved to the Apostolic Penitentiary, but determination of the delict itself and the application of the penalty for the Eastern Churches is now reserved to the Congregation

²⁵² See CUSCHIERI, *The Sacrament of Reconciliation*, p. 314. See also K. GREENAWALT, "The Use of Religious Convictions by Legislators and Judges," in *Journal of Church and State*, 36 (1994), pp. 541-555.

²⁵³ See CUSCHIERI, *The Sacrament of Reconciliation*, p. 314.

for the Doctrine of the Faith in virtue of Art. 3, §3 of apostolic letter *Sacramentorum sanctitatis tutela*.

CONCLUSION

The focus of our inquiry in this Chapter was on the analysis of the foundational sources of the positive ecclesiastical law on the seal of confession and of the canonical norms presently governing the delict of its violation. The results of this analysis may be summarized as follows:

First, the seal of confession is based on the natural law principles related to one's right to a good reputation and to not have one's personal secrets illegitimately divulged. It is based on the moral right to seek counsel for any and all behaviours and thoughts—whatever they may be. These are fundamental human rights necessary for one's existence in a human community. The right not to have one's personal secrets divulged derives from a number of sources: by its own nature, in virtue of a promise, by contract, in one's professional relationship with another, and one's pastoral relationship. The obligation of confessional secrecy has been considered as including these sources. The natural law binds a person to whom a secret has been entrusted in confidence in virtue of justice, charity, and fidelity to one's word.

Second, canonical authors propose several arguments or theories as the divine law basis of the seal of confession. These include statements from Scriptures, the very nature of the sacrament (sacramental sign), confessional knowledge as divine knowledge (knowledge revealed to God), the avoidance of scandal, the obligation to refrain from judgement, and the protection of the common supernatural good. Of these theories, the last seems to be the most comprehensive, as it is able to accommodate in a satisfactory

way all circumstances involving the seal of confession. The divine law binds one who has received the confessional matter in virtue of justice and religion. The virtue of religion arises from the reverence for the Sacrament of Reconciliation and the good of the Sacrament itself.

Third, certain aspects of the seal of confession are of merely positive ecclesiastical law. The determination of the seal confession, the different forms of violations, the persons directly bound by the obligation of the confessional secrecy, the different kinds of penalties for the violation of the seal, the process for ascertaining the commission of the delict and for imposing the appropriate penalty for it, are all the product of the gradual evolution of positive ecclesiastical legislation on the matter. Because these aspects are of positive ecclesiastical law flowing from different historico-cultural experiences of the Church, we find certain differences on some issues in the Latin and the Eastern Codes, which have been identified in this study. The positive law is the most important aspect from the point of view of the civil law, since this is what the courts would look at first and foremost in their analyses. It is therefore critical that we have a statement of the law which is clear and accurate, along with the necessary supporting interpretations and learned opinions before we embark on our civil law analysis.

Although the institute of the seal of confession pertains exclusively to the Church's domain, its inviolability is being frequently challenged in civil courts of different countries, especially when a confessor is judicially summoned to testify in civil or criminal trials which might involve matters revealed in sacramental confession. Since this touches on the very core of our study, we will try to examine in the following Chapter

the seal of confession as it has historically been treated in the civil courts of major common law jurisdictions.

CHAPTER THREE

FOUNDATIONS IN JURISPRUDENCE OF THE PRIEST-PENITENT PRIVILEGE

INTRODUCTION

In the previous two Chapters, we considered the historical foundations and established the *ius vigen*s of the seal of confession. We will examine in this Chapter how the canonical principles on the seal of confession have been received into the jurisprudence and legislation of those countries on which the Canadian law is founded. The principal question we will pursue here is whether the seal of confession as we know it in canon law was privileged in civil law prior to *R. v. Gruenke*.¹ This question does not seem to have a simple answer, because, as noted by W.M. Best, "... [W]hether communications made to spiritual advisers are, or ought to be, protected from disclosure in courts of justice, presents a question of some difficulty."²

To answer this question, the jurisprudence and legislation from the five common law jurisdictions judicially considered in *Gruenke* and on which the decision was based will be examined and synthesized using both the historical and analytical method. The phrase "common law" is used herein not in the canonical sense, but in the sense of the principles which derive from the authority of civil judgments (as opposed to legislation).

The Chapter will be outlined as follows. We will first review briefly the doctrine of privilege. Then, we will undertake a careful analysis of the law and jurisprudence of England on the privilege, since all countries with common law heritage, including

¹ [1991] 3 S.C.R. 263.

² W.M. BEST, *The Principles of the Law of Evidence with Elementary Rules for Conducting the Examination and Cross-Examination of Witnesses*, Twelfth Edition, ed. by S. PHIPSON, London, Sweet & Maxwell, 1922, p. 499; also see C. HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," in *Papers Read Before the Juridical Society*, 3 (1865), p. 129.

Canada, draw heavily upon the English legal system. We will also provide a synthesis of the law and jurisprudence of Ireland, the United States, Australia, and New Zealand, since these jurisdictions were also cited in the Canadian jurisprudence.

A few preliminary remarks regarding terminology are in order. First, the phrase “civil law” will be used in the canonical sense of being the secular law of the state, in contradistinction to canon law. This is in contrast to the secular understanding of civil law as being litigation concerning non-criminal legal issues such as tort or contractual matters, and which is distinguished from the area of law known as criminal law. Second, the terminology “priest-penitent privilege” will be used in accordance with the law of evidence to denote the exemption from testimony granted to confessors regarding matters heard by them during the course of sacramental confession.³ Third, the phrase *ratio decidendi* refers to the essential legal principle which emerges from the jurisprudence of a case and is considered binding from a *stare decisis* precedent point of view. Fourth, the phrase *obiter dicta* refers to statements in jurisprudence which, while they are non-binding, are nevertheless illustrative of judicial thought and influential on future jurisprudence as elaborations on the law. This will be elaborated on further below.

With respect to the citation of cases and statutes, civil law legal citation methodology will be followed. It should also be noted that in early legal documents, Latin is occasionally mixed with Norman French. Spelling and punctuation will be reproduced as they appear in the original legal texts, bearing in mind that many English words have

³ Other terminology which appears interchangeably in the jurisprudence and has the same meaning and import is “clergy-penitent privilege,” “clergyman-penitent privilege,” “pastor-penitent privilege,” “sacerdotal privilege,” “secret of confession,” “confessor’s privilege,” “minister’s privilege,” “ministerial privilege,” “confessor-confessant privilege,” “religious privilege,” “religious communication privilege,” and other similar phrases.

undergone evolutions in their spelling and usage since the time they were published in the early legal documents and case law over the past thousand years. Some common features of older English include extra spaces between punctuation, phonetic spellings, and the use of the long “s” which appears as “f.”

3.1 — THE DOCTRINE OF PRIVILEGE

Prior to analysing the jurisprudence, we will review briefly the doctrine of privilege. An essential principle of the law of evidence is that the full truth of all matters touching upon a dispute must be brought before the court, and that litigants are entitled to have all relevant evidence adduced. As noted by J. Stephen, “The general rule is that every person must testify as to what he knows.”⁴

Sometimes exceptions to this principle are made, and certain communications are held to be inadmissible in court. These are called evidentiary privileges and are grounded in public policy. D. Elliott synthesizes the English authorities on the doctrine of privilege when he states that a privilege may be said to exist when “... [T]he law holds that the interest involved in non-disclosure of the matter is so important that it outweighs the public interest in having all relevant evidence made available at a judicial trial. In such a case, the witness is either excused, or positively prohibited, from answering.”⁵ In other words, a privilege exists when the need to know the truth is offset by the need to maintain the confidence. The Canadian Supreme Court has stated in its jurisprudence the following as the principle and rationale of the law of privilege:

⁴ J. STEPHEN, *A Digest of the Law of Evidence*, Eighth Edition, London, MacMillan, 1909, p. 205.

⁵ See D. ELLIOTT, “An Evidential Privilege for Priest-Penitent Communications,” in *Journal of the Church Law Association of Canada*, 4 (1998), p. 410.

The doctrine of privilege acts as an exception to the truth-finding process of our adversarial trial procedure. Although all relevant information is presumptively admissible at trial, some probative and trustworthy evidence will be excluded to serve other overriding social interests. The same principles apply to exempt, completely or partially, particular communications arising out of certain defined relationships from disclosure in judicial proceedings. Since the existence of the privilege impedes the realization of the central objective of our legal system in order to advance other goals, the question of privilege is essentially one of public policy.⁶

Generally speaking, privileges must be justified by some “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”⁷

We now turn to an analysis of the law of the doctrine of privilege as applied to confessional communications in the five common law systems mentioned earlier.

3.2 — ENGLISH LAW AND JURISPRUDENCE ON THE PRIEST-PENITENT PRIVILEGE

In this section, the focus of our analysis will be the English law and jurisprudence on the privilege. We will determine the status of the privilege under the English law during the different historical periods of England, namely: the pre-Reformation period prior to 1530; the Reformation period from 1530 to 1660; the Restoration period from 1660 until 1865; and the Modern period from 1865 until present.

3.2.1 – The Priest-Penitent Privilege in the Pre-Reformation Period

An examination of medieval English law and courts is important for our study since the English system is the foundation of the common law systems of the world. More specifically,

The determination of the status of sacramental confession—whether privileged or not—before the Reformation is of far greater value than the mere satisfaction of finding an answer to a question of academic interest. For to-day even a cursory examination of the

⁶ *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536 at 559; also see *R. v. Snider*, [1954] S.C.R. 479 at 482-483.

⁷ *Trammel v. United States*, 445 U.S. 40 at 51 (1980); cited with approval by McLachlin J. in *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 at 170.

many American legal precedents, in the form of judicial opinions, which are hostile to the existence of the privilege of "priest and penitent," openly base their adverse conclusions upon the long line of similar precedents in English law.⁸

Prior to the Reformation, the English civil government respected the jurisdiction of Church courts.⁹ F. Pollock and F. Maitland indicate that in this period, "it is well known that the superior clergy took (and with good cause) a large part in legislation and the direction of justice, as well as in general government."¹⁰ The courts were run by the Church and staffed by bishops and priests (until Innocent IV prohibited clergy from sitting as judges in the King's courts).¹¹ Pollock and Maitland note that

... [I]t is by 'popish clergymen' that our English common law is converted from a rude mass of customs into an articulate system, and when the 'popish clergymen', yielding at length to the pope's commands, no longer sit as the principal justices of the king's court, the golden age of the common law is over.¹²

Following this line of reasoning, R. Nolan concludes that "... [B]efore the Reformation the seal was regarded as sacred by the common law of England."¹³ As for the secular courts, R. Bursell notes that it would be unlikely that the courts would *not*

⁸ R. WHITE, "Confession and the Law," in *The Ecclesiastical Review*, 97 (1937), pp. 120-121.

⁹ P. JASON, "The Courts Christian in Medieval England," in *The Catholic Lawyer*, 37 (1997), p. 351; J. LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," in *Northern Ireland Legal Quarterly*, 13 (1959), p. 160.

¹⁰ F. POLLOCK and F. MAITLAND, *The History of English Law Before the Time of Edward I*, London, Cambridge University Press, 1895, vol. I, p. 11. Pollock and Maitland's conclusions are widely accepted. Also see JASON, "The Courts Christian in Medieval England," pp. 339-358.

¹¹ See POLLOCK and MAITLAND, *The History of English Law*, pp. 88-114; also see G. NOKES, "Professional Privilege," in *The Law Quarterly Review*, 66 (1950), p. 94; LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," p. 160.

¹² POLLOCK and MAITLAND, *The History of English Law*, p. 112.

¹³ R. NOLAN, art., "The Law of the Seal of Confession," in C. HERBERMAN et al. (eds.), *The Catholic Encyclopedia*, New York, NY, The Encyclopedia Press, 1912, vol. XIII, p. 652.

uphold the seal of confession, given that it was an obligation on all of the laity at the time.¹⁴ In the time before the Reformation, it was likely that there was a

... [N]atural disposition on the part of the courts of law, while this country was still Roman Catholic, to respect the seal of confession ... for, of course, whether or not a priest was legally compellable to disclose matter of confession (or, rather, whether he was legally *punishable* if he did *not* disclose it), no one can doubt that he would have been regarded as infamous by a Roman Catholic community if he did so.¹⁵

Elliott cautions that the law of evidence was not developed in the modern sense at this stage, and any “privilege” must be understood in this context.¹⁶ Some authors also state that the canon law of the Church would only be persuasive, but not binding, in the English civil courts.¹⁷ However, Nolan rejects this assertion since “... [T]here seems to be so much weighty evidence against this view that it is difficult to accept it.”¹⁸ Thus, the canon law in England was most likely binding.

In the century prior to the Norman conquest of 1066, the secular legislation created both a right and an obligation to confess sins.¹⁹ Although there is no mention of the seal of confession in the legislation, it would be unimaginable that it was *not* upheld. As Nolan notes,

... [T]he very close connexion between the religion of the Anglo-Saxons and their laws, many of which are purely ordinances of religious observance enacted by the State, the

¹⁴ See R. BURSELL, “The Seal of the Confessional,” in *The Ecclesiastical Law Journal*, 2 (1990), p. 85.

¹⁵ “The Case of Constance Kent and the Seal of Confession,” in *Jur*, 11 (1865), p. 287.

¹⁶ See ELLIOTT, “An Evidential Privilege for Priest-Penitent Communications,” p. 411.

¹⁷ See C. DONAHUE, “Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined After 75 Years in the Light of Some Records from the Church Courts,” in *Michigan Law Review*, 72 (1974), pp. 647-716; also see JASON, “The Courts Christian in Medieval England,” p. 353.

¹⁸ NOLAN, “The Law of the Seal of Confession,” p. 649.

¹⁹ See *ibid*.

repeated recognition of the supreme jurisdiction of the pope, and the various instances of the application in the Church in England of the laws of the Church in general lead conclusively to the opinion that the ecclesiastical law of the secrecy of confession was recognized by the law of the land in Anglo-Saxon England.²⁰

Between the Norman Conquest of 1066 and the Reformation of 1533, the laws of England upheld the priest-penitent privilege.²¹ A statutory declaration attributed to the laws of Henry I (r. 1100-1135) states the privilege in the following terms, which bears some resemblance to the phraseology found in Gratian's version:

Let a priest beware of repeating what he hears from those who confess their faults to him, either to relatives or strangers ; but if he do so, let him be deposed and all the days of his life be wandering about in disgrace.²²

Later, c. 21 of the Fourth Lateran Council was enforced by the courts of England and constituted a privilege in these courts.²³ The privilege was further affirmed in the canons of a number of provincial Councils in England.²⁴ The fact that these statutes and

²⁰ Ibid.

²¹ W. Finlason notes that while the civil law recognized the privilege for the first time during the Saxon period, an exception for treason may have emerged following the Norman conquest. This will be discussed further below. See W. FINLASON, "Case Notes," in *R. v. Hay* (1860) 2 Fost. & F. 6a.

²² "Caveat sacerdos, ne de hiis qui ei confitentur peccata sua alicui recitet quod ei confessus est, non propinquis nec extraneis ; quod si fecerit, deponatur, et omnibus diebus vite sue ignominiosus peregrinando poeniteat" (*Leges, Hen. 1, c. 5, §17*; English trans. in BEST, *The Principles of the Law of Evidence*, p. 502). Best cautions that this should not be taken as authoritative and that "[T]he laws of Hen. 1 are only useful as guides to the common law" (BEST, *The Principles of the Law of Evidence*, p. 502).

²³ See BEST, *The Principles of the Law of Evidence*, p. 501.

²⁴ In the year 1220, the Council of Durham promulgated the following: "Nullus ira vel odio, vel ecclesiae metu, vel mortis, in aliquo audeat revelare confessiones signo vel verbo, generali, vel speciali, ut dicendo, ' Ego scio quales vos estis, ' sub periculo ordinis et beneficii ; et si convictus fuerit, absque misericordia degradabitur" (D. WILKINS [ed.], *Concilia Magnae Britanniae et Hiberniae*, Londini, Gosling, 1737, vol. I, p. 577); the Council of Oxford in 1222 (and Exeter in 1287) affirmed the seal in the following terms: "Nullus sacerdos irā aut metu etiam mortis, audeat detegere confessioneius alicujus signo, vel verbo, generaliter aut specialiter et si super hoc convictus fuerit, sine spere laxationis non immeriti debet degradari" (BEST, *The Principles of the Law of Evidence*, p. 501); the 1322 Constitution of Walter, Archbishop of Canterbury, stated "Item nullus Sacerdos irā, odio, metu etiam mortis audeat detegere quovismodo alicujus Confessionem signo, nutu, vel verbo generaliter vel specialiter. Et si super hoc convictus fuerit, sine ipse reconciliationis, non immerito debet degradari" (G. LYNDWOOD, *Provinciale (seu*

their commentaries were compiled by G. Lyndwood (who some regard as the only significant English canonist) when he was chief of the ecclesiastical courts under the Archbishop of Canterbury, further suggests that the law concerning the seal would have been enforced in the ecclesiastical courts of England.²⁵

With respect to the seal of confession in the secular courts, Nolan states:

The fact that the laws of the Church were so emphatic on the subject, coupled with the fact that the Church was then the Church of the nation, affords good ground for inferring that the secular courts recognized the seal. The recognition of it would not have rested on any principle of immunity from disclosure of confidential communications made to clergymen. It would have rested on the fact that confession was a sacrament, on the fact of that necessity for it which the doctrine of the Church laid down, on the fact of the practice of it by both the king and people, and on the fact that the practice was wholly a matter of spiritual discipline and one, moreover, in regard to which the Church had so definitely declared the law of absolute secrecy.²⁶

Further, as noted by Best, "... [T]here cannot be much doubt that, previous to the Reformation, statements made to a priest were privileged from disclosure, and that the priest disclosing them was severely punished."²⁷

In 1315, the English parliament passed the statute *Articuli Cleri*.²⁸ Chapter X provides for sanctuary for criminals, and ends with the following statement:

Constitutiones Angliae), Oxoniae, Excudebat H. Hall Academiae Typographus, Impensis Ric. Davis, 1679, vol. I, pp. 334-335). Similar legislation appeared in the synodal statutes of Winchester, Worcester, Chichester, Ely, Wells, London, and Salisbury: see BURSELL, "The Seal of the Confessional," p. 84, and BEST, *The Principles of the Law of Evidence*, p. 501.

²⁵ See NOLAN, "The Law of the Seal of Confession," p. 650.

²⁶ See *ibid.*

²⁷ BEST, *The Principles of the Law of Evidence*, p. 501. Also see HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," p. 137.

²⁸ 9 Edw. 2, c. 10 (repealed in 1863); also see E. COKE, *The Second Part of the Institutes of the Laws of England*, London, Clarke, 1817, pp. 628-629.

It is the will of our Lord the King that thieves who are approvers, whenever they wish, should be able to confess their crimes to priests; but the confessors should take care not by any mistake to give information to approvers of this kind.²⁹

The meaning of this provision is unclear and has been the subject of much debate amongst legal authorities. The great common lawyer, Sir Edward Coke, Chief Justice to James I, writing in 1628, in his oft-quoted passage interpreting this section of the statute provides the following interpretation:

Latrones vel appellatores.] This branch extendeth onely to theeves and approvers indited of felony, but extended not to high treasons : for if high treason be discovered to the confessor, he ought to discover it, for the danger that thereupon dependeth to the king and the whole realme ; therefore this branch declareth the common law, that the priviledge of confession extendeth onely to felonies : and albeit, if a man indited of felony becometh an approver, he is sworne to discover all felonies and treasons, yet is hee not in degree of an approver in law, but onely of the offence whereof he is indited ; and for the rest, it is for the benefit of the king, to move him to mercy : so as this branch beginneth with theeves, extendeth onely to approvers of theevery or felony, and not to appeales of treason ; for by the common law, a man indited of high treason could not have the benefit of clergy (as it was holden in the kings time, when this act was made) nor any clergy-man priviledge of confession to conceale high treason : and so was it resolved in * 7 Hen. 5. whereupon frier John Randolph the queene dowagers confessor, accused her of treason, for compassing of the death of the king : and so was it resolved in the case of Henry Garnet, superiour of the jesuites in England, who would have shadowed his treason under the priviledge of confession, although in deed he was not onely consenting, but abetting the principall conspirators of the powder-treason, as by the record of his attainder appeareth ; and albeit this act extendeth to felonies onely, as hath been said, yet the caveat given to the confessors is observable, *ne erronee informet*.³⁰

Thus, Coke is suggesting that the legislation creates a privilege of the confessional. Even though he makes an exception for treason, Coke clearly acknowledges the existence of the privilege in the common law at the time of his writing.³¹ Although legal authorities

²⁹ "Placet etiam domino regi, ut latrones vel appellatores, quandocunque voluerint, possint sacerdotibus sua facinora confiteri : sed caveant confessores, ne erronee hujusmodi appellatores informant" (COKE, *The Second Part of the Institutes of the Laws of England*, p. 629; English trans. in BEST, *The Principles of the Law of Evidence*, p. 502). The term "approver" in English law generally means an accomplice to a crime who confesses and gives evidence against his co-accused.

³⁰ COKE, *The Second Part of the Institutes of the Laws of England*, p. 629 [text reproduced as it appears].

³¹ See NOKES, "Professional Privilege," p. 95; also see "The Case of Constance Kent and the Seal of Confession," p. 287; HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," p. 141.

reject Coke's assertion that the statute itself created a privilege of the confessional, and some also reject his assertion that there was an exception for treason, they do accept Coke's recognition of the privilege operating up to the time at which he wrote.³²

*Randolph's Case*³³ of 1419 should be noted since it was cited by Coke in support of his contention that the priest-penitent privilege did not extend to cases of treason. The following report appears in Holinshed's *Chronicles*:

In this sixt yeare, whilst these things were adooing in Normandie, quèene Ione late wife of king Henrie the fourth, and mother in law to this king, was arrested by the duke of Bedford the kings lieutenant in his absence, and by him committed to safe keeping in the

³² "It is very doubtful, however, whether the caveat at the end of the above enactment was inserted to warn the confessor against disclosing the secrets of the penitent *to others*. The grammatical construction and context seem to show that it was to prevent his abusing his privilege of access to the criminal, by conveying information to him from without; and the clause is translated accordingly in the best edition of the statutes. It is submitted, moreover, that the enactment extended to treason, and that Sir Edward Coke's contention to the contrary is incorrect" (BEST, *The Principles of the Law of Evidence*, p. 503); "For the exclusion of it from cases of high treason there appears to be no foundation except Sir Edward Coke's own view as quoted, because the two cases he cites in support of that view nowise support it" (NOLAN, "The Law of the Seal of Confession," p. 653); "In Coke's gloss on the Act of 1315 he asserted that 'it declareth the common law, that the priviledge of confession extendeth onely to felonies' ; but in fact the statute did nothing of the sort. Nevertheless the Act was a convenient peg on which to hang a discourse, and the discourse is remarkable less for its dubious 'authorities' than for its implication of some privilege for confessional statements to the clergy in the early seventeenth century"(NOKES, "Professional Privilege," p. 95); "It follows, then, that not only was there nothing in the change which took place at the Reformation to alter the case as to the privilege attaching to confession, but that there was, on the contrary, an express recognition of it by statute. For of course the recognition of confession implies, in the absence of anything to the contrary, the recognition of secrecy, because such was the common law rule ; and if it were otherwise, no one would be likely to confess, and therefore the directions to the Anglican clergy, to exhort penitents to confess, would be idle and futile. It follows, also, that the clergy of the Established Church would be within the privilege in cases in which, acting according to the rubric of the Service for the Visitation of the Sick, and with a view to the giving of a judicial or sacramental absolution, they have received confessions" (FINLASON, "Case Notes," 6a). Finlason also states that "... [N]ow, here it is clearly recognized by Coke that there was such a privilege ; and neither in Randolph's case nor Garnet's does it appear that the communication was in sacramental confession ; and so under the seal of confession. On the contrary, in Garnet's case, Lord Coke gave six reasons why the communication should not be deemed sacred ; not one of which involved a denial of the privilege, but all of which implied its existence—the main reason being, that the communication was not in confession—the distinction taken by Hill J., in the above case. The authority of Lord Coke, therefore, is clear that there was such a privilege at common law ; and that such privilege continued after the separation from Rome, and after the alteration of religion" (FINLASON, "Case Notes," 6); also see HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," pp. 139-141; BURSELL, "The Seal of the Confessional," p. 85.

³³ *Rot. Parl.* anno. 7 Hen. 5, nu. 13.

castell of Leeds in Kent, there to abide the kings pleasure. About the same time, one frier Randoll of the order of Franciscanes that professed diuinitie, and had beene confessor to the same queene, was taken in the Ile of Gernesey ; and being first brought ouer into Normandie, and was by the kings commandement sent hither into England, and committed to the Tower, where he remained till the parson of the Tower quarelling with him, by chance slue him there within the Tower ward. It was reported that he had conspired with the quéen by sorcerie and necromancie to destroye the king.³⁴

Coke is suggesting the Queen made a confession of a treasonous plot during a sacramental confession, and this was later disclosed to the authorities. However, there is no evidence that this was a sacramental confession, as the use of the word “confession” seems to have been used in the sense of an “admission”; and also, it appears that the confessor had disclosed the plot as a *co-conspirator* with the Queen after his imprisonment, and not necessarily as her confessor.³⁵

One last source may be considered in support of the existence of the privilege during the pre-Reformation period. A 1510 legal compilation by J. de Burgh entitled *Pupilla oculi* mentions that confessors appearing as witnesses in court were not to divulge confessional communications in accordance with the provincial statutes mentioned above.³⁶ However, de Burgh does not directly assert the existence of a corresponding privilege.

Some authors are reluctant to offer any firm conclusions about the existence of a privilege during the pre-Reformation period. C. Hopwood acknowledges that there is

³⁴ *Holinshed's Chronicles of England, Scotland, and Ireland*, London, Johnson, 1808, vol. III, p. 106 [text reproduced as it appears].

³⁵ See BURSELL, “The Seal of the Confessional,” p. 85; NOLAN, “The Law of the Seal of Confession,” p. 653.

³⁶ See NOKES, “Professional Privilege,” p. 94; NOLAN, “The Law of the Seal of Confession,” p. 651.

indeed strong evidence in support of the existence of such a privilege, but cautions that it is not conclusive for the following reasons:

1st, because the very nature of the duty, and its attendant obligation of secrecy, would make it improbable any such case would occur, for none need know of the confession except the confider and the confessor.—2ndly, until such a case had arisen and been decided, it might be doubtful how far such canon law had come within the condition precedent of its being law, viz., “that it had been received and allowed of here.” (Lord Hale, *Hist. Com. L.* 27) What might have been the answer given to such a claim of privilege, considering the jealousy evinced in our history of such claims on the part of the clergy, it is difficult to say.”³⁷

However, Hopwood concedes that “... [T]here is plausible ground for the assertion that secrecy inviolable *was* attached to religious confession to the ministers of the church before the Reformation; that after it some trace of such law remained...”³⁸

Based on the foregoing authorities, there is historico-legal evidence to support the proposition that the canonical seal of confession was in all likelihood respected in the laws of England prior to the Reformation. This is due primarily to the fact that England was at the time a Catholic country, and that much of the court system was administered by the Church.

3.2.2 – The Priest-Penitent Privilege in the Reformation Period

In order to understand the law and jurisprudence of the Reformation period, it is important to examine the historical context in which it evolved.³⁹ During the Erastianism (the political movement for supremacy of the state over the church) of the Reformation,

³⁷ HOPWOOD, “On the Law Relating to Confessions in Criminal Cases,” p. 137; also see V. ALLRED, “The Confessor in Court,” in *Jur.* 13 (1953), p. 4.

³⁸ HOPWOOD, “On the Law Relating to Confessions in Criminal Cases,” p. 149.

³⁹ See J. WILLIAMS, “Sources for Recusant History (1559-1791) in English Official Archives,” in *Recusant History*, 16 (1982-83), p. 333; also see D. LAYCOCK, “Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century,” in *Minnesota Law Review*, 80 (1986), pp. 1047-1102.

and especially during the oppression of the Church during the Restoration period, Catholicism was a proscribed religion, and all branches of government⁴⁰ including Parliament⁴¹ and the Judiciary (the Queen's Bench, Appeal Courts, Exchequer, Star Chamber, and Privy Council),⁴² played an active role in its oppression. The pervasive anti-Catholic sentiment influenced the English jurisprudence on the seal of confession, an observation made by many non-English jurists (Irish, American, and Canadian) as will be seen later, and most authors.⁴³

With regard to the status of Catholic canon law in England, a number of enactments were passed which deprived it of all legal authority. The first and the most significant enactment was the 1533 *Submission of the Clergy Act*⁴⁴ which invalidated all canon law of the Catholic Church which was contrary to English common law or legislation. Section 3 of this act read:

3:-- Provyded alway that no canons constitucions or ordynance shalbe made or put in execucion within this Realme by auorytie of the convocacion of the clergie, which shalbe contraryaunt or repugnant to the Kynges prerogatyve Royall or the customes lawes or

⁴⁰ See NOLAN, "The Law of the Seal of Confession," p. 653; WILLIAMS, "Sources for Recusant History (1559-1791) in English Official Archives," p. 331; R. LINKER, "English Catholics in the Eighteenth Century: An Interpretation," in *Church History*, 35 (1966), pp. 288-310.

⁴¹ For example, the *Uniformity Act*, 1 Eliz., c. 2, of 1559 provided for fines and property confiscation of "recusants" (Catholics who refused to adhere to the Church of England); the *Elizabethan Act of Supremacy*, 1 Eliz., c. 1 of 1559 required oaths contrary to the Catholic faith; and the *Act Against Recusants*, 35 Eliz., c. 2, of 1593 made recusancy a punishable offence with property confiscation on conviction. These provisions remained in force until the second *Relief Act*, 31 Geo. III, c. 32 of 1791 abolished them.

⁴² See WILLIAMS, "Sources for Recusant History (1559-1791) in English Official Archives," pp. 349-408; A. ADOLPH, "Papists' Horses and the Privy Council," in *Recusant History*, 24 (1998), pp. 56-57.

⁴³ See, for example J. WIGMORE, *Evidence in Trials at Common Law*, Revised by John T. McNaughton, Toronto, Little, Brown, 1961, 8, §2396; LAYCOCK, "Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century," p. 1059.

⁴⁴ 25 Hen. VIII, c. 19.

statutes of this Realme; any thyng conteyned in this acte to the contrarye hereof notwithstanding.⁴⁵

Was the seal of confession contrary to the laws of the realm? As Bursell points out, "... [T]he seal of the confessional was concomitant of confession in the mediaeval church,"⁴⁶ and the obligation of private confession was still required by the 1539 *An Act for Abolishing of Diversity of Opinions in certain Articles concerning Christian Religion*⁴⁷ as well as the 1549 *Book of Common Prayer* which required confession during sick visitation and communion services, and which was also approved by Parliament.⁴⁸ Therefore, as Nolan notes, "... [T]here is no reason to think that the privilege of the seal would not have been observed in that reign."⁴⁹

However, the *Second Book of Common Prayer* of 1552 and the *Third Book of Common Prayer* of 1662 no longer made confession a requirement.⁵⁰ Following the Reformation, the practice of private auricular confession declined in the Church of England, and confession was no longer compulsory nor considered a sacrament.⁵¹ *The*

⁴⁵ Ibid.

⁴⁶ See BURSELL, "The Seal of the Confessional," p. 87.

⁴⁷ 31 Hen. VIII, c. 14, later abolished in 1547 by 1 Edw. VI, c. 12, s. 2.

⁴⁸ See BURSELL, "The Seal of the Confessional," p. 87; FINLASON, "Case Notes," 6a, 175 E.R. 935; H. BLUNT, *The Book of Church Law*, Eighth Edition, London, Longmans, 1899, pp. 173, 176.

⁴⁹ NOLAN, "The Law of the Seal of Confession," p. 654.

⁵⁰ See *ibid.*

⁵¹ See *ibid.*, p. 655.

Directory for Worship which contained no provisions for confession replaced the last *Anglican Book of Prayer*, and this book was abolished by Parliament in 1645.⁵²

In terms of canon law and legislation, c. 113 of the Canons of 1603 for Anglican Clergy is the sole legislative reference to any kind of secrecy during the Reformation. It is taken by some authors as embodying the post-Reformation law on the priest-penitent privilege,⁵³ and is "... [T]aken to represent and stand in place of all previous law of the Church of England on this subject."⁵⁴ It stated:

If any man confess his secret and hidden sins to the minister for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him, we do not in any way bind the said minister by this our constitution, but do straitly charge and admonish him that he do not at any time reveal and make known to any person whatsoever any crime or offence so committed to his trust and secrecy (*except they be such crimes as by the laws of this realm his own life may be called into question for the same*) under pain of irregularity.⁵⁵

A number of observations may be made about this canon. First, there is disagreement over its interpretation. Yellin suggests that the phrase in italics is in reference to situations where simple *knowledge* of certain crimes made a person subject to capital punishment, such as treason.⁵⁶ More likely, this phrase has an unknown meaning, or refers only to a

⁵² See TIEMANN and BUSH, *The Right to Silence: Privileged Clergy Communication and the Law*, p. 53.

⁵³ See LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," pp. 170-172; TIEMANN and BUSH, *The Right to Silence: Privileged Clergy Communication and the Law*, p. 51; BEST, *The Principles of the Law of Evidence*, p. 503.

⁵⁴ HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," p. 141.

⁵⁵ Reported in BEST, *The Principles of the Law of Evidence*, p. 503.

⁵⁶ See YELLIN, "The History and Current Status of the Clergy-Penitent Privilege," p. 103.

minister being an actual *accessory* to either treason or murder.⁵⁷ This canon has not been cited in any litigation mentioned herein concerning the seal, and its exact meaning is unclear.⁵⁸ Second, the canon seems to have departed from the all-encompassing secrecy which appears in the pre-Reformation conciliar legislation mentioned earlier.⁵⁹ Third, the mere fact that c. 113 was promulgated suggests that confessional secrecy was not contrary to royal prerogative set out in the provisions of the *Submission of the Clergy Act*.⁶⁰ It therefore could possibly be taken as authority for the existence of the privilege in the law prior to the canon. Fourth, Hopwood suggests that this canon did not create any kind of positive law privilege, but was aimed at internal discipline by way of an exhortation to the Anglican clergy:

Even to the extent of moral admonition, it can only bind the clergy as a rule of action, *Middleton v. Croft* (Cas. temp. Hardwick 326.), and therefore cannot have been intended to restrain a court of justice, but its presence among the canons is inconsistent with any positive law binding the clergy in *every* case of confession, under *all* circumstances, to secrecy.⁶¹

⁵⁷ See BURSELL, "The Seal of the Confessional," p. 87; BEST, *The Principles of the Law of Evidence*, p. 503.

⁵⁸ See *ibid.*, p. 504; also see WIGMORE, *Evidence in Trials at Common Law*, §2394.

⁵⁹ See NOLAN, "The Law of the Seal of Confession," p. 656.

⁶⁰ See BURSELL, "The Seal of the Confessional," p. 88.

⁶¹ HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," p. 142. Also see BLUNT, *The Book of Church Law*, p. 176. The Church of England has apparently retained c. 113 as the guiding authority on confessional secrecy, notwithstanding its ineffectiveness in civil law, as will be seen in the debate surrounding *R. v. Kent*: see BURSELL, "The Seal of the Confessional," pp. 95-96, 100-109; LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," pp. 170-172; S. REESE, "Confidential Communications to the Clergy," in *Ohio State Law Journal*, 24 (1963), pp. 56-57, footnote 7; NOLAN, "The Law of the Seal of Confession," p. 658.

The legislation of the Reformation period having been considered, we now turn to the jurisprudence, that is, the famous *Garnet's Case* of 1606.⁶² This case was prosecuted by Sir Edward Coke himself. The facts of the case which are relevant to our study are as follows: Henry Garnet, a Jesuit priest, was charged with conspiracy in connection with the Gunpowder Plot. At issue was whether he had knowledge of the conspiracy and whether he had disclosed it as required by law. Garnet had received information purportedly in confession concerning the plot which confirmed the information he had received outside of the confessional earlier from another co-conspirator. When questioned why he did not disclose the plot, "Garnet faintly answered, he might not disclose it to any, because it was a matter of secret confession, and would endanger the lives of divers men"⁶³ However, it does not appear that there was an attempt to compel him in court to disclose the actual confessional communications. The fact of the treasonous communications was established from third-party sources.

The following arguments were then made by Sir Edward Coke:

"Concerning Garnet himself; 1st, For that answer of his, That he knew of the Powder-Treason by confession, it is true which before was spoken, that such acts as this is, *Non laudantur nisi peracta*, are then only commended, when they are performed : but otherwise, first, Greenwell's was no sacramental confession, for that the confitent was not penitent : nay, himself hath clearly delivered under his hand that the Powder-Treason was told him, not as a fault, but by way of consultation and advice. 2dly, It was a future thing to be done, and not already then executed. 3dly, Greenwell told it not of himself, that he should do it, but of Fawkes, Percy, Catesby, Winter, and others ; and therefore he ought to have discovered them, for that there were no confitents. 4thly, He might and ought to have discovered the mischief, for preservation of the state, though he had concealed the persons. 5thly, Catesby told it to him *extra confessionem*, out of confession ; saying, they might as well turn him out. Lastly, By the common law, howsoever it were (it being *crimen læsæ Majestatis*) he ought to have disclosed it."⁶⁴

⁶² (1606) 2 How. St. Tr. (1606) 218.

⁶³ *Ibid.*, at 242 [text reproduced as it appears in the case report].

⁶⁴ *Ibid.*, at 245-246 [text reproduced as it appears in the case report].

Arguments One and Five, that there was no sacramental confession and that the matter was heard *extra confessionem* appear to have been accepted by the Court. The Earl of Salisbury, one of the presiding judges, observed that these communications were made either outside of a sacramental confession, or without contrition on the part of the penitent, and in any event confirmed what was already heard outside the confessional:

Hereby, saith he, it appears, that either Greenwell told you out of confession, and then there needs no secrecy ; or if it were in confession, he professed no penitency, and therefore you could not absolve him. To which the earl added, That this one circumstance must still be remembered, and cannot be cleared ; That when Greenwell told you what Catesby meant in particular, and you then called to mind also what Catesby had spoken to you in the general before, if you had not been so desirous to have the plot take effect, you might have disclosed it out of your general knowledge from Catesby...⁶⁵

Argument Six, which indicates that knowledge of treason by way of confessional communications should be revealed, does not appear to have been adopted in the jurisprudence. There is no clear ruling with regard to the seal of confession in this case, nor was it clearly raised.⁶⁶ In fact, there is no statement anywhere in the jurisprudence which resolved the question as to whether the privilege excluded treasonous revelations, notwithstanding Coke's later assertions to that effect.⁶⁷ However, it does suggest that there was a priest-penitent privilege during this period which applied to Catholic priests, albeit with an exception for treason.⁶⁸

⁶⁵ Ibid., at 256.

⁶⁶ See E. BADELY, *The Privilege of Religious Confessions in the English Courts of Justice Considered, In a Letter to a Friend*, London, Butterworths, 1865, pp. 16-18; BURSELL, "The Seal of the Confessional," pp. 88-89; YELLIN, "The History and Current Status of the Clergy-Penitent Privilege," p. 100; WIGMORE, *Evidence in Trials at Common Law*, §2394.

⁶⁷ See NOKES, "Professional Privilege," p. 95.

⁶⁸ See E. HOGAN, "A Modern Problem on the Privilege of the Confessional," in *Loyola Law Review*, 6 (1951), p. 12; YELLIN, "The History and Current Status of the Clergy-Penitent Privilege," p. 100;

Thus, based on the *First Book of Common Prayer*, the Canons of 1603, and *Garnet's Case*, it would appear that during the Reformation period the priest-penitent privilege existed, except for treason. We now turn to the era following the Restoration.

3.2.3 – The Priest-Penitent Privilege in the Restoration Period

The first reported case in the Restoration period involving the priest-penitent privilege is a case adjudicated involving an unnamed litigant in 1693.⁶⁹ In that case, the issue of privileged communications was raised in the context of solicitor-client privilege. Lord Chief Justice Holt, in *obiter*,⁷⁰ held such communications privileged from disclosure, but added that it would be "... [O]therwise of a gentleman, *parson*, &c."⁷¹ "Parson" here can be taken as a reference to clergy in general.⁷²

ALLRED, "The Confessor in Court," p. 5; WHITE, "Confession and the Law," pp. 125-131. Wigmore, however, leaves the question open: WIGMORE, *Evidence in Trials at Common Law*, §2394.

⁶⁹ *Anon.* (1693) Skinner 404 (N.P.).

⁷⁰ *Obiter dictum (dicta)*, or simply *obiter* or *dicta*, is "[a] remark made, or an opinion expressed, by a judge, in his decision upon a cause, 'by the way,' that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy, or argument. Such are not binding as precedent" (BLACK, *Black's Law Dictionary*, p. 966). While *obiter* statements are not binding, they are nevertheless illustrative of judicial thought and often referred to in later jurisprudence.

⁷¹ *Anon.* (1693), at 404.

⁷² Badely restrictively interprets this case to "... [S]imply mean, that if a Gentleman, a Parson, or any other person, not educated and practicing as a lawyer, is consulted on matters which properly belong only to a man professionally educated as a lawyer, the communications between such persons cannot be considered professional – in other words, the gentleman or the Parson, cannot be treated as a lawyer, though he has apparently acted in that capacity" (BADELY, *The Privilege of Religious Confessions*, p. 50). This interpretation of the jurisprudence has not been followed by subsequent authors.

The privilege was judicially considered in another case decided sometime before 1790. The case of *R. v. Sparkes*⁷³ was a decision of Mr. Justice Buller. The following is stated with respect to the facts and jurisprudence of this case:

There the prisoner being a papist had made a confession before a protestant clergyman, of the crime for which he was indicted, and that confession was permitted to be given in evidence on the trial, and he was convicted and executed. The reason against admitting that evidence was much stronger than in the present case ; there the prisoner came to the priest for ghostly comfort, and to ease his conscience oppressed with guilt. Besides, in this case the confidence, if any was reposed, was at an end. The confidence was merely as it respected the trial then coming on, without any reference to this cause, which was not then thought of, and supposing it could not be given in evidence on that trial, still it is admissible on the present, when the purpose for which it is given is at an end.⁷⁴

These statements on the privilege, although seeming to rule against the privilege, in fact do not address the question.⁷⁵ In the later *People v. Phillips* case (to be considered under the American jurisprudence), Judge Clinton stated the following in rejecting the jurisprudence in *R. v. Sparkes*:

... the decision of Mr. Justice Buller, was, to say the least, erroneous ; for when a man under the agonies of an afflicted conscience and the disquietudes of a perturbed mind, applies to a minister of the Almighty ... and solicits from him advice and consolation, in this hour of penitence and remorse, and when this confession and disclosure may be followed by the most salutary effects upon the religious principles and future conduct of the penitent ... surely the establishment of a rule throwing all these pleasing prospects into shade, and prostrating the relation between the penitent and comforter, between the votary and the minister of religion, must be pronounced a heresy in our legal code.⁷⁶

The case of *Du Barré v. Livette*, which cited *R. v. Sparkes*, was decided in 1790.

An issue arose as to whether an interpreter for a lawyer's client was bound by solicitor-

⁷³ Unreported in any law reports as an individual case, reported secondarily in *Du Barré v. Livette* (1790) Peake at 109-110.

⁷⁴ *Ibid.*, at 110.

⁷⁵ See BEST, *The Principles of the Law of Evidence*, p. 500. Also see BURSELL, "The Seal of the Confessional," p. 90.

⁷⁶ Abstracted in 1 W.L.J. 109 (1843), and reported in *The Catholic Lawyer*, 1(1955), p. 204. Also see STEPHEN, *A Digest of the Law of Evidence*, p. 205.

client privilege. Lord Kenyon concluded in his decision that such conversations were privileged as akin to solicitor-client communications. With respect to the priest-penitent privilege, in *obiter*, he indicated that this case differed from *R. v. Sparkes*, and stated that the priest-penitent privilege is different from solicitor-client privilege. He made the following observations:

It is sufficient for me, sitting here, to say that this case materially differs from that cited [*Sparkes*], *but I should have paused before I admitted the evidence there admitted*. The case, as it respects the Judge who determined it, is entitled to every attention from me : but this case differs from it. The *Popish religion is now unknown to the law of this country*, nor was it necessary for the prisoner to make that confession to aid him in his defence. But the relation between attorney and client is as old as the law itself.⁷⁷

Four observations may be made about this statement. First, this is one of the first statements in jurisprudence concerning an apparent judicial reluctance to receive evidence of confessional statements (“... [B]ut I should have paused before I admitted the evidence there admitted” [referring to *Sparkes*]) notwithstanding the apparent non-existence of the privilege. Bursell points out that the reason for his hesitation is not stated,⁷⁸ and Cohen states that there is no legal ground for such hesitation.⁷⁹ In any event, Hopwood concludes that “His comments on the case, though they express caution, show that, as he proceeded with the consideration of the case cited, his judgment tended to confirm it.”⁸⁰ Second, it should be observed that this particular case did not involve a sacramental confession to a priest and did not resolve the question as to whether priest-penitent communications are

⁷⁷ *Du Barré v. Livette*, at 110.

⁷⁸ See BURSELL, “The Seal of the Confessional,” p. 90.

⁷⁹ See H. COHEN, *Roscoe’s Digest of the Law of Evidence in Criminal Cases*, Thirteenth Edition, London, Sweet and Maxwell, 1908, p. 127.

⁸⁰ HOPWOOD, “On the Law Relating to Confessions in Criminal Cases,” p. 146.

privileged.⁸¹ Third, it should be noted that by 1790 the Catholic Church had definitively lost all legal privileges in England ("The Popish religion is now unknown to the law of this country..."). Fourth, Lord Kenyon does not place the priest-penitent privilege on the same footing as solicitor-client privilege.

The next case on the subject of privileged communications was decided in 1792. *Wilson v. Rastall*⁸² confirmed the restriction of privileged communications to lawyers and clients. The issue was whether letters given in confidence to an agent of the defendant, who forwarded these letters to his attorney, were protected from disclosure by virtue of solicitor-client privilege. The Court (Lord Kenyon, and Justices Buller and Gross, *en banc*) ruled unanimously that such communications were not privileged given that there was no formal consultation between solicitor and client, and in *obiter* stated that the only privileged communications recognized in law were between lawyers and clients in their professional capacity.⁸³ In doing so, they definitively excluded any privilege between priest and penitent, though no ruling was made expressly against it.

⁸¹ See BEST, *The Principles of the Law of Evidence*, p. 500; also see NOLAN, "The Law of the Seal of Confession," p. 657.

⁸² (1860) 4 T.R. 753.

⁸³ Other cases similarly decided that the privilege is restricted to lawyer-client communications. See *Cuts v. Pickering* 1 Vent. Rep. 133 (1666); *Vaillant v. Dodemead* (1742) 2 Atkyn's Rep. 524 (agents not privileged); *The Duchess of Kingston's Case* (1776) 20 How. St. Tr. 355 at 573 (physicians and surgeons not privileged; this case marked a turning point in the English law with respect to confidential communications: see *D. v. National Society for the Prevention of Cruelty to Children* (= *D. v. N.S.P.C.C.*) [1978] A.C. 171 at 238; *Falmouth v. Moss* (1822) 11 Price 455 (stewards not privileged). However, in some cases the courts have ruled in favour of confidentiality, such as in *A-G v. Briant* (1846) 15 M. & W. 168 at 183-186 (questions exposing the identity of government informers are contrary to public policy) and *D. v. N.S.P.C.C.* (public interest requires that identity of informers of child abuse remain confidential).

The 1823 case of *R. v Radford* is reported *in arguendo* in the case of *R. v. Gilham* which will be considered below. It appears as follows:

And in *Rex v. Radford*, for murder tried at Exeter Summer Assizes, 1823 (*ex relatione Coleridge*), where a clergyman had prevailed on the prisoner to confess, by dwelling on the heinousness of the crime charged against him, and the denunciations of Scripture against it, without giving him any caution that it could be used in evidence against him, Best, C.J. refused to allow the clergyman to state the confession, saying that he thought it dangerous after the confidence thus created, which would throw the prisoner off his guard, and the impression thus produced, to allow what he then said to be given in evidence against him.⁸⁴

Bursell points out that this case did not involve a sacramental confession and cannot be taken as authority for the priest-penitent privilege.⁸⁵ This case does not seem to have been followed in *R. v. Gilham*.

The case of *R. v. Gilham* was decided in 1828. In that case, the prison chaplain, a Protestant minister, approached a prisoner and urged him to make a confession of a crime to the warden. The prisoner did so, and the issue arose as to whether this confession to the cleric should have been admissible in evidence in court. Lord Tenterden ruled the evidence of the clergyman admissible.

The *ratio decidendi* underlying this decision is that such a confession, one made at the urging of a clergyman, is admissible. However, it is only admissible if it was *not* made with any promise of *temporal* (as opposed to *spiritual*) gain by the cleric. In other words, as long as there was no promise made to the prisoner of material improvement of his circumstances, then the confession may be taken as a free and wilful act. This having been said, there is no suggestion in this case that there is any privilege with respect to

⁸⁴ Reported in *R. v. Gilham*, (1828) 1 Mood. 186 at 197-198.

⁸⁵ See BURSELL, "The Seal of the Confessional," p. 91. Also see HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," p. 144.

these communications to the clergyman. The following analysis of this case is provided by Best:

R. v. Gilham only shows that a confession of guilt made by a prisoner, in consequence of the spiritual exhortations of a clergyman that it will be for his soul's health to do so, is receivable in evidence against him,—a decision perfectly well founded, because such exhortations cannot possibly be considered “*illegal inducements to confess.*” For by this expression ... the law means language calculated to convey to the mind of a person accused or suspected of an offence, that by acknowledging guilt he will better his position, so far as it may be affected by the *temporal* consequences of that offence. And the ground on which the law rejects a confession, made after such an inducement to confess, is the reasonable apprehension that, in consequence of it, the party may have been led to make a false acknowledgement of guilt,—an argument wholly inapplicable where he is only told that, by his avowing the truth, a *spiritual* benefit will accrue to him.⁸⁶

In at least one Canadian case which upheld the privilege, this case was interpreted as suggesting that the rule against priest-penitent privilege would not be enforced, and the privilege would likely be upheld in future English rulings.⁸⁷

In the case of *Broad v. Pitt*⁸⁸ decided in 1828, a lawyer had been asked about a conversation with a client when he prepared a deed. Lord Chief Justice Best indicated that only communications to attorneys in contemplation of litigation are covered by solicitor-client privilege, and, in *obiter*, ruled against the application of this privilege to a clergyman. He stated:

The privilege does not apply to clergymen, since the decision the other day, in the case of *Gilham* (Carr. Suppl. 61). I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner ; but if he chooses to disclose them, I shall receive them in evidence.⁸⁹

⁸⁶ BEST, *The Principles of the Law of Evidence*, p. 499; also see LINDSAY, “Privileged Communications Part I: Communications With Spiritual Advisors,” p. 162; HOPWOOD, “On the Law Relating to Confessions in Criminal Cases,” p. 133; BURSELL, “The Seal of the Confessional,” p. 91.

⁸⁷ See *Gill v. Bouchard* (1896), 5 Que. Q.B. 138 at 174.

⁸⁸ 3 Car. & P. 518 (C.C.P.).

⁸⁹ *Ibid.*, 519. Also see J. CUTLER and C. CAGNEY (eds.), *Powell's Principles and Practice of the Law of Evidence*, Seventh Edition, London, Butterworth & Co., 1898, p. 121.

Once again, the jurisprudence confirms that by this point no privilege was recognized in English law, although an apparent reluctance to compel such communications was equally evident.⁹⁰

Elliott suggests that the judicial discretion alluded to by Best must have been a reference to his practice of using persuasion on the party which was seeking disclosure, rather than leaving it open for judges not to oblige testimony if they see fit in the particular circumstances of any given case.⁹¹ Hopwood simply rejects Best's reasoning:

The inconsistency of this remark destroys the judicial weight which the reputation of the speaker would have secured to it. The evidence is not improper or inadmissible, but the judge will not compel him who knows it to give it in court! The propriety of excluding or admitting such evidence must depend on grounds of public harm or benefit, and not private privilege, caprice, or opinion.⁹²

Seven years later, the case of *R. v. Wild*⁹³ was decided. A constable who arrested a fourteen-year old prevailed upon him to confess to the crime by telling him to kneel down and confess the truth to him before God. The accused then confessed to the crime. The judges, while disapproving of the methodology of extracting the confession, nevertheless ruled it admissible.

⁹⁰ See LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," p. 161; BEST, *The Principles of the Law of Evidence*, p. 282. S. Tacon suggests that Best is describing what is in "in practice, a 'privilege' against disclosure of confidential matters where, for example, a clergyman indicates a reluctance to testify" (S. TACON, "A Question of Privilege: Valid Protection or Obstruction of Justice?" in *Osgoode Hall Law Journal*, 17 [1979], p. 335).

⁹¹ See ELLIOTT, "An Evidential Privilege for Priest-Penitent Communications," p. 415.

⁹² HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," pp. 143-144.

⁹³ *R. v. Wild*, (1835), 1 Mood. 453.

Some authorities cite this case along with other cases against the existence of the priest-penitent privilege.⁹⁴ However, as Best points out, although the confession was conducted in a way which suggested some form of spiritual exercise remotely similar to a confession, the confession was not made to anyone who "... [W]as, nor professed to be, a clergyman."⁹⁵ The case therefore cannot properly be taken as jurisprudence which supports the body of law against the priest-penitent privilege.

In the *Greenlaw v. King* case,⁹⁶ an issue arose as to the admissibility of certain communications in a solicitor-client context. Lord Langdale, M.R., ruled against any privilege beyond that of solicitor and client, and noted:

The cases of privilege are confined to solicitors and their clients ; and stewards, parents, medical attendants, *clergymen*, and persons in the most closely confidential relation, are bound to disclose communications made to them.⁹⁷

The *Russell v. Jackson* case⁹⁸ was decided in 1851. The issue was whether certain communications between a deceased testator and his solicitor, as well as between the executors and the solicitor, were privileged. On the facts, Vice-Chancellor Turner ruled against the privilege for the former, and in favour of the privilege for the latter. He sets solicitor-client privilege apart from the priest-penitent privilege thus:

It is evident that the rule which protects from disclosure confidential communications between solicitor and client does not rest simply upon the confidence reposed by the

⁹⁴ See, for example, HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," pp. 133-134, on the principle that temporal inducements to confess are permissible, while spiritual exhortations will not vitiate the confession from an evidentiary point of view.

⁹⁵ BEST, *The Principles of the Law of Evidence*, p. 499.

⁹⁶ 1 Beav. 137.

⁹⁷ *Ibid.*, at 145 [emphasis added].

⁹⁸ (1851) 9 Hare 387.

client in the solicitor, for there is no such rule in other cases where equal confidence is reposed : in the cases, for instance, of the medical adviser and the patient, *and of the clergyman and the prisoner*. It seems to rest not upon the confidence itself, but upon the necessity of carrying it out. Lord Brougham, in *Greenough v. Gaskell* (1 My. & K. 98), gives, I think, the true foundation of it. He says : "It is founded on a regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources ; deprived of professional assistance, a man would not venture to consult any skilful person, or would only dare tell his counsellor half his case."⁹⁹

In the mid-nineteenth century, as England emerged from the Recusant era, a glimmer of jurisprudence appears which tends to support the priest-penitent privilege. In the 1853 case of *R. v. Griffin*,¹⁰⁰ conversations between an accused and the chaplain of the workhouse she resided in were sought by the prosecution to be produced in evidence against the accused on a charge of murder. Judge Baron Alderson of the Central Criminal Court opined that such evidence was not receivable, and the prosecution accordingly withdrew it. He stated in his decision:

I think these conversations ought not be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is because without an unfettered means of communication the client would not have proper legal assistance. The same principle applies to a person deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule ; but I think such evidence ought not to be given.¹⁰¹

This case is the only English case known to have analogized the priest-penitent privilege to the solicitor-client privilege.¹⁰² Stephen suggests that his opinion is based more on "a

⁹⁹ 9 Hare 391 [emphasis added].

¹⁰⁰ (1853) 6 C.C.L.C. 219.

¹⁰¹ Ibid.

¹⁰² In at least one early Canadian case from Québec, this case was cited as "... [A] decided indication in modern judicial utterances of the extension of this principle [of solicitor-client privilege] to the confidential communications between a penitent and his religious advisor" (*Gill v. Bouchard*, at 174). Also see F. AULD and C. MORAWETZ (eds.), *MacRae on Evidence*, Second Edition, Toronto, Carswell, 1952, p. 335.

matter of good feeling than as a matter of positive law.”¹⁰³ Likewise, Hopwood points out that “... [I]n this most men would concur, but mere feelings of compassion, or sense of fitness of the evidence, are unsafe guides in these matters.”¹⁰⁴ This case is not fully reported, and there is no conclusion stated in the case report.¹⁰⁵ No previous case law is cited in support of Alderson’s position, and it was not followed in subsequent jurisprudence.¹⁰⁶ Some authors suggest this case only applies to situations where the confessor voluntarily tenders the confession in evidence and there is a question of undue influence.¹⁰⁷

The case of *R. v. Hay*¹⁰⁸ decided in 1860 involved the criminal trial of an individual who was charged with larceny. The accused had presented a stolen item to a Catholic priest in the context of confession. The following discourse occurred between the judge and the cleric:

The witness took the oath in the usual form, and gave the following evidence :—
I have been twelve years Catholic priest at the Felling. On Christmas Day I received the watch produced.

Headlam then asked, from whom did you receive that watch ?

Witness.—I received it in connexion with the confessional.

His Lordship.—You are not asked at present to disclose anything stated to you in the confessional ; you are asked a simple fact—from whom did you receive that watch which you gave to the policeman ?

¹⁰³ STEPHEN, *A Digest of the Law of Evidence*, p. 206; also see D. PACIOCCO and L. STUESSER, *The Law of Evidence*, Second Edition, Toronto, Publications for Professionals, 1999, p. 52.

¹⁰⁴ HOPWOOD, “On the Law Relating to Confessions in Criminal Cases,” p. 145.

¹⁰⁵ See BEST, *The Principles of the Law of Evidence*, p. 500.

¹⁰⁶ See LINDSAY, “Privileged Communications Part I: Communications with Spiritual Advisors,” p. 162.

¹⁰⁷ See “The Case of Constance Kent and the Seal of Confession,” p. 288.

¹⁰⁸ (1860) 2 Fost. & F. 4 (Assizes).

Witness.—The reply to that question would implicate the person who gave me the watch, therefore I cannot answer it. If I answered it, my suspension for life would be a necessary consequence. I should be violating the laws of the Church, as well as the natural laws.

His Lordship.—I have already told you plainly I cannot enter into this question. All I can say is, you are bound to answer, “From whom did you receive that watch?” On the ground I have stated to you, you are not asked to disclose anything that a penitent may have said to you in the confessional. That you are not asked to disclose; but you are asked to disclose from whom you received stolen property on the 25th of December last. Do you answer it, or do you not?

Witness.—I really cannot, my lord.

His Lordship.—Then I adjudge you to be guilty of contempt of Court, and order you to be committed to gaol. [To the officer of the Court]—Take him into custody.

The witness was accordingly removed in custody.

Other witnesses were called.

Verdict, guilty.¹⁰⁹

A number of important observations may be made about this case. First, the case reveals a misunderstanding on the part of the judiciary as to what is covered by the seal of confession. As noted in Chapter Two, any word, sign, or deed which would directly or indirectly reveal both the identity of the penitent and his sin would constitute a breach of the seal of confession. The fact that the accused had presented the priest with a stolen watch would likely have sufficed to reveal both the penitent and his sin, since the eyewitness connected the felon with his crime.¹¹⁰ The Court seems to have restricted the privilege to matters of verbal communication between priest and penitent, and not on the broader obligations of the seal of confession to protect the *identity* of the penitent and his sin.¹¹¹ Second, this case is significant since it is the first one reported in which a cleric

¹⁰⁹ Ibid., at 6-10.

¹¹⁰ See ALLRED, “The Confessor in Court,” p. 5.

¹¹¹ “The distinction taken by the learned Judge was no doubt quite sound as regarded the legal privilege or protection attached to confession (for the matter was out of confession); although the obligation on the priest might possibly include anything which might indirectly tend to disclose what had been divulged in confession” (FINLASON, “Case Notes,” 8a). Hopwood, however, suggests Finlason’s commentary on this case is “unwarranted, as I conceive, by the principal case, and going into suggestions of

was compelled to break the seal of confession, failing which he was committed for contempt.¹¹² Third, the case *does* seem to imply the existence of the priest-penitent privilege, at least for direct communications in the confessional, since the question posed to the cleric was qualified by the statements "You are not asked at present to disclose anything stated to you in the confessional," and later "On the ground I have stated to you, you are not asked to disclose anything that a penitent may have said to you in the confessional."¹¹³ However, given that the privilege is at best only implied in this case, *R. v. Hay* is "... [A] decision apparently unimpeachable in itself, but leaving the general question untouched."¹¹⁴ Even if a privilege *can* be implied, "... [I]t can hardly displace the

opinion not, it is known, shared by the judge" (HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," p. 146).

¹¹² Sopinka, Lederman, and Bryant point out that this is the only reported case where a priest was committed for contempt with respect to refusal to break the seal of confession. See J. SOPINKA, S. LEDERMAN, and A. BRYANT, *The Law of Evidence in Canada*, Toronto, Butterworths, 1992, p. 694. However, as will be seen later, the *Anon.* (1905) case also reports that the cleric refused to testify and was jailed for contempt of court. There are other cases where priests were imprisoned for refusing to disclose private communications such as *Butler v. Moore* which will be discussed below, but these did not concern the seal of confession.

¹¹³ FINLASON, "Case Notes," 6, 9. Regarding these statements Finlason notes that "[I]t has been erroneously supposed that the learned Judge denied that any privilege attached to confession : but, as will be seen, he did not deny it ; on the contrary, impliedly admitted it, and drew a distinction which would otherwise have been futile. That there is such a privilege can scarcely be denied" (FINLASON, "Case Notes," 6a). Also see LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," p. 163; NOLAN, "The Law of the Seal of Confession," p. 658. Bursell does not agree with these authors: "However, on a strict reading this would seem to be wrong. All the judge in fact did was to rule that the question objected to did not in law place the priest in the position in which the priest felt it did; thus there could not be any implied recognition of the legality of the priest's claim. Whether the judge was correct in such a restrictive ruling is another matter. It is unlikely that the seal of the confessional applies solely to words; if this is so, any action which is properly part and parcel of the confession is embraced by it. However, the return of stolen property *to the priest* is not a necessary part of the confession; its return to the priest is at most a convenience and at worst an attempt to evade discovery" (BURSELL, "The Seal of the Confessional," p. 92). Of course, the real reason may have been restitution, an equally likely possibility.

¹¹⁴ BEST, *The Principles of the Law of Evidence*, p. 500. Also see NOKES, "Professional Privilege," p. 97.

bulk of authority which, though inconclusive, is undoubtedly against the existence of the privilege.”¹¹⁵ Fourth, the case seems to have been decided on the basis of fact that the exchange of the watch between the penitent and priest was done as an action that was completely removed from the sacramental confession *per se*.¹¹⁶ The case attracted much public attention due to the possibility that the privilege of the confessional was restored.¹¹⁷

The controversial 1865 decision in the case of *R. v. Kent*¹¹⁸ involved a situation in which a magistrate had refused to receive the testimony of an Anglican priest who had heard the confession of a woman accused of murder. The cleric claimed the communications were subject to the seal of confession, and the magistrate did not press the cleric for any further disclosure. It should be noted in this case that the accused did not challenge the charge and the testimony was unnecessary.¹¹⁹ One author suggests that

¹¹⁵ J. GOBBO, D. BYRNE, and J. HEYDON (eds.), *Cross on Evidence*, Second Australian Edition, Sydney, Butterworths, 1979, p. 281.

¹¹⁶ “... [F]or it was a question not as to anything said in confession, but as to something done by and between the prisoner and the witness after and out of confession, and so not within the privilege, attaching only to a sacramental confession.” (FINLASON, “Case Notes,” 9b). Also see BURSELL, “The Seal of the Confessional,” p. 92. One writer suggested that it was done *during* confession, but for ulterior reasons: “The priest may have intended, however, to defeat the authorities by receiving the watch during confession in order that he could return it to its owner without being required to disclose who gave it to him” (H. RYAN, “Obligation of the Clergy not to Reveal Confidential Information,” in *Criminal Reports* (3d), 73 [1991], p. 222).

¹¹⁷ This case actually caused debate in the British House of Commons, where it was strongly asserted by Lord Westmeath that there is no privilege of the confessional: see J. HAGEMAN, *Privileged Communications as a Branch of Legal Evidence*, Princeton, Honeyman & Co., 1889, reprinted by Rothman & Co., Littleton, 1983, pp. 128-129; NOLAN, “The Law of the Seal of Confession,” p. 658.

¹¹⁸ Reported in BEST, *The Principles of the Law of Evidence*, pp. 504-505.

¹¹⁹ This case was referred to in an 1890 letter from Lord Chief Justice Coleridge (who defended Constance Kent) to W. Gladstone (later Prime Minister of England) which indicated that Sir James Willes, the judge in this case, considered the question of the privilege of confession as yet undecided, while acknowledging at the same time that generally the English law does not recognize the privilege. This letter

the seal of confession was not at issue here since the penitent had already disclosed the confessional communications outside the confessional, thereby breaking the seal.¹²⁰ Moreover, the real issue seems to have centred around what the minister had told the penitent, and not what the penitent had disclosed to the minister, since an issue of duress had emerged.¹²¹

Following the *R. v. Hay* and *R. v. Kent* cases, two schools of thought emerged regarding the existence of the privilege following the Reformation. One maintained that the privilege of confession either continued to exist, and/or *was* reinstated by the *Emancipation Act*; and/or *should be* reinstated on the basis of public policy. This school of thought is represented by authorities such as J. Bentham and E. Badely. The second school of thought, which was promoted by authorities such as C. Hopwood, argued that the privilege of confession ceased to exist and *should not* be reinstated following the Reformation.

is reproduced in WIGMORE, *Evidence in Trials at Common Law*, §2394. Like *Hay*, this case also drew the attention of the media and Parliament. Two of the Law Lords, Lord Westbury and Lord Chelmsford, stated this evidentiary ruling to be incorrect, that there was no priest-penitent privilege at law for the Anglican clergy, *a fortiori* for Catholic clergy, and that the clergyman *should* have been compelled to answer: See *Hansard, The Parliamentary Debates*, ser. 3, London, The United Kingdom Parliament, House of Commons, 1820-1891, CLXXIX, (12 May, 1865), pp. 177-182. Lord Westbury stated: "There can be no doubt that in a suit or criminal proceeding a clergyman of the Church of England is not privileged so as to decline to answer a question which is put to him for the purposes of justice, on the ground that his answer would reveal something that has been made known to him in confession. A witness is compelled to answer every such question, and the law of England does not extend the privilege of refusing to answer to Roman Catholic clergymen who have obtained the information in confession from a person of their own persuasion" (*Hansard, Parliamentary Debates*, p. 180). For further commentary, see BEST, *The Principles of the Law of Evidence*, p. 504; NOKES, "Professional Privilege," p. 98; BURSELL, "The Seal of the Confessional," p. 93; LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," pp. 164-165; and TIEMANN and BUSH, *The Right to Silence: Privileged Clergy Communication and the Law*, pp. 117-120.

¹²⁰ See "The Case of Constance Kent and the Seal of Confession," p. 289.

¹²¹ See *ibid.*

In his early 19th century writings, the English jurist, Jeremy Bentham (1748-1832), concludes on the basis of public policy arguments that the priest-penitent privilege should in fact be upheld, notwithstanding the jurisprudence up to that point. He bases this on two grounds. The first ground is that the “mass of evidence” in litigation would not be lessened. The second ground is that of “vexation.” Let us explore this further.

With respect to the first ground, he states that if secrecy is not provided for confession:

What would be the consequence?—That, of that quantity of confessorial evidence which is now delivered in secret for a purpose purely religious, a certain proportion (it is impossible to say what, but probably a considerable one) would not be so delivered : would be kept back, under the apprehension of its being made use of for a judicial purpose.¹²²

What this means is that, essentially, if the privilege is allowed, there will be no evidence of confessional communications brought forward as evidence in court. If the privilege is disallowed, people simply will not confess anything that could be used against them in court. Thus, upholding the privilege will not lessen the total amount of evidence.

With respect to the second ground, after asserting that the Catholic religion should be tolerated, he states the following with regard to penitents:

In the character of penitents, the people would be pressed with the whole weight of the penal branch of the law : inhibited from the exercise of this essential and indispensable article of their religion : prohibited, on pain of death, from the confession of all such misdeeds as, if judicially disclosed, would have the effect of drawing down upon them that punishment ; and so, in the case of inferior misdeeds, combated by inferior punishments.

Such would be the consequences to penitents.¹²³

¹²² J. BENTHAM, *Rationale of Judicial Evidence Specially Applied to English Practice*, London, Hunt and Clark, 1827, vol. IV, p. 587.

¹²³ *Ibid.*, p. 588. Also see “The Case of Constance Kent and the Seal of Confession,” p. 287.

In other words, toleration of the Catholic religion should include respect for its confessional practices. To deny penitents the right to confessional secrecy would amount to "vexation."¹²⁴

The vexation argument also applies to confessors. With regard to coercing confessors to reveal the contents of the confessional, Bentham says:

To confessors, the consequences would be at least equally oppressive. To them, it would be a downright persecution : if any hardship, inflicted on a man on a religious account, be susceptible of that, now happily odious, name. To all individuals of that profession, it would be an order to violate what by them is numbered amongst the most sacred of religious duties. In this case, as in the case of all conflicts of this kind, some would stand firm under the persecution, others would sink under it. To the former, supposing arrangements on this head efficient and consistent, it would have the effect of imprisonment : a most severe imprisonment for life. As to those who sunk under it ; what proportion of the number would on this occasion be visited by the torments of a wounded conscience, and to what degree of intensity those torments would amount in the instance of each individual, are questions, the answer to which must on this occasion be referred by a non-catholic to the most competent judges amongst catholics : but a species of suffering, the estimation of which does not require any such appropriate and precise information, is the infamy that could not but attach itself to the violation of so important a religious duty.¹²⁵

Bentham then draws the following conclusion, based on these arguments:

The advantage gained by the coercion, gained in the shape of assistance to justice, would be casual, and even rare : the mischief produced by it constant and all-extensive. Without reckoning the instances in which it happened to the apprehension to be realized ; the alarm itself, intense and all comprehensive as it would be, would be a most extensive as well as afflictive grievance.¹²⁶

Bentham therefore argues that the interests of justice may still be served while upholding the privilege:

¹²⁴ Black defines "vexation" as "The injury or damage which is suffered in consequence of the tricks of another" (BLACK, *Black's Law Dictionary*, p. 1403). Bentham is of course using the term in a wider sense to describe state harassment and persecution of penitents in light of the penitential practices of the Catholic religion.

¹²⁵ BENTHAM, *Rationale of Judicial Evidence*, pp. 588-589.

¹²⁶ *Ibid.*, p. 589.

Who the misdoer is, the confessor knows better than to disclose ; as little will he give any such information as may lead to the arrestation of the delinquent, under circumstances likely to end in his being crushed by the afflictive hand of the law. But, without any such disclosure, he may disclose what shall be sufficient to prevent the consummation of impending mischief. "At such or such hour, go not, unless accompanied, to such or such a place : strengthen such or such a door : be careful to keep well fastened such or such a window."¹²⁷

These conclusions are remarkable in view of the fact that Bentham was both an opponent of privileges and a champion of Protestantism.

The second major proponent of the priest-penitent privilege is E. Badely, writing in 1865 in response to the *R. v. Hay* and *R. v. Kent* decisions. Badely makes the following remarks on both the Reformation and the positive law:

It is beyond all question that neither the proceedings of the 16th nor those of the 17th century (including therefore the whole period of the Reformation) made any change whatever in the sacred and inviolable character of this religious Rite. They certainly did not render unlawful the general use of private penitential confession ... those privileges existed by the law of the State as well as by the law of the Church, and that there is nothing in the statute book directly or indirectly to weaken them ...

The right of Catholics at the present day to have their professions respected in courts of justice rests upon a somewhat different ground from that of Anglicans, but not very difficult to support. That they had that right originally, by the common law as well as by the laws ecclesiastical cannot be doubted. If they lost it at that time, they lost it not because the privilege was taken away, or treated as illegal, by any special enactment, but because the religion itself was proscribed ... But happily those days of tyranny and barbarism are ended, and the Religion is restored, not indeed as the religion of the State, but as one sanctioned and protected by law. The Catholic therefore is reinstated in his right to the perfect enjoyment of all the ordinances of his creed, and of those privileges which are necessary to the performance of every one of his religious duties. If he is not, he has not that benefit which the Legislature intended to give him.¹²⁸

Badely went on to conclude:

Under these circumstances, I know not how any person can venture to affirm, that confessions are not privileged in Courts of Justice. Even if Statutes and Canons had left the privilege doubtful, which I fearlessly maintain that they have not, it exists, as we have seen, by the Common Law; and therefore the legal maxim would apply to it, "*Quae Communi Legi derogant, stricte interpretari debent.*" In a word, if Confession is authorized, or permitted, as a religious Rite, its secrecy is authorised and permitted also;

¹²⁷ Ibid., p. 591.

¹²⁸ BADELY, *The Privilege of Religious Confessions*, p. 32.

for without it, the Rite itself is neutralized, and the rules which sanction it are a dead letter; but, as well said by Baron Alderson, in another case [*Scott's Case*, 1 Dears. & Bell's, C.C.R. 67], if you make a thing lawful to be done, it is lawful in all its consequences.¹²⁹

A number of authors agreed with Badely's arguments. For example, Best states:

That these arguments have considerable force in them it would be impossible to deny. Nor, as far as members of the Church of England are concerned, are they weakened by the undoubted fact that the general practice and ministerial solicitation of auricular confession is discountenanced by the Church of England, however much [individual ministers of] that Church may encourage it in particular cases.¹³⁰

Best also provides the following rationale for upholding the priest-penitent privilege:

There are two reasons for judicial inviolability of "the seal of confession"—(1) the privilege of the person to whose disadvantage it is sought to procure its violation, and (2) the exposure of the clerical witness to ecclesiastical penalties. It is submitted that either of these is sufficient in any court, and constitutes in a petty sessional court, a "just excuse" for refusal of the witness to answer, within the meaning of sect. 16 of the Indictable Offences Act, 1848, and sect. 7 of the Summary Jurisdiction Act, 1848 (*ante*, p. 121). The 113th Canon of 1603 (*ante*, p. 503), appears to suffice in the case of the Anglican clergy, and the pre-Reformation canons to a similar effect in the case of the Roman Catholic clergy.¹³¹

Nolan also suggests that there are strong grounds in public policy for the privilege. After noting that the Catholic religion is once again tolerated in England, there being state-appointed Catholic chaplains serving in the military and the penitentiaries, he states:

Moreover, the State knows full well that confession is an essential part of Catholic practice and that the inviolability of the seal is an essential part of confession; the three main objects for which these chaplains are required are that they may hear the confessions of persons in their charge, say Mass in their presence, and communicate them. To say that, despite these facts, the Catholic chaplain of a remand prison might be required, under pain of committal, to disclose, on the prisoner's trial, a sacramental confession which the latter had made, would seem like laying a trap for both the priest and the prisoner. No one having the least acquaintance with trials as conducted by English or Irish judges to-day can think of such an event except as being in the remotest degree improbable.¹³²

¹²⁹ *Ibid.*, pp. 74-75; also see FINLASON, "Case Notes," 6a.

¹³⁰ BEST, *The Principles of the Law of Evidence*, p. 505.

¹³¹ *Ibid.*

¹³² NOLAN, "The Law of the Seal of Confession," p. 660.

C. Hopwood, on the other hand, although he accepts Badely's conclusions on the existence of a Pre-Reformation privilege, disagrees with Badely in all other respects, and concludes that the *Emancipation Act* did nothing toward resurrecting the privilege.¹³³ Hopwood reviews all the cases decided on this issue until the time of his writing in 1865, and states "... [S]carcely any of them is express on the point, but the weight of them is against the privilege."¹³⁴ According to Hopwood, only two cases, *Broad v. Pitt* and *R. v. Radford*, offer some support to the existence of the privilege.¹³⁵ Most authors agree with Hopwood that during the seventeenth century, the privilege was unequivocally withdrawn by the English courts, and simply never re-emerged in its previous form. Tiemann and Bush date the formal end of the privilege to 1645 when the *Anglican Prayer Book* was abolished.¹³⁶ However, Wigmore, relying on Hopwood, puts the date closer to the Restoration of 1666 with the implementation of the Charles II's anti-Catholic legislative initiatives, such as the *Uniformity Act* discussed earlier.¹³⁷ As noted by Nokes,

Though it seems possible to argue that a privilege could be implied from the duty, Badely did not refer to any case where the privilege was considered before the Reformation ; and,

¹³³ See HOPWOOD, "Confessions in Criminal Causes," p. 139. For a critical analysis of Hopwood's argumentation, see WHITE, "Confession and the Law," pp. 120-125.

¹³⁴ HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," p. 143.

¹³⁵ See *ibid.*

¹³⁶ See TIEMANN and BUSH, *The Right to Silence: Privileged Clergy Communication and the Law*, p. 53.

¹³⁷ See WIGMORE, *Evidence in Trials at Common Law*, §2394. Also see TIEMANN and BUSH, *The Right to Silence: Privileged Clergy Communication and the Law*, p. 53, for a detailed listing of this legislation.

as the law of evidence was then fragmentary and undeveloped, it is not certain that this inverted benefit of clergy was recognized.¹³⁸

He goes on to state that

Badely's argument that the pre-Reformation privilege was revived in favour of Catholics by their subsequent emancipation is fallacious, if for no other reason than that the principal Roman Catholic Relief Acts, as the name of the more modern implies, removed disabilities but did not create or re-create privileges.¹³⁹

Nokes also dismisses the possibility that the privilege against self-incrimination might be used, since the Catholic Church is only considered a voluntary society, and any sanctions would be dictated by foreign law (i.e., that of the Catholic Church).¹⁴⁰ In any event, testifying with regard to confessional communications and the right not to incriminate oneself by admissions which establish personal guilt are not analogous.

Mr. Justice Duffy of the Irish High Court, writing in 1945, likewise concludes that the privilege ceased to exist in England during the Restoration period:

Later English judges interpreting the common law have disagreed ; rare decisions upholding the priest-penitent privilege to the full extent may be found up to eighty years ago, but they are not now regarded as law, because the preponderance of judicial opinion in England has denied any privilege whatever to the priest for confidences made either inside or outside the confessional. The fact is that the old common law has been overlooked or brushed aside.¹⁴¹

Nokes sums up the judicial erosion of the privilege in English jurisprudence as such:

¹³⁸ NOKES, "Professional Privilege," p. 94. Also see HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," p. 139, and GOBBO, BYRNE, and HEYDON (eds.), *Cross on Evidence*, p. 281.

¹³⁹ NOKES, "Professional Privilege," p. 100.

¹⁴⁰ Ibid., pp. 101-103. Also see *R. v. Scott* (1856) 1 Dears. & Bell 47 (C.C.A.) (bankrupt must testify even if it may tend to incriminate him in other matters); but see *AG v. Briant*, at 185 (no requirement to answer a question that may disclose the identity of a government informer). Elliott also rejects self-incrimination as a ground for the privilege, since exposure to a criminal charge is necessary to support this privilege (as opposed to the internal disciplinary processes of religious bodies): see ELLIOTT, "An Evidential Privilege for Priest-Penitent Communications," p. 416. Also see GOBBO, BYRNE, and HEYDON (eds.), *Cross on Evidence*, p. 281.

¹⁴¹ *Cook v. Carroll*, [1945] I.R. 515 at 517.

Even after the Restoration the matter does not appear to have been raised, and by the end of the seventeenth century there was a hint that the privilege did not exist [*Anon.* (1694) *Skin.* 404.]. In the eighteenth century Coke's views on evidence were not treated by the Bench with more than formal respect [*Omychund v. Barker* (1744) 1 *Atk.* 21 at 40, 41, 44, 45, 48], ... while early in the next century legal writers denied that the law knew any such privilege...¹⁴²

As to the reason why the privilege lost its standing in the common law, Stephen states the following with regard to the jurisprudence of the Restoration era:

I think that the modern Law of Evidence is not so old as the Reformation, but has grown up by the practice of the Courts, and by decisions in the course of the last two centuries. It came into existence at a time when exceptions in favour of auricular confessions to Roman Catholic priests were not likely to be made.¹⁴³

Likewise, Wigmore suggests that the reason the English law refused to concede that privilege is simply that the Catholic Church was disfavoured in the centuries when the jurisprudence unfolded.¹⁴⁴

With regard to policy, after acknowledging that the question is one which presents great difficulty, Hopwood states that "... [A]fter careful consideration it is submitted, in opposition to powerful arguments, that there is not, nor ought to be such a privilege."¹⁴⁵

He sets out two arguments against upholding the privilege:

Admitting that there is much to secure our sympathies in this appeal, is it founded upon a true estimate of its benefits to mankind at large, and does it not overlook the first duty of justice—the detection of the crime first, the amendment of the criminal afterwards? Besides, all its amending effect may be produced with but a modified restraint of its wide pretensions. The confessor may receive the confessions of the penitent, may even keep them secret, and yet not break the law. In his breast, until he be questioned in a court of justice, may lie hidden the fact of a confession, as well as its details. A charge of want of candour may be made against this argument; yet it seems consistent with the duties of priest and citizen. It meets that very disinclination expressed, as we have already seen, by

¹⁴² NOKES, "Professional Privilege," p. 96.

¹⁴³ STEPHEN, *A Digest of the Law of Evidence*, p. 205.

¹⁴⁴ WIGMORE, *Evidence in Trials at Common Law*, §2396; NOKES, "Professional Privilege," p. 99.

¹⁴⁵ HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," p. 137.

judges who hardly denied the law to be as stated above. Thus much for securing to society the benefits, fancied or real, of unrestrained confession.¹⁴⁶

Nokes likewise directly rejects Bentham's argument concerning evidence:

... [H]is contentions that recognition of the privilege for Catholics would not reduce the general 'mass of evidence', and that priests can occasionally prevent the effect of contemplated crimes by judicious warnings, lacks even a Mephistophelean appeal.¹⁴⁷

Hopwood's second argument against the privilege concerns the proliferation of the privilege amongst other religions. He states:

Is it to extend even to the Mussulman, Hindoo, or Gentoo priest, and be denied to the tradesman or layman who, for the while, among our dissenting brethren, fulfils the duties as earnestly, as conscientiously, and with as much healing effect for the penitent's welfare, as his priest-penitent brethren educated at Maynooth, Oxford, and St. Bees? If it is so extended, then every confession of a formal religious kind may be excluded from proof in our courts of justice; then shall we take a step backward in that noble course of freeing the investigation of truth in criminal cases from special and vexatious hindrances, so long and so beneficially pursued.¹⁴⁸

3.2.4 – The Priest-Penitent Privilege in the Modern Period

We now turn to the modern era of jurisprudence, from 1865 until present. The first case of this era is *R. v. Castro*.¹⁴⁹ The case involved a civil action concerning an issue of impersonation. Wigmore notes that in the charge (jury instructions) of the Chief Justice there was an "... [I]ndication that if a priest refused to disclose subject matter of a confession, he would not be compelled to speak."¹⁵⁰

¹⁴⁶ Ibid., pp. 147-148.

¹⁴⁷ NOKES, "Professional Privilege," p. 99.

¹⁴⁸ HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," p. 148. As will be seen under the American jurisprudence, this argument was rejected.

¹⁴⁹ (1874) 2 Charge of the Chief Justice 648, reported in WIGMORE, *Evidence in Trials at Common Law*, §2394, fn. 6.

¹⁵⁰ Ibid.

In the 1881 case of *Wheeler v. Le Marchant*¹⁵¹ one of the issues to be resolved was whether letters exchanged between the defendant's solicitors and surveyors were privileged communications. Mr. Justice Jessel, M.R., stated that only those communications which were prepared after the dispute had arisen with the plaintiff were protected by solicitor-client privilege. He stated that the only privilege that exists is between lawyer and client, and remarked in *obiter* that "... [C]ommunications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected."¹⁵² Mr. Justice Duffy commented on the importance of the *obiter* in this case as follows: "... [T]he authority of that learned Judge stands so high that this *obiter dictum* is constantly quoted as embodying the law of England."¹⁵³ This is the most frequently-cited case in Canadian (as well as Irish and American) jurisprudence and legal writings as authority for the proposition in England that there is no priest-penitent privilege recognized in common law.¹⁵⁴

¹⁵¹ (1881) 17 Ch. 675.

¹⁵² Ibid. 681. Also see CUTLER and CAGNEY (eds.), *Powell's Principles and Practice*, p. 133; J. FINLAISON, *Wills on the Law of Evidence in Civil and Criminal Cases*, Third Edition, London, Stevens & Sons, 1938, p. 283.

¹⁵³ *Cook v. Carroll*, at 517; also see LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," p. 163.

¹⁵⁴ Citing *Halsbury's*, Madame Justice L'Heureux-Dubé observed that "The English position has not changed since *Wheeler v. Le Marchant*" (*Gruenke*, at 305).

The case of *Normanshaw v. Normanshaw and Measham*¹⁵⁵ was decided in 1893.

The husband petitioned for divorce on the ground of adultery, and he called a clergyman who had spoken to the wife about the allegations in question. The cleric, a member of the Church of England, objected to testifying with respect to this conversation. Mr. Justice Jeune compelled the cleric to answer, and the case report states that he indicated:

... [I]t was not to be supposed for a single moment that a clergyman had any right to withhold information from a court of law. It was a principle of our jurisprudence that justice should prevail, and no unrecognized privilege could be allowed to stand in the way of it.¹⁵⁶

It should be noted that nowhere is it alleged in the facts that this was a sacramental confession. As noted by Nokes, "... [T]he court appeared to regard the facts as not showing any occasion for privilege, and so had no need to consider whether any privilege could exist."¹⁵⁷

The next decision touching on the issue was the case of *Ruthven v. De Bour*¹⁵⁸ in 1901. The digest of the jurisprudence states the following:

In the case of *Ruthven v. De Bour*, an action for libel before Mr. Justice Ridley on the 8th inst., the plaintiff, who conducted his own case, asked in cross-examination one of the witnesses, a Roman Catholic priest, whether a priest who heard confessions was not bound to put certain questions to those who confessed. This question was perhaps put in an offensive manner, but it was *prima facie* merely a question as to the usage of the Roman Catholic priesthood. The witness thereupon asked the judge whether he was bound to answer the question, and the judge, according to the newspaper reports, replied, "No," and (addressing the plaintiff) said, "You are not entitled to ask what questions priests put in the confessional or the answers given." This decision is somewhat perplexing. There has been much discussion as to whether a Roman Catholic priest who

¹⁵⁵ 69 L.T.R. (n.s.) 468 (P.D. & A.). Also see CUTLER and CAGNEY (eds.), *Powell's Principles and Practice*, p. 121; BEST, *The Principles of the Law of Evidence*, p. 501.

¹⁵⁶ *Normanshaw v. Normanshaw*, at 469.

¹⁵⁷ NOKES, "Professional Privilege," p. 97. Also see LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," p. 164; NOLAN, "The Law of the Seal of Confession," p. 658.

¹⁵⁸ (1901) 45 Sol. Jo. 272.

gives evidence in the English courts can be compelled to disclose any fact which he only knows through being told of it in confession, and the general tendency of the decisions is to hold that even in these circumstances the witness has no privilege. But it will be observed that the decision of Mr. Justice Ridley goes much further, and suggests a privilege as to the usage of the priesthood of which we can find no trace in any law book. The action was apparently not one to excite much sympathy, and the plaintiff had not the assistance of counsel, but it is important that no question of privilege should be decided without careful consideration.¹⁵⁹

Once again, it is evident in jurisprudence that there is in fact a priest-penitent privilege, even though it refers to the communications of the priest and not the penitent.¹⁶⁰ Bursell suggests that this is the only occasion where the question of the seal received a ruling in its favour, though the matter of the privilege was once again not directly in issue.¹⁶¹

A 1905 anonymous case is reported in which a cleric with the Church of England claimed the privilege of the confessional.¹⁶² He was imprisoned for seven days for refusing to testify as to what he heard in the confessional, though it is unclear if his refusal was properly founded since the prisoner had apparently waived the confessor's obligation of secrecy.¹⁶³ This is the last case to directly comment on the priest-penitent privilege, the remainder being *obiter* statements.¹⁶⁴

No jurisprudence touching on the seal of confession is reported until 1948 when *McTaggart v. McTaggart*¹⁶⁵ was decided. In that case, the question was raised whether

¹⁵⁹ Ibid.

¹⁶⁰ See NOLAN, "The Law of the Seal of Confession," p. 658.

¹⁶¹ See BURSELL, "The Seal of the Confessional," p. 95.

¹⁶² *Anon.* (1905), reported in BEST, *The Principles of the Law of Evidence*, p. 121.

¹⁶³ See BURSELL, "The Seal of the Confessional," p. 93.

¹⁶⁴ See *ibid.*

¹⁶⁵ [1948] 2 All E.R. 754 (C.A.).

communications between spouses and their marital conciliator (in this case a probation officer) were privileged. Lord Denning ruled that there was no privilege, and stated additionally, in *obiter*, that "... [T]he probation officer has no privilege of his own from disclosure *any more than a priest*, or a medical man, or a banker..."¹⁶⁶ However, Lord Denning did suggest in his decision that if both parties had requested the conversation remain privileged, he would have upheld it since the doctrine of communications without prejudice holds that it is in the interests of justice to protect communications with a view to conciliation.¹⁶⁷

Lord Denning made a further ruling to similar effect in the 1963 *A-G v. Mulholland*; *A-G v. Foster* case.¹⁶⁸ At issue was the privilege claimed by a journalist, and the following statement was made in the case:

The only profession that I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer, but of the client. *Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge.* Let me not be mistaken. The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper, and indeed, necessary question in the course of justice...¹⁶⁹

¹⁶⁶ *Ibid.*, at 755-756 [emphasis added].

¹⁶⁷ See ELLIOTT, "An Evidential Privilege for Priest-Penitent Communications," p. 416; GOBBO, BYRNE, and HEYDON (eds.), *Cross on Evidence*, p. 282. The *McTaggart* case was followed in *Henley v. Henley* [1955] 1 All E.R. 590n (P.D. & A.) where Mr. Justice Sachs ruled that marriage mediation communications facilitated by a clergyman were privileged, since marital reconciliation is in the interests of justice. It was also followed in *Pais v. Pais* 1971 P. 119, where marriage mediation communications facilitated by a priest were held to be privileged unless both parties waived the privilege.

¹⁶⁸ [1963] 1 All E.R. 767 (C.A.).

¹⁶⁹ *Ibid.*, at 771 [emphasis added].

Hunter v. Mann,¹⁷⁰ judged in 1974 before Mr. Justice Boreham, concerned the duty of a physician to disclose information received in his professional capacity pursuant to the English *Road Traffic Act*. The Court appears to have accepted the proposition that, like a doctor, a priest, although bound to not make disclosure of confidential information without the consent of the penitent, has no absolute privilege.¹⁷¹

The 1978 case of *D. v. N.S.P.C.C.* concerned the identity of the informer to a children's aid organization which, the Law Lords ruled, should remain confidential due to its similarity to the police informer privilege. Lord Simon of Glaisdale, applying the Wigmore criteria (criteria for determining the admissibility of statements made in confidence, which will be explored in further detail below), held that the common law provides no protection for confessional communications, and that while a judge may attempt to *dissuade* certain questions concerning confidential matters, he may not *prevent* them from being asked, since "... [I]t must be law, not discretion, which is in command."¹⁷² He also stated, however, that the categories of privilege are not closed, and the public interest is the decisive factor in determining whether evidence (such as confessional communications) should be admitted:

The various classes of excluded relevant evidence may for ease of exposition be presented under different colours. But in reality they constitute a spectrum, refractions of the single light of a public interest which may outshine that of the desirability that all relevant evidence should be adduced to a court of law.¹⁷³

¹⁷⁰ [1974] 2 All E.R. 414 (Q.B.).

¹⁷¹ *Hunter v. Mann* 417.

¹⁷² *D. v. N.S.P.C.C.*, at 239.

¹⁷³ *Ibid.* 233. The Supreme Court of Canada has read the phrase "public interest" in this case in the same sense as the term "privilege": see *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494 at 512. Note that confidentiality of the communications

He also *did* suggest that such communications could be a matter for future statutory enactments:

But it may be that some of the relationships will need re-examination as matters of practice or law; and it is to be borne in mind that it has been found expedient in some jurisdictions to modify the common law rule of disclosure by giving statutory immunity to, for example, doctors or priests.¹⁷⁴

Lord Edmund-Davies stated, in *obiter*, what may be regarded as the current English law on confessional communications:

In civil proceedings a judge has no discretion, simply because what is contemplated is the disclosure of information which has passed between persons in a confidential relationship (other than that of lawyer and client), to direct a party to that relationship that he need not disclose that information even though its disclosure is (a) relevant to and (b) necessary for the attainment of justice in a particular case. If (a) and (b) are established, the doctor or priest must be directed to answer if, despite the strong dissuasion of the judge, the advocate persists in seeking disclosure. This is also true of all other confidential relationships in the absence of a special statutory provision, such as the Civil Evidence Act 1968, regarding communications between patent agents and their clients.¹⁷⁵

In the 1984 case of *Francome v. Mirror Group Newspapers Ltd.*,¹⁷⁶ the Court ruled that the plaintiff should be entitled to exclude wiretap evidence since the obtaining of this particular wiretap evidence was in itself a criminal act. Mr. Justice Donaldson, M.R., made the following comments on situations of conflict between moral obligations and legal obligations that a confessor may find himself in:

... [I]n very rare circumstances, a situation can arise in which the citizen is faced with a conflict between what is, in effect, two inconsistent laws. The first law is the law of land. The second is a moral imperative, usually, but not always, religious in origin. *An obvious example is the priest's obligation of silence in relation to the confessional*, but others can

may be a material consideration in finding privilege on the ground of public policy: *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2)* [1974] A.C. 405 at 433.

¹⁷⁴ *D. v. N.S.P.C.C.*, at 240.

¹⁷⁵ *Ibid.*, at 245. Also see *Kuruma v. The Queen* [1955] A.C. 197 at 203.

¹⁷⁶ *Francome v. Mirror Group Newspapers Ltd.* [1984] 2 All E.R. 408 (C.A.).

be given. In conducting the business of the courts, judges seek to avoid any such conflict, but occasionally it is unavoidable. Yielding to the moral imperative does not excuse a breach of the law of the land, but it is understandable and in some circumstances may even be praiseworthy.¹⁷⁷

This statement affirms that when the canon law of the seal of confession and the civil law are in conflict, the civil law prevails, although there seems to be sympathy on the part of the judiciary for those who refuse to breach the confidence.

The 1990 *W. v. Edgell and Others* case¹⁷⁸ involved a psychiatrist's report concerning a violent patient who had reported a long time interest in weapons. The patient sought release from a secure hospital. He simultaneously sought an equitable injunction to prevent the disclosure of the psychiatrist's report, on the basis that the psychiatrist had a duty of confidentiality with respect to the communications made during the course of treatment.

The Court ruled that the disclosure should be permitted on the basis of the public interest since the duty owed to the public was subordinate to the duty of confidence. Lord Justice Bingham made the following observations in *obiter*:

The decided cases very clearly establish (1) that the law recognises an important public interest in maintaining professional duties of confidence but (2) that the law treats such duties not as absolute but as liable to be overridden where there is held to be a stronger public interest in disclosure. *Thus the public interest in the administration of justice may require a clergyman, a banker, a medical man, a journalist or an accountant to breach his professional duty of confidence.*¹⁷⁹

¹⁷⁷ *Ibid.*, at 412-413 [emphasis added].

¹⁷⁸ [1990] 1 All E.R. 835 (C.A.).

¹⁷⁹ *Ibid.*, at 848 [emphasis added].

3.2.5 – The Priest-Penitent Privilege in the Equity Courts

The evidentiary interpretations in English law thus having been considered, we now turn to four reported equity cases which touch upon the issue.¹⁸⁰ Unlike the evidentiary cases, the equity cases are all consistent in their rulings.

The 1875 *Anderson v. Bank of British Columbia* case¹⁸¹ involved a demand for production of a letter exchanged between managers in contemplation of litigation. The bank refused production of the letters on the basis of privilege. Mr. Justice Jessel, M.R., ruled that the communications were not privileged, and stated the following with respect to the priest-penitent privilege:

Our law has not extended that privilege, as some foreign laws have, to the medical profession, or to the sacerdotal profession. We know that in some foreign countries communications made to a medical man are privileged, upon the ground that it is as desirable that a man shall be perfectly free in his communication with his medical man as that he shall be free in his communications with his lawyer. That has not been recognised in this country. Again, in foreign countries where the Roman Catholic faith prevails, it is considered that the same principles ought to be extended to the confessional, and that it is desirable that a man should not be hampered in going to confession by the thought that either he or his priest may be compelled to disclose in a Court of Justice the substance of what passed in such communication. This, again, whether it is rational or irrational, is not recognised by our law.¹⁸²

Mr. Justice Jessel evidently did not hold the priest-penitent privilege in high esteem.

In the 1987 case of *Goddard v. Nationwide Building Society*,¹⁸³ a defendant came into possession of a note made by the plaintiff's solicitor and sought to produce this in

¹⁸⁰ Confidentiality is a principle of equity which enjoins anyone who has received confidential information in exchange for promising to keep the information secret from revealing it. Actions concerning breach of confidentiality are within the jurisdiction of the Courts of Equity in England.

¹⁸¹ [1875] L.R. Ch. D. 2 644.

¹⁸² *Ibid.*, at 650-651.

¹⁸³ [1986] 3 All ER 264 (C.A.).

evidence. The Court ruled against admitting the evidence, and in the decision of Lord Justice Nourse the following statement appears:

Secondly, although the equitable jurisdiction is of much wider application, I have little doubt that it can prevail over the rule of evidence only in cases where privilege can be claimed. *The equitable jurisdiction is well able to extend, for example, to the grant of an injunction to restrain an unauthorised disclosure of confidential communications between priest and penitent or doctor and patient. But those communications are not privileged in legal proceedings* and I do not believe that equity would restrain a litigant who already had a record of such communications in his possession from using it for the purposes of his litigation. It cannot be the function of equity to accord a de facto privilege to communications in respect of which no privilege can be claimed. Equity follows the law.¹⁸⁴

This case unequivocally reaffirms that in English law there is no privilege between clergyman and penitent. However, it also indicates that a court of equity might intervene to prevent a confessor from unilaterally disclosing confessional communications *outside* of legal proceedings. This is consistent with the natural law on secrets discussed in the previous Chapter.

The *Stephens v. Avery and others* case¹⁸⁵ decided in 1988 involved an action for equitable relief concerning a breach of confidence against an individual who had revealed to a newspaper some details of a sexual relationship known through a friend. The Court ruled that such a revelation constituted a breach of confidentiality and made the following observations:

Counsel for the defendants submits that in the absence of either a legally enforceable contract or a pre-existing relationship, such as that of employer and employee, doctor and patient, *or priest and penitent*, it is not possible to impose a legal duty of confidence on the recipient of the information merely by saying that the information is given in confidence. In my judgment that is wrong in law. The basis of equitable intervention to protect confidentiality is that it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information.

¹⁸⁴ *Ibid.*, at 271.

¹⁸⁵ [1988] 2 All E.R. 477 (Ch.).

Although the relationship between the parties is often important in cases where it is said there is an implied as opposed to express obligation of confidence, the relationship between the parties is not the determining factor. It is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information.¹⁸⁶

This case deals once again with the natural law right of an individual to have a secret maintained. However, it does not affirm the priest-penitent privilege.

The 1988 *A-G v. Guardian Newspapers Ltd. (No 2)* case¹⁸⁷ is the final object of discussion in this section. In this case, an injunction was sought by the government against a former secret service agent who wished to publish his memoirs about matters subject to the *Official Secrets Act* and which had already been published abroad. The Court did not grant the injunction since the damage to the Crown had already been done by the prior publication, and noted that a confidential relationship together with a demonstration that non-disclosure would be in the public interest must be shown. Lord Justice Donaldson noted the following concerning confidentiality:

The right [of confidentiality] can arise out of a contract whereby one party (the confidant) undertakes that he will maintain the confidentiality of information directly or indirectly made available to him by the other party (the confider) or acquired by him in a situation, eg, his employment, created by the confider. *But it can also arise as a necessary and traditional incident of a relationship between the confidant and the confider, eg priest and penitent, doctor and patient, lawyer and client, husband and wife.*¹⁸⁸

Once again, the equity courts maintain that confidentiality can be enforced against an individual to prevent him from disclosing secrets in certain circumstances, including confessional communications. However, this protection is a right of the penitent against

¹⁸⁶ *Ibid.*, at 482 [emphasis added].

¹⁸⁷ *A-G v. Observer Ltd., A-G v. Times Newspapers Ltd.* [1990] 1 A.C. 109, *sub nom A-G v. Guardian Newspapers Ltd. (No 2)* [1988] 3 All E.R. 545 (H.L.).

¹⁸⁸ *Ibid.*, at 595 [emphasis added]; also see 639.

the confessor to protect secrets, and should not be confused with any privilege of the confessional.

Nokes makes the following observation about the equity cases in comparison to the common law courts:

A perusal of the reports shows that, when a claim to privilege for confessional secrets was made in person, usually in the common law courts, the Bench either was reluctant to refuse it or evaded it by holding that no occasion for privilege had arisen ; but that when any question of such privilege arose for consideration otherwise, the equity courts in particular expressed strong obiter dicta against its recognition, and after the first Judicature Act one did not hesitate to point out that in the event of conflict on questions of privilege the equitable rule must prevail.¹⁸⁹

The equity courts, unlike the common law courts, are entirely consistent in maintaining that there is no priest-penitent privilege. At the same time, they do recognize that outside of court proceedings, a penitent could enjoin a confessor from revealing confessional communication.

3.2.6 – The State of the English Jurisprudence

The following observations may be made regarding the twenty-nine English cases reviewed above. First, one case which was decided during the Reformation period seems to recognize the existence of the priest-penitent privilege at the time of its adjudication.¹⁹⁰ Second, eighteen cases which were decided thereafter make clear statements, albeit *obiter*, that there is no priest-penitent privilege.¹⁹¹ Third, seven cases which were decided

¹⁸⁹ See NOKES, "Professional Privilege," p. 98.

¹⁹⁰ *Garnet's Case*.

¹⁹¹ *Anon.* (1693), *Broad v. Pitt*, *Greenlaw v. King*, *Russell v. Jackson*, *Wheeler v. Le Marchant*, *Normanshaw v. Normanshaw and Measham*, *Anon.* (1905), *McTaggart v. McTaggart*, *A-G v. Mulholland*, *Hunter v. Mann*, *D. v. N.S.P.C.C.*, *Francome v. Mirror Group Newspapers Ltd.*, *W. v. Edgell and Others*, plus the four equity cases of *Anderson v. Bank of British Columbia*, *Goddard v. Nationwide Building Society*, *Stephens v. Avery and others*, and *A-G v. Guardian Newspapers Ltd. (No 2)*.

after the Catholic emancipation and adjudicated between 1829 and 1901 show a subtle but apparently temporary trend in the jurisprudence which seems to be in favour of recognizing the privilege.¹⁹² Fourth, three cases are inconclusive.¹⁹³ Fifth, two cases show some judicial reluctance to demand testimony notwithstanding the compellability of clergy to testify concerning matters heard in confession.¹⁹⁴

Based on this body of case law, most modern legal writers and commentators conclude that there is no privilege in English law.¹⁹⁵ However, as will be shown below, there are a number of writers and commentators who take the position that the question remains open.

It should also be noted at this point that the apparent judicial discretion to not compel a confessor to testify is not necessarily what it seems. Based on *D. v. N.S.P.C.C.*, Elliott is careful to point out that even in cases where the judiciary showed reluctance to compel a cleric to answer, "... [I]t is by no means established whether there is any discretion in a civil court to refuse to order disclosure, in the absence of some legal

¹⁹² *R. v. Gilham*, *R. v. Radford*, *R. v. Griffin*, *R. v. Hay*, *R. v. Kent*, *R. v. Castro*, and *Ruthven v. De Bour*.

¹⁹³ *Randolph's Case*, *R. v. Sparkes*, *Wilson v. Rastall*, and *R. v. Wild*.

¹⁹⁴ *Du Barré v. Livette*, *Broad v. Pitt*.

¹⁹⁵ See L. MACNALLY, *The Rules of Evidence on Pleas of the Crown, Illustrated from Printed and Manuscript Trials and Cases*, London, Butterworth, 1802, p. 250; COHEN, *Roscoe's Digest of the Law of Evidence*, pp. 127-128; T. STARKIE, *Practical Treatise on the Law of Evidence*, Fourth Edition, London, Stevens and Norton, 1853, p. 40; CUTLER and CAGNEY (eds.), *Powell's Principles and Practice*, p. 121; FINLAISON, *Wills on the Law of Evidence*, p. 283; WIGMORE, *Evidence in Trials at Common Law*, §2394; HOPWOOD, "On the Law Relating to Confessions in Criminal Cases," p. 143; ELLIOTT, "An Evidential Privilege for Priest-Penitent Communications," p. 411; YELLIN, "The History and Current Status of the Clergy-Penitent Privilege," p. 103.

privilege.”¹⁹⁶ In other words, where a witness is questioned during a civil trial (as opposed to a criminal trial), the judge has a duty to the party that called the witness to require him to testify, and has no discretion to excuse the witness from testifying without a formal privilege. Elliott notes “There is no case reported in the books in which the discretion was used to excuse a priest (or anyone else) from answering a relevant question on the basis that it would breach confidence.”¹⁹⁷ With respect to judicial discretion to exclude evidence in criminal trials, there is more discretion based on recent English legislation on criminal evidence, but it is unlikely to cover the case of sacramental confessions.¹⁹⁸

A minority view suggests that the jurisprudence to date is not definitive with respect to the privilege. As noted by one American commentator,

... [I]n England, at common law, the question remained ever in a nebulous state; it being decided at one time that such communications were privileged, at another that they were not so, and again a middle ground being adopted, it was said that, though they were acceptable as evidence if purely voluntary, yet they were highly improper if coercion were employed ... the question never received precise adjudication in England.¹⁹⁹

The reason for this lack of precise adjudication may be as follows:

And it is observable, but very easily explainable, that hardly any case has ever occurred in which the question, pure and simple, has ever arisen. That is, the question whether, by the law of England, the seal of the confessional is or is not respected. It is very easily explainable how such a question, in so pure and simple a form, should scarcely have arisen ; for it will be obvious, upon reflection, that unless either the priest do something out of confession, or the penitent in some way discloses the matter out of confession—neither of which cases is likely to occur—there is not likely to be any clue as to this species of evidence.²⁰⁰

¹⁹⁶ See ELLIOTT, “An Evidential Privilege for Priest-Penitent Communications,” p. 413.

¹⁹⁷ See *ibid.*, p. 415.

¹⁹⁸ See *ibid.*, pp. 414-415.

¹⁹⁹ D. Cloud, in ALLRED, “The Confessor in Court,” p. 7.

²⁰⁰ “The Case of Constance Kent and the Seal of Confession,” p. 287.

Nokes also agrees that the question remains open:

Yet the fact remains that few of the judges ever referred to their brethren's opinions, and that in none of the English cases cited was the history of this claim ever considered, or full argument on it heard, or a definite ruling given. In the absence of either statutory provision or decision, therefore, the existence of the privilege might appear still to be an open question.²⁰¹

Nokes makes the following observation about the inconsistency in the English jurisprudence concerning the privilege:

Although it was over four hundred years ago when the ' heavy hand ' of Henry VIII descended upon the Church, throughout that long period of nationalisation the judges have seldom spoken with one voice on the enforcement of any priestly privilege.²⁰²

Likewise, looking at the jurisprudence collectively, it has been observed that "... [T]he authorities appear inconsistent as to the circumstances in which the obligation of confidence may be overruled and, therefore, how far it extends to the pastoral work of the clergy in general."²⁰³ Lindsay states that the question remains open, and suggests that "... [T]he extent of such privilege and the legal basis on which it rests remain to be authoritatively determined,"²⁰⁴ and that "... [T]here does not seem to be an English case during the past 150 years in which the matter has been fully argued or fully considered."²⁰⁵ Also, he points out that there are no reported cases where a cleric was

²⁰¹ NOKES, "Professional Privilege," p. 98.

²⁰² See *ibid.* p. 89.

²⁰³ *Halsbury's Laws of England*, 4th ed. (reissued), London, Butterworths, 2003, vol. VII (1), p. 376.

²⁰⁴ LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," p. 160.

²⁰⁵ *Ibid.*, p. 161.

actually asked to break the seal of confession.²⁰⁶ Stephen likewise writes that the issue “[H]as never been solemnly decided in England.”²⁰⁷ Allred states that “On a careful examination of the English decisions it will be seen they are in the main inconclusive, and that there has always been a trend of English judicial thought in its favor.”²⁰⁸ Last, Professor J. Lyon emphatically states that (since there has been no consideration in the jurisprudence of the issue of self-incrimination to the priest, who is essentially a person in authority and compellable by the state), “... [L]egal writers should stop stating categorically that no privilege exists at common law for confessions made to priests when the courts have never really considered the only real ground on which such a privilege should be based.”²⁰⁹

In light of all of these considerations, it is reasonable to conclude that, although there are numerous *obiter* statements against the existence of the privilege in English jurisprudence, and while there are a number of cases which seem to favour the privilege, there is no case which has directly dealt with the question. Would future jurisprudence disregard the mass of *obiter* statements made by the courts to date against the privilege? This remains to be seen.

²⁰⁶ See *ibid.*, p. 168.

²⁰⁷ STEPHEN, *A Digest of the Law of Evidence*, p. 204.

²⁰⁸ ALLRED, “The Confessor in Court,” p. 21.

²⁰⁹ See J. LYON, “Privileged Communications—Penitent and Priest,” in *Criminal Law Quarterly*, 7 (1964-65), p. 330. This will be further considered in Chapter Four.

3.3 — THE LAW OF IRELAND

There are four cases in the Irish jurisprudence that are significant to our study. The first is the 1802 case of *Butler v. Moore*.²¹⁰ In this case, the validity of a will was challenged on the basis that the testator had returned to Catholicism from Protestantism (at that time a Catholic could not make a valid will according to English law). To prove the testator had returned to the Catholic faith, his confessor was called to testify, and he demurred on the basis of clerical secrecy. Michael Smith, M.R., overruled the demurrer. MacNally summarizes the jurisprudence in his case digest as follows:

Master of the Rolls, (Mr Michael Smith, bart.) Thought there was no difficulty in the case, though it had run into great length of discussion, which he indulged, as being most likely to give satisfaction upon a question which seemed to involve something of a public feeling. But he was bound to over-rule the demurrer. It was the undoubted legal constitutional right of every subject of the realm, who has a cause depending, to call upon a fellow subject to testify what he may know of the matters in issue ; and every man is bound to make the discovery, unless specially exempted and protected by law. It was candidly admitted, that no special exemption could be shewn in the present instance, and analogous cases and principles alone were relied upon : and, there was no doubt, that analogous cases and principles were sufficient for judicial determination. But the principle must be clear as light, and the analogy irresistably strong. That clearness of principle and strength of analogy did not appear in this case, and demurrers of this nature being held strictly, he was obliged to overule it.²¹¹

The confessor was found guilty of contempt for refusing to testify and was imprisoned.

Best observes with respect to this case, "How far a particular form of religious belief being disfavoured by law at the period (A.D. 1802) affected the decision in *Butler v. Moore*, is not easy to say ; but both that case and *R. v. Sparkes* leave the general question untouched..."²¹² Bursell points out that the case is not fully reported, and since

²¹⁰ Reported in MACNALLY, *The Rules of Evidence on Pleas of the Crown*, p. 253.

²¹¹ *Ibid.*, p. 255 [text reproduced as it appears].

²¹² BEST, *The Principles of the Law of Evidence*, p. 500.

the issue of confessional communications was not directly raised, "It seems best, therefore, to regard it as being concerned with a claim extending to extra-confessional confidences made to a priest during his clerical functions."²¹³ Judge Clinton in the *People v. Phillips* case agrees that there was no sacramental confession at issue,²¹⁴ and rejects its jurisprudence, stating "The Master of the Rolls determined against the demurrer; the reasons he assigns are loose and general, and very unsatisfactory..."²¹⁵ He also concludes that Smith incorrectly relied on the *Vaillant v. Dodemead* decision, because "The case then relied upon, does in no respect, in no similitude of principle or resemblance of fact quadrate with the case adjudicated, or in any degree, or to any extent support it."²¹⁶

The *Butler v. Moore* case cited above is treated as part of the body of Irish jurisprudence by some authors,²¹⁷ but it is not consistent with the other Irish jurisprudence. It is more frequently cited along with the English jurisprudence.

In the case of *In re Keller*²¹⁸ a Catholic priest was called as a witness, and refused to answer a question concerning the estate of the bankrupt. The grounds for his refusal

²¹³ See BURSELL, "The Seal of the Confessional," p. 96. Lindsay, however, reads this case as ruling against the privilege: see LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," p. 165.

²¹⁴ Abstracted in 1 W.L.J. 109 (1843), and reported in *The Catholic Lawyer*, 1(1955), p. 206; also see NOLAN, "The Law of the Seal of Confession," p. 653.

²¹⁵ *People v. Phillips*, at 205.

²¹⁶ *Ibid.*

²¹⁷ See NOKES, "Professional Privilege," p. 96.

²¹⁸ (1887) 22 L.R.I. 158.

were that he had only acquired the information in his capacity as a priest, albeit by way of an informal conversation. In any event, Boyd, J. at the trial level stated *obiter* that

I am willing, as far as in me lies, to protect any witnesses in your position from being obliged to answer any question in reference to anything received in confidence in the confessional ; but I cannot recognize it as any excuse for a witness not answering a question that he feels in honour bound not to answer it [His Lordship directed that the question be answered.]²¹⁹

However, because these particular communications were accepted as a professional confidence and not as confessional communications, Boyd stated the following:

I cannot recognise that there is any justification in your refusing to answer the question asked. If so, the whole of the bankruptcy law might be defeated by the simple expedient of getting a gentleman of your position to occupy a position of trust with regard to the bankrupt ; and that would be fatal to the administration of justice, and, I would say, would impose also on reverend gentlemen a very invidious task.²²⁰

The *obiter* in this case clearly recognizes the priest-penitent privilege.²²¹ However, Bursell points out that, since this did not involve a sacramental confession, it is therefore not a precedent.²²² Chief Baron Palles (one of the Law Lords who heard the appeal in this case concerning the validity of the warrant of committal for contempt against Rev. Keller) agrees that the *In re Keller* decision is not a precedent as the issue of confessional communications was not actually decided:

The ground of the refusal was the alleged privilege of the confessional. The clergyman, however, was discharged by the Queen's Bench Division, by virtue of a writ of *habeas corpus*, on the ground of defect in the warrant of committal ; so that the point was not decided.²²³

²¹⁹ *Ibid.*, at 160.

²²⁰ *Ibid.*

²²¹ See LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," p. 166.

²²² See BURSELL, "The Seal of the Confessional," p. 96.

²²³ *Tannian v. Sinnott* (1903) 37 I.L.T. & Sol. J. 275.

In the case of *Tannian v. Synnott*²²⁴ a Roman Catholic priest was called to testify in an action for slander involving a conversation which had occurred on the street. Chief Baron Palles stated in *obiter* that:

[H]e would not ask the witness to depose to anything connected, directly or indirectly, with confession ... [h]e added, however, that the present occasion was not complicated by such matters, and he allowed the evidence to be given in spite of an objection on behalf of the defendant.²²⁵

The *obiter* in the decision clearly recognizes the priest-penitent privilege.²²⁶

The 1945 *Cook v. Carroll* case became the *locus classicus* for the law in Ireland²²⁷ and therefore it will be examined in some detail here as an alternative to the English jurisprudence. In this case, a priest had held a conference at his residence in the hope of settling a lawsuit that had arisen between his parishioners. At no time was there a suggestion that this was a sacramental confession. At the trial, both the plaintiff and the defendant waived the privilege over this conversation, but the priest persisted in his refusal to testify, citing priest-penitent privilege. The priest was cited for contempt of court and fined. On appeal from the Circuit Court, the High Court reversed the contempt charge, finding that the priest was within his rights to refuse to testify.

In the jurisprudence of this case, the differences between the English and Irish law were noted, and the *obiter dicta* of Jessel in *Wheeler v. Le Marchant* was not followed. All communications between the priest and his parishioners, even *outside* of the

²²⁴ See *ibid.*

²²⁵ *Ibid.*

²²⁶ See LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," p. 166.

²²⁷ See *Halsbury's Laws of England*, vol. VII (1), p. 376.

confessional, were held to be privileged. One factor was that Article 44(2) of the 1937 Constitution of Ireland recognized that the Roman Catholic Church occupied a “special position,” a provision which at that time set Ireland apart from the rest of the common law jurisdictions.²²⁸ It permitted Duffy to treat the common law as *tabula rasa* and to depart from any previous common law precedents.²²⁹ In fact, Duffy went beyond even the letter and spirit of the canon law in concluding that the privilege could only be waived with the consent of the priest.²³⁰

Duffy also observed in his decision that Ireland accepted the English common law only to the extent that it was consistent with its national character. The rejection of the priest-penitent privilege by English courts is a result of the Reformation, an event which itself was repudiated by the Irish people.²³¹ He stated that: “... [I]t is unthinkable that we should have imposed on ourselves in this matter the regrettable preconceptions of English Judges as having here the binding force of law, when merely re-echoed by pre-Treaty Judges in Ireland.”²³²

It should also be noted that Duffy argued that Wigmore’s conditions are satisfied not only by sacramental confession but by any confidential communications with a

²²⁸ See *Cook v. Carroll*, at 519. This section was abolished in 1973.

²²⁹ See *ibid.*, at 522; also see LINDSAY, “Privileged Communications Part I: Communications with Spiritual Advisors,” p. 167.

²³⁰ See *Cook v. Carroll*, at 524, 523-525.

²³¹ See *ibid.*, at 519, 523.

²³² *Ibid.*, at 520.

priest.²³³ He concludes that Wigmore's refusal to recognize any English priest-penitent privilege is based on his rejection of the third condition, since

the rule was first adopted in England at a period when religious bias was inevitable and when public opinion would have resented the privilege as being mainly a concession to Popish priests. It is sometimes forgotten that the Catholic Emancipation Act, with its provisions for suppression and banishment, proclaimed the dislike of the Jesuits and members of other religious orders as late actually as the year 1829 ; a spirit of that sort is very powerful and dies hard.²³⁴

Bursell notes that Duffy's arguments are wide enough to protect other religions from disclosure of confessional communications as well.²³⁵ Elliott states that this case does indeed create a common law privilege in Ireland.²³⁶ Thus, we may conclude that there is a common law priest-penitent privilege in Ireland.

3.4 — THE LAW OF THE UNITED STATES OF AMERICA

Canadian law is increasingly influenced by American law, and in the *Gruenke* case a number of American cases and authorities were mentioned. Up until the American Revolution in 1776, the English law prevailed in America. After that, the case law began to diverge. In this section, we will examine the American jurisprudence and legislation on the matter of our discussion both at the federal and the state levels. We will then review authoritative commentators on the priest-penitent privilege, specifically J. Wigmore's criteria and analysis.

²³³ See *ibid.*, at 521.

²³⁴ *Ibid.*, at 521-522.

²³⁵ See BURSELL, "The Seal of the Confessional," p. 97.

²³⁶ See ELLIOTT, "An Evidential Privilege for Priest-Penitent Communications," p. 419. Also see LINDSAY, "Privileged Communications Part I: Communications with Spiritual Advisors," p. 160.

3.4.1 – American Federal Jurisprudence

All American federal court jurisprudence unequivocally recognizes the priest-penitent privilege. The 1876 Supreme Court decision in *Totten v. U.S.*²³⁷ involved an action against the U.S. government for secret services rendered during the Civil War. The Court dismissed the action on the basis that

... [P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. *On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between a husband and wife, or of communication by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose.*²³⁸

Two important observations should be made about this statement. First, this case clearly recognized the privilege in *obiter dicta*. Second, it placed the privilege on the same footing as solicitor-client privilege, something the English law was unwilling to do.

The privilege was again recognized at federal common law in the 1958 United States Court of Appeals case of *Mullen v. U.S.*²³⁹ In this case, a Lutheran minister was called to testify as to what he heard in confession. Judge Fahy of the Court of Appeals (concurring with Judge Edgerton) in the District of Columbia noted that any priest-penitent privilege in English common law prior to the Reformation had ceased to exist. However, at that time the federal courts were governed by the 1948 *Federal Rules of*

²³⁷ 92 US 605. Similar *obiter dicta* are found in the jurisprudence of Judge Learned Hand in *McMann v. Securities and Exchange Commission*, 87 F. 2d 377 at 378 (1937), *cert. denied*, 301 U.S. 684 (U.S.S.C., 1937).

²³⁸ *Totten v. U.S.* at 605 [emphasis added]. For further commentary on this case, see YELLIN, "The History and Current Status of the Clergy-Penitent Privilege," pp. 106-107.

²³⁹ 263 F. 2d 275. For further commentary on this case, see M. PLANTAMURA, "The Clergyman-Penitent Privilege," in S. STONE and R. LIEBMAN (eds.), *Testimonial Privileges*, Colorado Springs, McGraw-Hill, 1983, pp. 361-362.

Criminal Procedure which allowed for the reinterpretation of the common law on evidentiary privileges.²⁴⁰ In his famous dictum, he stated that “[W]hen reason and experience call for recognition of a privilege which has the effect of restricting evidence the dead hand of the common law will not restrain such recognition.”²⁴¹ After noting that the privilege had ceased to exist in the English common law, he rejected the English common law and applied the Wigmore criteria:

It thus appears that non-recognition of the privilege at certain periods in the development of the common law was inconsistent with the basic principles of the common law itself. It would be no service to the common law to perpetuate in its name a rule of evidence which is inconsistent with the foregoing fundamental guides furnished by that law.²⁴²

After citing Wigmore and referring to *People v. Phillips*, Fahy concludes on the basis of the Wigmore criteria that

Sound policy—reason and experience—concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent’s confidential confession to him, at least absent the penitent’s consent. Knowledge so acquired in the performance of a spiritual function as indicated in this case is not to be transformed into evidence to be given to the whole world. As Wigmore points out, such a confidential communication meets all the requirements that have rendered communications between husband and wife and attorney and client privileged and incompetent. The benefit of preserving these confidences inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of the tranquility of the home, the integrity of the professional relationship, and the spiritual rehabilitation of the penitent. The rules of evidence have always been concerned not only with truth but with the manner of its ascertainment.²⁴³

²⁴⁰ “The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience” (Federal Rules of Criminal Procedure, 28 U.S.C.A., Rule 26). For a consideration of some of the early challenges in applying this Rule to the priest-penitent privilege as well as other privileges, see D. LOUISELL, “Confidentiality, Conformity, and Confusion: Privileges in the Federal Courts Today,” in *Tulane Law Review*, 31 (1956), pp. 101-124. Although the Federal Rules do not directly state the privilege, they do recognize the state laws on privilege, and the American military rules of evidence make direct provision for the priest-penitent privilege: see R. Courts-Martial, Mil. R. Evid. 503.

²⁴¹ *Mullen v. U.S.*, at 279.

²⁴² *Ibid.*, at 280.

²⁴³ *Ibid.*

Since this foundation of jurisprudence was established, all of the federal case law (including *obiter dicta* in the United States Supreme Court case of *Trammel v. United States*) has strongly affirmed the priest-penitent privilege at common law.²⁴⁴

3.4.2 – American State Jurisprudence

The first major state-level case involving the priest-penitent privilege was the famous 1813 New York case of *People v. Phillips*, referred to earlier.²⁴⁵ In that case, a Catholic priest refused to answer questions concerning the restitution of some items which he had returned on behalf of a penitent. The Court of General Sessions, Mayor Clinton de Witt adjudicating, excused the priest from testifying, not necessarily on the basis of any privilege of the confessional, but on the natural law and the constitutional principle of freedom of religion. Regarding the first argument concerning the natural law, the Court said:

It cannot therefore, for a moment be believed, that the mild and just principles of the common law would place the witness in such a dreadful predicament; in such a horrible dilemma, between perjury and false swearing: If he tells the truth he violates his ecclesiastical oath—if he prevaricates he violates his judicial oath—Whether he lies, or whether he testifies the truth he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience.²⁴⁶

²⁴⁴ See *Cimijotti v. Paulsen*, 219 F. Supp. 621 at 623-625 (1963); *In re Verplank*, 329 F. Supp. 433 at 435; *United States v. Luther*, 481 F. 2d 429 at 433 (1973); *United States v. Nixon*, 418 U.S. 683 at 709 (1974); *In re Wood*, 430 F. Supp. 41 at 46 (1977); *Trammel v. United States*, 51; *In re Grand Jury Investigation*, 918 F. 2d 374 (1990).

²⁴⁵ Hageman suggests that the earlier case of *Baker and Rowlson v. Arnold and Arnold*, 1 Caines Rep. 258 (1803) held that confession to a priest was not privileged: see HAGEMAN, *Privileged Communications as a Branch of Legal Evidence*, pp. 122-123. However, a reading of this case does not reveal an express ruling regarding this issue. This case has not been recognized by any other authors or cited in any jurisprudence concerning the priest-penitent privilege.

²⁴⁶ *People v. Phillips*, at 203.

With respect to the second argument concerning constitutionality, the Court stated the following:

It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected. The sacraments of a religion are its most important elements. We have but two in the Protestant Church—Baptism and the Lord's Supper—and they are considered the seals of the covenant of grace. Suppose that a decision of this court, or a law of the state should prevent the administration of one or both of these sacraments, would not the constitution be violated, and the freedom of religion be infringed? Every man who hears me will answer in the affirmative. Will not the same result follow, if we deprive the Roman catholic of one of his ordinances? Secrecy is of the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed: To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman catholic religion would be thus annihilated.²⁴⁷

Taken together, these statements may be seen as establishing a strong foundation for the priest-penitent privilege in American state law. Just as the historical developments in England shaped the jurisprudence concerning the priest-penitent privilege, so did the historical circumstances in America. As noted earlier, laws are a product of history, and it would appear that this decision may have been influenced by the desire of the then thirty five year-old American judicial system to distinguish itself from the English system in light of the recent acrimony between the United States and Great Britain during the War of 1812.²⁴⁸ The presiding judge may also have been persuaded by the arguments of the famous Irish-American lawyer William Sampson and opponent of the English common

²⁴⁷ Ibid., at 207.

²⁴⁸ One of the reasons why the American law may have departed so readily from the English law on the issue of the priest-penitent privilege is that the natural law seems to have played a stronger role in American legal thought than in English legal thought which tended more toward the positive law. As noted by R. Hittinger, "American legal theorists and jurists resisted the pure positivism entrenched in England and in some legal cultures on the Continent. They recognized that neither laws nor a legal system could be explained simply on the basis of the will of the sovereign" (R. HITTINGER, "Introduction," in H. ROMMEN, *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. by T. HANLEY, Indianapolis, Liberty Fund, 1998, pp. xv-xvi).

law: "Sampson pointed out that this new nation must feel no obligation to accept the decisions of English judges as something binding upon those who seek to fashion a new nation with a new law of its own."²⁴⁹

Not less than four years later, however, in the case of *People v. Smith*, the Court found that a Protestant minister was not bound by the same strictures and therefore must testify.²⁵⁰ In response to this, the state of New York passed the first legislation in the United States upholding the priest-penitent privilege for all religions.²⁵¹ M. Callahan comments that:

The legislators in 1828 were more interested in the value the privilege had as a break with English law than they were in its theological and constitutional implications. Nor was its promoter likely to allow them to forget the fiercely anti-British sentiment on which the privilege rested.²⁵²

This factor likely drove the decision more than any sympathy towards Catholicism, since "Anti-Catholic bigotry was pervasive for much of American history."²⁵³

While the *Phillips* case was followed federally, it was all but ignored by the state jurisprudence, and the English common law prevailed.²⁵⁴ The jurisprudence generally

²⁴⁹ M. CALLAHAN, "Historical Inquiry Into the Priest-Penitent Privilege," in *Jur*, 36 (1976), p. 334.

²⁵⁰ Abstracted in 2 N.Y. City Hall Rec. 77 (1817), and reported in *The Catholic Lawyer*, 1 (1955), pp. 209-213.

²⁵¹ See YELLIN, "The History and Current Status of the Clergy-Penitent Privilege," p. 106.

²⁵² CALLAHAN, "Historical Inquiry Into the Priest-Penitent Privilege," p. 335; also see LAYCOCK, "Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century," pp. 1047-1058; W. WALSH, "The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence," in *Indiana Law Journal*, 80 (2005), pp. 1037-1089; "Developments in the Law: Privileged Communications," in *Harvard Law Review*, 98 (1984), p. 1459.

²⁵³ See LAYCOCK, "Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century," p. 1068. For more information on some of the issues facing the Catholic Church in early America, see E. SMITH, "The Fundamental Church-State Tradition of the Catholic Church in the United States," in *Church History*, 38 (1969), pp. 486-505.

held that in the absence of statutory protection, confessions to clergymen are not privileged at common law.²⁵⁵ Most commentators have accepted this jurisprudence at face value, notwithstanding the lack of analysis in the jurisprudence of these state-level cases.²⁵⁶ Allred points out that unlike the federal cases, these cases simply followed the English common law which, it has been pointed out, may be regarded as inconclusive, and does not of course take into account the First Amendment.²⁵⁷ If either of these factors were taken into consideration, the outcome of these state-level cases might have differed.

3.4.3 – American State Legislation

Between 1828 and 1991 all fifty states enacted legislative provisions for the privilege.²⁵⁸ There is a large and continuously growing body of case law interpreting

²⁵⁴ Nolan writes that “If the question had ever had occasion to call for the considered judgment of a court of appeal, there is no doubt that the answer to it at common law would have been deduced from its history in England” (NOLAN, “The Law of the Seal of Confession,” p. 661).

²⁵⁵ See *Bahrey v. Poniatishin*, 112 A. 481 (1921); *Commonwealth v. Drake*, 15 Mass. 161 at 162 (1818); *State v. Morehous*, 117 A. 296 at 300 (1922); *In re Swenson*, 237 NW 589 at 590 (1931); *Barnes v. State*, 23 So. 2d, 405 at 408 (1945); *Johnson v. Commonwealth*, 221 SW 2d 87 at 89 (1949); *Biggers v. State*, 358 SW 2d, 188 at 191, *error refused, no reversible error* 360 SW 2d, 516 (1962); *Rancourt v. Waterville Urban Renewal Auth.*, 223 A. 2d 303 at 304 (1966); *In re Estate of Soeder*, 7 Ohio App 2d 271 at 299 (1966); *Killingsworth v. Killingsworth*, 217 So. 2d 57 at 63 (1968); *Keenan v. Gigante*, 47 N.Y. 2d 160 at 166 (1979), *cert. denied*, 444 U.S. 887 (1979). As in England, canon law is treated as foreign law: *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 US 696 at 726-727 (1976).

²⁵⁶ See, for example, WIGMORE, *Evidence in Trials at Common Law*, §2394; H. MITCHELL, “Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion,” in *Minnesota Law Review*, 71 (1987), p. 737; HAGEMAN, *Privileged Communications as a Branch of Legal Evidence*, pp. 122-123, 127.

²⁵⁷ See ALLRED, “The Confessor in Court,” in *Jur*, 13 (1953), pp. 21-22.

²⁵⁸ See Ala. Code, § 12-21-166; Ala. Rules of Evid., art. V, Rule 505; Alaska Rules of Evid., art. V, Rule 506; Ariz. Rev. Stat., tit. 12, ch. 13, art. 4, § 12-2233 and tit. 13, ch. 38, art. 20, § 13-4062(3); Ark. Code Ann., tit. 16(4), ch. 41, §§ 101, Rule 505; Cal. Code (Evid.), div. 8, ch. 3, § 917, and ch. 4, art. 8, §§ 1030-1034; Colo. Rev. Stat., § 13-90-107(1)(c); Conn. Gen. Stat., § 52-146(b); Del. Unif. Rules Evid., art. V, Rule 505; D.C. Stat., § 14-309; Fla. Stat., tit. 7, § 90.505; Ga. Code Ann., tit. 24, ch. 9, art. 2, pt. 1, § 22; Haw. Rev. Stat., Rules Evid., ch. 626, div. 4, Rule 506; Idaho Code, § 9-203(3); Ill. Civil Pro. Code, ch. 735, act 5, art. VIII, part 8, 5/8-803; Ind. Code, tit. 34, art. 46, ch. 3, § 1; Iowa Code, tit. XV(3), § 622.10

these statutes and their provisions.²⁵⁹ These statutes are generally construed strictly by the

(1); Kan. Stat. Ann., § 60-429; Ky. Rev. Stat., tit. XXVIII, § 422A00.0505; La. Stat., Code of Evid., ch. 5, art. 511, tit. 13, ch. 17, pt. II, § 3734.2; Me. Rules of Evid., art. V, Rule 505; Md. Code Ann., tit. 9(1), § 9-111; Mass. Gen. Laws, pt. III, tit. II, ch. 233, s. 20A; Mich. Comp. Laws, §§ 600.2156 and 767.5a; Minn. Stat., § 595.02c; Miss. Code, tit. 13, ch. 1, § 13-1-22; Mo. Rev. Stat., tit. XXXIII, § 491.060(4); Mont. Code Ann., § 26-1-804; Neb. Rev. Stat., § 27-506; Nev. Rev. Stat., tit. 4, § 49-255; N. H. Rev. Stat., tit. LIII, § 516:35; N. J. Stat. Ann., tit. 2A (9), ch. 84A, art. II, § 23; N. M. Stat., art. 5, Rule 11-506; N.Y. Cons. Laws, § 4505; N. C. Gen. Stat., § 8-53.2; N. D. Rules of Evid., art. V, Rule 505; Ohio Rev. Code, § 2317.02; Okla. Stat., tit. 12, ch. 40, art. V, § 2505; Or. Rev. Stat., tit. 4, § 40.260, Rule 506; 42 Pa. C. S., pt. VI, § 5943; R. I. Gen. Laws, § 9-17-23; S. C. Code of Laws, § 19-11-90; S. D. Cod. Laws, §§ 19-13-16 to -18, Rule 505 (a-c); Tenn. Code Ann., § 24-1-206; Tex. Rules of Evid., art. V, Rule 505; Utah Code Ann., § 78-24-8(3); Vt. Stat. Ann. tit. 12, pt. 4, ch. 61, § 1607; Va. Code Ann., §§ 8.01-400 and 19.2-271.3; Wash. Rev. Code, § 5.60.060; W. Va. Code, §§ 48-1-301, and 57-3-9; Wis. Stat., § 905.06; Wyo. Stat. Ann., § 1-12-101(a)(ii); Am. Samoa Code Ann., §§ 45.2001-45.2016 (clergy privilege not abrogated, though not stated); Guam Code Ann., tit. 6, 503(h); P. R. Code, tit. 32, subtit. IV, ch. V, § 28; V. I. Code, tit. V, subtit. 1, pt. V, ch. 67, subch. V, § 857.

²⁵⁹ For a survey and analysis of the policy and jurisprudence concerning the interpretation of the privilege statutes, see C. CREECH, "The Clergy-Communicant Privilege: Blessed Are the Meek, For They Shall Remain Silent," in *North Carolina Law Review*, 65 (1987), pp. 1390-1408; C. QUICK, "Privileges Under the Uniform Rules of Evidence," in *University of Cincinnati Law Review*, 26 (1957), pp. 543-547; L. ADAMS and M. POLK, "Privileged Communications—Some Recent Developments," in *Vanderbilt Law Review*, 5 (1952), pp. 590-607; M. FITZGERALD, *The Sacramental Seal of Confession in Relation to Selected Child Abuse Statutes in the Civil Law of the United States*, JUD diss., Rome, Gregorian University, 1991, pp. 100-236; J. MEDINA, "Is There a Time to Keep Silence?"—The Priest-Penitent Privilege in Oklahoma," in *Oklahoma Law Review*, (1974), pp. 258-264; H. MOODY, "The Priest-Penitent Privilege in South Carolina—Background and Development," in *South Carolina Law Quarterly*, 12 (1960), pp. 440-453; T. TAYLOR, "The New North Carolina Priest-Penitent Statute," in *North Carolina Law Review*, 46 (1968), pp. 427-433; S. CAMPBELL, "Catholic Sisters, Irregularly Ordained Women and the Clergy-Penitent Privilege," in *U.C. Davis Law Review*, 9 (1976), pp. 527-547; J. MONTONE, "In Search of Forgiveness: *State v. Szemple* and the Priest-Penitent Privilege in New Jersey," in *Rutgers Law Review*, 48 (1995), pp. 263-312; W. HURLEY, "Privileged Communications in Oregon," in *Oregon Law Review*, 36 (1957), p. 152; "Testimonial Privilege and Competency in Indiana," in *Indiana Law Journal*, 27 (1952), p. 267; MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," pp. 740-785; C. HORNER, "Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society," in *Drake Law Review*, 45 (1997), pp. 697-732; J. SIPPEL, "Priest-Penitent Privilege Statutes: Dual Protection in the Confessional," in *Catholic University of America Law Review*, 43 (1994), pp. 1127-1164; REESE, "Confidential Communications to the Clergy," pp. 61-88; PLANTAMURA, "The Clergyman-Penitent Privilege," pp. 361-376; YELLIN, "The History and Current Status of the Clergy-Penitent Privilege," pp. 108-156; M. MAZZA, "Should Clergy Hold the Priest-Penitent Privilege?" in *Marquette Law Review*, 82 (1998) pp. 181-204; "Developments in the Law: Privileged Communications," pp. 1458-1562; F. KUHLMANN, "Communications to Clergymen—When are They Privileged?" in *Valparaiso University Law Review*, 2 (1967-68), pp. 265-295; R. ARAUJO, "International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the 'Priest-Penitent' Privilege," in *American University International Law Review*, 15 (2000), pp. 658-66; IOPPOLO, D. et al., *Confidentiality in the United States: A Legal-Canonical Study*, Washington, DC, CLSA, 1988, 167 p.; ALLRED, "The Confessor in Court," pp. 7-32; D. LEONARD and V. GOLD, *Evidence: A Structured Approach*, New York, Aspen Publishers, 2004, pp. 583-590; C. TORCIA (ed.), *Wharton's Criminal Evidence*, Thirteenth Edition, New York, The Lawyers Co-Operative Publishing Company, 1973, vol. 3, pp. 85-86; R. WEINBERG, *Confidential*

courts.²⁶⁰ The provisions of these statutes cover who qualifies as a cleric, who qualifies as a penitent, cases of mistaken belief, types of communications, qualifying religious bodies and confessional discipline, third party presence, waiver, and sanctions. No statutes have been repealed since they were promulgated, which suggests that the privilege has not been misused.²⁶¹ However, it should also be noted that since the 1960's, each state has passed child abuse reporting statutes, some of which abrogate the privilege.²⁶² Electronic

and Other Communication, New York, Oceana Publications, 1967, pp. 31-35; TIEMANN and BUSH, *The Right to Silence: Privileged Clergy Communication and the Law*, pp. 127-232; ARCHDIOCESE OF NEWARK, "Cleric-Penitent Privilege (USA) With Correspondence," in *CLSGBI Newsletter*, No. 102 (1995), pp. 22-26; M. SMITH, "The Pastor on the Witness Stand: Toward a Religious Privilege in the Courts," in *The Catholic Lawyer*, 29 (1984), pp. 1-21; "Slandorous Communication to Clergyman Held Absolutely Privileged," in *The Catholic Lawyer*, 11 (1965), pp. 66-70.

²⁶⁰ See R. STOYLES, "The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses," in *University of Pittsburg Law Review*, 29 (1967), p. 32. E. Morgan and J. Maguire pointedly state that "Many legislatures have subordinated justice to sentimentality by forbidding ministers of religion to disclose confessions made in the course of church discipline" (E. MORGAN and J. MAGUIRE, "Looking Backward and Forward," in *Harvard Law Review*, "L" [1937], p. 910).

²⁶¹ See REESE, "Confidential Communications to the Clergy," p. 58.

²⁶² At the time Mitchell's article was written, seven statutes abrogated the privilege, three upheld it, and the remainder do not resolve the issue of whether the privilege also applies to these reporting requirements. It remains to be fully argued whether the free exercise of religion would suffice to uphold the privilege: see MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," pp. 790-825. For further consideration of these statutes, see W. COLE, "Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis," in *Columbia Journal of Law & Social Problems*, 21 (1988), pp. 1-53; D. BESHAROV, "The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect," in *Villanova Law Review*, 23 (1977-1978), pp. 458-520; P. COLEMAN, "'Shrinking' the Clergyperson Exemption to Florida's Mandatory Child Abuse Reporting Statute," in *Nova Law Review*, 12 (1987), pp. 115-145; D. FENTON, "Texas' Clergyman-Penitent Privilege and the Duty to Report Suspected Child Abuse," in *Baylor Law Review*, 38 (1986), pp. 231-248; L. FRISCHMEYER and D. BALLARD, "Iowa Professionals and the Child Abuse Reporting Statute - A Case of Success," in *Iowa Law Review*, 65 (1980), pp. 1273-1385; W. IVERS, "When Must a Priest Report Under a Child Abuse Reporting Statute? - Resolution to the Priest's Conflicting Duties," in *Valparaiso Law Review*, 21 (1987), pp. 431-465; K. KEEGAN, "The Clergy-Penitent Privilege and the Child Abuse Reporting Statute: Is the Secret Sacred?" in *John Marshall Law Review*, 19 (1986), pp. 1031-1051; T. MILNE, "'Bless me Father, for I am About to Sin . . .': Should Clergy Counselors Have a Duty to Protect Third Parties?" in *Tulsa Law Journal*, 22 (1986), pp. 139-165; and FITZGERALD, *The Sacramental Seal of Confession in Relation to Selected Child Abuse Statutes in the Civil Law of the United States*, pp. 219-236.

surveillance of confessional communications is generally illegal,²⁶³ though current legislation may need to be improved in order to provide full protection.²⁶⁴

It is generally assumed the priest-penitent privilege legislation is constitutional on the basis of freedom of religion, although there have to date been no formal challenges.²⁶⁵ The basis of such a challenge may be separation of Church and State (the privilege could be seen as promoting the Catholic religion and those with established confessional secrecy), denial of equal protection (some religions do not meet the criteria of the statutes), as well as the issue as to whether revocation of the privilege would actually violate the constitutional right to the free exercise of religion.²⁶⁶

3.4.4 – The Wigmore Criteria

The American law, unlike the English law, is based on the axiom that it is “[M]ore desirable to risk concealment of the truth than to disrupt the values that the

²⁶³ “A Prisoner’s Secretly Taped Sacramental Confession,” in *Or*, 26 (1996-1997), pp. 33, 35-36; “Recording of Prisoner’s Sacramental Confession Violated Rights,” in *Or*, 26 (1996-1997), pp. 537, 539-545; DEIBEL, “The Oregon Case in Review,” pp. 17-20; WOESTMAN, “A Penitent Gives Confessor Permission to Reveal Sins,” pp. 70-72.

²⁶⁴ For a discussion of the legal deficiencies of protection of priest-penitent communications under electronic surveillance, see M. GOLDSMITH and K. BALMFORTH, “The Electronic Surveillance of Privileged Communications: A Conflict in Doctrines,” in *Southern California Law Review*, 64 (1991), pp. 904, 917; ADAMS and POLK, “Privileged Communications—Some Recent Developments,” pp. 598-601; YELLIN, “The History and Current Status of the Clergy-Penitent Privilege,” pp. 148-156.

²⁶⁵ See STOYLES, “The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses,” p. 27.

²⁶⁶ See ELLIOTT, “An Evidential Privilege for Priest-Penitent Communications,” p. 428; MITCHELL, “Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion,” pp. 777-785; REESE, “Confidential Communications to the Clergy,” pp. 87-88; STOYLES, “The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses,” pp. 27-63; ALLRED, “The Confessor in Court,” pp. 10-11; R. COLOMBO, “Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege,” in *New York University Law Review*, 73 (1998), pp. 225-252; J. MAYES, “Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern,” in *Indiana Law Journal*, 62 (1987), pp. 397-423.

privilege supports.”²⁶⁷ In order to determine when this axiom should be applied, Professor J. Wigmore (+1943), in his *locus classicus* on the law of evidence, *Evidence in Trials at Common Law*, sets out four criteria:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.²⁶⁸

Wigmore then analysed the priest-penitent privilege using these four criteria. With regard to the first criterion, Wigmore stated that “... [I]n effect, it may be assumed that a permanent secrecy, subject only to an optional variation by the priest, is an essential of any real confessional system as now maintained.”²⁶⁹ Regarding the second criterion, Wigmore observed that “In so far as such confessions concern crimes and wrongs, they might certainly, in some indefinite but substantial measure, be discontinued, and the penitential relation be to that extent annulled.”²⁷⁰ In relation to the third criterion, Wigmore indicates that “In a state where toleration of religions exists by law, and where a substantial part of the community professes a religion practising a confessional system,

²⁶⁷ *People ex. re. Noren v. Dempsey*, 139 NE 2d. 780 at 783 (1957).

²⁶⁸ WIGMORE, *Evidence in Trials at Common Law*, §2285.

²⁶⁹ *Ibid.*, §2396.

²⁷⁰ *Ibid.* Mitchell suggests that empirical evidence is not essential but may help to support this criterion. See MITCHELL, “Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion,” pp. 762-765. Also see “Testimonial Privilege and Competency in Indiana,” in *Indiana Law Journal*, 27 (1952), p. 267.

this question must be answered in the affirmative.”²⁷¹ Finally, relying on Bentham,

Wigmore states the following with respect to his fourth criterion:

This species of evidence, as already noticed in other connections (§§2251-2291, *supra*), ought in no system of law to be relied upon as a chief material object of proof. In criminal cases it would be impolitic to encourage a resort to this too facile channel of confessions. In civil cases the ordinary process of discovery upon oath would be a sufficient equivalent.

On the whole, then, this privilege has adequate grounds for recognition.²⁷²

The United States federal courts agree the priest-penitent privilege satisfies the Wigmore criteria.²⁷³ Although the Wigmore criteria have been used in the English courts,²⁷⁴ given the jurisprudence in England to date, it is doubtful that the Wigmore test would suffice to resurrect the privilege, though it might be useful in constructing legislation similar to what has been promulgated in the American states.²⁷⁵

It should be noted that Wigmore sought a conclusive resolution of this issue, and not a case-by-case determination.²⁷⁶ Mitchell also proposes that, from a public policy point of view, the priest-penitent privilege may also be based on the right to privacy, as well as on the constitutional right to the free exercise of religion.²⁷⁷

²⁷¹ WIGMORE, *Evidence in Trials at Common Law*, §2396. Wigmore points out that the jurisprudence against the privilege in England was based on the refusal to concede that the penitential relationship deserved any recognition due to the historical intolerance toward the Catholic Church. See WIGMORE, *Evidence in Trials at Common Law*, §2396; also see NOKES, “Professional Privilege,” p. 99.

²⁷² WIGMORE, *Evidence in Trials at Common Law*, §2396.

²⁷³ See *In re Verplank*, at 435.

²⁷⁴ See, for example, *D. v. N.S.P.C.C.*, at 241.

²⁷⁵ See ELLIOTT, “An Evidential Privilege for Priest-Penitent Communications,” p. 426.

²⁷⁶ See MITCHELL, “Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion,” pp. 767-768.

²⁷⁷ See *ibid.*, pp. 768-777, 793-821.

3.5 — THE LAW OF AUSTRALIA AND NEW ZEALAND

The two remaining jurisdictions which were mentioned in the *Gruenke* case are the Commonwealth countries of Australia and New Zealand. At least three states in Australia have enacted evidentiary statutes which recognize the priest-penitent privilege.²⁷⁸ New Zealand has similar legislation.²⁷⁹ There is a small body of interpretative case law for both Australia²⁸⁰ and New Zealand.²⁸¹ The Wigmore criteria

²⁷⁸ “*Religious confession* (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy. (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose. (3) This section applies even if an Act provides – (a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or (b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground. (4) In this section, “religious confession” means a confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the church or religious denomination concerned” (s. 127, *Evidence Act*, 2001 [Tasmania]); “*Confessions to clergymen and medical men* (1) No clergyman of any church or religious denomination shall without the consent of the person making the confession divulge in any suit action or proceeding whether civil or criminal any confession made to him in his professional character according to the usage of the church or religious denomination to which he belongs” (s. 28, *Evidence Act*, 1958 [Victoria]); and “*Religious confessions* (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy. (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose. (3) This section applies even if an Act provides: (a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or (b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground. (4) In this section: “religious confession” means a confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the church or religious denomination concerned” (s. 127, *Evidence Act*, 1995 [New South Wales]). Also see GOBBO, BYRNE, and HEYDON (eds.), *Cross on Evidence*, p. 281.

²⁷⁹ “*Privilege for communications with ministers of religion* - (1) A person has a privilege in respect of any communication between that person and a minister of religion if the communication was (a) made in confidence to or by the minister in the minister’s capacity as a minister of religion; and (b) made for the purpose of the person obtaining or receiving from the minister religious or spiritual advice, benefit, or comfort. (2) A person is a minister of religion for the purposes of this section if the person has a status within a church or other religious or spiritual community that requires or calls for that person (a) to receive confidential communications of the kind described in subsection (1); and (b) to respond with religious or spiritual advice, benefit, or comfort” (s. 58, *Evidence Act*, 2006).

²⁸⁰ See, for example, *R. v. Lynch*, [1954] Tas. S.R. 47 at 48 (S.C.) (confession not made for a spiritual purpose is not protected, since it was not a proper confession within the meaning of the legislation). In *McGuinness v. Attorney-General of Victoria*, Latham, C.J. stated that “Privilege from

have also been applied in making determinations of issues which are related to privileged communications.²⁸²

CONCLUSION

The following conclusions may be drawn from the review and analysis of the common law systems on the priest-penitent privilege surveyed and analysed above.

The English law and jurisprudence on the privilege may be summarized as follows: First, there is evidence to reasonably conclude that the canon law on the seal of confession was likely privileged in the law of England prior to the Reformation. Second, the privilege appears to have eroded from Norman times to the Reformation era to exclude treason. Third, there are numerous statements in English law during the Restoration period which indicate that the priest-penitent privilege ceased to exist during

disclosure in courts of justice is exceptional and depends on the strongest considerations of public policy. The paramount principle of public policy is that the truth should be always accessible to the established courts of the country. It was found necessary to make exceptions in favour of state secrets, confidences between counsel and client, doctor and patient, and *priest and penitent*, cases presenting the strongest possible reasons for silencing testimony" (*McGuinness v. Attorney-General of Victoria*, (1940) 63 C.L.R. 73 at 87 [H.C. of A.]; emphasis added). For further consideration of the case law, legislation, and policy issues regarding the priest-penitent privilege in Australia, see A. CONNAGHAN, *The Impact of Legislation in New South Wales, Australia, in the Obligation to Preserve the Seal of Confession, According to Canon 983 of the Code of Canon Law*, Ottawa, Saint Paul University, unpublished Masters thesis, 1998, 46 p., and M. PERRELLA, "Should Western Australia Adopt an Evidentiary Privilege Protecting Communications Given as Religious Confessions?" in *Murdoch University Electronic Journal of Law*, 4(3) 1997, <http://www.murdoch.edu.au/elaw/issues/v4n3/perr43.html>. Also see, similarly, *Ronald v. Harper* (1909), 15 A.L.R. (C.N.) 5 (Vic. Sup. Ct.) in which Hodges, J., rejected a claim for "ecclesiastical privilege" made by a clerk concerning presbyteral documents and imprisoned the clerk for refusing to produce them.

²⁸¹ Cooke J., referring to the legislation, stated that "The rationale for any such privilege must be that a person should not suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief" (*R. v. Howse*, [1983] N.Z.L.R. 246 at 251 [N.Z.C.A.]). Also see B. LUCAS, "Confidentiality, Confession and Civil Law," in 24th *CLSANZ Proc*, 1990, pp. 139-159.

²⁸² For example, Turner J. of the New Zealand Supreme Court stated that "The famous *dictum* of Lord Macmillan in *Donoghue v. Stevenson* [1932] A.C. 562, 619; [1932] All E.R. Rep I, 30, that 'the categories of negligence are never closed' may serve as inspiration for a similar remark as to the categories of privilege" (*Bell v. University of Auckland*, [1969] N.Z.L.R. 1029 at 1036 [N.Z.S.C.]).

that period. However, because all these statements are *obiter dicta*, they are not conclusive. Fourth, the legislation emancipating Catholics in England does not appear to have reinstated the privilege. Fifth, although there may be a reluctance on the part of the judiciary to accept evidence concerning matters under the seal of confession, there is no absolute discretion to exclude it. Persuasion may be used to dissuade the party requesting the evidence, but there is no legal authority to exclude it where it is sought. Sixth, the equity courts unequivocally affirm that there is no privilege, although they would be prepared to enforce secrecy of confessional communications against a confessor who sought to reveal them without a waiver from the penitent. Seventh, the current law in England that would apply to the priest-penitent privilege is governed by the public interest which would be decided on a case-by-case basis rather than providing for a privilege. It is reasonable to conclude that English jurisprudence to date has not recognized the privilege. And, even though the issue has never received a formal and direct adjudication, there is no reason to assume that the numerous *obiter* statements in the English jurisprudence against the privilege would be disregarded and overruled in any future jurisprudence.

It is quite evident from our brief review that the Irish jurisprudence has rejected the English jurisprudence by affirming the priest-penitent privilege. The Irish jurisprudence distinguishes itself from the English jurisprudence on the basis of Irish history as well as the application of the Wigmore criteria.

Our examination of the American law and jurisprudence indicates that the American federal jurisprudence has rejected the English jurisprudence and has upheld the priest-penitent privilege, and has applied both the Wigmore criteria and the federal rules

of evidence in support of the privilege. On the other hand, the American state-level jurisprudence has followed the English jurisprudence and has in general ruled against the recognition of the privilege. However, this jurisprudence has been supplanted by state legislation creating a statutory privilege in all American states. There is a wide body of jurisprudence strictly interpreting the state-level statutes. However, the constitutionality of the priest-penitent privilege has not been directly addressed to date by the courts.

Australia and New Zealand follow the American state-level model and make statutory provision in a number of their states for the priest-penitent privilege. This legislation has been interpreted by a smaller body of case law than the American state-level legislation but it appears to be consistent in meaning and import with its American counterparts.

What we have analysed thus far in this Chapter is the foundation of law and jurisprudence on the priest-penitent privilege in the major non-Canadian common law systems. In the following Chapter we will examine the Canadian law and jurisprudence on this same issue.

CHAPTER FOUR

CONFIDENTIAL RELIGIOUS COMMUNICATIONS IN CANADIAN LAW

INTRODUCTION

In the preceding Chapters we established the canonical foundations of the seal of confession, as well as its reception or lack thereof into the law and jurisprudence of non-Canadian common law jurisdictions. The focus of our inquiry in this Chapter will now turn to Canadian law and jurisprudence. The principal question we will attempt to answer is whether the seal of confession as set out in canon law constitutes a privileged communication in Canadian law. This question will be answered through an analysis of the Canadian legislation and jurisprudence. The Chapter will be outlined as follows.

First, we will survey the Canadian legislative framework and supporting jurisprudence in order to provide the necessary interpretative context for our analysis of the priest-penitent privilege. This survey will cover the legislative division of powers as set out in constitutional law, as well as the role of the *Charter*. This will be followed by an examination of the existing federal and provincial legislation concerning the priest-penitent privilege, as well as the interpretative jurisprudence.

Second, we will analyze the jurisprudence relevant to our main question. The jurisprudence will be divided into the following categories: discretion to exclude evidence, moral suasion, confessions to persons in authority, self-incrimination, confidential communications, the Wigmore criteria in Canadian jurisprudence, and the current law concerning the priest-penitent privilege. The analysis of the current law will centre on the *Gruenke* decision. This analysis will include a survey of the jurisprudence on the priest-penitent privilege prior to *Gruenke*, a careful evaluation of the relevant facts and judicial history, as well as a review of the majority and minority jurisprudence, particularly the legal

criteria necessary to determine when communications are potentially privileged, and a critical assessment of the Canadian law and some legislative solutions. Then, we will consider the post-*Gruenke* jurisprudence which is relevant to our study. The salient provisions of the *Charter* will also be taken into account.

Third, the status of the seal of confession will be analyzed in light of the *Gruenke* decision. In this analysis we will consider the seal of confession generally, and specifically in terms of each segment of the Wigmore criteria and will draw therefrom appropriate conclusions.

Fourth, we will evaluate the seal of confession in relation to the statutory requirements of reporting certain matters contained in Canadian law. For the purposes of our study, we will discuss the legislation on child protection and communicable diseases.

Fifth, the Catholic Church's position on conflicts between canon law and civil law will be briefly considered. This will include the responses of the Church to date on the seal of confession and the confessor as witness in a court of law.

4.1 — THE CANADIAN LEGISLATIVE FRAMEWORK AND SUPPORTING JURISPRUDENCE

The following section will contain an examination of the general division of jurisdiction in Canadian evidence law in order to provide the necessary context for our analysis of the priest-penitent privilege. We will first examine the relevant federal legislation and constitutional authorities, and then the provincial legislation and supporting interpretative case law, particularly in the jurisdictions of Québec and Newfoundland.

4.1.1 — Constitutional Law and the Division of Legislative Powers

Before examining the Canadian legislation, we must consider the way authority to legislate over matters of evidence is structured in the Canadian Confederation. This is

important for two reasons: first, it provides a framework for categorizing the existing legislation; second, it explains in what areas of law the provincial legislation concerning the priest-penitent privilege is in force, and in what areas of law it is not.

Jurisdiction over the law of evidence in Canada is divided between the federal government and the provinces. In matters within federal jurisdiction, the provisions of the *Canada Evidence Act*¹ must be applied. Otherwise, the provincial enactments govern.² There is a large body of case law interpreting the provisions of these acts as well as adding to the substantive law of evidence.

For the purposes of our study, the areas which are governed by the federal law of evidence and where an issue about religious privilege would likely arise or have arisen in past case law are, *inter alia*, criminal law and procedure, bankruptcy and insolvency, and marriage and divorce.³ With regard to provincial jurisdiction, the areas where the issue of the secrecy of confessional communications might arise would be in civil litigation between private parties, and the enforcement of provincial statutes, including child protection legislation, and minor criminal matters.⁴

¹ R.S. 1985 c. C-5.

² See *Alberta Evidence Act*, R.S.A. 2000, c. A-18; *Code of Civil Procedure*, R.S.Q., c. C-25; *Code of Penal Procedure*, R.S.Q., c. C-25.1; *Evidence Act*, R.S.B.C. 1996, c. 124; *Evidence Act*, R.S.N.B. 1973, c. E-11; *Evidence Act*, R.S.N.L. 1990, c. E-16; *Evidence Act*, R.S.N.S. 1989, c. 154; *Evidence Act*, R.S.N.W.T 1988, c. E-8; *Evidence Act*, R.S.O. 1990, c. E.23; *Evidence Act*, R.S.P.E.I. 1988, c. E-11; *Evidence Act*, S.S. 2006, c. E-11.2; and *The Manitoba Evidence Act*, R.S.M. 1987, c. E-150.

³ S. 91 (21, 26, 27) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).

⁴ S. 92 (13, 15, 16) of the *Constitution Act, 1867*.

4.1.2 — The *Canadian Charter of Rights and Freedoms*

Although there is no federal legislation which establishes or protects religious communications, there is constitutional legislation which has an important bearing on the issue, this being the *Canadian Charter of Rights and Freedoms*.⁵ There are a number of important sections of the *Charter* which, as we shall see, have a role to play in deciding the question of privilege. These are freedom of religion, the right to privacy, and the interpretation of the law in a way which is consistent with Canada's multicultural tradition.

4.1.3 — Québec Legislation and Interpretative Case Law

The law of Continental Europe, which is based primarily on codes, is the source of the civil law of the province of Québec. This province was settled by the French beginning in 1534, and was a French colony until the British Conquest in 1760.

Up until the mid-1970's, the Québec *Code of Civil Procedure* contained the legislative provision which protected the priest-penitent privilege. It was influenced by the laws and jurisprudence of France as well as the public policy which supported the earlier articles on the priest-penitent privilege in the *Code of Civil Procedure*.⁶ In spite of the political tensions and mixed relations between the Roman Catholic Church and the

⁵ Enacted as Schedule B to the *Canada Act, 1982*, (U.K.) c. 11 which came into force on April 17, 1982.

⁶ See *Massé v. Robillard* (1880), 10 *Revue légale* 527 at 532; *Gill v. Bouchard*, at 139, 168, 175. For a consideration and analysis of the predecessor legislation (art. 332 of the *Code of Civil Procedure*, 1965, c. 80, formerly art. 275) in the Québec *Code of Civil Procedure*, see Y. LABONTE, *Le secret de confession devant les tribunaux dans l'Ancien Droit français, en Common Law, dans la province de Québec*, DD diss., Montréal, University of Montréal, 1958, pp. 172-223. Also see NOLAN, "The Law of the Seal of Confession," p. 661. Mr. Justice Duffy of the Irish High Court was so impressed with the progressive nature of this legislation that he made the following comment in his 1945 jurisprudence: "But the most apposite legislation is, as one would expect, that of Quebec, where I find a statute, passed sixty years ago, ordaining that a witness 'cannot be compelled to declare what has been revealed to him confidentially in his professional character as religious or legal advisor.' The limits of the legal adviser's privilege at common law are clear and settled; and French Canada, by assimilating the sacerdotal privilege for every religion to the legal privilege, has instituted a very interesting precedent, of which I think the practical results would repay investigation" (*Cook v. Carroll*, at 518).

Erastianism of the English colonial government after the conquest of New France in 1760, the Church in the province of Québec nevertheless was allowed to freely operate and function.⁷ It suggests that unlike in England, the English colonial government in Lower Canada did not necessarily perceive the priest-penitent privilege as threatening to civil order in any way and did not feel that the people of Québec should directly be obliged to follow the English common law position which refused to concede the privilege. The legislation was supported by a substantive body of case law which clearly recognized the priest-penitent privilege and which distinguished it from the English common law, much as the American federal jurisprudence did.

The jurisprudence which developed in the 19th century affirms that the priest-penitent privilege is, as in Ireland and the federal jurisprudence of the United States, of the same

⁷ The articles signed in 1760 with the British make the following basic religious freedom provision in art. 27: "The free exercise of the Catholic, Apostolic, and Roman religion, shall subsist entire, in such manner that all states and the people of the Towns and countries, places and distant parts, shall continue to assemble in the churches, and to frequent the sacraments as heretofore, without being molested in any manner, directly or indirectly" (*Articles of Capitulation*, 1760) [text reproduced as it appears]. Prior to the British conquest of New France and the advent of Erastianism, the Gelasian approach (spiritual matters were the jurisdiction of the Church while temporal matters were the jurisdiction of the state) prevailed over church-state relations: see C. JAENAN, "Church State Relations in Canada (1604-1685)," in *The Canadian Catholic Historical Association*, (1967), p. 18; also see D. DOYLE, "Religious Freedom and Canadian Church Privileges," in *Journal of Church and State*, 26 (1984), pp. 294-295. Erastianism however gave way in certain cases to Gallicanism (resistance to papal authority by the local Catholic Church in favour of the state): see M. TRUDEL, "L'Église dans l'État au Canada sous M^{gr} de Saint Vallier," in *La société canadienne d'histoire de l'Église catholique*, (1972), pp. 29-33. For a consideration of the historical legal and political challenges that the Roman Catholic Church faced under the Erastianism of English colonial rule, see M. TRUDEL, "La servitude de l'Église catholique du Canada français sous le régime anglais," in *La société canadienne d'histoire de l'Église catholique*, (1963), pp. 11-33, and the response of H. NEATBY, "Servitude de l'Église catholique: A Reconsideration," in *The Canadian Catholic Historical Association*, (1969), pp. 9-25. Due to the threat of the American revolution, England permitted the Catholic Church in Québec to occupy a position of "quasi-legal establishment": see D. MCDUGALL, "Some Problems of Church and State in Canada and Ireland, 1790-1815," in *The Canadian Catholic Historical Association*, (1940-41), p. 21. The Catholic Church has also had a demonstrated influence on the laws of Québec and also Canada: see L. LANDREVILLE, "L'influence de l'Église sur nos lois canadiennes," in *La société canadienne d'histoire de l'Église catholique*, (1962), pp. 63-71. However, this influence has greatly diminished since the 1960's: see, for example, A. DE VALK, "Understandable but Mistaken: Law, Morality, and the Catholic Church in Canada 1966-1969," in *The Canadian Catholic Historical Association*, (1982), pp. 87-109.

species as that of solicitor-client privilege.⁸ Neither the priest *nor the penitent* may reveal confessional communications in court.⁹ Communications within the context of purely spiritual or religious matters are protected from disclosure. However, communications with religious advisors for purely social purposes are not protected,¹⁰ nor are communications for the purpose of committing a crime or other offences, such as fraud.¹¹ All of these provisions are consistent with the canon law.

Today, the main statute currently protecting the priest-penitent privilege in Québec is s. 9 of the *Charter of Human Rights and Freedoms* which states that

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.¹²

⁸ See *Massé v. Robillard*, at 532; *Gill v. Bouchard*, at 139, 141, 175; *Ouellet v. Sicotte* (1896), 9 R.J.Q. 463 at 464-465 (C.S.); *R. v. Aloff* (1909), 16 C.C.C. 385 at 386; *Boily v. La Corporation de la Paroisse de la Baie Saint-Paul* (1913), 43 R.J.Q. 272 at 280 (C.S.).

⁹ See *Massé v. Robillard*, at 532; *Gill v. Bouchard*, at 141; *Boily v. La Corporation de la Paroisse de la Baie Saint-Paul*, at 280-281; also see NOLAN, "The Law of the Seal of Confession," p. 661, and *Wigmore on Evidence*, §2395. *Contra: Lefebvre v. Jobin* (1917), 52 R.J.Q. 492 at 497-498 (C.S.) (confessor forbidden to reveal confessional communications, *but* penitent may reveal what the priest said in confession if there has been some inappropriate use of the confessional by the confessor).

¹⁰ See *Joyal v. Lafontaine* (1926), 33 R.J. 514 at 518-519.

¹¹ See *Gill v. Bouchard*, at 170; *Lefebvre v. Jobin*, at 496.

¹² "Toute personne tenue par la loi au secret professionnel et tout prêtre ou autre ministre du culte ne peuvent, même en justice, divulguer les renseignements confidentiels qui leur ont été révélés en raison de leur état ou profession, à moins qu'ils n'y soient autorisés par celui qui leur a fait ces confidences ou par une disposition expresse de la loi" (*Charte des droits et libertés de la personne*, L.R.Q. c. C-12; English trans. in *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12). Commenting on the general aspects of professional secrecy in Québec, J. Dawson makes the following observations: "In the civil law tradition, inherited in part by Québec, principles of evidence and civil obligation are not distinct, but are submerged in a broader conception of professional secrecy. When confidential information is covered by professional secrecy there is both a general obligation of non-disclosure on the part of the professional and the material is barred from admission in legal proceedings" (J. DAWSON, "Compelled Production of Medical Records," in *McGill Law Journal*, 43 (1998), p. 58).

This general legislative protection supported by interpretative case law is comparable to that found in the American state model. However, this statute is noteworthy since it apparently elevates confessional secrecy *beyond* mere statutory recognition of the priest-penitent privilege as it formerly appeared in the Québec *Code of Civil Procedure* and the American state legislation and seemingly raises it to the level of a *human right*, at least in name. It is remarkable in Canada that one province could consider the priest-penitent privilege in the same category as a human right, while neighbouring provinces (except Newfoundland, to be considered below) and the federal government refuse to even acknowledge its existence in legislation. This legislative inconsistency underscores the fact that the priest-penitent privilege is ultimately a rule based on policy, not on legal principles. Human rights do not end at a province's borders.

In addition to Québec's *Charter of Human Rights and Freedoms*, a second important legislative protection in Québec, which may be valuable for the written documentation discussed in Chapter Two such as *aides-memoires* or any other written materials used in support of confession, is found in the *Code of Penal Procedure*. There, in Division II, the following is set out:

SEARCH IN RESPECT OF CONFIDENTIAL INFORMATION

Professional secrecy.

115. A person who makes a search in respect of confidential information held by a person bound by law to professional secrecy, by a priest or by any other minister of religion shall give him, before beginning to search for such information, a reasonable opportunity to object to the examination of anything that may lead to the disclosure of such information, unless the person entitled to the confidentiality of the information consents to the search.

Objection to the seizure.

116. If an objection is raised, the person making the search shall, in the presence of the objector and without examining or copying the thing, place it in a package, seal and identify the package, and deliver it promptly to the clerk of the Court of Québec in the judicial district where the search was made.

Examination of the thing seized.

117. The objector or the person entitled to the confidentiality of the information may, with the leave of a judge of the Court of Québec, examine the thing seized. The objector may also copy the thing seized upon payment of the costs fixed by regulation.

Protection of confidentiality.

The examination or copy shall be carried out in the presence of the judge or, on his order, in the presence of the clerk of the court. The judge shall take whatever measures are required to ensure the confidentiality of the information.

Determination of confidential nature.

118. On the application of the objector or of the person entitled to the confidentiality of the information, a judge of the court where the thing seized was filed or, in the absence of such a judge, a judge of the Court of Québec shall rule on the confidentiality of the information.

In camera hearing.

119. The judge shall hear the application *in camera*. He may summon witnesses, examine the thing seized and allow the attorneys to examine it. He shall, however, take whatever measures are required to ensure the confidentiality of the information.

Declaration of confidentiality.

120. If the judge declares all the information that the thing may disclose to be confidential, he shall order that the thing be returned to the objector; in the opposite case, he shall order it to be returned to the seizer or the prosecutor, depending on whether or not proceedings have been instituted.¹³

¹³ "PERQUISITION À L'ÉGARD DE RENSEIGNEMENTS CONFIDENTIELS -Prêtre ou ministre du culte.- 115. Celui qui effectue une perquisition à l'égard de renseignements confidentiels détenus par une personne que la loi oblige au secret professionnel, par un prêtre ou par un autre ministre du culte, doit lui donner, avant de commencer la recherche d'un tel renseignement, une occasion raisonnable de s'opposer à l'examen de toute chose susceptible de révéler ce renseignement, à moins que celui qui a droit à la confidentialité du renseignement ne consente à la perquisition. 1987, c. 96, a. 115. Opposition à la saisie.- 116. En cas d'opposition, celui qui effectue la perquisition doit, en présence de l'opposant et sans examiner ou copier la chose, placer celle-ci dans un contenant qu'il scelle, identifie et remet dans les plus brefs délais au greffier de la Cour du Québec du district judiciaire où a été effectuée la perquisition. 1987, c. 96, a. 116; 1988, c. 21, a. 66. Examen de la chose saisie.- 117. L'opposant ou celui qui a droit à la confidentialité du renseignement peuvent, avec l'autorisation d'un juge de la Cour du Québec examiner la chose saisie. L'opposant peut en outre, sur paiement des frais fixés par règlement, la copier. Confidentialité.- L'examen ou la copie se font en présence du juge ou, sur son ordre, en présence du greffier de la cour. Le juge prend toutes les mesures nécessaires pour préserver la confidentialité du renseignement. 1987, c. 96, a. 117; 1988, c. 21, a. 66. Ordonnance.- 118. À la demande de l'opposant ou de celui qui a droit à la confidentialité du renseignement, un juge de la cour où a été déposée la chose saisie ou, en l'absence d'un tel juge, un juge de la Cour du Québec statue sur le caractère confidentiel du renseignement. Préavis. - Un préavis d'au moins un jour franc de cette demande doit, dans les 15 jours de la remise de la chose saisie au greffier, être signifié au saisissant et au poursuivant ainsi qu'à l'autre personne qui a droit de présenter une telle demande. À défaut de préavis dans ce délai, la chose saisie est remise au poursuivant ou au saisissant, selon que la poursuite a été ou non intentée. 1987, c. 96, a. 118; 1988, c. 21, a. 66. Huis-clos. - 119. Le juge entend la demande à huis clos. Il peut assigner lui-même des témoins, examiner la chose saisie et permettre aux procureurs d'examiner celle-ci. Cependant, il doit prendre toutes les mesures nécessaires pour préserver la confidentialité du renseignement. 1987, c. 96, a.

This legislation supports and complements the protection of the priest-penitent privilege found in the *Charter of Human Rights and Freedoms*. It sensibly recognizes the question of the applicability to the issue of writings.

4.1.4 — Newfoundland Legislation and Interpretative Case Law

Section 8 of the Newfoundland *Evidence Act* indicates the following:

Privilege of clergy

A member of the clergy or a priest shall not be compellable to give evidence as to a confession made to him or her in his or her professional capacity.¹⁴

Given the substantial French presence in the early fishing industry, as well as the large influx of Irish immigrants to Newfoundland in the 18th century, the privilege may well have been entrenched in legislation due to the influence of the cultural expectations of these groups which they brought with them from both France and Ireland. The provision was in force prior to Newfoundland joining Canadian Confederation in 1949 and was continued into post-Confederation statute law.

119. Déclaration de confidentialité. - 120. S'il déclare confidentiels tous les renseignements que la chose peut révéler, le juge ordonne qu'elle soit remise à l'opposant; s'il déclare le contraire, il en ordonne la remise au poursuivant ou au saisissant, selon qu'une poursuite a été ou non intentée. Déclaration de confidentialité. S'il ne déclare confidentiels qu'une partie des renseignements, le juge peut ordonner de remettre la chose saisie au poursuivant ou au saisissant, selon le cas, pourvu que ces renseignements soient retranchés et soient remis à l'opposant. 1987, c. 96, a. 120" (*Code de procédure pénale*, L.R.Q. c. C-25.1; English trans. in *Code of Criminal Procedure*, R.S.Q. c. C-25).

¹⁴ R.S.N.L. 1990, c. E-16, formerly s. 6 of the *Evidence Act*, R.S.N. 1970, c. 115. Duffy J. seems to suggest that the priest-penitent privilege in Newfoundland was only codified around 1916: see *Cook v. Carroll*, at 518; similarly see R. CHAMBERS and M. MCINNES, "Commentary on *R. v. Church of Scientology and Zaharia*," in *Canadian Bar Review*, 68 (1989), p. 183. However, Nolan points to an earlier provision: "A clergyman or priest shall not be compellable to give evidence as to any confession made to him in his professional character" from *Consolidated Statutes*, 1872, c. 23, s. 11, incorporated later in the *Consolidated Statutes*, 1892. See NOLAN, "The Law of the Seal of Confession," p. 661. It should also be noted that there are Newfoundland cases involving the priest-penitent privilege, but these do not include statutory interpretation; rather, they concern the common law and will be considered with the rest of the body of Canadian case law.

Commenting on both the Québec and Newfoundland provisions, Sopinka *et al.* state that:

A literal interpretation of the statutory privilege in each case suggests that it is reposed not in the communicant but in the cleric, and accordingly, he is not compellable to disclose the communication even in the situation where the parishioner is willing to waive the privilege. Because the privilege belongs to the cleric, only he would have the power to waive it. A more purposive interpretation would vest the privilege in both parties. Moreover, the Newfoundland provision grants privilege only to communications made by way of confession, whereas the Quebec enactment allows a cleric to decline to divulge any information received by reason of his or her status or profession.¹⁵

4.2 — CANADIAN JURISPRUDENCE RELATED TO THE PRIEST-PENITENT PRIVILEGE

In this section we will examine the common law decisions and analyses in areas of law which are related directly or indirectly to the privilege for religious communications, as well as the jurisprudence concerning the privilege itself. It will cover the areas of discretion to exclude evidence, moral suasion, confessions to persons in authority, self-incrimination, confidential communications, the advent of the Wigmore criteria in Canadian jurisprudence, and the priest-penitent privilege itself.

4.2.1 – Judicial Discretion to Exclude Evidence

In Canada, there is judicial discretion in both civil and criminal matters to exclude otherwise admissible evidence on a number of grounds.¹⁶ Generally, all relevant evidence is admissible, but this is subject to the judicial discretion to exclude evidence for a number of reasons, including public policy grounds, if the prejudicial value outweighs the probative

¹⁵ SOPINKA, LEDERMAN, and BRYANT, *The Law of Evidence in Canada*, p. 695. Also see ONTARIO ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS, *Royal Commission Inquiry into Civil Rights*, vol. 2, (The McRuer Report), Toronto, Queen's Printer, 1968, p. 820.

¹⁶ See SOPINKA, LEDERMAN, and BRYANT, *The Law of Evidence in Canada*, pp. 28-37; *R. v. Morris*, [1983] 2 S.C.R. 190, esp. Lamer's dissent at 201; *R. v. Corbett* [1988] 1 S.C.R. 670, esp. La Forest's dissent at 701-748; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 691.

value, or simply if it is impolitic.¹⁷ Evidence may also be excluded if in the opinion of the trial judge it is contrary to the interests of justice or otherwise unfair to a litigant,¹⁸ and if it "... [I]s likely to do more harm than good to the trial process."¹⁹ There is also judicial discretion to exclude discovery of documentary evidence.²⁰

It is of course open for a trial judge to exclude private religious communications if they fall into these categories. This having been said, this discretionary authority has not to date been applied to confidential religious communications in any reported cases involving the priest-penitent privilege in Canada,²¹ and in any event does not serve as a proper legal foundation for this privilege.

4.2.2 – Moral Suasion

Where evidence is not formally excluded by judicial discretion, both the prosecution and the judiciary may legitimately *discourage* questions concerning confidential religious communications. While there is no priest-penitent privilege recognized in case law, confidentiality will still be respected as far as possible.²² It was acknowledged (in the

¹⁷ *R. v. Morris*, at 201.

¹⁸ See TACON, "A Question of Privilege: Valid Protection or Obstruction of Justice?" p. 335.

¹⁹ *R. v. Seaboyer*, at 621.

²⁰ See *M.(A). v. Ryan*, at 183-184, 197.

²¹ In the case of *Cronkwright v. Cronkwright* (1970), O.R. 3 784 (Ont. H.C.), Mr. Justice Wright held that the court had discretion to exclude statements made to an Anglican cleric involved in marital mediation. However, this was based on the authority of a lower court case which was later overturned by the Supreme Court (*R. v. Wray*, [1971] S.C.R. 272). This latter case held that there was only a limited discretion to exclude evidence unfair to the accused in a criminal case. Since the *Wray* decision was handed down, it appears that this decision is now restricted to criminal cases, and there now appears to be a widening trend in the use of judicial discretion, which may validate the jurisprudence in *Cronkwright*: see SOPINKA, LEDERMAN, and BRYANT, *The Law of Evidence in Canada*, pp. 32-33.

²² See R. MANES and M. SILVER, *The Law of Confidential Communications in Canada*, Toronto, Butterworths, 1996, p. 53.

dissenting opinion of Houlden, J.A.) that following the “moral authority” argument of Lord Simon in *D. v. N.S.P.C.C.* discussed in Chapter Three, there is a

... [G]eneral practice in Ontario whereby the Court has refused to order priests to answer questions involving confidential communications, although no legal basis exists for any objection to answer. In Ontario, the Judge’s suggestion that such questions not be pressed has generally been accepted: *Cronkwright v. Cronkwright* (1970), 14 D.L.R. (3d) 168, [1970] 3 O.R. 784, 2 R.F.L. 241.²³

And as later noted in the *Scientology* case,

... [N]o English cases have dealt with the privilege as it appears that the discretion of the prosecutors and the courts have avoided any necessity for such determination. The Ontario practice has similarly been for the trial judge to suggest that questions that would require a violation of priest-penitent confidence not be pressed...²⁴

With regard to this practice, which would normally be followed in other provinces in addition to Ontario, Ryan notes that counsel generally accede to the urging of the presiding judge that questions concerning confessional secrecy not be pursued, since there is usually little to gain by attempting to force this testimony:

It is of course true that several judges who have denied the existence of the privilege have said that they would do their best to avoid being compelled to commit a witness to prison for refusing to make disclosure, and all judges are believed to take the same position. Counsel probably refrain from seeking to compel confessors to testify about confessions, since it is well known that Roman Catholic priests will go to prison rather than make disclosure, and it may be assumed that Uniate and Orthodox priests and those of various “national” churches and Old Catholic churches will do so as well. Few others are known to hear private confessions.²⁵

Ryan goes on to say that

In contemporary practice, when privilege has been claimed and the witness insists on preserving the secrecy of a confidential communication, a trial judge may suggest to counsel that the question should not be pressed. In practice, counsel frequently accede to the suggestion and withdraw the question. If counsel persists, the judge may suggest to the witness or party that confidentiality might not be essential and might be waived. If neither counsel nor the witness nor the party yields, the judge must apparently apply the Wigmore tests, and, if he decides that the question should be answered, he must order the witness to do

²³ See *Reference re Legislative Privilege* (1978), 83 D.L.R. (3d) 161 at 172 (Ont. C.A.).

²⁴ *Scientology*, at 537-538. This practice was also acknowledged by the Supreme Court: see *Gruenke*, p. 287.

²⁵ See RYAN, “Obligation of the Clergy not to Reveal Confidential Information,” p. 223.

so. If the witness still refuses, the judge has a discretion in measuring the severity of the sanction to be imposed on the witness. It is suggested that a slight penalty might actually uphold the privilege that is ostensibly denied.²⁶

Quick notes that "It would be a poor priest or clergyman that would reveal confidential confessions, and an even poorer prosecutor who would insist upon it."²⁷

4.2.3 – Confessions to Persons in Authority

Involuntary criminal confessions made to persons in authority are not admissible in evidence.²⁸ However, Osler J. in *R. v. Ryan* held that the person receiving the confession must be *connected* with the prosecution in order to be considered a person in authority, which would exclude a confessor.²⁹ Lyon rejects this limitation as unsupported by the earlier case law, and states that in any event without a priest-penitent privilege, a confessor may in fact be found to be a person in authority, albeit unwittingly:

If a surgeon is able to break down a suspect's resistance to self-incrimination through words of inducement, and thus become a person in authority, how much more certainly is a priest a person in authority, aided by the Church's immense power over the devout. Confession is not merely induced, it is required. Authority is central to the process of confession as practised by the Church. Only the goal of criminal prosecution is lacking in this person in authority, but this distinction loses its significance once the police decide to compel the priest's extraction of confessions to serve this purpose whether he wills it or not.

Our State does not attempt to minister to the spiritual needs of citizens, wisely leaving this endeavour to the Churches. In filling this human need, some Churches acquire a virtual window into the minds of their members. The State should not peer into this window unless it is prepared to accept the responsibility which goes with it. We have long since concluded that this is not a suitable undertaking for the State.³⁰

²⁶ See *ibid.*, p. 231. Also see UNIFORM LAW CONFERENCE OF CANADA, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, Toronto, Carswell, 1982, p. 420.

²⁷ QUICK, "Privileges Under the Uniform Rules of Evidence," p. 545; also see CANADA LAW REFORM COMMISSION, Law of Evidence Project, Study Paper No. 12, *Evidence: Professional Privileges Before the Courts*, Ottawa, Law Reform Commission, 1975, p. 17. For a general consideration of prosecutorial discretion to call witnesses, see *R. v. Cook*, [1997] 1 S.C.R. 1113 at 1124-1125.

²⁸ *Ibrahim v. The King* [1914] A.C. 599 at 609.

²⁹ *R. v. Ryan*, (1905) 9 O.L.R. 137 at 143.

³⁰ LYON, "Privileged Communications—Penitent and Priest," p. 330.

Along the same lines, Elliott notes that "... [I]f a penitent is obliged by the discipline of his church to confess his sins, using the confession against him in a court is tantamount to demanding self-incrimination by him. The argument is that the priest is in effect an agent of the prosecution authorities, in that the penitent is obliged by his church to confess to the priest, who is in turn obliged by law to repeat the confession in court."³¹

As we shall see, although this line of reasoning was apparently found compelling by the minority in *Gruenke*, it has not to date served as a ground for excluding evidence of confessions or providing a foundation for the priest-penitent privilege.

4.2.4 – Self-Incrimination

Could the right in the *Charter* against self-incrimination be used to support a finding of privilege in certain cases?³² Section 11(c) of the *Charter* only provides that a person who is charged with a criminal offence cannot be compelled to be a witness against himself,³³ and s. 13 provides that a witness in a criminal trial who is not charged with the offence must give evidence, but such evidence cannot be used against him in future proceedings.³⁴

Self-incrimination is not a proper legal category which could serve as a foundation for the priest-penitent privilege. For the reasons stated in Chapter Three, it has never been

³¹ Ibid., p. 416.

³² For some pre-*Charter* considerations, see TACON, "A Question of Privilege: Valid Protection or Obstruction of Justice?" p. 336; B. MCLACHLIN, "Confidential Communications and the Law of Privilege," in *University of British Columbia Law Review*, 2 (1977), p. 266; McLachlin in turn cites Sopinka, Lederman, and Bryant who state that the "the privilege against testimonial self-incrimination has never developed beyond the embryonic stage in Canada." See also CANADA LAW REFORM COMMISSION, *Report on Evidence*, Ottawa, Law Reform Commission, 1975, pp. 78-79.

³³ S. 11(c): "Any person charged with an offence has the right ... c) not to be compelled to be a witness in proceedings against that person in respect of the offence..."

³⁴ S. 13: "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

asserted as a foundation for the privilege in other jurisdictions. Unless the confessional communications fall into these categories, they have no application. In any event, if they did apply, they do not create a proper priest-penitent privilege.³⁵

4.2.5 – Confidential Communications and Breach of Confidence

It is well established that there is no privilege attached to any communications simply on the basis of their having been made in confidence, even though it may be a “material consideration” when privilege is claimed on the basis of public interest.³⁶ As noted by Elliott,

The fact that the witness finds it repugnant to his sense of honour to give an answer which will break a confidence reposed in him by someone else does not excuse him from his duty. The public interest in the disclosure of all matters relevant to a judicial proceeding is regarded as so important that it prevails over any considerations of private honour between individuals. It is simply no answer for a witness to say ‘I was told this in confidence by a person who trusted me to keep his confidence’.³⁷

Confessional communications are not protected at law simply because they were made in confidence. Additionally, the Ontario Court of Appeal in *Reference re Legislative Privilege* affirmed that “... [T]here is no recognized discretion to exclude relevant and admissible evidence based on confidentiality alone.”³⁸

The use of breach of confidence to exclude confidential communications is limited to situations where one party wishes to enjoin another from using confidential information to the enjoining party’s detriment.³⁹ As McLachlin notes, breach of confidence and privilege

³⁵ For further consideration of the privilege against self-incrimination, see *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 at 489.

³⁶ *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Comm’rs (No. 2)*, at 433; *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, at 512.

³⁷ ELLIOTT, “An Evidential Privilege for Priest-Penitent Communications,” pp. 409-410.

³⁸ *Reference re Legislative Privilege*, at 173.

³⁹ See MCLACHLIN, “Confidential Communications and the Law of Privilege,” p. 282.

have an entirely different basis. Breach of confidence requires only that the communication was confidential, whereas confidentiality alone is not a sufficient ground for privilege.⁴⁰ Additionally, the use of the Wigmore criteria seems to offer better protection, since they weigh the public interest in obtaining the truth versus the need to maintain the confidence. This weighing exercise is an analytical aspect lacking in the use of breach of confidence.⁴¹ The use of breach of confidence as a basis of excluding confessional communications does not appear to be a means of excluding confessional communications, although it may serve as grounds for an equitable action between priest and penitent to keep the matter confidential.

4.2.6 – The Wigmore Criteria in Canadian Jurisprudence

As indicated earlier, the Wigmore criteria have been used in Ireland and the United States to adjudicate the priest-penitent privilege. They appeared in Canadian jurisprudence for one of the first times in connection with the law of privilege in the 1958 case of *Re Kryschuk and Zulynik*,⁴² and later in the case of *Slavutych v. Baker et al.*⁴³ The *Slavutych* case is important because it brought the Wigmore criteria to the fore in Canadian jurisprudence and was referred to in the jurisprudence of the *Gruenke* decision.⁴⁴

⁴⁰ See *ibid.*

⁴¹ See *ibid.*, p. 283.

⁴² [1958] 14 D.L.R. 676 (Sask. P.M. Ct.). This case involved a social worker who was mediating a conflict between a putative father and mother concerning paternity. The judge held that simply on the objection of one of the parties, the communications were deemed privileged, and the evidence of the social worker was excluded. Similarly, clergy or any other party attempting to facilitate reconciliation between the parties would also be subject to the privilege (see *Cronkwright*, below). The case followed and applied *McTaggart v. McTaggart*, which was reviewed in the previous Chapter.

⁴³ [1976] 1 S.C.R. 254.

⁴⁴ *Slavutych v. Baker et al.*, [1976] 1 S.C.R. 254 at 260, note 101.

In the *Slavutych* case, the criteria were applied to determine whether a communication, in this case a “tenure form sheet” for a university professor, made under condition of strict confidence, was admissible in evidence at an arbitration hearing. The Supreme Court held that the arbitration board had erred in law in admitting this into evidence. The communication should have been ruled inadmissible on the basis of it having met all four of the Wigmore criteria.⁴⁵ In Peter Sim’s opinion:

Taken at face value, the *Slavutych* decision gives Canadian courts unprecedented authority to rewrite the law of evidence. New privileges could be created to cover situations completely unrelated to the existing common law categories. Established categories of privilege could be discarded or modified on the ground they no longer satisfy Wigmore’s conditions. Subsequent cases have made steps in both these directions.⁴⁶

This case introduced “... [A] new flexibility by establishing the principle that privilege may attach to non-traditional classes of confidential communications in certain circumstances.”⁴⁷

Likewise, B. McLachlin, writing then for the Faculty of Law of the University of British Columbia, stated that prior to the *Slavutych* decision, privileged communications were restricted heretofore to solicitor-client and husband and wife situations.⁴⁸ Most importantly, *Slavutych* is authority for the proposition “... [T]hat the categories of privilege are not

⁴⁵ Ibid., pp. 261-262.

⁴⁶ P. SIM, “Privilege and Confidentiality: The Impact of *Slavutych v. Baker* on the Canadian Law of Evidence,” in *Advocates’ Quarterly*, 5 (1984-85), p. 358; also see MCLACHLIN, “Confidential Communications and the Law of Privilege,” p. 274.

⁴⁷ B. COTTON, “Is There a Qualified Privilege at Common Law for Non-Traditional Classes of Confidential Communications? Maybe,” in *Advocates’ Quarterly*, 12 (1990), p. 195.

⁴⁸ See MCLACHLIN, “Confidential Communications and the Law of Privilege,” p. 267.

closed”⁴⁹ and that the old English common law which restricted them to solicitor-client and marital communications has been superseded.⁵⁰

4.2.7 – The Priest-Penitent Privilege in Canadian Jurisprudence

In the following discussion we will consider the priest-penitent privilege in Canadian jurisprudence. As will be seen, unlike in England and the United States, there is a dearth of case law on the subject. The cases in this section will be examined from the point of view of the priest-penitent privilege prior to *Gruenke*, and the *Gruenke* decision itself.

4.2.7.1 – The Priest-Penitent Privilege Prior to *R. v. Gruenke*

Like the United States, the English law on the priest-penitent privilege originally served as the basis for Canadian law. As R. Manes and M. Silver have stated “Because the priest-penitent privilege was on low ebb when Canada inherited the common law of England in the mid-1800’s, there was no basis for such a privilege in Canadian jurisprudence.”⁵¹

There were only two cases (apart from the Québec provincial-level decisions considered above) directly involving the priest-penitent privilege at common law prior to the *Gruenke* decision, these being the 1987 Ontario Court of Appeal case of *Re Church of Scientology and The Queen (No. 6)*,⁵² and the 1988 case of *R. v. Medina*.⁵³ As will be seen, they had a significant bearing on the jurisprudence in *Gruenke*.

⁴⁹ *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, at 512.

⁵⁰ For a survey of various decisions concerning the application of the Wigmore criteria prior to *Gruenke*, see COTTON, “Is there a Qualified Privilege at Common Law for Non-Traditional Classes of Confidential Communications? Maybe,” pp. 202-204. Also see, specifically, *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 (solicitor-client privilege upheld); *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572 (journalist-source privilege denied).

⁵¹ MANES and SILVER, *The Law of Confidential Communications in Canada*, p. 52.

⁵² (1987), 31 C.C.C. (3d) 449, leave to appeal to S.C.C. refused 23 O.A.C. 320. Prior to this case, a ruling was made on communications to religious in *Mackell v. Ottawa Separate School Trustees* (1917), XL

In the *Scientology* case, a search warrant was issued to search the offices of the Church of Scientology in connection with allegations of fraud. The statements used to obtain the search warrants indicated that the documents sought were communications prepared for commercial and secular intentions and were elicited for criminal purposes. When the search warrant was executed at the head offices in Toronto, a large volume of documents entitled “pastoral counselling folders” and “ethics files” were seized. The church applied to quash the warrant and sought return of these documents on the basis that they were protected by the priest-penitent privilege. The Court ruled that the search warrants were jurisdictionally valid since the information used to obtain the warrants established that the communications were for commercial and secular use, even if it was open for the courts to recognize a religious communications privilege in a particular case.⁵⁴ The Court made a number of important observations about the common law, the Wigmore criteria, and the *Charter*.

First, with respect to the common law, the Court reviewed a number of cases in England, Ireland, and the United States, which are discussed in Chapter Three. The Court stated that “While some of these cases appear to implicitly recognize the religious privilege, the majority limit the protection to communications involving the obtaining of legal advice

O.L.R. 272 at 286. In that case, it was held that members of a religious teaching fraternity who had taken perpetual vows to devote themselves to the welfare of children and their own sanctification were not on this basis excluded from answering questions. A number of authorities cite this case in support of the contention that there is no priest-penitent privilege in Canadian law. See, for example, A. SHEPPARD, *Evidence*, Toronto, Carswell, 1988, pp. 565-566. However, the priest-penitent privilege itself was not in issue in this case.

⁵³ 17 October, 1988 (Ont. S.C., unreported); digested in RYAN, “Obligation of the Clergy not to Reveal Confidential Information,” pp. 217-218.

⁵⁴ See *Scientology*, at 542-543.

with respect to the conduct of litigation or rights to property.”⁵⁵ The Court also recognized that “The commentators generally attribute the state of the law during this period of English history to the post-Reformation climate of religious intolerance and anti-Catholicism.”⁵⁶ The Court acknowledged that the decisions in *Cook v. Carroll* and *Mullen v. United States* which rejected Jessel’s jurisprudence in *Wheeler v. La Marchant*, “... [S]trongly assert the existence of the priest-penitent privilege at common law”⁵⁷ in those jurisdictions. However, the Court ultimately ruled that in *Canadian* common law, “... [T]here is no recognized class privilege accorded to the priest-and-penitent relationship...”⁵⁸

Second, the Court recognized the application of the Wigmore criteria on a case-by-case basis in making determinations of priest-penitent privilege.⁵⁹ The Court noted that both *Cook* and *Mullen* applied the Wigmore criteria to conclude that priest-penitent communications are privileged, and the Court stated that “The [Wigmore] passage demonstrates that all the common law conditions with respect to privileged communications are applicable to the relationship of priest and penitent.”⁶⁰ The fact that *Wheeler* was overruled⁶¹ is indicative that the question was once again open to adjudication using the Wigmore criteria.

⁵⁵ Ibid., at 537.

⁵⁶ Ibid.

⁵⁷ Ibid., at 538.

⁵⁸ Ibid., at 541.

⁵⁹ See *ibid.*, at 538-539.

⁶⁰ Ibid., at 538.

⁶¹ Ibid., at 459.

Third, the following observations were made about the religious freedom provision of the *Charter*:

Chief Justice Dickson stated in *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d), 18 D.L.R. (4th) 321, [1985] 1 S.C.R. 295, that the fundamental freedom of conscience and religion now enshrined in s. 2(a) of the *Charter* embraces not only the freedom of religious thought and belief but also the "right to manifest religious belief by worship and practice or by teaching and dissemination". This protection will no doubt strengthen the argument in favour of recognition of a priest-and-penitent privilege. The restrictive common law interpretation of the privilege may have to be reassessed to bring it in conformity with the constitutional freedom.

In our view, however, while s. 2 of the *Charter* enhances the claim that communications made in confidence to a priest or ordained minister should be afforded a privilege, its applicability must be determined on a case-by-case basis. The freedom is not absolute.⁶²

Synthesizing both the *Charter* argument and the Wigmore criteria, the Court stated the following in its jurisprudence:

We cannot agree, however, that it is too late to expand the modern law of privilege. In light of the constitutional protection given by the *Charter* and having regard to the expansion of the law of privilege under the general principles enunciated by Dean Wigmore and accepted by the Supreme Court of Canada in *Slavutych v. Baker*, *supra*, we are satisfied that our courts will be encouraged to recognize the propriety of a priest-and-penitent privilege, if not as a class, then at least on a case-by-case basis.⁶³

With this, the two lines of jurisprudence were set for the decision in *R. v. Gruenke* four years later.

The *Scientology* case drew the attention of a number of writers. R. Chambers and M. McInnes stated that

The *Scientology* case is interesting because it is the first time that a common law privilege for clerics has been made possible in Canada. This possibility exists because of the Supreme Court of Canada's decision in *Slavutych v. Baker* in 1975. The acceptance by our highest court of Wigmore's four-fold test for privileged communications paved the way for the emergence of new forms of privilege at common law and, as we shall see, for the re-emergence of old ones.⁶⁴

⁶² *Ibid.*, at 540.

⁶³ *Ibid.*, at 541.

⁶⁴ CHAMBERS and MCINNES, "Commentary on *R. v. Church of Scientology and Zaharia*," p. 177.

In the case of *R. v. Medina*, the accused had attended at the home of the pastor of an ecclesial body of which he was not a member. This ecclesial body did not have an established practice of confession. He confessed to murdering an individual and asked for help to leave the city. The pastor then allowed the fact of this confession to be made known to the police, and the pastor gave evidence of the confession at the trial. Campbell J. held that the communication seemed more like a request for assistance to flee than a confession, and set out four tests for determining whether a communication was “religious” in nature or whether it was for some other purpose:

- (1) Does the communication involve some aspect of religious belief, worship or practice?
- (2) Is the religious aspect the dominant feature or purpose of the communication?
- (3) Even if the religious aspect is not the dominant purpose, how significant is it? Would the communication have been called into being without the religious aspect?
...
- (4) Is the religious aspect of the communication sincere or is it colourable? Did it amount to a good faith manifestation of religious belief, worship or practice?⁶⁵

Campbell J. also considered the Wigmore criteria, and found that none of the tests were satisfied. He found with regard to the first criterion that the accused did not demonstrate an expectation of privacy, and he found with regard to the second criterion that privacy was not essential to this particular fleeting relationship. With respect to the third criterion, he agreed that s. 2(b) of the *Charter* definitely considers the pastoral counselling relationship one which should be sedulously fostered, but considered these particular communications more for the purposes of evading prosecution. In terms of the last criterion, Campbell J., after considering Bentham and Wigmore, decided that the injury that would inure to the relationship was not

⁶⁵ Cited in *R. v. Gruenke*, at 312.

greater than the benefit obtained from the admission of the evidence. This was based on the fact that there was no indication of penance, and that the communication was not primarily for religious purposes.⁶⁶

4.2.7.2 – The Jurisprudence in *R. v. Gruenke*

The first and only case to reach the Supreme Court of Canada concerning the priest-penitent privilege is the *Gruenke* case. In it there are two lines of jurisprudence concerning the privilege. Prior to examining these, the facts and the lower court jurisprudence will be reviewed. This case is especially important since

Although Quebec and Newfoundland have enacted legislation protecting clergy-penitent absolute privilege, the absence of legislation and of clear case law in the other jurisdictions enhances the importance of *Gruenke* as the definitive statement of the common law in relation to religious communications.⁶⁷

4.2.7.2.1 – Relevant Facts of the *Gruenke* Decision

The relevant facts of the case are as follows. In 1986, a 22-year-old woman, one Adele Rosemary Gruenke, with an accomplice, was involved in the murder of an elderly man in Manitoba. Ms. Gruenke was a member of the Victorious Faith Centre, a born-again Christian ecclesial community. Two days after the murder, a lay counsellor of this ecclesial body, who had heard of the death, visited Ms. Gruenke at her home to discuss the matter. The matter was discussed first at Ms. Gruenke's home, and later at the counsellor's home. When her involvement was disclosed, the counsellor informed the pastor, and Ms. Gruenke then met with them on their church premises, and later returned for further discussions to the

⁶⁶ In reviewing this case, Ryan notes that "Campbell J.'s sympathetic consideration of the religious element and its Charter protection, and his careful analysis and balancing of interests, lead to a respectful conclusion that his method was entirely appropriate and his decision demonstrably correct" (See RYAN, "Obligation of the Clergy not to Reveal Confidential Information," p. 231).

⁶⁷ M. OGILVIE, *Religious Institutions and the Law in Canada*, Toronto, Carswell, 1996, p. 146.

counsellor's home. During these conversations, Ms. Gruenke disclosed her involvement in the offence and admitted her guilt. Prior to the trial, the pastor had already revealed the details to the police. The pastor was called as a witness with respect to these communications.

4.2.7.2.2 – Judicial History of the Case

Both the lay counsellor and the pastor of the accused were called to testify at the preliminary inquiry (a form of trial held before the formal trial to determine if there is any evidence to proceed on), and the defence sought to prevent the testimony with respect to these communications from being entered into the evidentiary record of the trial on the basis of the priest-penitent privilege. Queen's Bench Justice Ruth Krindle held that the communications between Gruenke and her pastor were not protected from disclosure. She based this on the assertion that there was no recognized class privilege for priest and penitent relationships in Canada in accordance with the *Scientology* case, and that the admissibility of such evidence should be decided on a case-by-case basis. She ruled that the communications to the lay counsellor were not privileged since she was not ordained as a priest or minister, and was more akin to being a social worker. She also ruled that the communications were already disclosed by the pastor prior to the trial, rendering them public information. In any event, the communications in this particular denomination could not be compared to the secrecy demanded of a priest by a penitent in the confessional, and were more a means of social working with their church members. She indicated that the requirement that these witnesses testify did not interfere with their right to freedom of religion under the *Charter*,

since such disclosure did not interfere with the worship system of this particular ecclesial body.⁶⁸

The case was appealed to the Manitoba Court of Appeal. The panel of judges, as per Mr. Justice Twaddle, ruled that Madame Justice Krindle was correct in her application of the law and her ruling on the privilege. Following *Scientology*, the Court of Appeal acknowledged that while a claim for privilege may be enhanced in a particular case by s. 2(a) of the *Charter*, it did not in and of itself create a religious communication privilege at common law. Exclusion of evidence they said can only be justified on public policy grounds which establish that the public interest in excluding the evidence outweighs the public interest in admitting it. The Court of Appeal concluded that her freedom of religion was not violated by the requirement that her statements be disclosed. This was based in part on the fact that there was no real practice of confession in the traditional sense in that particular ecclesial community:

In the case at bar, I accept that the church to which the pastor and the counsellor belonged believed in the confession of sin. I also accept that the accused Gruenke was told that, if she told the truth, she would feel better spiritually as well as physically and emotionally. There is, however, no evidence of a church practice requiring that a confession be made in such circumstances. Nor is there evidence that the accused Gruenke made her confession pursuant to such a practice. There is nothing on the record which even suggests that the accused Gruenke's freedom of religion was impinged upon in any way by requiring the pastor and the counsellor to relate what was told to them by her on November 30, 1986. Indeed, the record suggests that the admissions were made by the accused Gruenke as much for her emotional comfort as for her spiritual well-being and that her religious belief required her to accept responsibility for her conduct.⁶⁹

With regard to the Wigmore criteria, the Court also ruled that none of the four points of the Wigmore test were satisfied, and that although confidentiality may have been desirable, it was not essential. Mr. Justice Twaddle stated that, based on the facts, the expectation of

⁶⁸ Krindle, J., 16 October, 1987 unreported., cited in *Gruenke*, at 279-280.

⁶⁹ See (1989), 55 Man. R. (2d) 289 at 299 (C.A.).

secrecy was not sufficiently established so as to justify exclusion of the testimony. In considering the Wigmore test, Mr. Justice Twaddle noted that this disclosure situation was not one in which community opinion demands sedulous fostering of the secrecy, unlike the relationship between a Catholic priest and his parishioners in *Cook v. Carroll*. This last point will be developed further below, but it is noted here as an “indication” which seems to suggest that the confessional seal of the Catholic Church might be upheld in the courts of Canada.⁷⁰

The case was then appealed to the Supreme Court of Canada, and that Court rendered its judgment in 1991. Two lines of jurisprudence emerged concerning the question of whether these communications should be excluded from evidence. The first line was that each instance of religious communications should be decided on a “case-by-case” basis on the basis of policy arguments (using the Wigmore criteria), with the burden of establishing this privilege being on the party claiming privilege, the assumption being that such communications *are not* privileged. The second line was that there should be a “class” (*prima facie*, or “blanket”) privilege, the burden of overturning the privilege being on the party seeking disclosure of the communication, with the assumption being that such communications *are* privileged.

The first opinion was adopted and developed by Chief Justice Antonio Lamer, supported by the majority of the Supreme Court Justices (La Forest, Sopinka, Cory, McLachlin, Stevenson, and Iacobucci JJ.), while the second line of jurisprudence was

⁷⁰ For a further analysis and consideration of Mr. Justice Twaddle’s jurisprudence, see RYAN, “Obligation of the Clergy not to Reveal Confidential Information,” pp. 227-229.

proposed by Madame Justice L'Heureux-Dubé, supported by the other minority Justice (Gonthier J.).⁷¹ We now turn to a consideration of these lines of jurisprudence.

4.2.7.2.3 – Analysis of the Majority Jurisprudence

With respect to the class privilege, Lamer observed that the issue is essentially a matter of policy and stated that the trend is towards a principle-based approach and away from rigid categories, criticized by some judges as the antiquated “pigeon-hole” approach to evidence.⁷² First, he rejected the blanket privilege, since religious communications did not have the same policy foundation as solicitor-client privilege, mainly since there was no intrinsic connection to the justice system; this, notwithstanding their social importance.⁷³ Second, he rejected the proposition that a class privilege was necessary to give full effect to the religious freedom clause of the *Charter*, and indicated that the extent to which freedom of religion may be impinged upon in matters concerning religious communications will depend on the circumstances of each case.⁷⁴

Having concluded that there is no support in common law for a class privilege, Lamer then went on to consider the case-by-case privilege. First, he considered the Wigmore criteria. Based on the *Slavutych* and *Scientology* cases,⁷⁵ he indicated that the Wigmore

⁷¹ See *Gruenke*, at 266.

⁷² See *ibid.*, at 288.

⁷³ See *ibid.*, at 289; in support of this he cited *Geffen v. Goodman Estate* and *Solosky v. The Queen*, [1980] 1 S.C.R. 821.

⁷⁴ See *Gruenke*, at 289.

⁷⁵ Also see *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, at 512.

criteria should be employed in making determinations of privilege in cases involving confidential religious communications. He stated that:

This is not to say that the Wigmore criteria are “carved in stone”, but rather that these considerations provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court. Nor does this preclude the identification of a new class on a privileged basis.⁷⁶

Second, with respect to the *Charter*, he indicated that two sections will play a role in informing the Wigmore analysis, these being s. 2(a) and s. 27.⁷⁷ With regard to s. 2(a), he

⁷⁶ Gruenke, at 290.

⁷⁷ As the decision indicates, the *Charter* applies to the common law, including the rules of privileged communications: see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 603, and *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at 184. However, a distinction should be drawn between litigation which involves the government and litigation between private parties only. Cory, J., in *Hill v. Church of Scientology of Toronto*, stated that “[W]hen determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action” (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1169-1170). He went on to say that “[T]he most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will “apply” to the common law only to the extent that the common law is found to be inconsistent with *Charter* values” (*Hill v. Church of Scientology of Toronto*, at 1170-1171). Noting Cory, J.’s comments, McLachlin, J. observed that “I should pause here to note that in looking at the *Charter*, it is important to bear in mind the distinction drawn by this Court between actually applying the *Charter* to the common law, on the one hand, and ensuring the common law reflects *Charter* values, on the other” (*M. (A.) v. Ryan*, at 171-172). She went on to say “While the facts of *Hill* involved an attempt to mount a *Charter* challenge to the common law rules of defamation, I am of the view that Cory J.’s comments are equally applicable to the common law of privilege at issue in this case. In view of the purely private nature of the litigation at bar, the *Charter* does not “apply” *per se*. Nevertheless, ensuring that the common law of privilege develops in accordance with “*Charter* values” requires that the existing rules be scrutinized to ensure that they reflect the values the *Charter* enshrines. This does not mean that the rules of privilege can be abrogated entirely and replaced with a new form of discretion governing disclosure. Rather, it means that the basic structure of the common law privilege analysis must remain intact, even if particular rules which are applied within that structure must be modified and updated to reflect emerging social realities” (*M. (A.) v. Ryan*, at 172). It should also be noted that the *Charter* arguments advanced in favour of making the priest-penitent privilege claim would be different in criminal versus civil litigation. Prior to the *Charter*, testimonial privileges were treated the same way in both civil and criminal cases: see TACON, “A Question of Privilege: Valid Protection or Obstruction of Justice?” p. 335. Religious communications may be more likely to be found privileged at a civil trial than at a criminal trial since as noted by McLachlin J., “The defendant in a civil suit stands to lose money and repute; the accused in a criminal case stands to lose his or her own liberty” (*M. (A.) v. Ryan*, at 179). The courts always have to take into account the right of the accused to make full answer and defence to criminal charges.

reiterated the conclusions quoted above in *Scientology* that this section may enhance the claim for privilege on a case-by-case basis.⁷⁸ He also stated that s. 27 of the *Charter*, which requires that the *Charter* be interpreted consistently with the multicultural heritage of Canadians, should also inform the Wigmore analysis and increase the likelihood of the privilege being applied on a case-by-case basis.⁷⁹ Citing *R. v. Big M Drug Mart*, he stated that all religious beliefs and practices must be treated equally in Canada:

It is for this reason that I have, throughout these reasons, employed the general term "religious communications" in place of the more traditional term "priest-penitent communications". In applying the Wigmore criteria to particular cases, both s. 2(a) and 27 must be kept in mind. This means that the case-by-case analysis must begin with a "non-denominational approach." The fact that the communications were not made to an ordained priest or minister or that they did not constitute a formal confession will not bar the possibility of the communications being excluded. All of the relevant circumstances must be considered and the Wigmore criteria applied in a manner which is sensitive to the fact of Canada's multicultural heritage. This will be most important at the second and third stages of the Wigmore inquiry. In my view, such a case-by-case approach will avoid the problem of "pigeon-holing" referred to by Wilson J. in *Geffen v. Goodman Estate*, *supra*.⁸⁰

⁷⁸ The sections states: "2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion." Prior to the *Charter*, the Canada Law Reform Commission concluded that in addition to the Wigmore criteria "There are also other important reasons for the recognition of a privilege to religious advisers. Freedom of worship and religion is one of the fundamental values of a democratic society which respects freedom of thought. Religious advisers are a moral guidance in the eyes of religious believers. Therefore, one may indeed wonder to what extent the respect of religious confidence is not an attribute of religious freedom" (CANADA LAW REFORM COMMISSION, Law of Evidence Project, Study Paper No. 12, *Evidence: Professional Privileges Before the Courts*, p. 17). From a post-*Charter* perspective, Chambers and McInnes agree that the *Charter* provision should increase the likelihood that the third and fourth Wigmore criteria will be met: "A guarantee of religious freedom should assist in passing this test. Section 2(a) of the *Charter* reveals our fundamental concern for respecting and protecting the religious practices of others. This is strong evidence that the priest-penitent relationship is one which the entire community wishes to foster even if few choose to enter into it. The fourth branch of Wigmore's test requires a comparison between the injury to the relation and the benefit for litigation created by the disclosure. Again the *Charter* should tip the scale in favour of recognition of priest and penitent privilege. The injury to that relationship should weigh more heavily in light of our constitutional concern for the free practice of religion" (CHAMBERS and MCINNES, "Commentary on *R. v. Church of Scientology and Zaharia*," pp. 190-191).

⁷⁹ See *Gruenke*, at 290-291.

⁸⁰ *Ibid.*, at 291. Certainly Best had himself previously suggested that the privilege should not be restricted to only Catholic confessional practice: see BEST, *The Principles of the Law of Evidence*, p. 505.

These observations having been made, Chief Justice Lamer ultimately stated that where religious communications satisfy the Wigmore criteria, they will be excluded from evidence.⁸¹

Chief Justice Lamer did not incorporate an analysis of the role of the Preamble⁸² into his jurisprudence and it does not appear to have played a role in the outcome of the decision. This is unfortunate since it may have helped to inform the jurisprudence of this case and assist in the resolution of future cases involving claims of religious confidentiality. As Prof. J. Abbass notes with respect to the mention in the Preamble of Canada being founded on the “supremacy of God” and the “rule of law,”

Had the Preamble referred only to the rule of law, the task of defining civil rights and human freedoms might have been easier as the Courts would have applied the reason of positive law and precedent to interpret the *Charter*. However, by expressly mentioning the supremacy of God in the Preamble, the *Charter* also intends to draw upon principles from other sources, namely theology and philosophy, to explain the meaning of the *Charter's* rights and freedoms. In this context, faith necessarily assists reason and, together, they serve as the appropriate method to understand better the foundational principles which, in turn, *Charter* guarantees are to be interpreted.⁸³

Rather than restricting it to the minimum terms of the Wigmore criteria in the context of only ss. 2(a) and 27 of the *Charter*, the use of the Preamble in the *Gruenke* analysis would have given the theological and natural law basis for confessional practices and confidential religious communications a more prominent role to play in adjudicating cases of privilege. This is not to say that the Preamble will not have a role to play in future cases. Indeed, the Preamble must at least be raised *in arguendo* by counsel in future cases since it is the vehicle

⁸¹ *Gruenke*, at 291.

⁸² Preamble: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”

⁸³ J. ABBASS, “Religious Expression and the Canadian Charter,” in *StC*, 39 (2005), p. 86.

whereby the natural law and divine law concerning the seal of confession may be brought to the fore in litigation.

Nevertheless, the fact that the Preamble appears to have essentially been disregarded in this case is consistent with the general judicial reluctance to grapple with this component of the *Charter*. Cases to date have done little with respect to developing the Preamble's potential role in adjudication of matters touching upon religion.⁸⁴ The jurisprudence in *Gruenke* is no exception and appears to follow this trend.

Next, Chief Justice Lamer went on to apply the Wigmore criteria to the facts of this case. With respect to the first criterion, Lamer agreed with the conclusion of the Court of Appeal, but used a somewhat different analysis. He stated that on the evidence there was no expectation that the communications would be in strict confidence:

Ms. Gruenke did not approach Ms. Frovich and the Pastor on the basis that the communications were to be confidential. In fact, Ms. Frovich initiated the meeting and Ms. Gruenke testified that she saw no harm in speaking to Janine Frovich because she had already made up her mind to turn herself into [sic] the police and "take the blame". In my view, the Court of Appeal accurately described these communications as being made more to relieve Ms. Gruenke's emotional stress than for a religious or spiritual purpose. I note that my view is based on the parties' statements and behaviour in relation to the communication and not on the lack of a formal practice of "confession" in the Victorious Faith Centre Church. While the existence of a formal practice of "confession" may well be a strong indication that the parties expected the communications to be confidential, the lack of such a formal practice is not, in and of itself, determinative.⁸⁵

Lamer did not analyze the facts using the other three Wigmore criteria, since the first one was not satisfied, and agreed that the statements were properly admitted and did not infringe upon the freedom of religion of Ms. Gruenke.

⁸⁴ See, for example, *Zylberberg v. Sudbury Board of Education* (1988), 65 O.R. (2nd) 641 (Ont. C.A.); *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.); *R. v. Sharpe*, [2001] 1 S.C.R. 45 (S.C.C.); but see *Allen v. Renfrew County* (2004), 69 O.R. (3rd) 742 at 752 (Ont. Sup. Ct.).

⁸⁵ *Gruenke*, at 292.

To summarize, Mr. Justice Lamer had three main points in his jurisprudence. First, there is no privilege at common law; second, the Wigmore analysis is to be applied on a case-by-case basis; and third, the *Charter* should inform the analysis. This is the current law in Canada in federal matters and where provincial law is silent in matters under provincial jurisdiction.

One observation that may be made about the application of the Wigmore criteria in Canadian jurisprudence in general is that the rights of the cleric who received the confidential communications are never really taken into consideration. This is consistent with the broader framework of the *Charter*, which essentially is a document which balances the rights of the individual with the rights of society and the state. The terms of reference for decision-making seem to be mainly between the rights of the individual to privacy in a religious context versus the rights of the state to know, and in this analytical process, the rights of the confessor seem to have been neglected or disregarded altogether. The fact that a cleric would be exposed to grave ecclesiastical penalties would certainly seem to be a just reason in favour of not compelling him to disclose communications which breach the sacramental seal. It is worthwhile to compare this to legislation in jurisdictions which protect the priest-penitent privilege such as Québec and Newfoundland as surveyed earlier which vest the right of the privilege not only in the penitent but also *in the confessor*. The American jurisprudence similarly seems to take the confessor's rights into account. For example, in one case, a situation arose in which an ex-spouse sought disclosure of sworn statements that had been adduced at a marriage tribunal pursuant to a petition for a declaration of nullity. The Court rejected the application on the basis that such communications were completely secret, and noted Wigmore's observation that the consequences which would befall a confessor who

revealed a confession may serve as a valid ground for the religious communications privilege. In rejecting the application, the Court stated *in obiter* that “The priests involved would be subjected to infamy and disgrace if they disclosed communications which they have sworn to keep secret.”⁸⁶ In Canadian common law, the impact on the confessor is *not* given as a criterion. This is regrettable for a society which claims to respect religious rights and freedoms, since authors such as Elliott assert that demanding a priest testify in light of the severe punishment he will suffer is equivalent to a persecution of religion by the state.⁸⁷

4.2.7.2.4 – Analysis of the Minority Jurisprudence

The minority jurisprudence of this case, while not the law in Canada, is important for a number of reasons. First, it provides important insights into the type of policy argumentation that would be necessary to establish the secrecy of confessional communications within the Wigmore framework. Second, it indicates that amongst the Canadian judiciary there is at least some sympathy for the public policy underlying the privilege. Third, the argumentation is more developed and comprehensive than the majority jurisprudence, and is compelling. In this regard, it should also be observed that the minority jurisprudence is consistent with the Irish, American, and Québec jurisprudence which has recognized the priest-penitent privilege.

Madame Justice L’Heureux-Dubé has six main components in her jurisprudence concerning the religious communications privilege. The first is an analysis of the policy foundations; the second is an examination of the historical and jurisprudential corpus; the

⁸⁶ *Cimijotti v. Paulsen*, at 626.

⁸⁷ See ELLIOTT, “An Evidential Privilege for Priest-Penitent Communications,” p. 421.

third is recent developments in Canada and other jurisdictions; the fourth is the Wigmore approach toward religious communications; the fifth is the general application of the privilege; and the sixth is the specific application of the privilege to the facts presented in the *Gruenke* case.

In terms of the first component, Madame Justice L'Heureux-Dubé agreed with Mr. Justice Lamer that any privilege is a question of policy.⁸⁸ She went on to state that there are four values promoted by the religious communications class privilege, these being society's interest in religious communications, freedom of religion, privacy issues, and other related concerns.

First, with respect to society's interest in religious communications, the arguments in favour of their recognition are primarily utilitarian in nature. Madame Justice L'Heureux-Dubé indicated that "Confidentiality in the relationship between the religious leader and an individual allows full and frank disclosure of matters which are troubling to the individual," and that psychological and spiritual health are important values which are offered in the intimate relationship found in confessional discourse.⁸⁹

She also stated that society has more to gain in the long run by fostering and upholding these relationships than it does by forcing disclosure of such communications, especially in terms of the maintenance of the mental, emotional, and spiritual health of the members of our society.⁹⁰ This argument is based on several propositions. The first is that

⁸⁸ *Gruenke*, at 296.

⁸⁹ *Ibid*, at 297. In support of this, she cites COLE, "Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis," p. 15, and MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," pp. 762, 767.

⁹⁰ *Gruenke*, at 298. She cites the following from Mitchell: "A more commonly mentioned reason [for fostering the clergy-confider relationship] is the benefit the community derives from the mental, emotional, and

confidentiality is essential to spiritual guidance, due to the need for genuine trust between priest and penitent.⁹¹ The second is that without confidentiality, people would be deterred from confession, and confession itself would essentially be prohibited since individuals would be unlikely to candidly confess when they do come.⁹² The third argument is that it allows for the maintenance of religious organizations themselves, by allowing for a necessary atmosphere of trust between leaders and congregants.⁹³ She then concludes with respect to this first point:

spiritual health of its members. One author has written that the privilege is important to the health and stability of the whole society and that it enables people to deal with their problems with positive results. The individual penitent or counselee may receive forgiveness, absolution, advice and comfort; from these may flow spiritual, emotional, mental, and even physical health. The community benefits from the health of its citizens, and for many persons religion, including confidential consultations with clergy, contributes significantly to that health" (MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," p. 767).

⁹¹ Gruenke, at 298. She cites the following from Tiemann and Bush: "There must be a genuine trust between the clergy and congregant or their relationship cannot proceed to the deep level of understanding necessary for good pastoral care. While the average pastor or rabbi is not prepared to engage in depth therapy, there can be no hindrance to the counseling relationship which might cause those who seek help to hold back mention of the very act, feeling, or circumstance causing the most spiritual turmoil. Confidence must be complete if pastoral counseling is to be helpful. There must be no possibility of a disclosure of the shared confidences should a court of law call the pastor or rabbi as a witness" (TIEMANN and BUSH, *The Right to Silence: Privileged Clergy Communication and the Law*, p. 23).

⁹² Gruenke, at 298. In support of this, she cites BENTHAM, *Rationale of Judicial Evidence*, vol. IV, pp. 588-592. She also cautions that the actual *numbers* of individuals who would be deterred are not the sole concern, the exercise being more qualitative than quantitative. In this regard, she cites the following from Mitchell: "It would be difficult to test how many people fail to come forward for help because they fear disclosure. Furthermore, at issue is not just the *number* of persons who consult clergy or the *number* of consultations, but the *healing quality* of those consultations" (MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," p. 765). This having been said, if statistics concerning the numbers who avoid confession if disclosure were a possibility *could* be established, these would help to validate and strengthen the policy arguments. This will be discussed in more detail below.

⁹³ See Gruenke, at 299. She cites the following from Cole: "Religious confidentiality is vitally important to the maintenance of religious organizations as well as to their individual members. An atmosphere of trust, made possible by the knowledge that communications made in secret will remain secret, is the keystone of strong clergy-communicant relationships which are in turn the cement that holds many religious organizations together. In a very real sense, then, the value of religious confidentiality is the value to society of religion and religious organizations generally. Even from a purely utilitarian perspective, that value cannot be overstated. Religious organizations based on claims to unchanging truths are a stabilizing influence in an

These societal interests are intuitively compelling, if they acknowledge a privilege in those uncommon situations where the confidentiality of a relationship is so fundamental that breaching it will do more harm than good to society. In those circumstances, public policy would be promoted at the cost of the search for truth.⁹⁴

The second value promoted by a religious communications class privilege is freedom of religion, which she accepted as a sound basis for a class privilege.⁹⁵ She also stated that the *Charter* supports recognition of a class privilege since the Preamble itself recognizes the religious foundations of Canada, and the provisions specifically recognize freedom of religion in s. 2(a), cited earlier. She concludes:

In effect, the inclusion of a guarantee of freedom of religion in the *Charter* indicates that a legal privilege is commensurate with Canadian values.

While the impact of the *Charter* in a particular case must, of course, be assessed on the facts of that case, the values outlined above and the constitutional protection of freedom of religion bring support to the recognition of a religious communications privilege at common law.⁹⁶

Unfortunately, no substantive arguments were developed with respect to the role the Preamble might play in these types of determinations.

The third value promoted by a religious communications class privilege is the interest of privacy.⁹⁷ Madame Justice L'Heureux-Dubé indicated that this particular basis of the

increasingly fast-paced and atomized society where bonds of community are scarce and worth preserving. Moreover, many provide needed social services that government is unwilling or unable to provide in a cost-efficient and humane manner" (COLE, "Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis," pp. 15-16).

⁹⁴ *Gruenke*, at 300.

⁹⁵ *Gruenke*, at 300-301. In support of this, she cites BENTHAM, *Rationale of Judicial Evidence*, pp. 588-592; COLE, "Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis," p. 16; and MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," p. 776.

⁹⁶ *Gruenke*, at 301.

⁹⁷ See *Gruenke*, at 302. In this regard, she cites the following from Mitchell: "The privacy rationale rests the clergy privilege on each person's interest in the dignity of privacy for his most intimate relationships. A confider who seeks out a member of the clergy for confession and counsel draws on or establishes a soul-baring relationship as deeply intimate as any among family members. There is general repugnance at the law's

privilege is not utilitarian in nature, but instead an important benefit to the individual as opposed to society.⁹⁸ On this basis, she concludes:

It should be stressed that this privacy interest does not simply address the interest all people have in the privacy of their conversations; it goes much further in that the individual seeks out the religious leader for spiritual guidance and assistance. This religious element in the relationship promotes special values of privacy characteristic of that relationship, and makes the privacy rationale a possible justification towards the recognition of the privilege.⁹⁹

intrusion into such a relationship" (MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," p. 768). There has been in Canada a strong movement in legislation (for example, the federal *Privacy Act*, R.S. 1985, c. P-21, and the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5) and case law (for example, the Supreme Court cases of *R. v Edwards* (1996), 104 C.C.C. (3d) 136 at 153; *R. v. Plant* (1993), 84 C.C.C. (3d) 203 at 212) towards the protection of individual privacy. The privacy rights movement may help to inform the Wigmore criteria and increase the likelihood that confessional communications will be respected. For example, Madame Justice McLachlin indicated with respect to the fourth Wigmore criterion that "the interests served by protection from disclosure must include the privacy interest of the person claiming the privilege and inequalities which may be perpetuated by the absence of protection" (*M. (A). v. Ryan*, at 175). This argument incorporates both s. 8 on privacy and s. 15 on equality in the *Charter* as support for the fourth criterion: see PACIOCCO and STUESSER, *The Law of Evidence*, Second Edition, p. 165. In addition, privacy considerations may offer support apart from the Wigmore criteria. Madame Justice L'Heureux-Dubé indicated "In my view, where a plaintiff is unsuccessful in her privilege claim, she may still suffer a serious incursion upon her privacy which is unwarranted ..." (*M. (A). v. Ryan*, at 198). Dawson agrees that privacy arguments might be advanced which may result in communications being excluded in cases where the Wigmore criteria are not applied: "Further criteria could be added to protect privacy on a case-by-case basis, leading to exclusion of evidence which has privacy implications but which does not concern a confidential communication within a special relationship. Sections 7 and 24 of the *Canadian Charter* might also be invoked to support exclusion of evidence where it is necessary to defend privacy rights" (DAWSON, "Compelled Production of Medical Records," p. 64).

⁹⁸ *Gruenke*, at 302. She cites the following from Mitchell: "Unlike Wigmore's utilitarian rationale, the privacy rationale justifies the clergy privilege primarily in terms of the participants' interests and not society's benefit—except to the extent that everyone benefits from living in a society in which the law does not intrude unnecessarily into people's private lives. Whereas the Wigmore rationale seems to imply that society favors persons confiding in their clergy, the privacy rationale is consistent with society's neutrality or even antipathy toward such confidences. The privacy rationale protects the clergy-confider relationship because the confider, and not society generally, values that relationship. One advantage, then, of the privacy rationale over the Wigmore rationale is that a privacy rationale maintains the privilege even in the face of popular loss of confidence in the clergy. A related advantage of the privacy rationale is that it does not depend on any showing that disclosure of confidences would in fact deter or inhibit relationships with clergy. In other words, the privacy rationale eliminates the need to meet Wigmore's second and third prerequisites for a privilege" (MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," p. 769).

⁹⁹ *Gruenke*, at 303.

This is a significant observation for the purposes of this study, as it was demonstrated in Chapter Two that one of the rationales for the *ius vicens* of the seal of confession is based on the need for privacy.

The final value which the class privilege promotes is what Madame Justice L'Heureux-Dubé terms "other concerns." There are two concerns she raises here. The first concern is the widely-known fact that the priests simply will not testify even if subpoenaed and threatened with contempt of court.¹⁰⁰ She concludes that this rationale may have been what underlay the thinking behind Best's jurisprudence in *Broad v. Pitt* when he remarked that he would not compel a cleric to testify, while at the same time refusing to accept the existence of the privilege. Madame Justice L'Heureux-Dubé concludes:

Compelling disclosure, or charging a cleric in contempt, it is further argued, places the presiding judge in the position of having either to force the breach of a confidence, or to imprison the cleric, both of which may arguably bring disrepute to the system of justice.¹⁰¹

¹⁰⁰ See *ibid.* at 303. She quotes the following from Reese "Most clergy will not testify concerning confidential communications regardless of whether there is a statutory privilege. They are bound by an overpowering discipline that dictates the strictest standards of conduct concerning the maintenance of the inviolability of the confidential communication made to them in their ministerial capacity. This is just as true of most Protestant clergy as it is of the Roman Catholic. Therefore, in a state without the privilege, a clergyman facing contempt charges for refusing to testify would have little trouble making the decision about what to do. He would refuse, face contempt charges, and imprisonment. The pressure from an institutional standpoint would reinforce his determination. To testify would cast doubt upon the security all people have toward the secrecy of confidential communications to the clergy" (S. REESE, "Confidential Communications to the Clergy," p. 81). Also see HOGAN, "A Modern Problem on the Privilege of the Confessional," p. 14. Elliott defines contempt as made out where (in accordance with *A-G v. Mulholland*) the witness fails to answer a question which touches upon evidence which for the attainment of justice is necessary or serves some useful purpose, but this would be a rare occurrence (See ELLIOTT, "An Evidential Privilege for Priest-Penitent Communications," p. 417). Similarly, Mr. Justice Duffy observed that experience has shown that trying to invade the privacy of the confession is "utter futility" (*Cook v. Carroll*, at 518).

¹⁰¹ See *Gruenke*, at 304. In support of this, she refers to REESE, "Confidential Communications to the Clergy," pp. 60-61. It has similarly been observed that "The spectacle of courts imprisoning members of the clergy for refusing to violate confidences entrusted to them might tend to subvert public faith in the judicial process" ("Developments in the Law: Privileged Communications," p. 1562). This would be reminiscent of the historical torture, imprisonment and/or execution of confessors for failing to disclose matters subject to the seal of confession or acquired by them as priests outside of the confessional, such as John Nepomucen, the Russian confessors of Talitskii, Aleksei, and Levin, Randolph, Garnet, Puig, and the confessors cited in the cases of *R. v. Hay*, *Anon.* (1905), and *Butler v. Moore*. Elliott sums up the conflict between Church and State as follows: "A priest or clergyman will in the course of his ministry often receive private information from members of his flock, which his priestly duty requires him to keep secret. He might well be obliged to choose between

The second “concern” she raises is that to admit into evidence that which was confessed to a priest is analogous to admitting into evidence confessions made under duress to the police.¹⁰²

With regard to the second component of the historical and jurisprudential data, Madame Justice L’Heureux-Dubé affirms, based on the legal history and jurisprudence concerning the privilege which unfolded during the Reformation, that there is no class-based privilege for religious communications in English law.

Regarding the third component, she observes that there are few cases in Canada on the subject, and agrees with Mr. Justice Lamer that the current trend is to limit class privileges.¹⁰³ However, she also notes that the legislation and case law in many jurisdictions, which protect the secrecy of religious communications, demonstrate that it is indeed consonant with the society’s interests: “. . . [T]he statutory provisions suggest that the public interest in various jurisdictions has been served by the recognition of a privilege for confidential religious communications.”¹⁰⁴ She goes on to conclude:

With these rationales and policy, and constitutional and historical considerations in mind, as well as the case law and the statutory provisions previously discussed, should this Court recognize a particular category of privileges for religious communications? While it may be that Parliament or the provincial legislatures are at liberty to enact statutory provisions creating such

disregarding his priestly duty or suffering legal penalties, which may be severe. Moreover, the prospect of having to submit him to this invidious choice will be repugnant to the judge; and the fact of such a choice being put, and of the clergyman being sent to gaol for doing his duty, is bound to cause dismay in large sections of the public. The possibility of this conflict of church and state actually happening is extremely small, but the fact that it exists at all is dismaying to many persons” (ELLIOTT, “An Evidential Privilege for Priest-Penitent Communications,” p. 410). Other authors have duly noted the public disapproval that would result if a priest was imprisoned for contempt: see YELLIN, “The History and Current Status of the Clergy-Penitent Privilege,” p. 112; LEONARD and GOLD, *Evidence: A Structured Approach*, p. 584.

¹⁰² See *Gruenke*, at 304. In support of this, she refers to LYON, “Privileged Communications—Penitent and Priest,” p. 327.

¹⁰³ *Gruenke*, at 307.

¹⁰⁴ *Ibid.*, at 309.

a privilege besides those already existing in Quebec and Newfoundland, it is my view that there is a human need for a spiritual counsellor, a need which, in a system of religious freedom and freedom of thought and belief, must be recognized. While serving a number of other policy interests, the values to society of "the human need to disclose to a spiritual counsellor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return" in the words of Berger C.J. in *Trammel v. United States*, *supra*, at p. 51, must supercede the truth-searching policy.¹⁰⁵

Madame Justice L'Heureux-Dubé then turns to Wigmore criteria and religious communications in general, the fourth component of her jurisprudence. She states at the outset:

It is interesting to note, however, that Dean Wigmore himself originally formulated the four canons of privilege in order to assess what kind of relationships would attract a new category of privilege. In fact, using his own four-step approach, Wigmore concluded that "[the pastor's] privilege had adequate grounds for recognition": Wigmore, *supra*, at p. 878.¹⁰⁶

In other words, it may be taken for granted that the Wigmore criteria have *already* proven that religious communications should be privileged, at least in the context of a formal confession, and that these criteria were intended for determination of *new* privileges. Additionally, assessing religious communications on a case-by-case basis will require evidence in each case that focuses more on short term interests, and "An *ad hoc* approach to privilege may overshadow the long-term interest which the recognition of a religious privilege seeks to preserve."¹⁰⁷ Ultimately she concludes:

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., at 310. She relies on MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," pp. 767-768.

¹⁰⁷ *Gruenke*, at 310. In support of this, she quotes the following from Mitchell: "Although Wigmore expressly contemplated a balancing of interests, he did not contemplate weighing clerics' and confiders' interests in confidentiality against specific litigants' interests in the outcome of their litigation. Rather, he contemplated weighing *society's* interest in clergy-confider relationships generally against *society's* interest in access to full information in every litigation. Apparently, Wigmore also had in mind a single conclusive balancing that would determine whether, *in the long run*, society benefits more from nondisclosure than from disclosure. If so, the privilege should be recognized; if not, the privilege should fail. Wigmore was not advocating ad hoc judicial determinations following every individual claim of privilege. This all-or-nothing approach has been criticized by some who prefer more ad hoc balancing. Such criticism may seem to carry special weight when the claim of privilege would shield evidence of child abuse. A privilege that seems to be acceptable in general may appear less so when it withholds crucial evidence of serious abuse of a helpless

In my view, it is more in line with the rationales identified earlier, the spirit of the *Charter* and the goal of assuring the certainty of the law, to recognize a pastor-penitent category of privilege in this country. If our society truly wishes to encourage the creation and development of spiritual relationships, individuals must have a certain amount of confidence that their religious confessions, given in confidence and for spiritual relief, will not be disclosed. Not knowing in advance whether his or her confession will be afforded any protection, a penitent may not confess, or may not confess as freely as he or she otherwise would. Both the number of confessions and their quality will be affected; see Mitchell at p. 763. The special relationship between clergy and parishioners may not develop, resulting in a chilling effect on the spiritual relationship within our society. In that case, the very rationale for the pastor-penitent privilege may be defeated. The lack of a recognized category also has ramifications for freedom of religion. Concerns about certainty apply as much to the development of specific religions as to spiritual practices in general.¹⁰⁸

With regard to the application of the Wigmore criteria to pastor-penitent communications, she states:

Of course, this does not mean that every communication between pastor and penitent will be protected. The creation of the category simply acknowledges that our society recognizes that the relationship should be fostered, and that disclosure of communications will generally do more harm than good. Accordingly, the pastor-penitent relationship answers the third and fourth legs of the Wigmore test. But in any given case, the specific nature of the relationship must be examined to ensure it fits the category. Furthermore, the extent of the privilege will still be determined in accordance with the first and second legs of Wigmore's test.¹⁰⁹

The fifth component of her jurisprudence concerns the general application of the privilege. Prior to the Wigmore test being applied, the communications must first be characterized as being religious in nature, as per the tests set out in *R. v. Medina*, in order to determine if it attracts the values promoted by the religious communications privilege.¹¹⁰ Once so characterized, the Wigmore criteria may then be used to analyze the communication.

child. One danger of the ad hoc approach to privileges, however, is its tendency to focus on the palpable need for evidence in the individual case and to neglect more intangible and long-term interests. Even in ad hoc weighing, the balancer must take into account the long-term effects of disclosure on the practice of religion and the benefits the community derives from clergy's contributions to the health of many citizens" (MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," pp. 767-768).

¹⁰⁸ *Gruenke*, at 311.

¹⁰⁹ *Ibid.*, at 312.

¹¹⁰ *Ibid.*, at 313.

Regarding the first criterion, she explains:

The first of these two aspects is that the religious communications must originate in the expectation that they will not be disclosed. It is clear that the requirement of confidentiality serves to stress that only private communications may be privileged. This analysis protects both privacy and utilitarian values. The analysis of this issue is a factual exercise, having regard to all the circumstances. In particular, the persons involved and the place where the communications take place will be relevant. In addition, the expectations of the people involved may be assessed through testimony where that is possible, and by some examination of the practices of the religious denomination involved. In making this latter assessment, however, an overly rigid application of the practice of the religious denomination should be avoided. Chambers and McInnis, *supra*, observe at p. 186: "It would be inconsistent with expectations if a communication received by a cleric in confidence was privileged only if the rules governing his or her conduct required the maintenance of secrecy."

This position is strengthened by reference to s. 27 of the *Charter*, which mandates an interpretation of the *Charter* consistent with the multicultural heritage of Canadians. The requirement or the availability of a confidential communications [sic] such as a confession will not be determinative of the availability of the privilege, although it may be relevant. Accordingly, I would not accord "confessional" communications any "special privilege" going beyond the application of the principles defined here (see Ryan, "Obligation of the Clergy not to Reveal Confidential Information" (1991), 73 C.R. (3d) 217, at p. 218).¹¹¹

Concerning the second criterion, she concludes:

The second Wigmore criteria, that confidentiality be essential to the full maintenance of the relationship, highlights the narrow application of the privilege. The privacy interests of the religious leader and individual involved, in combination with the benefit to society of the relationship's confidentiality, will not be sufficient to pass the second criteria in every case. Determination of this issue will involve, among other things, a consideration of the nature of the particular relationship at bar and the nature of the cleric-individual relationship in broader terms.

In this context, the practice or procedure used to communicate and perhaps the very fact of confidential communication will have to be probed. An example of this type of analysis is found in *Slavutych*, *supra*. The relationship envisaged in the privilege is one in which the individual approaches the religious leader with the intent of gaining religious or spiritual comfort, advice, or absolution. For instance, the communications made in an effort to flee from the criminal justice system (see *R. v. Medina*, *supra*) will not attract the privilege since gaining the assistance of anyone, let alone a religious leader, to escape justice is not the kind of relationship society seeks to foster and, consequently, cannot be covered by the pastor-penitent privilege.¹¹²

¹¹¹ Ibid., at 313-314.

¹¹² Ibid., at 314.

As indicated under the fourth component, she considers the third and fourth aspects of the Wigmore criteria to be satisfied in all cases where the relationship is legitimately established in evidence.

The sixth and final component of her jurisprudence is an application of the Wigmore criteria to the facts of this case. With respect to Ms. Gruenke's communication with her pastor, she concludes, in agreement with Mr. Justice Lamer, that there were no privacy expectations attached, and accordingly the communications were not deemed privileged.¹¹³

4.2.8 – The Uncertainty of the Canadian Law

Certainty of the law is an important value in any legal system. Having to depend on the *ad hoc* evidentiary rulings does not allow people to go about their personal business in a confident and secure manner. The much-derided "pigeon-hole" approach towards privileges has at least *this* quality. As Sim observes concerning *Slavutych*, we still have to deal with "... [T]he uncertainty inherent in the application of Wigmore's four broadly stated conditions."¹¹⁴ The same may be said for *Gruenke*. Elliott makes a similar observation in noting that the case-by-case approach has the following result:

The effective position in Canada is as though a one-line statute has enacted that a Court may in a suitable case allow a claim for priest/penitent privilege, without giving any indication of what might be a suitable case, beyond indicating that the matter must be judged in a manner consistent with the multicultural heritage of Canadians. This leaves a long and arduous task on a succession of claimants and courts to work out a reasonably clear and certain body of law on the matter.¹¹⁵

¹¹³ Ibid., at 316.

¹¹⁴ SIM, "Privilege and Confidentiality: The Impact of *Slavutych v. Baker* on the Canadian Law of Evidence," pp. 378-379.

¹¹⁵ ELLIOTT, "An Evidential Privilege for Priest-Penitent Communications," p. 433.

Without legislation, the outcome will ultimately depend on what comes before the courts, and when. Generally, the development of religious freedoms and rights in Canada has traditionally moved forward incrementally on a case-by-case basis.¹¹⁶ The same will have to be said specifically with respect to the privilege concerning religious communications. Elliott states:

Eventually, with luck, a body of law will be produced which will resemble a carefully drafted statutory class privilege. How ample this body of law will be will depend upon the continued willingness of the judges to give effect to imperfectly expressed legislative desire (in S. 2(b) of the Charter) to promote freedom of religion, by means of protecting pastoral communications from disclosure in court. It is, moreover, likely that the completed edifice will owe less to a steady focussing on fundamental questions and more to a regard for the exigencies of particular cases.¹¹⁷

Referring to the English law, but equally applicable to Canada, Nokes states the following:

If any privilege were recognised now, its limits would require as clear delineation as those of legal professional privilege. In particular, it would be desirable to distinguish between ritual confession and private conversation, and to decide the classes of minister of religion to whom a protected confession might be made.¹¹⁸

Madame Justice L'Heureux-Dubé also notes that a number of questions remain outstanding in Canadian law concerning religious communications privilege:

Among these are the following: Who may claim the privilege? Does the privilege cover written as well as oral communications? What is the effect of a waiver by the confident [sic]? Does the religious leader have an independent legally protected interest in the privileged communications, and if so what is its extent? In what circumstances may a privilege be claimed?¹¹⁹

With regard to the case-by-case approach, although there is uncertainty, once a ruling is made with regard to a particular religion, it should serve as a precedent for future cases

¹¹⁶ See D. DOYLE, "Religious Freedom and Canadian Church Privileges," in *Journal of Church and State*, 26 (1984), p. 294.

¹¹⁷ ELLIOTT, "An Evidential Privilege for Priest-Penitent Communications," p. 435.

¹¹⁸ NOKES, "Professional Privilege," p. 100.

¹¹⁹ Gruenke, at 314-315.

involving that same religion unless the circumstances are markedly different, as they were in the Jehovah Witnesses cases which will be considered below. Even though the privilege will be applied on a case-by-case basis, if it is determined that the Catholic seal of confession is privileged in an individual case, this should still serve as a form of precedent for future cases. Once it has been found that confession meets the criteria, and since sacramental confession is always uniform in terms of its practice and expectations of secrecy, it would be difficult to argue in later cases that it *does not* meet the criteria. Application of the religious communication privilege to an individual religion should be stable and not something which should be shifting and changing from case to case. In keeping with the spirit of Wigmore, and the general need for some degree of certainty of the law, there should be at least *some* semblance of stability once the confessional practice of a particular religion is found to meet the criteria.

4.2.9 – Legislative Solutions

Despite the various recommendations by law reform commissions against the creation of a statutory privilege, many authorities have in fact made compelling arguments in favour of doing so. Mr. Justice Duffy stated that it would provide clarity to do so.¹²⁰ Elliott likewise argued for the creation of a statutory privilege.¹²¹ In what follows, we will consider the legislative option.

The best option to clarify the law definitively would be to amend the federal and provincial evidence legislation. This would have the effect of largely settling the law, though

¹²⁰ See *Cook v. Carroll*, at 519.

¹²¹ See ELLIOTT, "An Evidential Privilege for Priest-Penitent Communications," pp. 410, 416, 420-438.

as previously noted, the American experience has demonstrated that there will always remain interpretative questions concerning application. Also, if legislation is passed which offers some protection for the privilege, it is highly unlikely that an airtight privilege provision would be made which did not have a plethora of exceptions for cases which society considers grave. Unfortunately, this would effectively defeat the purpose of the seal which demands secrecy under all circumstances. Nevertheless, the legislative option has its benefits, particularly certainty of the law.

General policy considerations concerning the statutory dimension of the sacerdotal privilege may be seen in the various reports of the law reform commissions. Most reports recommended against the creation of a statutory priest-penitent privilege,¹²² although some did find in favour of legislation.¹²³

¹²² "No cases have been drawn to our attention, where in the history of the administration of justice in this Province, a priest has been asked to testify as to what has been revealed to him in the confessional. Until a court in this Province, or any other province, has ruled that a priest is compelled to testify as to communications made in the confessional, it would not appear that legislative action is necessary" (ONTARIO ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS, *Report of the Royal Commission Inquiry into Civil Rights, [The McRuer Report]*, pp. 820-821); "The common law did not recognize a privilege for confidential communications between clients and such professionals as social workers, medical practitioners, psychiatrists, accountants or clergymen. All these professions contend that their clients should be entitled to claim a privilege for confidential communications made during the course of a professional relationship. The task of deciding whether one or all of these professions should be granted a privilege is most difficult. Inevitably a decision granting an absolute privilege to any group is seen as arbitrary. Because of the strong interest in admitting all relevant evidence, exceptions to the general rule granting such a privilege might engulf the exclusionary rule itself. Since it would be unrealistic to attempt to define the circumstances where the maintenance of confidentiality for communications made in the course of professional relationships outweighs the benefit of their disclosure this section provides that the judge should weigh the competing interests whenever such a privilege is claimed" (CANADA LAW REFORM COMMISSION, *Law of Evidence Project, Study Paper No. 12, Evidence: Professional Privileges Before the Courts*, p. 80); "Representations have been made to us that the privilege which exists between a solicitor and his client should be extended to communications between accountants and their clients, newsmen and their sources of information, physicians and their patients, and clergymen and members of their congregations. None of these relationships are fundamentally or historically the same as that which exists between the solicitor and his client. The argument put forward is that they are all based on confidence; however, as we have pointed out, the solicitor and client relationship is based not on confidence, but arises necessarily out of the basic right of the client to equality before the law. The extension of a statutory privilege to any of the relationships we have mentioned would result in closing to the judicial process wide areas in its search for truth. We have come to the conclusion that this consideration outweighs the argument put forward in favour of providing statutory protection for the relevant communicants" (ONTARIO LAW REFORM COMMISSION, *Report on the Law of Evidence*, Toronto, Ministry of the Attorney General, 1976,

Notwithstanding these recommendations, in June of 1977 the Joint Working Group of the Canadian Council of Churches and the Canadian Catholic Conference made a submission to the Minister of Justice. This brief urged the Minister to amend the federal *Evidence Act* to create a priest-penitent privilege which would extend not only to matters heard in confession but to any matters discussed in confidence during pastoral ministry.¹²⁴ This brief was followed by a similar submission by the Anglican Church of Canada. No action was taken with respect to these recommendations, and Ryan observed that that these types of submissions "... [A]re resisted by many if not most lawyers and judges..."¹²⁵

To date, Canadian legislative bodies such as Parliament and the Provincial legislatures have been reluctant to enter into the decision-making process due to the political

pp. 145-146); "The disadvantage of discretions and of the balancing of public interests involved in the judicial recognition of new privileges at common law is that those who want absolute assurance that their confidential communications will never be used in court may not be satisfied with such vagueness and unpredictability. However, this flexibility is preferred to a fixed rule that confidential communications must always be disclosed if they are relevant and otherwise admissible" (UNIFORM LAW CONFERENCE OF CANADA, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, p. 420).

¹²³ "On the other hand, the reasons justifying the non-recognition of a privilege for religious advisers under common law are mostly historical. The priest's right to secrecy seems to have existed in England prior to the Reformation. It was then essentially related to the secrecy of confession. After the Reformation, only the Catholics or 'papists' retained the sacrament of penance. The abolition of this right was thus a consequence of politically motivated religious intolerance towards the Catholic faith. In our country today, religious intolerance is a thing of the past. Freedom of religion is guaranteed by our political system and the motives for the abolition of the privilege in this particular case are not acceptable anymore. Indeed Canadian courts would seriously hesitate to hold in contempt of court a minister, priest, or rabbi who would refuse to divulge during testimony any confidences made to them. Furthermore we find it hard to imagine that, in order to obtain conviction, the prosecution would, during trial call as a witness the priest who received the accused's confession. Finally, we must also consider that, in spite of a court order, a religious adviser who would feel it against his principles to testify could very well allow himself to be convicted. The effectiveness of the rule in such cases is therefore doubtful. There therefore normally should not be any hesitation to legislative protection. However, the recent surge in new sects, associations, groups, or movements of religious or supposedly religious character would no doubt create problems of precise identification of religious confidences" (CANADA LAW REFORM COMMISSION, *Law of Evidence Project, Study Paper No. 12, Evidence: Professional Privileges Before the Courts*, p. 17).

¹²⁴ See RYAN, "Obligation of the Clergy not to Reveal Confidential Information," pp. 217-218.

¹²⁵ *Ibid.*, p. 219.

ramifications amongst the electorate, leaving it to the courts to sort out what should have otherwise been a policy decision reflected in legislation. The courts have identified the Wigmore criteria as rooted in policy, and policy should be reflected in legislation. Unfortunately, there does not currently seem to be the necessary political will to carry out such a legislative initiative. Elliott notes that the issue is simple: "To do anything effective at all, the legislature must make up its mind."¹²⁶ Indeed, as stated above, one of the reasons Madame Justice L'Heureux-Dubé felt inclined to recognize the privilege was that there simply was a lack of legislation.¹²⁷

4.2.10 – Post-*Gruenke* Jurisprudence

Since the *Gruenke* decision was handed down in 1991, it has either been followed, distinguished, explained, mentioned, or otherwise cited in some 225 cases. However, these cases have applied *Gruenke* mainly in dealing with the issue of *other* privileges, primarily solicitor-client privilege, doctor-patient privilege, and government agency records. Only around one per cent of these cases have actually touched on the religious communications issue. In this section we will consider those cases which are relevant to our study and help us in interpreting the Canadian law on the privilege.

The 1993 civil case of *McCabe & Munnalall v. McCann et al.*¹²⁸ involved a situation where the plaintiff's lawyer sought to compel the confessor of another priest to testify as to

¹²⁶ ELLIOTT, "An Evidential Privilege for Priest-Penitent Communications," p. 437.

¹²⁷ *Gruenke*, at 309.

¹²⁸ See unreported, B.C. Supreme Court, Action No. C927581, digested in part in LOPEZ-GALLO, "Are Confidential Communications Protected by Common Law Privilege?" pp. 305-324. We were advised by the registrar of the B.C. Supreme Court that there are no reasons for judgment on file for this ruling.

his confession during the course of an examination for discovery.¹²⁹ The judge denied the request to compel the confessor to reveal what was disclosed.

Another case which dealt directly with the religious communications case-by-case privilege concerned the Jehovah Witnesses, and was decided in Newfoundland in 2000. In this case, a member of their religious body, who was accused of a crime, met with church elders to discuss the matter, but made no actual confession. The Court, applying *Gruenke*, held that this communication did not meet the Wigmore criteria since, on the facts of this particular case, there was no confession of a religious nature nor any expectation of confidentiality.¹³⁰

One case of interest for the purposes of our study concerned private documentary evidence. In the 1994 case of *V. v. R.*¹³¹ a defendant who was being sued for the assault of his stepdaughter sought production of her childhood diaries. The plaintiff testified that she would not have written the diaries if there was a possibility of disclosure, and that she wrote them for therapeutic reasons. Two psychiatrists testified that disclosure would be harmful. The British Columbia Court of Appeal refused to order disclosure, and stated that:

¹²⁹ This is a pre-trial civil procedure which follows closure of pleadings, and involves questioning of the plaintiff and the defendant before a court reporter. Any salient evidence obtained can be read in at trial off the transcript from the examination for discovery and can then be added to the corpus of evidence.

¹³⁰ See *R. v. P. (J.J.)* (2000), 196 Nfld. & P.E.I.R. 142. Also see *Kilbreath v. Saskatchewan (Attorney General)*, [2005] 4 W.W.R. 462 (Sask. Q.B.). In this latter case, the Crown sought disclosure of the written notes of a counselling session involving a member and two women concerning a sexual assault. Prior to the execution of a search warrant, the notes were sealed and sent to their solicitors in another province. Although the religious communications privilege was mentioned, the focus was on the church's claim to solicitor-client privilege. The records were deemed not protected by solicitor-client privilege since they were only sent to the lawyer for safe-keeping and did not contain solicitor-client notes.

¹³¹ 118 D.L.R. (4th) 699 (B.C.C.A.). This case cited a similar ruling in the Ontario case of *R. v. W. (J.)* (unreported, March 25, 1994) (Ont. Ct. (Gen. Div.) and cited *infra*. Also see *O.W. v. W.P.*, [2001] A.J. No. 1148 (Alta. Q.B.).

Having in mind the view of Chief Justice Lamer in *Gruenke* that the Wigmore criteria are not written in stone and new classes are not precluded, I have reworded the Wigmore criteria to reflect the position of the appellant:

1. The writings must originate in a confidence that they would not be disclosed;
2. The activity of the secret writing is important if not essential to the healing process;
3. The healing process is such that in the opinion of the specialists (and therefore society) it ought to be strongly encouraged; and
4. The possible injury to the ongoing healing process is far greater than the benefit gained by disclosure.

In the present case, the chambers judge concluded that the Wigmore criteria can have no application because “the criteria relate (to) relationships between two human beings, not to the private thoughts of an individual”. For my part, I am prepared to extend the Wigmore criteria to a new category: journals kept in the expectation that they would not be read by anyone other than the writer.¹³²

The Court found that these criteria were satisfied on the evidence. In support of the policy, the following from August 18, 1994 edition of the *New York Times* by William Safire was cited with approval:

All of us – muckrakers, solons and would-be diarists – should take a serious look at the rush to break the seal of the self-confessional. Just as our home is our castle, our mind is our citadel of privacy – and so should be our mind’s most intimate expressions in a personal diary.¹³³

This case demonstrates that the Wigmore criteria may also be applied to private documents on which privilege is claimed, as it did in the *Slavutych* case. As noted in Chapter Two, documents which may draw a claim for privilege include writings done by the penitent or someone assisting the penitent prior to or during the course of a confession, as well as letters sent in reserved cases. For penitential matters between a penitent and an assistant (such as a translator), the *Slavutych* case should apply to exclude the evidence. For writings

¹³² *V. v. R.*, at 706.

¹³³ *Ibid.*, at 708.

intended for the personal use and eyes only of the penitent, the cases involving diaries should similarly apply.

4.3 — THE SEAL OF CONFESSION AND THE WIGMORE CRITERIA

Up to this point, we have considered the history and *ius vogens* of the seal of confession, as well as the civil law in the common law jurisdictions in which it finds itself. The seal of confession in Catholic canon law has never been adjudicated in Canada with respect to whether it is privileged or not. In this section we will examine the theoretical likelihood of it being supported in the Canadian law of privileged communications as set out above.

4.3.1 – The Seal and the Wigmore Criteria in General

As noted in Chapter Three, the writings of Bentham, himself an opponent of privileges other than that of solicitor-client, certainly support the proposition that the seal of confession should be treated as a privileged and confidential communication, and Wigmore, who shared Bentham's views on privilege, relied heavily on these. Most importantly, Dean Wigmore, the architect of the analytical framework for the determination of privileges, agrees that priest-penitent communications satisfy all four of the criteria and therefore should be treated as confidential communications, a point duly noted by most authors and judges. If the architect of the criteria agrees that priest-penitent confessional communications satisfy the criteria he developed, would it be sustainable to use his analytical framework, but simultaneously disregard his own analysis and conclusions using the criteria? Chambers and McInnes note that although Wigmore urged caution in the application of the criteria, "... [T]he restrictive application of the test should not preclude the possibility of a priest-penitent privilege. Wigmore himself believed that such a privilege for Roman Catholic priests had

adequate grounds for recognition.”¹³⁴ A number of legal writers also conclude that all Wigmore criteria are satisfied by confidential priest-penitent communications.¹³⁵

There has also been open support for this proposition amongst many of the non-English judiciary and law-makers. As we have already seen in Chapter Three, Mr. Justice Duffy of the Irish High Court ruled that the Catholic seal of confession met the Wigmore criteria. Similarly, the United States federal courts discarded the English common law against the privilege and recognized a privilege for confidential religious communications. American legislators have readily provided statutory protection for confessional secrecy where the case law was deficient. The same may be said for legislators in Québec and Newfoundland. The Supreme Court of Canada went as far as to overrule the English law, but did not go as far as other jurisdictions in recognizing a categorical privilege.

In Canada, some judges, like Madame Justice L’Heureux-Dubé, have expressed a degree of sympathy in favour of the religious privilege which suggests that the seal of confession would be respected. The Honourable Louise Arbour, former justice of the Supreme Court of Canada and currently the U.N. High Commissioner for Human Rights, also seems to accept the principle of the priest-penitent privilege as a rule of evidence.¹³⁶

¹³⁴ CHAMBERS and MCINNES, “Commentary on *R. v. Church of Scientology and Zaharia*,” p. 185.

¹³⁵ See, for example, MITCHELL, “Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion,” pp. 761-768; CHAMBERS and MCINNES, “Commentary on *R. v. Church of Scientology and Zaharia*,” pp. 186-189; RYAN, “Obligation of the Clergy not to Reveal Confidential Information,” p. 232; J. ST. MICHEL, “La Cour suprême du Canada a-t-elle aboli le secret de la confession?” in *Ius Ecclesiae*, 5 (1993), p. 431.

¹³⁶ Comparing international law to domestic law on privileges, she stated that “... [U]niversal acceptance of the duty to give evidence in criminal cases can be understood by all in our own society, but not in the international arena. That duty supersedes all other legitimate concerns, except in the narrow end of the lost privilege. *It covers very few concerns that can trump the search for truth in a criminal trial, like national security interests and the priest penitent privilege.* There is only a handful of these privileges that we uphold above and beyond the duty to come to court and provide evidence. We cannot make that assumption in the international forum” (L. ARBOUR and A. NEIER, “History and Future of the International Criminal Tribunals for

The canon law explained in Chapters One and Two would appear to meet the standards of the Wigmore criteria. The Catholic seal of confession has a strong foundation in history, philosophy, natural law and positive law (although the natural law element has never been considered in Canadian jurisprudence, and the divine law element might be disregarded altogether by a Canadian secular court). Indeed, it has been observed by a number of authors that the Catholic seal of confession is the very source, the foundation, and the legal-canonical wellspring from which any religious communications privilege originates.¹³⁷

The seal of confession in Catholic canon law, based on our analysis of the evidence adduced in Chapters One and Two, has in our opinion the strongest basis for confessional secrecy amongst the religious denominations.¹³⁸ If it is *not* deemed to satisfy the Wigmore

the Former Yugoslavia and Rwanda," in *American University International Law Review*, 13 [1998], p. 1502; emphasis added). For further consideration of the priest-penitent privilege from an international law point of view, see ARAUJO, "International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the 'Priest-Penitent' Privilege," pp. 639-666.

¹³⁷ *Gruenke*, at 304, as per Madame Justice L'Heureux-Dubé. Also see NOLAN, "The Law of the Seal of Confession," p. 660.

¹³⁸ Confidential confessional communications are of course treated differently in the ethical traditions and practices of each religion which maintains them. The Catholic tradition maintains that the secret of confession may never be disclosed for *any* reason whatsoever, and in comparison to all other religions, it appears that the Catholic tradition maintains the highest and strictest standards of secrecy. For special consideration of confessional secrecy and the Anglican Church in Canada, see RYAN, "Obligation of the Clergy not to Reveal Confidential Information," pp. 217-232. For the Anglican experience in England, see generally BURSELL, "The Seal of the Confessional," pp. 84-109. For the Anglican approach toward confessional secrecy generally, as well as the Lutheran, Reformed Church, Free Church and Jewish traditions, see TIEMANN and BUSH, *The Right to Silence: Privileged Clergy Communication and the Law*, pp. 49-86. For a Baptist perspective, see O. THOMAS, "Between Scylla and Charybdis: When None of the Choices are Good," in *Loyola Los Angeles Law Review*, 29 (1996), pp. 1781-1784. For a specific consideration of the Jewish approach, see R. PEARCE, "To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence," in *Loyola Los Angeles Law Review*, 29 (1996), pp. 1771-1780, and A. SCHAEFER and P. LEVI, "Resolving the Conflict Between Ethical Values of Confidentiality and Saving a Life: A Jewish View," in *Loyola Los Angeles Law Review*, 29 (1996), pp. 1761-1770. For the Islamic approach, see A. AL-HIBRI, "The Muslim Perspective on the Clergy-Penitent Privilege," in *Loyola Los Angeles Law Review*, 29 (1996), pp. 1723-1732. These may be contrasted with the strict Catholic ethical approach toward the secret of confession, as set out in A. BEVILACQUA, "Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests," in *Loyola Los Angeles Law Review*, 29 (1996), pp. 1733-1746, and T. COLLETT, "Sacred Secrets or Sanctimonious Silence?" in *Loyola Los Angeles Law Review*, 29 (1996), pp. 1747-1759. Observations on the practice in the

criteria, then what religious tradition *would* satisfy the criteria? A finding *against* the privilege applying to the seal of confession would therefore render the jurisprudence in *Gruenke* ineffectual since no known confessional communications secrecy meets the standard set by the Catholic model.

4.3.2 – The Seal and the Wigmore Criteria Specifically

The satisfaction of the four Wigmore criteria is a matter of fact.¹³⁹ However, the factual element of the Wigmore criteria is also intertwined with an intuitive policy analysis.¹⁴⁰ The first and the second criteria should easily be met by the Catholic practice of confession. The third and the fourth criteria may need to be supported by strong arguments and, if possible, empirical evidence. Let us turn then to an examination of the individual Wigmore criteria and Catholic seal of confession.

Regarding the first criterion (communications must originate in confidence), no known authorities or writers suggest that the seal of confession would *not* meet the Wigmore criteria, while other authors directly conclude this. Similarly, there are subtle allusions in many cases which suggest that the Catholic practice is considered the standard which other confessional practices are measured against, including the lower court decisions in *Gruenke*. Manes and Silver state that “Clearly, the giving of a confession to a priest in a confessional

Orthodox Churches may be noted in Chapter One. For a general survey of different religions and the challenges of accommodating them within the general legal framework of confessional communications, see HORNER, “Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society,” pp. 697-732.

¹³⁹ MCLACHLIN, “Confidential Communications and the Law of Privilege,” p. 275; *R. v. McLure*, [2001] 1 S.C.R. 445 at 456-457.

¹⁴⁰ *Gruenke*, at 300.

originates from confidence.”¹⁴¹ This is supported by the direct command in canon law to keep the matter of confession secret, and is supported by the severe penalties attached to a breach of the seal of confession. A confessor who reveals the confession automatically incurs the *latae sententiae* penalty of excommunication pursuant of the Latin Code and a major excommunication as per the Eastern Code. These penalties should be taken into account if the question came up in the context of a Catholic confession, and support the first criterion.

It should not be difficult to support the first criterion from an evidentiary point of view. All that would be required is *viva voce* evidence that the communication was in fact a sacramental confession and not an extra-confessional, non-sacramental communication. As stated above by Mr. Justice Lamer in *Gruenke*, a church with an established practice of secret confession is a “strong indication” that all parties clearly expect communications to remain private and confidential.¹⁴² In any event, the seal of confession is well-known amongst Catholics and non-Catholics alike as the highest form of secrecy known. This, coupled with the strong expectation of secrecy on the part of the penitent concerning confessional communications, should be sufficient to satisfy the first Wigmore criterion.

With respect to the second criterion (confidentiality must be essential to the relationship), Manes and Silver state:

It is submitted that if communications to clergy concerning crimes and torts were disclosed, there would be some immeasurable damage to the relationship, and accordingly, the second criterion is probably met. Crimes and certain torts being the sins that they are, it is logical to assume that they will often be the subject of communications with clergy.¹⁴³

¹⁴¹ MANES and SILVER, *The Law of Confidential Communications in Canada*, fn. 26, p. 57.

¹⁴² *Gruenke*, at 292.

¹⁴³ MANES and SILVER, *The Law of Confidential Communications in Canada*, pp. 58-59.

Catholic confessional practice should similarly easily satisfy the second criterion. As one theologian observed, "For each conscientious priest confession is without any doubt one of the most difficult and frustrating aspects of his ministry. It is here ... that he encounters the only real object of his pastoral care: the human soul, man, as he stands sinful and miserable, before God."¹⁴⁴ The kind of trust a priest needs to carry out his ministry in this regard, which is difficult at the best of times, requires a foundation of open disclosure and secrecy. The relationship is predicated on the need to maintain the confidence of the penitent in order to facilitate full disclosure and begin the healing of the penitent's psycho-spiritual wounds. The priest needs secrecy in which to deal with the frailty and failings of a penitent, and the penitent, who has rendered him or herself completely vulnerable to another human being and before God, needs to have a sense of reassurance and safety. Without this relationship being protected by secrecy, the relationship is jeopardized, and the confessor cannot carry out one of the most fundamental aspects of his ministry, while the penitent cannot avail him or herself of the spiritual healing that he or she needs.

Similarly, the obligation on all Catholics to make use of the sacrament of penance as the ordinary means of reconciliation means that they will have a strong expectation of confidentiality. Without such protection, the ordinary faithful of the Catholic Church are put into a conflict of laws situation, where on the one hand they are obliged by canon law to confess their sins, and on the other hand may be uncertain as to whether the secrecy of the seal of confession will be upheld and their confidences protected. This jeopardizes their relationship with both the confessor and in a broader sense the Church itself. This would

¹⁴⁴ A. SCHMEMANN, "Some Reflections on Confession," in *St. Vladimir's Theological Quarterly*, 5 (1961), p. 38.

create distrust between the confessor and the penitent. Without complete trust between the confessor and the penitent, the penitent may very well withhold information with civil or criminal ramifications, resulting in an incomplete sacramental confession.

The greatest hurdles lie in the third and fourth criteria. In this regard, Nokes states that:

It is upon these two criteria that the greatest difference of opinion is probable, for they involve the religious tenets which were the original basis of any privilege for confession. If the fundamentals of Christianity are unquestioned, and if it is believed that confession is a spiritual duty and benefit, then, whatever secular inconvenience may result, the secrets of confession should remain inviolate ; in other words, the collateral evil to society of compelling a breach of confidence between priest and penitent outweighs the interest of the secular in enforcing justice. While these beliefs were at one time regarded as indisputable, or later were paid the compliment of lip service, they are now far from universally accepted ; there are many who do not regard the disclosure of confessional secrets as an evil to society ; some who, if they do not disapprove of confession altogether, regard any benefit from it as merely psychological, and therefore see little distinction between a confession to a priest and conversation with a psychiatrist.¹⁴⁵

With respect to the third criterion (the relationship ought to be sedulously fostered), the use of the word “ought” invites policy argumentation. Policy analysis and argumentation is an intuitive exercise – but one which may nevertheless be informed by the natural law.¹⁴⁶ In that regard, for both the third and fourth criteria, the natural law set out in Chapter Two is of assistance in developing argumentation.

Two questions are important in analyzing the third criterion, namely: which relationships, and which community? Sim points out that there are many relationships which could be considered as ones which should be sedulously fostered, but suggests that only those which directly contribute to the public interest in some way should satisfy this

¹⁴⁵ NOKES, “Professional Privilege,” p. 99.

¹⁴⁶ See H. VEATCH, “Natural Law and the ‘Is’—‘Ought’ Question,” in *The Catholic Lawyer*, 26 (1981), pp. 251-265.

criterion.¹⁴⁷ For example, a hospital committee setting standards or a child protection organization would qualify.

Whether Sim is being unduly restrictive or not, the work of the Church in hearing confessions should be able to meet these criteria due to the psychological value of maintaining a healthy conscience and self-esteem as well as the importance of spiritual counselling with regard to existential anxieties and issues. This is implicitly recognized by all levels of government since many government institutions, be they military, hospitals, or the correctional services, have chaplains to serve these needs. Chaplains play such an important role that they are sent into war zones and serve shoulder-to-shoulder with active-duty soldiers. Indeed, as we pointed out in Chapter Three, the only American federal legislation protecting confidential religious communications is in the Military Rules of Evidence. The Canadian Forces have an entire branch dedicated to the Chaplaincy. One may make the same arguments for having chapels in government-run airports.

Along the same lines, Mitchell points out that some American legislation formally recognizes the benefits directly in their statutes.¹⁴⁸ McLachlin J., has stated with respect to the third Wigmore criterion that "The mental health of the citizenry, no less than its physical health, is a public good of great importance."¹⁴⁹ The practice of confession in the Catholic

¹⁴⁷ SIM, "Privilege and Confidentiality: The Impact of Slavutych v. Baker on the Canadian Law of Evidence," p. 377.

¹⁴⁸ MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," p. 767.

¹⁴⁹ *M. (A). v. Ryan*, at 174. For a discussion of the role that penance may play in the rehabilitation of convicted criminals, see J. CELICKOWSKI, "Bringing Penance Back to the Penitentiary: Using the Sacrament of Reconciliation as a Model for Restoring Rehabilitation as a Priority in the Criminal Justice System," in *The Catholic Lawyer*, 40 (2000), pp. 239-270.

Church certainly contributes to the public interest and should satisfy this aspect of the third criterion.

The natural law also supports this criterion. As noted in Chapter Two, one basis of a natural secret is that a person should not unjustly suffer harm, annoyance, or embarrassment. The revelation of an important secret would certainly be damaging to the mental and spiritual health of the penitent, and the healing relationship between priest and penitent would be compromised or simply never come into existence. Accordingly, the natural law points to the conclusion that the relationship should be sedulously fostered.

The second issue regarding the third criterion is the question of which community is the reference community. The *Slavutych* case looked at whether the confidence was important to the university community.¹⁵⁰ The question that will have to be answered is, *which* community? Does “community” mean the religion in question? Or does it mean Canadian society? This would not present an issue if we argue that the reference community is the church community, i.e., the parishioners of the Catholic churches in Canada. Even if we argue that the reference community is society in general, the argument should still hold. Contemporary authors such as Chambers and McInnes, citing Statistics Canada census data which indicates that the vast majority of Canadians profess *some* religion, suggest that Catholic confessional practice should meet the third criterion even today:

Wigmore reasoned that priest and penitent communications met his third criterion, “where a substantial part of the community professes a religion practicing a confessional system”. Times have changed, but given the pervasive nature of religious institutions in Canadian society, priest-penitent privilege should satisfy Wigmore’s third test as he applied it.¹⁵¹

¹⁵⁰ See *Slavutych*, at 261.

¹⁵¹ CHAMBERS and MCINNES, “Commentary on *R. v. Church of Scientology and Zaharia*,” p. 188.

In fact, recent trends suggest a surge in the use of confession. In a recent edition of *The Globe and Mail*, a study was cited which indicates that confession as a practice is enjoying a revival, particularly amongst young people, and this includes Protestant denominations where the practice of confession is part of their tradition.¹⁵² The use of religious confession may wax and wane over time, but it would appear to be a religious exercise that is here to stay.

This having been said, the Catholic Church can strengthen its position, especially with regard to the third Wigmore criterion. Statements to the effect that "... [T]he relationship should be sedulously fostered" or "confession contributes to mental and spiritual health" are, if one looks closely enough, mere conjecture. Empirical evidence would be valuable in our demanding litigation process where the rights of the Catholic Church are but grudgingly conceded. In this regard, arm's length, objective research in the social science of pastoral theology would help to support the assertion that the third criterion is met by Catholic confession. The research should answer the question as to whether confession contributes to a person's health. It must be done by an independent body, preferably at a university level, by a respected institution which can carry out such research. The research design must be properly founded in terms of its basis in statistics, social sciences and pastoral theology. Alternatively, public opinion research may be conducted by universities with pastoral and social science wings, as well as reputable polling firms to help determine this criterion. Similar research should be conducted in the medical field to demonstrate that confession may have positive physiological effects. We have not encountered any significant research on Catholic confessional practices in these areas to date, and without research to support these criteria, the Church is leaving itself in a vulnerable position.

¹⁵² See M. DANN, "Social Studies: Religion Today," in *The Globe and Mail*, February 18, 2004, p. A18.

Similarly, satisfaction of the fourth criterion (the injury must be greater than the benefit from disclosure) is also an intuitive exercise, based on belief and opinion, but one which can also be aided by the natural law. The fourth criterion is the most difficult of the four to establish, and a number of privilege claims have been denied on the basis of failing to meet this criterion.¹⁵³ Manes and Silver state:

The fourth criterion — the injury to the relationship be greater than the benefit to the litigation gained through disclosure — is the most difficult to meet. Perhaps the answer to this question lies more fundamentally with one's religious beliefs than in any objective judicial criteria. If one believes that the goal of repentance as gained through communication with the clergy is of supreme importance, then clearly, the interest in the administration of justice advanced by disclosure is of less importance.¹⁵⁴

This comment suggests that, like the third criterion, arguments may be strengthened by empirical evidence of public opinion and belief that this is in fact the case. Chambers and McInnes also note that child protection legislation (to be discussed below) may have an influence on the application of the fourth Wigmore criterion:

Of additional concern to clerics is the existence in every Canadian province and territory of legislation creating a duty to report suspected cases of child abuse. A priest could face a conflict between religious and civic duties just from hearing a confession. Even when not directly applicable, the existence of child welfare legislation can also play a role in the application of the fourth criterion of Wigmore's test as "a strong and useful indication of public policy."¹⁵⁵

The last point is that the natural law supports the fourth criterion. The natural law is premised on the assertion that there is an intrinsic harm associated with the betrayal of one's confidences which outweighs the benefits of disclosure.

¹⁵³ See CHAMBERS and MCINNES, "Commentary on *R. v. Church of Scientology and Zaharia*," p. 189.

¹⁵⁴ MANES and SILVER, *The Law of Confidential Communications in Canada*, p. 59.

¹⁵⁵ CHAMBERS and MCINNES, "Commentary on *R. v. Church of Scientology and Zaharia*," p. 191.

4.3.3 – Conclusion Regarding the Seal and the Wigmore Criteria

Based on the foregoing analysis of the seal of confession and the Wigmore criteria as stated in Canadian law, our theory of jurisprudence concerning the seal of confession is that it should be upheld as a privileged religious communication. This theory will be tested if and when the subject comes before the Canadian courts for adjudication.

4.4 — STATUTORY REPORTING REQUIREMENTS AND THE SEAL OF CONFESSION

The jurisprudence having been analysed on the issue of the privilege, we now consider the statutory reporting requirements. All Canadian provinces and territories (there are no federal requirements, this being an area of provincial jurisdiction) have reporting requirements for the purposes of child protection and control of communicable diseases. We will survey and analyse the salient provisions of this legislation in relation to the seal of confession.

4.4.1 – Child Protection Legislation

All provinces and territories have child protection legislation. This legislation requires that anyone who becomes aware of a child possibly at risk of any kind must report same to the appropriate authorities.¹⁵⁶ Such harm encompasses a wide spectrum of risks to children, and goes far beyond sexual and physical abuse. It may include a caregiver being unable or unwilling to provide the necessities of life or maintain adequate care, control, or supervision of a child; endangering the life, health, or emotional well-being of a child; being in charge of

¹⁵⁶ See ss. 7-8, *Child and Family Services Act*, S.N.W.T. 1997, c.13 (also applies to Nunavut); s. 72, *Child and Family Services Act*, R.S.O. 1990, c. C.11; ss. 13-14, *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46; ss. 3, 22, *Child Protection Act*, R.S.P.E.I. 1988, c. C-5.1; ss. 1, 4, *Child, Youth, and Family Enhancement Act*, R.S.A. 2000, c. C-12; ss. 14-15, *Child, Youth and Family Services Act*, S.N.L. 1998 c. C-12.1; ss. 117-118, *Children's Act*, R.S.Y. 2002, c. 31; ss. 22-25, *Children and Family Services Act*, S.N.S. 1990, c. C-5; ss. 30-31, *Family Services Act*, S.N.B. 1980 c. F-2.2; ss. 17-18, *The Child and Family Services Act*, C.C.S.M. c. C80; ss. 11-12, *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2; s. 39; ss. 38-39, *Youth Protection Act*, R.S.Q., c. P-34.1. For the full text of these provisions, see Appendix A.

a child who is beyond the control of the caregiver; inadequate health care; risk of any physical, mental, or “emotional harm” from the home environment or from improper associations with others; and being under twelve years of age and being left unattended.

Revelation of *any* of these risk factors by a penitent, be it parent, child, or others, could place the confessor in a clear conflict situation between the duty to report and the secrecy of the seal of confession. The broad range of situations also leaves the confessor with the responsibility of interpreting the large flow of information normally received during the course of a confession.

Almost no one is exempt from these reporting requirements. Most provinces exempt communications which fall under solicitor-client privilege, although Nova Scotia and Newfoundland do not seem to provide for even *this* privilege. The British Columbia legislation also excludes any communications which are deemed privileged under any other legislation, and the Saskatchewan legislation also exempts communications subject to Crown privilege. The Ontario legislation specifically states that priests are required to report, and the Newfoundland legislation specifies that a “member of the clergy or religious leader” must report any suspected harm to children. There would appear to be a conflict of law between the reporting legislation and the Newfoundland and the Québec legislation providing for the priest-penitent privilege.¹⁵⁷ No exceptions are made for confidential religious communications. Conviction for failure to comply with the foregoing legislation carries with it fines ranging from \$2,000 to \$10,000 and/or imprisonment for a maximum of six months.

¹⁵⁷ Mitchell has similarly observed with respect the American legislation that “... [T]he clergy privilege statutes mostly fail to state or even imply whether the privilege could be properly invoked to excuse a failure to report abuse” (MITCHELL, “Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion,” p. 789).

4.4.2 – Communicable Diseases Legislation

Similarly, in all provinces and territories there are mandatory statutory obligations to report infections of a wide variety of communicable diseases, including, in most cases, AIDS and HIV and other sexually transmitted diseases, to public health authorities.¹⁵⁸ However, these reporting requirements are considerably less uniform than the child protection reporting requirements discussed above. In some cases, reporting requirements are “non-nominal,” i.e., a name does not have to be provided and procedures are in place to protect the identity of individuals suffering from HIV and AIDS infections.

All provinces require medical professionals to report. Some provinces, such as Manitoba and Québec only appear to require reporting by medical professionals and/or laboratories. However, some provinces have broader reporting requirements. Alberta, in addition to medical professionals, requires that teachers and persons in charge of correctional institutions, nursing homes, and social care facilities report certain communicable diseases. The Saskatchewan legislation includes teachers, school principals, and managers of food handling establishments. Nova Scotia includes school principals and administrators of

¹⁵⁸ See ss. 4-5 and 34, *Communicable Diseases Act*, R.S.N.L. 1990, c. C-26; s. 3, *Communicable Diseases Regulations*, R.R.N.W.T. 1990, c. P-13 (enabling legislation: *Public Health Act*, R.S.N.W.T. 1988, c. P-12), and s. 23, *Public Health Act*, R.S.N.W.T. 1988, c. P-12 (also applies to Nunavut); ss. 4 and 22, *Communicable Diseases Regulations*, C.O. 1961/048 (enabling legislation: *Public Health and Safety Act*, R.S.Y. 2002 c. 176; s. 5, *Diseases and Dead Bodies Regulation*, Man. Reg. 338/88 (enabling statute: *The Public Health Act*, C.C.S.M. c. P210), and ss. 12.1 and 33, *The Public Health Act*, C.C.S.M. c. P210; ss. 2-4, *Health Act Communicable Disease Regulation*, B.C. Reg. 84/2006 (enabling legislation: *Health Act*, R.S.B.C. 1996, c. 179), and s. 104, *Health Act*, R.S.B.C. 1996, c. 179; ss. 31 and 71(1), *Health Protection Act*, S.N.S. 2004, c. 4; ss. 25-29, 39(1), 100(2), 101(1), *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7; ss. 79-82, 138, *Public Health Act*, R.S.Q., c. S-2.2; ss. 22-23, 31, and 73, *Public Health Act*, R.S.A. 2000, c. P-37; ss. 32 and 61, *The Public Health Act*, S.S. 1994, c. P-37; ss. 27-29, *Public Health Act*, R.S.N.B. 1998, c. P-22.4, s. 94(2), *General Regulation – Health Act*, N.B. Reg. 88-200 (enabling legislation: *Health Act*, R.S.N.B. 1973, c. H-2), and s. 28(1), *Health Act*, R.S.N.B. 1973, c. H-2, and s. 56(2), *Provincial Offences Procedure Act*, S.N.B. 1987, c. P-22.1; and ss. 7, 20, *Notifiable and Communicable Diseases Regulations*, P.E.I. Reg. EC330/85 (enabling legislation: *Public Health Act*, R.S.P.E.I. c. P-30). For the full text of these provisions, see Appendix B.

institutions such as hospitals, day cares, and detention facilities. Ontario requires school principals and institution operators to report. The Newfoundland legislation includes hospitals and academic institutions including heads of seminaries. If the head of a seminary happens to come across this information in confession, there would be a conflict with the legislation providing for the priest-penitent privilege. Finally, some provinces and territories, such as British Columbia, New Brunswick, Prince Edward Island, Yukon, the North West Territories, and Nunavut appear to place the obligation of reporting on *anyone* who becomes aware of incidents of communicable diseases. Individual reporting requirements would include technically confessors. In the provinces which have institutional reporting requirements, these would include rectors of seminaries, heads of monasteries or houses of prayer, or administrative heads of any other communal living setting found within the Catholic Church. For the purposes of our study, this would only apply if these persons were also acting as confessors. Conviction for failure to comply with the foregoing legislation carries with it fines of up to \$75,000 and/or imprisonment for a maximum of six months.

4.4.3 – Conclusions Regarding the Reporting Requirements

Strictly speaking, these reporting requirements do not concern the law of privilege, since “Privilege, as a rule of evidence, arises at trial and belongs to a ‘witness’.”¹⁵⁹ It does not necessarily operate in the same sense as these statutory reporting requirements *outside* of trial. In this regard, the Supreme Court in the *Gruenke* case did not address the issue of these

¹⁵⁹ PACIOCCO and STUESSER, *The Law of Evidence*, Second Edition, p. 147. Questions of privilege are normally determined at trial by way of *voir dire* (a mini-trial within a trial, done in the absence of the jury) which places the burden on the party seeking the privilege: see PACIOCCO and STUESSER, *The Law of Evidence*, p. 167. Note that in *Gruenke*, the failure of the trial judge to hold a formal *voir dire* was not considered to be a denial of a fair trial, particularly since counsel for the accused did not object and the trial judge heard the arguments in any event: see *Gruenke*, at 293-294.

reporting requirements in the context of the Wigmore criteria, leading one to assume that the Wigmore criteria were meant to apply only to situations of testimonial privilege in court. However, legislation always overrides the common law, and in the foregoing legislation, particularly the child protection legislation, the privilege is either directly abrogated, as in the case of Ontario and Newfoundland, or indirectly abrogated, as in the case of the remainder of the legislation which does not make a specific exception for confidential religious communications like it does for solicitor-client communications.

With respect to the comparative American law, Mitchell has observed that in most cases it is unclear whether the clergy-privilege in the privilege statutes exempts clergy from the reporting requirements of the child protection statutes.¹⁶⁰ Attempts at resolving the conflict between the priest-penitent privilege and the reporting requirements have produced differing results,¹⁶¹ and she has pointed out that the conflict has yet to be resolved with reference to the constitutional right to the free exercise of religion.¹⁶² Until then, "[J]urisdictions with no ready answer when a cleric invokes the clergy privilege to excuse a failure to report must resort to principles of statutory reconciliation or seek a legislative amendment to resolve the conflict."¹⁶³

Religious rights under the *Charter* are subject to limitations. As Mr. Justice La Forest has stated, "Freedom of religion is subject to such limitations as are necessary to protect

¹⁶⁰ See MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," p. 793. Cole reaches a similar conclusion: see COLE, "Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis," pp. 1-53.

¹⁶¹ See MITCHELL, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion," p. 793.

¹⁶² See *ibid.*

¹⁶³ *Ibid.*

public safety, order, health, or morals and the fundamental rights and freedoms of others.”¹⁶⁴

In other words, the safety of an individual would likely trump the right to freedom of religion in a particular case. Even Madame Justice L’Heureux-Dubé expressed some hesitation about the privilege applying in cases of child abuse.¹⁶⁵ Ryan goes a step further and makes the following prediction with respect to whether the Canadian *Charter* will offer any protection:

The foregoing is subject to the statutory obligation in every Canadian jurisdiction to report to a designated authority information related to child abuse, as defined in each local statute, without waiting to be questioned, let alone summoned as a witness. Failure to report may lead to conviction of an offence, and also liability in civil damages if the abuse is repeated. A similar obligation related to AIDS may be imposed by statute as affecting members of the clergy and lay workers of religious bodies. *Such obligations are likely to survive challenges under s.2(b) of the Charter.* On the other hand, present statutes do not require testimony in court, and the Charter may support refusal to disclose confidential communications in a religious context on these subjects in evidence. Conversely, subject to the statutory duty to report, a person who has received confidential information about past events is not obliged or entitled to disclose the information to any authority without the consent of the person who gave the information, except while giving evidence before a court or other authorized tribunal.¹⁶⁶

Given the direct and indirect abrogations of the privilege in the reporting legislation, these reporting requirements represent a real conflict of civil laws in Newfoundland and Québec. Additionally, in all jurisdictions, they represent a conflict between the Catholic canon law on the seal of confession and the civil law. However, it is in society’s interest that confessional secrecy be upheld notwithstanding the requirements of the reporting legislation.

What should be done with respect to this conflict of law? It is doubtful that the political will exists in all provinces and territories to pass an exemption in the reporting

¹⁶⁴ *Ross v. New Brunswick School Division No. 15* (1996), 133 D.L.R. (4th)1, at 29 (S.C.C.).

¹⁶⁵ See *Gruenke*, at 310.

¹⁶⁶ See RYAN, “Obligation of the Clergy not to Reveal Confidential Information,” p. 232 [emphasis added]. Also see ELLIOTT, “An Evidential Privilege for Priest-Penitent Communications,” fn. 123. With regard to warning third parties about potential harm, Milne, from an American law point of view, argues that the duty should *not* extend to clergy. See MILNE, “Bless me Father, for I am About to Sin . . .’: Should Clergy Counselors Have a Duty to Protect Third Parties?” p. 141.

legislation for confessors, or to repeal the provisions which specifically name clergy as being required to report. A *Charter* challenge to the legislation would likely be the only option available.

A *Charter* challenge to the provisions of the reporting legislation would be based on the objection that these provisions are in direct conflict with the freedom of religion provisions. Recall that the sacramental confession is not merely spiritual counselling, but is in fact placing an act of worship,¹⁶⁷ and in this sense directly interferes with the freedom of religion of the Catholic faith. The reporting statutes appear to restrict the religious freedom of the penitent since confession of such matters is discouraged, as well as the free exercise of religion of the confessor who would be subject to excommunication by being compelled to report. Additionally, the fact that the Preamble to the *Charter* itself directly acknowledges that Canada is founded on principles recognizing the supremacy of God also bolsters the argument that the freedom of religion provisions should protect this important act of worship in the Catholic tradition.

However, how does one answer the strong objection that the right to maintain confessional secrecy on the basis of freedom of religion should not cede to the safety needs of the general public? Is not the safety of a child or the avoidance of the wilful transmission of a fatal disease unquestionably paramount over the right to merely keep a secret?

In fact, confessional secrecy in such cases can actually facilitate public safety and help prevent such horrific acts from taking place. From the point of view of the Church, the mere fact that a person is actually confessing to child abuse or the wilful transmission of communicable diseases is indicative that they are experiencing remorse and recognize on

¹⁶⁷ See KENNEDY, *State Protection of Confessional Secrecy in the United States of America*, p. 14.

some level that their actions are sinful, harmful, and in need of remediation. It is unimaginable that anyone would callously confess such a sin, nor would a confessor validate such behaviour or confirm a penitent in such an intention. And, the mere fact of such a disclosure in the confessional puts the priest into a position that no one else could possibly be in: being able to discourage the penitent from future acts, and at the same time encouraging and persuading the penitent to seek treatment, place the child in protective custody in child abuse cases, and ultimately turn himself in to the authorities.¹⁶⁸ Bentham certainly saw reparation and prevention of future harm as an important reason for maintaining the secrecy of confession. And, the confessor is in a very special and privileged position to prevail upon a penitent to amend the behaviour and seek treatment. As Lyon stated, the Church has “immense power” in its relationship with the penitent,¹⁶⁹ and the Canada Law Reform Commission observed that “Religious advisors are a moral guidance in the eyes of religious believers.”¹⁷⁰ The influence of the confessor on a penitent is not to be underestimated and is powerful indeed; a confessor occupies a unique position with respect to the spiritual vulnerability of the penitent, and most penitents who submit themselves to a confessor will also follow his advice and suggestions. In any event, he can make it a condition of penance that the penitent seek treatment, place the child in some kind of protective situation, and ultimately turn him or herself in to the authorities. Here, the policy justification for confessional secrecy parallels the professional secrecy of a lawyer. The lawyer, precisely

¹⁶⁸ Recall that even the old Russian legislation considered in Chapter One required reporting *only* if the penitent refused to acknowledge the act as a sin and change his intention.

¹⁶⁹ LYON, “Privileged Communications—Penitent and Priest,” p. 330.

¹⁷⁰ CANADA LAW REFORM COMMISSION, Law of Evidence Project, Study Paper No. 12, *Evidence: Professional Privileges Before the Courts*, p. 17.

because of solicitor-client privilege, is in a position to encourage a fugitive of the law to turn him or herself in.¹⁷¹ This is not to equate solicitor-client privilege with the priest-penitent privilege.¹⁷² Rather, it is to demonstrate that a compelling rationale exists on which confessional secrecy can be founded *in these types of cases* which can be compared to that of the solicitor-client relationship with respect to fugitives.

If confessional secrecy is not protected, the penitent has *no one* in whom to trust so that he or she can make these first steps toward healing and protection of the victims of unhealthy and disordered behaviour. If these communications are not protected, a penitent may simply never disclose them until charged with an offence, and there will be no opportunity for the preventative intervention of a confessor early on. For these reasons, we submit that the freedom of religion provision of the *Charter* should serve to uphold confessional secrecy despite these legislative requirements, and protect a confessor from having to report matters relating to child protection in the long-term interests of safety in our society. It is in society's interests that such confessional communications be protected by the *Charter* in the face of these legislative reporting provisions as a legitimate and important exercise of religious rights which promote both personal healing and public safety.

4.5 — THE CATHOLIC CHURCH AND THE CIVIL LAW

The civil legal atmosphere in which religious institutions in Canada must operate is well assessed by Professor Ogilvie who states:

¹⁷¹ Alternatively, Ivers argues that since solicitor-client privilege is based on a constitutional protection which sets it on a higher policy level than other privileges, the priest-penitent could similarly be seen as specially protected on constitutional grounds: see IVERS, "When Must a Priest Report Under a Child Abuse Reporting Statute? - Resolution to the Priest's Conflicting Duties," p. 463.

¹⁷² Chief Justice Lamer stated in *Gruenke* that "In my view, religious communications, notwithstanding their social importance, are not inextricably linked with the justice system in the way that solicitor-client communications surely are" (*Gruenke*, at 289).

While Canadian civil courts have always taken great care to avoid undue intervention in internal ecclesiastical matters, frequently expressing embarrassment when cases are appealed to them, the fundamentals of the Canadian constitution and the common law require that Churches and individuals of faith be subject to the civil law of the land, regardless of any other obedience to which they feel themselves to be subject.¹⁷³

Ogilvie also observes that there is an increasing tendency to treat Churches as secular organizations and not recognize their unique needs for the protection of confidential communications.¹⁷⁴ As in English and American law, the state is considered supreme over religious institutions, and the canon law is treated as non-binding (foreign law).¹⁷⁵ In light of the potential conflicts between canon law and civil law, it is important to consider the Catholic Church's position regarding such conflicts of law.

4.5.1 – Conflict of Civil and Canon Law

If, after a case involving the seal of confession, it is decided by the Canadian courts that the seal of confession is not privileged, and a demand is made on a confessor to reveal the contents of confession; or, alternatively, if a confessor is charged with failing to report a matter concerning child protection or the spread of communicable diseases, a conflict of laws situation will arise. What is the Catholic Church's position in this regard?

Regarding the strict rule of secrecy concerning the canon on the seal of confession, F. McManus states that "The obligation of the canon is not affected by a contrary disposition of civil law in jurisdictions where communications to an ordained minister, whether sacramental

¹⁷³ M. OGILVIE, "Canadian Civil Court Intervention in the Exercise of Ecclesiastical Jurisdiction," in *StC*, 31 (1997), p. 50.

¹⁷⁴ See *ibid.*

¹⁷⁵ See *ibid.*, p. 48; *Basil v. Spratt* (1918-19), 44 O.L.R. 155 at 165, 176. Experts would have to be called to establish the canon law, but this may not be as simple as it seems. Serritella observes that "The ... assumption is that no one will challenge the Church's expert witnesses on Church law. We are learning that this assumption is ... false because increasing numbers of Church law experts are testifying on the other side of the case. These witnesses frequently have credentials which are indistinguishable from those of the Church's own experts" (SERRITELLA, "The Code of Canon Law and Civil Law," p. 206).

or extra-sacramental, are not considered privileged at law.”¹⁷⁶ Similarly, Brewer’s comments are also applicable:

The Church exists within particular cultures around the world; hence, its own legal system must exist alongside the legal systems of the various nations throughout the globe in which the Church is rooted. Because of the differing communities for which the civil law and ecclesiastical law are promulgated, because of differing philosophies and origins of the respective laws, because of differing recognized interests and rights to be protected and differing values, the civil law and ecclesiastical law sometimes coexist in tension. This is especially so in the United States where a fundamental principle of law, articulated in the First Amendment to the federal Constitution, is that the lawgiver shall make no laws that establish a religion. So, whereas the absolute secrecy of the confessional is seen as an obligation of the canon law within the ecclesial community, rooted in natural and divine positive law, generally the civil law recognizes no such obligation because the sacrament of penance itself is not an institution of civil society that it has a duty to protect. It is only to the extent that the good of civil society, or a significant portion of that society, demands protection of a religious institution that the civil law acts to do so.¹⁷⁷

Ultimately, the Church’s long tradition of martyrdom for the secrecy of confession will have to be continued. Lopez-Gallo affirms this in no uncertain terms: “The priests are ready, not only to go to jail, but to die, not for contempt of Court but because God, in their own conscience, is to be obeyed before man.”¹⁷⁸ This was recognized by Madame Justice L’Heureux-Dubé as set out earlier, and it has also been recognized by civil law writers. Ryan, for example, points out that “It is well known that Roman Catholic priests will go to prison rather than break the seal of the confessional. Consequently they are not brought before the courts and required to do so.”¹⁷⁹ Similarly, Sopinka *et al.* observe that “... [T]he threat of temporal sanctions is not generally viewed as an effective means of forcing disclosure

¹⁷⁶ *New Commentary*, p. 1164.

¹⁷⁷ BREWER, “The Right of the Penitent to Release the Confessor from the Seal: Considerations in Canon Law and American Law,” p. 455.

¹⁷⁸ LOPEZ-GALLO, “Are Confidential Communications Protected by Common Law Privilege?” p. 323.

¹⁷⁹ See RYAN, “Obligation of the Clergy not to Reveal Confidential Information,” p. 232.

because it is doubtful that many members of the clergy would violate what they consider to be a sacred trust even in the face of contempt proceedings.”¹⁸⁰

The fact is that regardless of what the civil law requires, the priest is held to the higher divine law which obliges his secrecy, no matter what the consequences. Therefore, the position of the priest cannot be compared with other professionals who must at times reveal in court the confidences to which they are privy.¹⁸¹ He has no option if and when forced to choose between the penalties set before him, civil versus ecclesiastical; he must choose the divine law.¹⁸²

4.5.2 – The Confessor as Witness in Canadian Courts

While the Canadian law may present uncertainties as to the course of action of a confessor called as a witness, the canon law certainly does not. As stated in no uncertain terms by Pope John Paul II, there may be no revelation to any earthly authority of anything heard in confession.¹⁸³ This position is consistent with the long line of authorities that preceded it; the Church has always asserted its rights independent of any human power. Aquinas, as we have seen in the Second Chapter, stated that a confessor may not reveal confessional communications since he possesses divine knowledge and not human knowledge. On this basis, Kurtscheid suggests that from the point of view of moral theology, the confessor may legitimately deny all confessional knowledge in court:

¹⁸⁰ SOPINKA, LEDERMAN, and BRYANT, *The Law of Evidence in Canada*, pp. 694-695.

¹⁸¹ See WOESTMAN, *Sacraments*, p. 275.

¹⁸² See ELLIOTT, “An Evidential Privilege for Priest-Penitent Communications,” p. 423. Also see CAPARROS, “Criminal Law Protection of the Human Rights in Civil and Religious Societies,” pp. 229-234.

¹⁸³ See JOHN PAUL II, “Seal of Confession Must be Kept,” p. 14.

... [W]hatever the priest knows through confession he, in a sense, does not know, because he possesses this knowledge not as man, but as the representative of God. He may, therefore, without qualms of conscience, swear to his ignorance in court, because the obligation of a witness extends only to his human knowledge.¹⁸⁴

From a moral theology point of view, Cappello also agrees,¹⁸⁵ and Roos develops this position further:

A confessor who is questioned about matter protected by the seal must deny, even under oath, that he has heard of or knows anything about the matter in question. His justification for such assertion is that he actually has no knowledge or communicable knowledge about the information being sought. If such a reply, however, would lead others to suspect that the information actually had been confessed or that the penitent failed to make an integral confession, then the confessor should answer in a different manner. Perhaps the best manner of handling such questions is to reprove the inquirer for raising the question, unless this too would cause suspicions about the actual confession.¹⁸⁶

This having been said, as we have seen in Chapter Two, the idea that the confessor's knowledge is divine and not human knowledge is probably more of a theological metaphor than a juridic reality, at least according to Kennedy. A confessor, of course, is still aware of the confession as a human being; the human memory still retains the knowledge of the confession. According to most authors, he may speak about it if released from the obligation of secrecy by the penitent. Accordingly, moral justifications aside, the recommendation that all knowledge of the confession be denied since he only knows it as divine knowledge and not as human knowledge may be seen as disingenuous. When police or attorneys have evidence that an individual accused of a crime or tort has disclosed that he has confessed the matter to the confessor, the confessor would be seen as lying to the police or the courts and attempting to obstruct justice and the truth-finding process. Additionally, a well-briefed

¹⁸⁴ KURTSCHIED, *A History of the Seal*, p. 195.

¹⁸⁵ "Practice huiusmodi interrogationes declinandae sunt silentio vel increpatione interrogantis, hac similive formula adhibita : ad has interrogationes non est, quod respondeam. Sed cavendum est ne confessarius id agat in iis adiunctis, in quibus declinando clarum responsum, celandae veritatis suspitionem ingereret"(CAPPELLO, *Tractatus canonico-moralis de sacramentis*, vol. II, n. 890).

¹⁸⁶ ROOS, *The Seal of Confession*, p. 74.

prosecutor who is aware of the divine/human knowledge metaphor may then attempt to inquire into the *divine* knowledge aspect, and the confessor will not appear to be candidly testifying if he employs the divine/human dichotomy.

Rather than deny the existence of any confessional communications, a confessor could, if ever asked by authorities about something known from confession, simply state that he has no information that he can testify to regarding the individual or matter in question. This admits of no knowledge whatsoever, *that can be shared*. As noted in Chapter Two, even though it is not technically a violation to reveal the mere fact of a confession, the risk in even *admitting* that a confession took place, if it is connected temporally and spatially with a recent crime, may generate a presumption that the crime in question was in fact confessed. For example, if a person admits in court that he confessed a crime at a certain time and date to a certain confessor, the admission of such a confession by the confessor shortly thereafter may tend towards an indirect revelation. To state he has no information that he can share about the individual in question protects the confessor from direct revelation as well as indirect disclosure that might result from public knowledge of the crime being connected temporally with the confession, such as in the *R. v. Hay* case discussed in Chapter Three. It is also simply more honest.¹⁸⁷

¹⁸⁷ It is of course a well-established Thomistic principle that when a law requires something sinful, it is morally permissible to disobey that law. Certainly the violation of divine law that would come with the revelation of a confession would fall into this category. Thus the refusal to divulge a matter protected by the seal of confession may be seen as a legitimate exercise in passive civil disobedience. For further consideration of the principle of civil disobedience and unjust laws, see W. CAHILL, "Natural Law Jurisprudence in Legal Practice," in *The Catholic Lawyer*, 4 (1958), pp. 30-34; D. KNOWLES, "Lex injusta non est lex," in *The Catholic Lawyer*, 2 (1956), pp. 237-244; M. MACGUIGAN, "Civil Disobedience and Natural Law," in *The Catholic Lawyer*, 11 (1965), pp. 118-129; P. WEBER, "Toward a Theory of Civil Disobedience," in *The Catholic Lawyer*, 13 (1967), pp. 198-210; and C. RICE, "The Problem of Unjust Laws," in *The Catholic Lawyer*, 26 (1981), pp. 278-285. Note also c. 22 of the 1983 Code and c. 1504 of the Eastern Code which state that "Civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise."

A witness is entitled to be represented by counsel, and a confessor would do well to avail himself of a well-briefed lawyer familiar with the canonical and civil issues at hand.¹⁸⁸ From the point of view of legal practice, counsel should vigorously object at the outset to the confessor being required to disclose anything known by way of confession. If documents are involved, counsel should request that these be sealed. If a ruling were nevertheless made requiring the confessor to disclose, and the confessor refuses, he should request that the presiding judge exercise his or her discretion to not find the witness in contempt. If the confessor is found in contempt, counsel should request that no fine or a nominal fine be levied against the confessor. As a ground for these objections, his counsel should ask that the conflicting situation in which he finds himself be taken into account as a mitigating circumstance. As noted by Lopez-Gallo, "... [I]t is only reasonable to think that the civil courts will recognize and appreciate the unique status of a Catholic confessor, which is so different to any secular profession: his divine call to a spiritual career, which is governed primarily by asceticism [sic] and discipline of Canon Law."¹⁸⁹ And, lastly, as observed by Mr. Justice Rich of Australia, "Divided duty has produced many martyrs."¹⁹⁰

¹⁸⁸ During the legislative debate in New Jersey concerning the seal of confession which arose after the confessional privilege came into question, the Archdiocese of Newark responded by issuing a letter which describes how a priest should respond if he is asked to reveal private confessional matters by the authorities. The relevant part reads as follows: "I [the Vicar General] bring this to your attention because a zealous law enforcement official could attempt to cajole you into divulging a communication pertaining to a future criminal act. If this does occur, I would ask you to contact the diocesan attorney at once so that the attorney may assist you in dealing with the law enforcement official" (ARCHDIOCESE OF NEWARK, "Cleric-Penitent Privilege (USA) With Correspondence," p. 23).

¹⁸⁹ LOPEZ-GALLO, "Are Confidential Communications Protected by Common Law Privilege?" p. 320.

¹⁹⁰ *McGuinness v. Attorney-General of Victoria*, at 86.

CONCLUSION

In the Canadian legislative framework, only two provinces have legislation which provides for a priest-penitent privilege, these being Newfoundland and Québec. There is no federal legislation, although there is constitutional law in the form of the Preamble and the freedom of religion provisions of the *Charter* which play a role in making determinations concerning the privilege. The statute in Québec was based on earlier French codifications and jurisprudence. The Newfoundland legislation may also have been influenced by both the strong Irish and French presence, which in turn would be influenced by the strong tradition in these cultures with respect to the law in favour of the privilege. The legislation would appear to vest the right to protection of the confidence in the confessor. However, its protections only extend to areas governed by provincial law. Other than these provinces, the seal of confession operates in a legislative vacuum.

We are able to draw some important conclusions regarding Canadian common law. First, there are a number of areas of jurisprudence which may have a bearing on the privilege. There is some judicial discretion to refuse relevant evidence, although this is not a reliable basis for the priest-penitent privilege, nor are there examples where this has been used. There is also the practice of moral suasion. The judiciary will use their discretion to try to have the question withdrawn, but there is no absolute power to do so even though generally lawyers will accede to the request. A *de facto* privilege may exist in the sense that a judge will most likely decline to charge a priest with contempt of court, or alternatively assign a small fine or no fine at all. The authors are unanimous in their opinions that prosecutors and judges would, as a matter of practice, not demand that a priest reveal a confession. This, unfortunately, leaves a confessor subject to the good-will of the judiciary rather than providing any kind of

legal certainty. It has also been argued that a priest may be an unwitting person in authority to whom a confession would be subject to revelation, but this has not been established in Canadian case law. It may also be observed that self-incrimination does not serve as a proper ground for the privilege. And, it should also be stated that confidentiality alone does not suffice as a ground for the privilege either. All of this having been said, there is no recognized category of privilege for priest-penitent communications in Canada.

Second, the Wigmore criteria govern decisions involving privileged communications in Canada and, these criteria are to be used to determine issues of religious privilege on a case-by-case basis. Sections 2(a) and 27 of the *Charter* are also part of the analysis. The Preamble did not form part of the jurisprudence concerning the privilege, but it should be raised nevertheless in future litigation since it serves as a vehicle by which the natural law and divine law concerning the seal of confession may be introduced. This is the law in Canada, notwithstanding the position taken by some judges that confidential religious communications should be accorded a class privilege. We have also observed that there are uncertainties inherent in this approach. These may be resolved by legislation, although it is doubtful that any such legislation will appear in the near future. A number of cases have been decided since *Gruenke* which apply the Wigmore criteria, but the issue of the Catholic seal of confession remains to be adjudicated. Developments and trends in the law of personal privacy also tend to support a finding in favour of the privilege. Additionally, it appears that documentary evidence, such as *aides-memoires* would be governed by similar principles to that of testimonial privileges. The legislation in Québec also assists in matters concerning writings associated with the seal, at least in that province.

Third, in any event, the seal of confession in our analysis clearly appears to satisfy the Wigmore criteria. There are *no* authors in Canada nor any case which has directly determined that communications subject to the seal of confession within the meaning of Catholic canon law are subject to disclosure at civil law. All authorities who have used the Wigmore criteria to analyse Catholic confessional communications including Wigmore himself have concluded that such communications are privileged. There is also support from some of the judiciary. For these reasons, it is expected that if the issue ever arises, the ruling would be in favour of confessional communications. The Church's position may be strengthened by adducing empirical evidence to support the questions of fact and intuitive policy analysis that the Wigmore criteria demand. This may be done by way of opinion surveys and social scientific research. Given the relative strength of Catholic confessional practise and secrecy, and given that it is the wellspring of confessional practices in other Christian religions, to rule that Catholic confessional communications are subject to disclosure, would, *a fortiori*, effectively be to rule that *no* religion is entitled to a religious communications privilege.

Fourth, it is unknown how the Wigmore criteria will be applied in the case of the statutory reporting requirements found in child protection and public health reporting legislation, but these are not cases of privilege *per se* because privilege technically only arises in a trial setting. However, they may represent a real conflict between the secrecy requirements of the canon law and the reporting requirements of the civil law. These reporting requirements may violate the freedom of religion provisions of the *Charter* in that Catholic confession is much more than counselling, and is in fact placing an act of worship, which squarely places it within the terms of s. 2(a) of the *Charter*. It is also in society's interests to protect such confessional communications as a legitimate and important exercise

in freedom of religion since the confessor is in a unique position to encourage the penitent reporting such matters to seek treatment and ultimately turn himself in to the authorities. The policy justification for this secrecy parallels that of a lawyer who, in confidence, encourages a fugitive to turn himself in. In this way, the secrecy of the confessional relationship can help promote and facilitate public safety.

Fifth, with regard to conflicts between canon law and civil law, the Church has taken the position that the divine law must be followed, and whatever consequences the confessor faces as an individual must be accepted. The confessor should deal with these situations strategically, including raising the privilege immediately, properly and frankly responding to inquiries and interrogation while being careful not directly or indirectly violate the seal of confession, and retaining counsel. However, given the strong position of the canon law within the Wigmore framework, as well as the reputation for fairness and respect for religious rights that Canadian courts enjoy, one would expect that a confessor would never be required to testify in court as to matters protected by the seal of confession.

Eight conclusions emerge from our study in response to our original questions stated in the general introduction.

First, the seal of confession may have an ethical basis in Scripture and in the early patristic life of the Church. In terms of its Scriptural element, while it is frequently pointed out that the seal of confession has no direct foundation in Scripture, the *ethical* aspect of it may nevertheless be based on the exhortations to cover the sins of others found therein as well as the later patristic writings. This ethic would apply at least where there is an expectation of privacy. We have also determined that the law on the seal of confession has a lengthy history. As a result of the internal developments within the Church, as well as external influences, it has gone through stages of maturation that have resulted in the canon as we know it today. It began as an ethic, and progressed to the point of being formalized in Church law, and in some cases civil law. Additionally, it has been accompanied by canons which developed over history which support and clarify its operation in different circumstances.

Second, the civil law and canon law appear to have influenced each other over time, *vis-à-vis* the seal of confession. There would appear to be a cyclical nature in the relationship between civil law and canon law. At first, the civil law influenced the canon law. In the fourth century civil law concerns contributed to a decline in public confession, and a corresponding rise in private penance. The influence of the Roman and Byzantine civil law after the Church assumed juridical status is apparent from Basil's canon and Leo's letter. Later, canon law influenced the civil law when Charlemagne incorporated it into the civil legislation. Similarly, the Catholic Church was established in England, and at this stage, the seal as set out in the statutes of the various synods apparently formed

part of the law of land, as did the rest of the canon law. Later, once the Church lost its influence and was suppressed during the English Reformation, the civil law began to influence the canon law once again. Likewise, the Gallicanists and Classicists in France sought an exception for treason or disregarded the sacramentality of a confession involving a future sin altogether. The Church reacted to these developments by rejecting these positions. We have also seen this in the East where the seal was formally incorporated into the canon law of the Catholic Kyivan Metropolitan Church at the same point in time that legislation was passed in the Russian Empire requiring disclosure. In the West, the civil law influences are apparent in the evolution of the canon on the seal of confession. In the 1917 Code, the words “for any reason” were added to the essential Lateran provisions in order to emphasize that no revelations may be made to any civil authorities for any reason whatsoever. Then, in the 1983 Code, the words “diligently take care” found in the 1917 Code were amplified to “it is absolutely forbidden” to place an even stronger emphasis on the seriousness of the duty of the confessor. We also see the inclusion of indirect violations in *Sacramentorum sanctitatis tutela* which may have been added in order to help confessors in courts. These canonical responses were supported by the exhortations of Pope John Paul II himself not to break the seal, notwithstanding the pressures of any civil authorities.

Third, the obligation of a confessor to uphold the seal stands on the three pillars of the natural, divine and positive law. The establishment of the natural law aspect of the seal of confession is important. It would appear that in legal systems based solely on the positive law, the seal of confession has not enjoyed any substantial protection, but where the natural law is more an integral part of the system, such as in the United States, the seal

appears to enjoy the most protection. The Canadian law appears to fall somewhere in between, and this is reflected in the relative uncertainty of the current law. The establishment of the divine law aspect of the seal of confession is important also, since it effectively resolves conflicts between the canon law and the civil law, at least from the Church's point of view. Of the six theories on which it may be based, the protection of the common supernatural good appears to be the most compelling. The positive law aspect is also the result of legislative evolution as influenced by historical circumstances as well as by the Church. It is the positive law which is ultimately what is taken into consideration by the civil courts when conducting their analyses, and it is therefore vital that the Church is able to state the law with clarity and precision.

Fourth, the seal of confession was received into the post-Reformation civil law and jurisprudence with differing results. As the history and jurisprudence demonstrates, the linchpin of the issue is not so much one of law, but of church-state relations which have played themselves out in the legal arena. In England, an exception was first made for treason during Norman times. During the Reformation it was suppressed altogether, and later jurisprudence essentially disallowed it, even though the matter has never received a proper adjudication and the body of case law is demonstrably inconclusive. Russian legislators did not go as far as the complete abolition in England, but did follow the Classical and Gallicanist schools in making exceptions to the seal. However, not all common law jurisdictions followed the English law. In Ireland where the Reformation was repudiated, the privilege was firmly established in common law and the English jurisprudence rejected. In the United States, where the yoke of English rule was thrown off and the authority of the English common law openly challenged, law quickly came

into being which allowed the priest-penitent privilege both in federal jurisprudence and state legislation. Similarly in Australia and New Zealand, the privilege was established in both statute and common law, though there is only a patchwork of protections. All of this underscores that it is a rule of policy, not a rule which can be derived logically and be universally agreed-upon by lawmakers. It is in this policy context that the Wigmore criteria have played a critical role in making determinations of communications covered by the law of privilege. Certainly a number of commentators including Bentham and the architect of the criteria Wigmore himself felt that confessional communications should be excluded from disclosure in a civil court. The Wigmore criteria were fundamental in establishing the rule of evidence in America and other jurisdictions.

Fifth, Canadian law and jurisprudence on the seal appear to occupy a position somewhere between the English law which has disallowed the seal and the American and Irish law which uphold the seal. In Canada, the law originally followed English law and made no allowance for the priest-penitent privilege, with the exception of Québec as a conquered territory. Later, statutes were passed in both Newfoundland and Québec protecting the seal and putting the priest-penitent privilege on the same footing as solicitor-client privilege, the Québec legislation apparently recognising it as a human right. The remaining provinces and the federal government have made no legislative provisions. Instead, they relied on the common law ruling against the seal which was set with English cases, most notably *Wheeler v. La Marchant*, at least prior to it being overruled in the *Scientology* case and supplanted by the *Gruenke* jurisprudence. It is reasonable to state that there is a *de facto* privilege in the sense that the judiciary may try

to dissuade questions concerning confessional matters, or alternatively not prosecute a contempt of court charge against a confessor who refuses to testify.

Sixth, a confessor is most likely not a compellable witness in Canadian courts. With the advent of the Wigmore criteria in Canadian law and the *Slavutych* case, the question was re-opened and the recognition of the priest-penitent privilege was made possible in the *Gruenke* case. The Supreme Court of Canada accepted the Wigmore criteria as the means of determining when confidential religious communications should be deemed privileged, but did not go so far as to accept the conclusion of the architect of the criteria that such communications are indeed privileged. Instead, it was left open to adjudicate this question in particular cases as they presented themselves. Sections 2(a) and 27 of the *Charter* have a critical role to play in making such determinations. And, although it was not incorporated into the jurisprudence in *Gruenke*, the provisions in the Preamble may also have an important role in future litigation as a means by which the natural law and divine law may be brought to bear on judicial decision-making in matters concerning confidential religious communications. It should also be noted that the *ad hoc* nature of the application of the Wigmore criteria has left the law flexible but at the same time uncertain. This uncertainty could be answered by legislation, but to date there does not appear to be any impetus to do so. There have not yet been any rulings in Canada with respect to whether confessional communications subject to the seal of confession as understood in Catholic canon law meet the Wigmore criteria. However, no authors suggest that these communications would not meet these standards, and Catholic confessional practice is seen implicitly or explicitly as having the highest level of secrecy amongst all religions, a standard against which other such communications may be

measured. Accordingly, it is expected that if ever confessional communications subject to the seal of confession are being adjudicated, the ruling would be in favour of these being subject to testimonial privilege and excluded from evidence.

Seventh, while there are statutory reporting requirements for incidents of child abuse and communicable diseases which appear to include confessors, a freedom of religion *Charter* challenge should be raised. Unlike the issue of general courtroom testimony, the case is more difficult with regard to the provincial legislation which mandates required the reporting of child abuse and communicable diseases, and there are few authorities to turn to. Since privilege by nature only arises at trial, and these statutes require reporting to government authorities outside of litigation, the Wigmore criteria are not necessarily applied. Some of the legislation specifically names priests and clergy as those required to report child abuse. This legislation appears to conflict with the secrecy requirements of seal of confession. To date, no case law has resolved this apparent conflict, and there is strong public sentiment that those who commit child abuse should not be protected in any way whatsoever. For this reason, legislative amendments to address the issue are doubtful. However, we suggest that the religious freedom provision of the *Charter* should protect such communications since the confessor may be seen in the same light as a lawyer who counsels a fugitive to turn himself in. The confessor may be the only person in whom a penitent may trust. In this sense, the basis of secrecy is the same as solicitor-client privilege, since the confessor is in the unique position of being able to counsel the penitent to seek treatment and cease the criminal and tortious behaviour. In this sense, confessional secrecy serves a public safety function and it benefits society to allow this secrecy. Accordingly, this may be a legitimate exercise in

religious freedom and the priest-penitent privilege should be allowed as an exception to the provisions of these statutes. Additionally, since the act of confession is essentially an act of worship in the Catholic faith, legislative provisions which interfere with this would be in conflict with the religious freedom provisions of the *Charter*.

Finally, in the case of conflicts between divine law and civil law, the divine law must unquestionably be followed as a legitimate exercise in civil disobedience. The lack of certainty in Canadian law may create problems for confessors who find themselves in situations where there are strongly conflicting obligations between canonical secrecy and civil law disclosure requirements. Therefore it is critical that confessors be cautious in situations where they are being pressured to break the seal of the confessional. They should respond to inquiries properly, be mindful of the risk of indirect revelations, and retain well-briefed counsel, to which they are legally entitled. Regardless of whether the seal of confession is deemed privileged or not, the tradition of the Church regarding civil laws which are contrary to divine law is abundantly clear, and under no circumstances may disclosures be made to any civil authorities. Ultimately, the continuation of the tradition of martyrdom may be necessary to uphold the seal of confession.

There are several areas of interest for future studies which could be pursued. First, the historical influence of civil law and historical events on the entrenchment of the seal of confession in the canon law of the other Eastern Catholic Churches could be undertaken with a view to determining whether there is a correlation similar to the one found between the Byzantine Catholic Church canon law and Russian civil legislation. A second area of interest for future research is an in-depth study of the general reception of the canon law in Canadian civil law. This area of research should include a

comprehensive study of the canon law of the Catholic church with respect to the provisions of the *Charter*. However, the most critical area of interest for future research would be in the field of pastoral psychology. This research help to inform and support the Wigmore criteria, which would focus on the health and psychological benefits of confession, with special regard for the need for secrecy. Another area of empirical research would be to determine whether penitents would be deterred from confession if revelation of the confession were a possibility. A final area of interest for future research is in the field of criminology, which would examine the efficacy of confessors in deterring ongoing or future criminal acts. All of this statistical research would help to inform both the canon law and the civil law on the issues raised by the Wigmore criteria.

Alberta

Child, Youth, and Family Enhancement Act, R.S.A. c. C-12).**Interpretation**

1(2) For the purposes of this Act, a child is in need of intervention if there are reasonable and probable grounds to believe that the survival, security or development of the child is endangered because of any of the following:

- (a) the child has been abandoned or lost;
- (b) the guardian of the child is dead and the child has no other guardian;
- (c) the child is neglected by the guardian;
- (d) the child has been or there is substantial risk that the child will be physically injured or sexually abused by the guardian of the child;
- (e) the guardian of the child is unable or unwilling to protect the child from physical injury or sexual abuse;
- (f) the child has been emotionally injured by the guardian of the child;
- (g) the guardian of the child is unable or unwilling to protect the child from emotional injury;
- (h) the guardian of the child has subjected the child to or is unable or unwilling to protect the child from cruel and unusual treatment or punishment.
- (i) repealed.

1(2.1) For the purposes of subsection (2)(c), a child is neglected if the guardian

- (a) is unable or unwilling to provide the child with the necessities of life,
- (b) is unable or unwilling to obtain for the child, or to permit the child to receive, essential medical, surgical or other remedial treatment that is necessary for the health or well-being of the child, or
- (c) is unable or unwilling to provide the child with adequate care or supervision.

1(3) For the purposes of this Act,

(a) a child is emotionally injured

(i) if there is impairment of the child's mental or emotional functioning or development, and

(ii) if there are reasonable and probable grounds to believe that the emotional injury is the result of

(A) rejection,

(A.1) emotional, social, cognitive or physiological neglect,

(B) deprivation of affection or cognitive stimulation,

(C) exposure to domestic violence or severe domestic disharmony,

(D) inappropriate criticism, threats, humiliation, accusations or expectations of or toward the child,

(E) the mental or emotional condition of the guardian of the child or of anyone living in the same residence as the child;

(F) chronic alcohol or drug abuse by the guardian or by anyone living in the same residence as the child;

(b) a child is physically injured if there is substantial and observable injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body that is evidenced by a laceration, a contusion, an abrasion, a scar, a fracture or other bony injury, a dislocation, a sprain, hemorrhaging, the rupture of viscus, a burn, a scald, frostbite, the loss or alteration of consciousness or physiological functioning or the loss of hair or teeth;

(c) a child is sexually abused if the child is inappropriately exposed or subjected to sexual contact, activity or behaviour including prostitution related activities.

Reporting child in need

4(1) Any person who has reasonable and probable grounds to believe that a child is in need of intervention shall forthwith report the matter to a director.

(1.1) A referral received pursuant to section 35 of the *Youth Criminal Justice Act* (Canada) is deemed to be a report made under subsection (1).

(2) Subsection (1) applies notwithstanding that the information on which the belief is founded is confidential and its disclosure is prohibited under any other Act.

(3) This section does not apply to information that is privileged as a result of a solicitor-client relationship.

(4) No action lies against a person reporting pursuant to this section, including a person who reports information referred to in subsection (3), unless the reporting is done maliciously or without reasonable and probable grounds for the belief.

(5) Notwithstanding and in addition to any other penalty provided by this Act, if a director has reasonable and probable grounds to believe that a person has not complied with subsection (1) and that person is registered under an Act regulating a profession or occupation prescribed in the regulations, the director shall advise the appropriate governing body of that profession or occupation of the failure to comply.

(6) Any person who fails to comply with subsection (1) is guilty of an offence and liable to a fine of not more than \$2000 and in default of payment to imprisonment for a term of not more than 6 months.

British Columbia

Child, Family and Community Service Act, R.S.B.C. 1996, c. 46.

When protection is needed

13 (1) A child needs protection in the following circumstances:

- (a) if the child has been, or is likely to be, physically harmed by the child's parent;
- (b) if the child has been, or is likely to be, sexually abused or exploited by the child's parent;
- (c) if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child;
- (d) if the child has been, or is likely to be, physically harmed because of neglect by the child's parent;
- (e) if the child is emotionally harmed by the parent's conduct;
- (f) if the child is deprived of necessary health care;
- (g) if the child's development is likely to be seriously impaired by a treatable condition and the child's parent refuses to provide or consent to treatment;
- (h) if the child's parent is unable or unwilling to care for the child and has not made adequate provision for the child's care;
- (i) if the child is or has been absent from home in circumstances that endanger the child's safety or well-being;
- (j) if the child's parent is dead and adequate provision has not been made for the child's care;
- (k) if the child has been abandoned and adequate provision has not been made for the child's care;
- (l) if the child is in the care of a director or another person by agreement and the child's parent is unwilling or unable to resume care when the agreement is no longer in force.

(1.1) For the purpose of subsection (1) (b) and (c) and section 14 (1) (a) but without limiting the meaning of "sexually abused" or "sexually exploited", a child has been or is likely to be sexually abused or sexually exploited if the child has been, or is likely to be,

(a) encouraged or helped to engage in prostitution, or

(b) coerced or inveigled into engaging in prostitution.

(2) For the purpose of subsection (1) (e), a child is emotionally harmed if the child demonstrates severe

(a) anxiety,

(b) depression,

(c) withdrawal, or

(d) self-destructive or aggressive behaviour.

Duty to report need for protection

14 (1) A person who has reason to believe that a child needs protection under section 13 must promptly report the matter to a director or a person designated by a director.

(2) Subsection (1) applies even if the information on which the belief is based

(a) is privileged, except as a result of a solicitor-client relationship, or

(b) is confidential and its disclosure is prohibited under another Act.

(3) A person who contravenes subsection (1) commits an offence.

(4) A person who knowingly reports to a director, or a person designated by a director, false information that a child needs protection commits an offence.

(5) No action for damages may be brought against a person for reporting information under this section unless the person knowingly reported false information.

(6) A person who commits an offence under this section is liable to a fine of up to \$10 000 or to imprisonment for up to 6 months, or to both.

(7) The limitation period governing the commencement of a proceeding under the *Offence Act* does not apply to a proceeding relating to an offence under this section.

Manitoba

The Child and Family Services Act, C.C.S.M. c. C-80.

Child in need of protection

17(1) For purposes of this Act, a child is in need of protection where the life, health or emotional well-being of the child is endangered by the act or omission of a person.

Illustrations of child in need

17(2) Without restricting the generality of subsection (1), a child is in need of protection where the child

- (a) is without adequate care, supervision or control;
- (b) is in the care, custody, control or charge of a person
 - (i) who is unable or unwilling to provide adequate care, supervision or control of the child, or
 - (ii) whose conduct endangers or might endanger the life, health or emotional well-being of the child, or
 - (iii) who neglects or refuses to provide or obtain proper medical or other remedial care or treatment necessary for the health or well-being of the child or who refuses to permit such care or treatment to be provided to the child when the care or treatment is recommended by a duly qualified medical practitioner;
- (c) is abused or is in danger of being abused;
- (d) is beyond the control of a person who has the care, custody, control or charge of the child;
- (e) is likely to suffer harm or injury due to the behaviour, condition, domestic environment or associations of the child or of a person having care, custody, control or charge of the child;
- (f) is subjected to aggression or sexual harassment that endangers the life, health or emotional well-being of the child;
- (g) being under the age of 12 years, is left unattended and without reasonable provision being made for the supervision and safety of the child; or

(h) is the subject, or is about to become the subject, of an unlawful adoption under *The Adoption Act* or of a sale under section 84.

Reporting a child in need of protection

18(1) Subject to subsection (1.1), where a person has information that leads the person reasonably to believe that a child is or might be in need of protection as provided in section 17, the person shall forthwith report the information to an agency or to a parent or guardian of the child.

Reporting to agency only

18(1.1) Where a person under subsection (1)

- (a) does not know the identity of the parent or guardian of the child;
- (b) has information that leads the person reasonably to believe that the parent or guardian
 - (i) is responsible for causing the child to be in need of protection, or
 - (ii) is unable or unwilling to provide adequate protection to the child in the circumstances; or
- (c) has information that leads the person reasonably to believe that the child is or might be suffering abuse by a parent or guardian of the child or by a person having care, custody, control or charge of the child;

subsection (1) does not apply and the person shall forthwith report the information to an agency.

Duty to report

18(2) Notwithstanding the provisions of any other Act, subsection (1) applies even where the person has acquired the information through the discharge of professional duties or within a confidential relationship, but nothing in this subsection abrogates any privilege that may exist because of the relationship between a solicitor and the solicitor's client.

New Brunswick

Family Services Act, S.N.B. 1980, c. F-2.2.

30(1) Any person who has information causing him to suspect that a child has been abandoned, deserted, physically or emotionally neglected, physically or sexually ill-treated or otherwise abused shall inform the Minister of the situation without delay.

30(2) This section applies notwithstanding that the person has acquired the information through the discharge of his duties or within a confidential relationship, but nothing in this subsection abrogates any privilege that may exist because of the relationship between a solicitor and the solicitor's client.

30(3) A professional person who acquires information in the discharge of the professional person's responsibilities that reasonably ought to cause the professional person to suspect that a child has been abandoned, deserted, physically or emotionally neglected, physically or sexually ill-treated or otherwise abused but who does not inform the Minister of the situation without delay commits an offence.

30(3.1) Proceedings with respect to an offence under subsection (3) may be instituted at any time within six years after the time when the subject matter of the proceedings arose.

30(4) Where the Minister has reasonable grounds to suspect that a professional person has committed an offence under subsection (3), the Minister may, regardless of any action the Minister may take with respect to prosecution, require any professional society, association or other organization authorized under the laws of the Province to regulate the professional activities of the person to cause an investigation to be made into the matter.

30(5) No action lies, in relation to the giving of information under this section, against a person who in good faith complies therewith.

30(5.01) No action shall be commenced against a person in relation to the giving of information to the Minister under this section except with leave of the court.

30(5.02) An application for leave shall be commenced by a Notice of Application served on the respondent and the Minister in accordance with the Rules of Court.

30(5.03) On an application for leave, leave shall be granted only if the applicant establishes, by affidavit or otherwise, a *prima facie* case that the person who gave the information to the Minister did not give the information in good faith.

30(5.04) If leave is not granted, the court may order the applicant to pay all or any portion of the costs of the application.

30(5.05) An action against a person in relation to the giving of information to the Minister under this section is a nullity if the action is commenced without the leave of the court.

30(5.1) A person who wilfully gives false information under this section commits an offence.

30(6) Except in the course of judicial proceedings, no person shall reveal the identity of a person who has given information under this section without that person's written consent.

30(7) Any person who violates subsection (6) commits an offence.

30(8) Upon completion of any investigation undertaken by the Minister as a result of any information provided by any person, the Minister may so advise the person who provided the information, and shall inform

(a) the parent;

(b) any person identified during the investigation as a person neglecting or ill-treating the child; and

(c) the child, if in the opinion of the Minister he is capable of understanding,

as to the findings and conclusions drawn by the Minister.

30(8.1) Notwithstanding subsection (8), the Minister shall not inform any person referred to in paragraphs (8)(a) to (c) of the findings and conclusion drawn by the Minister if

(a) in the opinion of the Minister, the giving of the information would have the effect of putting the child's well-being at risk,

(b) in the opinion of the Minister, the giving of the information may impede any criminal investigation related to the neglect or ill-treatment of the child, or

(c) in the case of a person identified during an investigation as neglecting or ill-treating the child, the person has not been contacted as part of the Minister's investigation.

30(9) Notwithstanding the *Evidence Act*, a spouse may be compelled to testify as a witness in the course of judicial proceedings brought against his spouse under this Act with respect to abuse or neglect of a child or an adult.

30(10) For the purposes of this section "professional person" means a physician, nurse, dentist or other health or mental health professional, an administrator of a hospital

facility, a school principal, school teacher or other teaching professional, a social work administrator, social worker or other social service professional, a child care worker in any day care center or child caring institution, a police or law enforcement officer, a psychologist, a guidance counsellor, or a recreational services administrator or worker, and includes any other person who by virtue of his employment or occupation has a responsibility to discharge a duty of care towards a child.

30.1(1) The Minister may, in accordance with subsection (2), provide to a child or parent or guardian of a child or to a person or organization providing services to children information relating to

- (a) the conviction of a person for assault or sexual assault of a child under the *Criminal Code*, (Canada),
- (b) a court order made under this Act in relation to a danger to a child's security or development under paragraph 31(1)(e), or
- (c) the findings and conclusions drawn by the Minister after conducting an investigation under subsection 31(2) in relation to a danger to a child's security and development under paragraph 31(1)(e).

30.1(2) Information may be provided under subsection (1) by the Minister if within five years before the release of the information

- (a) the person in respect of whom the information is to be released has been convicted of assault or sexual assault of a child under the *Criminal Code*, (Canada),
- (b) a court has found that the person in respect of whom the information is to be released has posed a danger to a child's security or development under paragraph 31(1)(e), or
- (c) the Minister, after conducting an investigation under subsection 31(2), has concluded that the person in respect of whom the information is to be released has posed a danger to the security or development of a child under paragraph 31(1)(e).

30.1(3) The Minister when providing information under this section shall not disclose the name of any child.

30.1(4) The giving of information by the Minister under this section shall be deemed for all purposes not to be a contravention of any Act or regulation or any common law rule of confidentiality.

31(1) The security or development of a child may be in danger when

- (a) the child is without adequate care, supervision or control;
- (b) the child is living in unfit or improper circumstances;
- (c) the child is in the care of a person who is unable or unwilling to provide adequate care, supervision or control of the child;
- (d) the child is in the care of a person whose conduct endangers the life, health or emotional well-being of the child;
- (e) the child is physically or sexually abused, physically or emotionally neglected, sexually exploited or in danger of such treatment;
- (f) the child is living in a situation where there is domestic violence;
- (g) the child is in the care of a person who neglects or refuses to provide or obtain proper medical, surgical or other remedial care or treatment necessary for the health or well-being of the child or refuses to permit such care or treatment to be supplied to the child;
- (h) the child is beyond the control of the person caring for him;
- (i) the child by his behaviour, condition, environment or association, is likely to injure himself or others;
- (j) the child is in the care of a person who does not have a right to custody of the child, without the consent of a person having such right;
- (k) the child is in the care of a person who neglects or refuses to ensure that the child attends school; or
- (l) the child has committed an offence or, if the child is under the age of twelve years, has committed an act or omission that would constitute an offence for which the child could be convicted if the child were twelve years of age or older.

Newfoundland

Child, Youth and Family Services Act, S.N.L. 1998 c. C-12.1.

Definition of child in need of protective intervention

14 A child is in need of protective intervention where the child

- (a) is, or is at risk of being, physically harmed by the action or lack of appropriate action by the child's parent;
- (b) is, or is at risk of being, sexually abused or exploited by the child's parent;
- (c) is emotionally harmed by the parent's conduct;
- (d) is, or is at risk of being, physically harmed by a person and the child's parent does not protect the child;
- (e) is, or is at risk of being, sexually abused or exploited by a person and the child's parent does not protect the child;
- (f) is being emotionally harmed by a person and the child's parent does not protect the child;
- (g) is in the custody of a parent who refuses or fails to obtain or permit essential medical, psychiatric, surgical or remedial care or treatment to be given to the child when recommended by a qualified health practitioner;
- (h) is abandoned;
- (i) has no living parent or a parent is unavailable to care for the child and has not made adequate provision for the child's care;
- (j) is living in a situation where there is violence; or
- (k) is actually or apparently under 12 years of age and has
 - (i) been left without adequate supervision,
 - (ii) allegedly killed or seriously injured another person or has caused serious damage to another person's property, or
 - (iii) on more than one occasion caused injury to another person or other living thing or threatened, either with or without weapons, to cause injury

to another person or other living thing, either with the parent's encouragement or because the parent does not respond adequately to the situation.

Duty to report

15(1) Where a person has information that a child is or may be in need of protective intervention, the person shall immediately report the matter to a director, social worker or a peace officer.

(2) Where a person makes a report under subsection (1), the person shall report all the information in his or her possession.

(3) Where a report is made to a peace officer under subsection (1), the peace officer shall, as soon as possible after receiving the report, inform a director or social worker.

(4) This section applies, notwithstanding the provisions of another Act, to a person referred to in subsection (5) who, in the course of his or her professional duties, has reasonable grounds to suspect that a child is or may be in need of protective intervention.

(5) Subsection (4) applies to every person who performs professional or official duties with respect to a child, including,

(a) a health care professional;

(b) a teacher, school principal, social worker, family counsellor, member of the clergy or religious leader, operator or employee of a child care service and a youth and recreation worker;

(c) a peace officer; and

(d) a solicitor.

(6) This section applies notwithstanding that the information is confidential or privileged, and an action does not lie against the informant unless the making of the report is done maliciously or without reasonable cause.

(7) A person shall not interfere with or harass a person who gives information under this section.

(8) A person who contravenes this section is guilty of an offence and is liable on summary conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 6 months, or to both a fine and imprisonment.

(9) Notwithstanding section 7 of the *Provincial Offences Act*, an information or complaint under this section may be laid or made within 3 years from the day when the matter of the information or complaint arose.

North West Territories and Nunavut

Child and Family Services Act, S.N.W.T. 1997, c. 13.

Child Who Needs Protection

7(3) A child needs protection where

- (a) the child has suffered physical harm inflicted by the child's parent or caused by the parent's inability to care and provide for or supervise and protect the child adequately;
- (b) there is a substantial risk that the child will suffer physical harm inflicted by the child's parent or caused by the parent's inability to care and provide for or supervise and protect the child adequately;
- (c) the child has been sexually molested or sexually exploited by the child's parent or by another person in circumstances where the child's parent knew or should have known of the possibility of sexual molestation or sexual exploitation and was unwilling or unable to protect the child;
- (d) there is a substantial risk that the child will be sexually molested or sexually exploited by the child's parent or by another person in circumstances where the child's parent knows or should know of the possibility of sexual molestation or sexual exploitation and is unwilling or unable to protect the child;
- (e) the child has demonstrated severe anxiety, depression, withdrawal, self-destructive behaviour, or aggressive behaviour towards others, or any other severe behaviour that is consistent with the child having suffered emotional harm and the child's parent does not provide, or refuses or is unavailable or unable to consent to the provision of, services, treatment or healing processes to remedy or alleviate the harm;
- (f) there is a substantial risk that the child will suffer emotional harm of the kind described in paragraph (e), and the child's parent does not provide, or refuses or is unavailable or unable to consent to the provision of, services, treatment or healing processes to prevent the harm;
- (g) the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development, and the child's parent does not provide, or refuses or is unavailable or unable to consent to the provision of, services, treatment or healing processes to remedy or alleviate the condition;

- (h) the child has been subject to a pattern of neglect that has resulted in physical or emotional harm to the child;
- (i) the child has been subject to a pattern of neglect and there is a substantial risk that the pattern of neglect will result in physical or emotional harm to the child;
- (j) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent of the child and the child's parent fails or refuses to obtain services, treatment or healing processes to remedy or alleviate the harm;
- (k) the child has been exposed to repeated domestic violence by or towards a parent of the child and there is a substantial risk that the exposure will result in physical or emotional harm to the child and the child's parent fails or refuses to obtain services, treatment or healing processes to prevent the harm;
- (l) the child's health or emotional or mental well-being has been harmed by the child's use of alcohol, drugs, solvents or similar substances, and the child's parent does not provide, or refuses or is unavailable or unable to consent to the provision of, services, treatment or healing processes to remedy or alleviate the harm;
- (m) there is a substantial risk that the child's health or emotional or mental well-being will be harmed by the child's use of alcohol, drugs, solvents or similar substances, and the child's parent does not provide, or refuses or is unavailable or unable to consent to the provision of, services, treatment or healing processes to prevent the harm;
- (n) the child requires medical treatment to cure, prevent or alleviate serious physical harm or serious physical suffering, and the child's parent does not provide, or refuses or is unavailable or unable to consent to the provision of, the treatment;
- (o) the child suffers from malnutrition of a degree that, if not immediately remedied, could seriously impair the child's growth or development or result in permanent injury or death;
- (p) the child has been abandoned by the child's parent without the child's parent having made adequate provision for the child's care or custody and the child's extended family has not made adequate provision for the child's care or custody;
- (q) the child's parents have died without making adequate provision for the child's care or custody and the child's extended family has not made adequate provision for the child's care or custody;

(r) the child's parent is unavailable or unable or unwilling to properly care for the child and the child's extended family has not made adequate provision for the child's care or custody; or

(s) the child is less than 12 years of age and has killed or seriously injured another person or has persisted in injuring others or causing damage to the property of others, and services, treatment or healing processes are necessary to prevent a recurrence, and the child's parent does not provide, or refuses or is unavailable or unable to consent to the provision of, the services, treatment or healing processes.

Duty to report child needing protection

8(1) A person who has information of the need of protection of a child shall, without delay, report the matter

(a) to a Child Protection Worker; or

(b) if a Child Protection Worker is not available, to a peace officer or an authorized person.

Duty may not be delegated

(2) For greater certainty, a person may not delegate the duty to report a matter under subsection (1) to another person.

Confidentiality and Privilege

(3) Subsection (1) applies

(a) notwithstanding any other Act; and

(b) notwithstanding that the information is confidential or privileged.

Civil Liability

(4) No action shall be commenced against a person for reporting information in accordance with this section unless it is done maliciously.

Solicitor and client privilege

(5) Nothing in this section shall abrogate any privilege that may exist between a solicitor and the solicitor's client.

Offence and Punishment

(6) Every person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding \$5,000, to imprisonment for a term not exceeding six months or to both.

Nova Scotia

*Children and Family Services Act, S.N.S. 1990, c. 5.***Child is in need of protective services**

22(1) In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.

(2) A child is in need of protective services where

- (a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;
- (b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);
- (c) the child has been sexually abused by a parent or guardian of the child, or by another person where a parent or guardian of the child knows or should know of the possibility of sexual abuse and fails to protect the child;
- (d) there is a substantial risk that the child will be sexually abused as described in clause (c);
- (e) a child requires medical treatment to cure, prevent or alleviate physical harm or suffering, and the child's parent or guardian does not provide, or refuses or is unavailable or is unable to consent to, the treatment;
- (f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
- (g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
- (h) the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the condition;

(i) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent or guardian of the child, and the child's parent or guardian fails or refuses to obtain services or treatment to remedy or alleviate the violence;

(j) the child has suffered physical harm caused by chronic and serious neglect by a parent or guardian of the child, and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(ja) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (j);

(k) the child has been abandoned, the child's only parent or guardian has died or is unavailable to exercise custodial rights over the child and has not made adequate provisions for the child's care and custody, or the child is in the care of an agency or another person and the parent or guardian of the child refuses or is unable or unwilling to resume the child's care and custody;

(l) the child is under twelve years of age and has killed or seriously injured another person or caused serious damage to another person's property, and services or treatment are necessary to prevent a recurrence and a parent or guardian of the child does not provide, or refuses or is unavailable or unable to consent to, the necessary services or treatment;

(m) the child is under twelve years of age and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of a parent or guardian of the child or because of the parent or guardian's failure or inability to supervise the child adequately.

Duty to report

23 (1) Every person who has information, whether or not it is confidential or privileged, indicating that a child is in need of protective services shall forthwith report that information to an agency.

(2) No action lies against a person by reason of that person reporting information pursuant to subsection (1), unless the reporting of that information is done falsely and maliciously.

(3) Every person who contravenes subsection (1) is guilty of an offence and upon summary conviction is liable to a fine of not more than two thousand dollars or to imprisonment for a period not exceeding six months or to both.

(4) No proceedings shall be instituted pursuant to subsection (3) more than two years after the contravention occurred.

(5) Every person who falsely and maliciously reports information to an agency indicating that a child is in need of protective services is guilty of an offence and upon summary conviction is liable to a fine of not more than two thousand dollars or to imprisonment for a period not exceeding six months or to both.

Duty of professionals and officials to report

24 (1) In this Section, "suffer abuse", when used in reference to a child, means be in need of protective services within the meaning of clause (a), (c), (e), (f), (h), (i) or (j) of subsection (2) of Section 22.

(2) Notwithstanding any other Act, every person who performs professional or official duties with respect to a child, including

- (a) a health care professional, including a physician, nurse, dentist, pharmacist or psychologist;
- (b) a teacher, school principal, social worker, family counsellor, member of the clergy, operator or employee of a day-care facility;
- (c) a peace officer or a medical examiner;
- (d) an operator or employee of a child-caring facility or child-care service;
- (e) a youth or recreation worker,

who, in the course of that person's professional or official duties, has reasonable grounds to suspect that a child is or may be suffering or may have suffered abuse shall forthwith report the suspicion and the information upon which it is based to an agency.

(3) This Section applies whether or not the information reported is confidential or privileged.

(4) Nothing in this Section affects the obligation of a person referred to in subsection (2) to report information pursuant to Section 23.

(5) No action lies against a person by reason of that person reporting information pursuant to subsection (2), unless the reporting is done falsely and maliciously.

(6) Every person who contravenes subsection (2) is guilty of an offence and upon summary conviction is liable to a fine of not more than five thousand dollars or to imprisonment for a period not exceeding one year or to both.

(7) No proceedings shall be instituted pursuant to subsection (6) more than two years after the contravention occurred.

(8) Every person who falsely and maliciously reports information to an agency indicating that a child is or may be suffering or may have suffered abuse is guilty of an offence and upon summary conviction is liable to a fine of not more than two thousand dollars or to imprisonment for a period not exceeding six months or to both.

Duty to report third-party abuse

25(1) In this Section, "abuse by a person other than a parent or guardian" means that a child

(a) has suffered physical harm, inflicted by a person other than a parent or guardian of the child or caused by the failure of a person other than a parent or guardian of the child to supervise and protect the child adequately;

(b) has been sexually abused by a person other than a parent or guardian or by another person where the person, not being a parent or guardian, with the care of the child knows or should know of the possibility of sexual abuse and fails to protect the child;

(c) has suffered serious emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour, caused by the intentional conduct of a person other than a parent or guardian.

(2) Every person who has information, whether or not it is confidential or privileged, indicating that a child is or may be suffering or may have suffered abuse by a person other than a parent or guardian shall forthwith report the information to an agency.

(3) Every person who contravenes subsection (2) is guilty of an offence and upon summary conviction is liable to a fine of not more than two thousand dollars or to imprisonment for a period not exceeding six months or to both.

(4) No proceedings shall be instituted pursuant to subsection (3) more than two years after the contravention occurred.

(5) No action lies against a person by reason of that person reporting information pursuant to subsection (2) unless the reporting of that information is done falsely and maliciously.

(6) Every person who falsely and maliciously reports information to an agency indicating that a child is or may be suffering or may have suffered abuse by a person other than a parent or guardian is guilty of an offence and upon summary conviction is liable to a fine or not more than two thousand dollars or to imprisonment for a period not exceeding six months or to both.

Ontario

Child and Family Services Act R.S.O. 1990, c. C.11.**Duty to report child in need of protection**

72(1) Despite the provisions of any other Act, if a person, including a person who performs professional or official duties with respect to children, has reasonable grounds to suspect one of the following, the person shall forthwith report the suspicion and the information on which it is based to a society:

1. The child has suffered physical harm, inflicted by the person having charge of the child or caused by or resulting from that person's,
 - i. failure to adequately care for, provide for, supervise or protect the child, or
 - ii. pattern of neglect in caring for, providing for, supervising or protecting the child.
2. There is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person's,
 - i. failure to adequately care for, provide for, supervise or protect the child, or
 - ii. pattern of neglect in caring for, providing for, supervising or protecting the child.
3. The child has been sexually molested or sexually exploited, by the person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child.
4. There is a risk that the child is likely to be sexually molested or sexually exploited as described in paragraph 3.
5. The child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, the treatment.
6. The child has suffered emotional harm, demonstrated by serious,
 - i. anxiety,

- ii. depression,
- iii. withdrawal,
- iv. self-destructive or aggressive behaviour, or
- v. delayed development,

and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.

7. The child has suffered emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.

8. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.

9. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and that the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to prevent the harm.

10. The child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the condition.

11. The child has been abandoned, the child's parent has died or is unavailable to exercise his or her custodial rights over the child and has not made adequate provision for the child's care and custody, or the child is in a residential placement and the parent refuses or is unable or unwilling to resume the child's care and custody.

12. The child is less than 12 years old and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, those services or treatment.

13. The child is less than 12 years old and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately.

Ongoing duty to report

(2) A person who has additional reasonable grounds to suspect one of the matters set out in subsection (1) shall make a further report under subsection (1) even if he or she has made previous reports with respect to the same child.

Person must report directly

(3) A person who has a duty to report a matter under subsection (1) or (2) shall make the report directly to the society and shall not rely on any other person to report on his or her behalf.

Offence

(4) A person referred to in subsection (5) is guilty of an offence if,

- (a) he or she contravenes subsection (1) or (2) by not reporting a suspicion; and
- (b) the information on which it was based was obtained in the course of his or her professional or official duties.

Same

(5) Subsection (4) applies to every person who performs professional or official duties with respect to children including,

- (a) a health care professional, including a physician, nurse, dentist, pharmacist and psychologist;
- (b) a teacher, school principal, social worker, family counsellor, operator or employee of a day nursery and youth and recreation worker;
- (b.1) a religious official, including a priest, a rabbi and a member of the clergy;
- (b.2) a mediator and an arbitrator;
- (c) a peace officer and a coroner;
- (d) a solicitor; and

(e) a service provider and an employee of a service provider.

Same

(6) In clause (5) (b), “youth and recreation worker” does not include a volunteer.

Same

(6.1) A director, officer or employee of a corporation who authorizes, permits or concurs in a contravention of an offence under subsection (4) by an employee of the corporation is guilty of an offence.

Same

(6.2) A person convicted of an offence under subsection (4) or (6.1) is liable to a fine of not more than \$1,000.

Section overrides privilege

(7) This section applies although the information reported may be confidential or privileged, and no action for making the report shall be instituted against a person who acts in accordance with this section unless the person acts maliciously or without reasonable grounds for the suspicion. R.S.O. 1990, c. C.11, s. 72 (7); 1999, c. 2, s. 22 (4).

Exception: solicitor client privilege

(8) Nothing in this section abrogates any privilege that may exist between a solicitor and his or her client.

Conflict

(9) This section prevails despite anything in the *Personal Health Information Protection Act, 2004*.

Prince Edward Island

Child Protection Act, R.S.P.E.I., 1988, c. C-5.1.

Child in need of protection

3. A child is in need of protection where

- (a) the child has suffered physical harm inflicted by a parent;
- (b) the child has suffered harm caused by
 - (i) neglect of the child by a parent,
 - (ii) failure of a parent to adequately supervise or protect the child,or
 - (iii) failure of a parent to provide for the adequate supervision or protection of the child;
- (c) the child has been sexually abused by a parent or by another person where the parent knew or ought to have known of the possibility of sexual abuse of the child and the parent failed to protect the child;
- (d) the child has been harmed as a result of being sexually exploited for the purposes of prostitution and the parent has failed or been unable to protect the child;
- (e) the child has suffered emotional harm inflicted by a parent, or by another person, where the parent knew or ought to have known that the other person was emotionally abusing the child and the parent failed to protect the child;
- (f) the child has suffered physical or emotional harm caused by being exposed to domestic violence by or towards a parent;
- (g) the child is at substantial risk of suffering harm within the meaning of clause (a), (b), (c), (d), (e) or (f);
- (h) the child requires specific medical, psychological or psychiatric treatment to cure, prevent or ameliorate the effects of a physical or emotional condition or harm suffered, and the parent does not, or refuses to obtain treatment or is unavailable or unable to consent to treatment;

(i) the child suffers from a mental, emotional or developmental condition, that, if not addressed, could seriously harm the child and the parent does not or refuses to obtain treatment or is unavailable or unable to consent to services or treatment to remedy or ameliorate the effects of the condition;

(j) the child has been abandoned, or the only parent of the child has died or is unavailable to take custody of the child, and adequate provisions have not been made for the care of the child;

(k) the child is in the custody of the Director or another person and the parent of the child refuses or is unable to resume custody of the child;

(l) the child is less than 12 years old, and the child, in the opinion of the Director,

(i) may have killed or seriously injured another person,

(ii) poses a serious danger to another person, or

(iii) may have caused significant loss or damage to property,

and the parent of the child does not obtain or is unwilling to consent to treatment for the child which may be necessary to prevent a recurrence of the incident or danger; or

(m) the past parenting by the parent has put a child at significant risk of harm within the meaning of this section.

Mandatory reporting

22(1) Notwithstanding any other Act, every person who has knowledge, or has reasonable grounds to suspect that a child is in need of protection shall

(a) without delay, report or cause to be reported the circumstances to the Director, or to a peace officer who shall report the information to the Director; and

(b) provide to the Director such additional information as is known or available to the person.

Confidential information

(2) Subsection (1) applies notwithstanding the confidential nature of information the information on which the report is based, but nothing in this section abrogates any solicitor-client privilege.

Identity of person reporting

(3) Subject to subsection (5), no person shall reveal or be compelled to reveal the identity of a person who has made a report or provided information respecting a child pursuant to subsection (1).

Not liable to civil action

(4) Subject to subsection (5), a person who makes a report or provides information pursuant to subsection (1) or who does anything to assist in an investigation carried out by the Director is not liable to any civil action in respect of providing such information or assistance.

False or misleading information

(5) Subsections (3) and (4) do not apply where a person knowingly makes a report or provides information which is false or misleading.

Québec

Youth Protection Act, R.S.Q., chapter P-34.1.**Security or development endangered.**

38. For the purposes of this Act, the security or development of a child is considered to be in danger where

- (a) his parents are deceased or do not, in fact, assume responsibility for his care, maintenance or education;
- (b) his mental or affective development is threatened by the lack of appropriate care or by the isolation in which he is maintained or by serious and continuous emotional rejection by his parents;
- (c) his physical health is threatened by the lack of appropriate care;
- (d) he is deprived of the material conditions of life appropriate to his needs and to the resources of his parents or of the persons having custody of him;
- (e) he is in the custody of a person whose behaviour or way of life creates a risk of moral or physical danger for the child;
- (f) he is forced or induced to beg, to do work disproportionate to his capacity or to perform for the public in a manner that is unacceptable for his age;
- (g) he is the victim of sexual abuse or he is subject to physical ill-treatment through violence or neglect;
- (h) he has serious behavioural disturbances and his parents fail to take the measures necessary to put an end to the situation in which the development or security of their child is in danger or the remedial measures taken by them fail.

Security or development not endangered.

However, the security or development of a child whose parents are deceased is not considered to be in danger if a person standing *in loco parentis* has, in fact, assumed responsibility for the child's care, maintenance and education, taking the child's needs into account.

Security or development endangered.

38.1. The security or development of a child may be considered to be in danger where

(a) he leaves his own home, a foster family, a facility maintained by an institution operating a rehabilitation centre or a hospital centre without authorization while his situation is not under the responsibility of the director of youth protection;

(b) he is of school age and does not attend school, or is frequently absent without reason;

(c) his parents do not carry out their obligations to provide him with care, maintenance and education or do not exercise stable supervision over him, while he has been entrusted to the care of an institution or foster family for one year.

Duty to report.

39. Every professional who, by the very nature of his profession, provides care or any other form of assistance to children and who, in the practice of his profession, has reasonable grounds to believe that the security or development of a child is or may be considered to be in danger within the meaning of section 38 or 38.1, must bring the situation to the attention of the director without delay. The same obligation is incumbent upon any employee of an institution, any teacher or any policeman who, in the performance of his duties, has reasonable grounds to believe that the security or development of a child is or may be considered to be in danger within the meaning of the said provisions.

Duty to report.

Any person, other than a person referred to in the first paragraph, who has reasonable grounds to believe that the security or development of a child is considered to be in danger within the meaning of subparagraph *g* of the first paragraph of section 38 must bring the situation to the attention of the director without delay.

Other cases.

Any person, other than a person referred to in the first paragraph, who has reasonable grounds to believe that the security or development of a child is or may be considered to be in danger within the meaning of subparagraph *a, b, c, d, e, f* or *h* of the first paragraph of section 38 or within the meaning of section 38.1 may bring the situation to the attention of the director.

Applicability.

The first and second paragraphs apply even to those persons who are bound by professional secrecy, except to an advocate who, in the practice of his profession, receives information concerning a situation described in section 38 or 38.1.

Saskatchewan

The Child and Family Services Act, S.S. 1989-90, c. C-7.2

Child in need of protection

11 A child is in need of protection where:

(a) as a result of action or omission by the child's parent:

(i) the child has suffered or is likely to suffer physical harm;

(ii) the child has suffered or is likely to suffer a serious impairment of mental or emotional functioning;

(iii) the child has been or is likely to be exposed to harmful interaction for a sexual purpose, including involvement in prostitution and including conduct that may amount to an offence within the meaning of the Criminal Code;

(iv) medical, surgical or other recognized remedial care or treatment that is considered essential by a duly qualified medical practitioner has not been or is not likely to be provided to the child;

(v) the child's development is likely to be seriously impaired by failure to remedy a mental, emotional or developmental condition; or

(vi) the child has been exposed to domestic violence or severe domestic disharmony that is likely to result in physical or emotional harm to the child;

(b) there is no adult person who is able and willing to provide for the child's needs, and physical or emotional harm to the child has occurred or is likely to occur; or

(c) the child is less than 12 years of age and:

(i) there are reasonable and probable grounds to believe that:

(A) the child has committed an act that, if the child were 12 years of age or more, would constitute an offence under the Criminal Code, the Narcotic Control Act (Canada) or Part III or Part IV of the Food and Drug Act (Canada); and

(B) family services are necessary to prevent a recurrence; and

(ii) the child's parent is unable or unwilling to provide for the child's needs.

Duty to report

12(1) Subject to subsections (2) and (3), every person who has reasonable grounds to believe that a child is in need of protection shall report the information to an officer or peace officer.

(2) Subsection (1) applies notwithstanding any claim of confidentiality or professional privilege other than:

(a) solicitor-client privilege; or

(b) Crown privilege.

Yukon

Children's Act, R.S.Y. 2002, c. 31.

Reporting of child in need of protection

117(1) A person who has reasonable grounds to believe that a child may be a child in need of protection may report the information on which the person bases that belief to the director, an agent of the director, or a peace officer.

(2) No legal action of any kind, including professional disciplinary proceedings, may be taken against a person who reports information under subsection (1) because of so reporting, unless the reporting was done maliciously and falsely.

(3) Any person who maliciously and falsely reports to a peace officer, the director, an agent of the director, or to any other person facts from which the inference that a child may be in need of protection may reasonably be drawn commits an offence and is liable on summary conviction to a fine of up to \$5,000 or imprisonment for as long as six months, or both.

Children in need of protection

118(1) A child is in need of protection when

- (a) the child is abandoned;
- (b) the child is in the care of a parent or other person who is unable to provide proper or competent care, supervision or control over the child;
- (c) the child is in the care of a parent or other person who is unwilling to provide proper or competent care, supervision or control over him;
- (d) the child is in probable danger of physical or psychological harm;
- (e) the parent or other person in whose care the child is neglects or refuses to provide or obtain proper medical care or treatment necessary for the health or well-being or normal development of the child;
- (f) the child is staying away from the child's home in circumstances that endanger the child's safety or well-being;
- (g) the parent or other person in whose care the child is fails to provide the child with reasonable protection from physical or psychological harm;

(h) the parent or person in whose care the child is involves the child in sexual activity;

(i) subject to subsection (2), the parent or person in whose care the child is beats, cuts, burns or physically abuses the child in any other way;

(j) the parent or person in whose care the child is deprives the child of reasonable necessities of life or health;

(k) the parent or person in whose custody he is harasses the child with threats to do or procures any other person to do any act referred to in paragraphs (a) to (j); or

(l) the parent or person in whose care the child is fails to take reasonable precautions to prevent any other person from doing any act referred to in paragraphs (a) to (j).

(2) The mere subjection of a child to physical discipline does not bring the child within the definition of child in need of protection, but the child may be in need of protection if the force is unreasonable or excessive, having regard to

(a) the age of the child;

(b) the type of instrument, if any, employed in corporal punishment;

(c) the location of any injuries on the child's person;

(d) the seriousness of the injuries which resulted, or which might reasonably have been expected to result, to the child; and

(e) the reasons for which it was felt necessary to discipline the child and any element of disproportion between the need for discipline and the amount of force employed.

Alberta

Public Health Act, R.S.A. 2000, c. P-37.

Notification of communicable disease

22(1). Where a physician, a health practitioner, a teacher or a person in charge of an institution knows or has reason to believe that a person under the care, custody, supervision or control of the physician, health practitioner, teacher or person in charge of an institution is infected with a communicable disease prescribed in the regulations for the purposes of this subsection, the physician, health practitioner, teacher or person in charge of an institution shall notify the medical officer of health of the regional health authority

(a) by the fastest means possible in the case of a prescribed disease that is designated in the regulations as requiring immediate notification, or

(b) within 48 hours in the prescribed form in the case of any other prescribed disease.

(2) Where a physician, a nurse practitioner or a midwife knows or has reason to believe that a person under the care in a hospital of the physician, nurse practitioner or midwife is infected with a disease to which subsection (1) applies, the physician, nurse practitioner or midwife shall, in addition to carrying out the physician's, nurse practitioner's or midwife's responsibilities under subsection (1), immediately inform the medical director or other person in charge of the hospital, and the medical director shall notify the medical officer of health of the regional health authority by telephone or in accordance with the prescribed form.

(3) Where a physician, a community health nurse, a nurse practitioner, a midwife or a person in charge of an institution knows or has reason to believe that a person under the care, custody, supervision or control of the physician, community health nurse, nurse practitioner, midwife or person in charge of an institution is infected with a disease referred to in section 20(2), the physician, community health nurse, nurse practitioner, midwife or person in charge of an institution shall, within 48 hours, notify the Chief Medical Officer in the prescribed form.

Discovery in laboratory

23. Where an examination of a specimen derived from a human body reveals evidence of a communicable disease, the director of the laboratory conducting the examination shall,

(a) in the case of a disease prescribed in the regulations for the purposes of this clause, notify the medical officer of health of the regional health authority

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(i) by the fastest means possible in the case of a prescribed disease that is designated in the regulations as requiring immediate notification, or

(ii) within 48 hours in the prescribed form or by telephone, in the case of any other prescribed disease,

and

(b) in the case of a disease referred to in section 20(2), notify the Chief Medical Officer in the prescribed form within 48 hours.

Examination

31.(1) Where a medical officer of health knows or has reason to believe that a person may be infected with a communicable disease referred to in section 20, that person shall, at the request of the medical officer of health, submit to any examinations necessary to determine whether the person is infected with the disease.

(2) In conducting an examination pursuant to subsection (1) to determine the existence of a communicable disease, the medical officer of health may require from any person who has knowledge of it the production of any information concerning the disease, including the sources or suspected sources of the disease and the names and addresses of any persons who may have been exposed to or become infected with the disease.

Penalty

73.(1) A person who contravenes this Act, the regulations, an order under section 62 or an order of a medical officer of health or physician under Part 3 is guilty of an offence.

(2) A person who contravenes an order under section 62 or an order of a medical officer of health or physician under Part 3 is liable to a fine of not more than \$100 for each day the contravention continues.

(3) A person who contravenes this Act or the regulations is, if no penalty in respect of that offence is prescribed elsewhere in this Act, liable to a fine of not more than \$2000 in the case of a first offence and \$5000 in the case of a subsequent offence.

(4) Where a person is convicted of an offence under this Act, the judge, in addition to any other penalty the judge may impose, may order the person to comply with the provision of this Act or the regulations or the order for the contravention of which the person was convicted.

British Columbia

Health Act Communicable Disease Regulation, B.C. Reg. 84/2006 (enabling legislation: Health Act, R.S.B.C. 1996, c. 179).

Reportable disease

2.(1) Where a person knows or suspects that an animal or another person is suffering from or has died from a communicable disease, he shall, without delay, make a report to the medical health officer.

(2) Where a physician knows or suspects that an animal or another person is suffering from or has died from a communicable disease, he shall, without delay and in accordance with section 4, make a report to the medical health officer if the disease

(a) is listed in Schedule A, or

(b) becomes epidemic or shows unusual features.

(3) Where a person in charge of a laboratory knows or suspects, as a result of analysis, examination or tests of or on a specimen, that an animal or another person is suffering from or has died from a communicable disease listed in Schedule B, he shall, within 7 days and in accordance with section 4, make a report to the medical health officer.

(4) The medical health officer shall forward a report received under this section, within 7 days of receiving it, to the Provincial health officer, together with any further information requested by the Provincial health officer.

(5) A report required to be made without delay shall be made by telephone or by any similar rapid means of communication.

Reports by hospital

3. In addition to the requirements of section 2, the administrator or other person in charge of a hospital shall, within 7 days, make a report to the medical health officer respecting a patient admitted to the hospital who is suffering from a reportable communicable disease or from rheumatic fever.

Contents of report

4.(1) A report made under section 2 (2) shall include

(a) the name of the disease,

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(b) the name, age, sex and address of the infected person, and

(c) appropriate details if the disease reported is epidemic or shows unusual features.

(2) A report made under section 2(3) shall include

(a) the name of the disease,

(b) the name and address of the person from whom the specimen was taken, and

(c) the name and address of the physician or other person who is or has been attending the person referred to in paragraph (b).

(3) A report made under section 3 shall include

(a) the name of the disease,

(b) the name, age, sex and address of the patient, and

(c) the name and address of the physician or other person who is or has been attending the patient.

(4) All reports referred to in this section shall include any further relevant information requested by the medical health officer.

(5) A report made under section 2 (2) or (3) or 3 respecting a person who voluntarily submitted to testing for Human Immunodeficiency Virus must omit the name and address of the person if that person so chooses.

Health Act, R.S.B.C. 1996, c. 179.

Offence and penalty

104.(1) A person who contravenes this Act or a regulation, bylaw, order, direction or permit under this Act commits an offence.

(2) Unless a lower penalty is specified by regulation or this Act, a person who commits an offence under subsection (1) is liable on conviction to the following:

(a) in the case of an offence that is not a continuing offence, a fine of not more than \$200 000 or imprisonment for not longer than 12 months, or both;

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(b) in the case of a continuing offence, a fine of not more than \$200 000 for each day the offence is continued or imprisonment for not longer than 12 months, or both.

Manitoba

The Public Health Act, C.C.S.M. c. P210.

C.M.O.H. may require information

12.1.(1) The chief medical officer of health, or a person designated by the minister, may require any person, organization, government department, government agency or other entity to report information about diseases, the symptoms and incidents of disease, and anything else the chief medical officer of health or designated person considers reasonably necessary to permit an assessment to be made of the threat disease presents to public health.

Personal information

12.1.(2) The information required under subsection (1) may include personal information and personal health information.

Duty to provide information

12.1.(3) Any one required to provide information under subsection (1) shall do so.

General penalty

33.(1) Subject to section 22.15, a person who contravenes or fails to comply with any provision of this Act or the regulations, or who disobeys or fails to comply with or carry out an order or direction lawfully made or given under this Act or the regulations, is guilty of an offence and liable, on summary conviction, to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding three months, or to both.

Continuing offence

33.(2) A violation of this Act or the regulations, or a failure to comply with this Act or the regulations or an order or direction lawfully made or given under this Act or the regulations that continues for more than one day, constitutes a separate offence on each day during which it continues.

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***Diseases and Dead Bodies Regulation*, Man. Reg. 338/88 (enabling statute: *The Public Health Act*, C.C.S.M. c. P210).**

Reporting of other communicable diseases

5. Within 24 hours of becoming aware that a person is suffering from a communicable disease that is not referred to in section 3 or 4, a health professional or the operator of a laboratory shall report the disease if:

- (a) the disease is occurring in an outbreak;
- (b) further cases are amenable to prevention;
- (c) the disease is common but presents with unusual clinical manifestations; or
- (d) the disease is potentially serious.

Newfoundland

Communicable Diseases Act, R.S.N.L. 1990, c. C-26.

Notice by physician

4.(1) When a physician knows, or has reason to believe, that a person is infected with a communicable disease he or she shall within 24 hours give notice to the deputy minister, or to the health officer in whose jurisdiction the person is, and to the hotel-keeper, keeper of a boarding house or tenant within whose house or rooms the person lives.

(2) The notice to the deputy minister or to the health officer shall, where possible, state the name of the disease, the name, age and sex of the person, and the name of the physician giving the notice, and shall by street and number or otherwise, sufficiently designate the house or room in which the person is living.

Notice by others

5.(1) Where a person, being the manager or recognized official head in charge of a hospital or residential institution, or a teacher or instructor of students in a school or college or other seminary of learning knows or has reason to believe that a person in the hospital or institution, school, college or other seminary of learning, has a communicable disease, that person shall immediately give notice to the deputy minister or to the health officer in whose district the hospital or other institution, school, college or seminary of learning is located.

(2) The notice shall state the name of the person giving notice, the hospital or other institution in which the person is, or, in case the person at the time was attending a school, college or other seminary of learning, the name of the person, and, if not a resident there, the street and number or other information sufficient to designate the house or premises in which the person lives.

General

34. In a case not otherwise specifically provided for in this Act, a person wilfully committing a breach of this Act shall be subject to a penalty not exceeding \$100, or in default of payment, to imprisonment for a period not exceeding 30 days, or to both a fine and imprisonment.

New Brunswick

Public Health Act, R.S.N.B. 1998, c. P-22.4.

Reporting of notifiable diseases and other information

27. Where a medical practitioner, nurse practitioner or nurse, while providing professional services to a person who is not a patient in or an out-patient of a hospital facility or a resident of an institution, has reasonable and probable grounds to believe that the person

(a) has or may have a notifiable disease or is or may be infected with an agent of a communicable disease,

(b) has or may be affected by an injury or risk factor prescribed by regulation, or

(c) has suffered a reportable event prescribed by regulation,

the medical practitioner, nurse practitioner or nurse shall report, in accordance with the regulations, to a medical officer of health or a person designated by the Minister.

28. Where a person in charge of an institution has reasonable and probable grounds to believe that a person under his or her custody or control

(a) has or may have a notifiable disease or is or may be infected with an agent of a communicable disease,

(b) is or may be affected by an injury or risk factor prescribed by regulation, or

(c) has suffered a reportable event prescribed by regulation,

the person shall report, in accordance with the regulations, to a medical officer of health or a person designated by the Minister.

29. The principal of a school or the operator of a day care centre who believes, on reasonable and probable grounds, that a pupil in the school or a child in the day care centre, as the case may be, has or may have measles, meningitis, mumps, pertussis or rubella shall report, in accordance with the regulations, to a medical officer of health or a person designated by the Minister.

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General Regulation – Health Act, N.B. Reg. 88-200 (enabling legislation: *Health Act*, R.S.N.B. 1973, c. H-2).

94.(2) Where a medical practitioner, nurse, householder or other person recognizes or suspects the presence of a notifiable disease listed in subsection (1), a notification shall be sent to the district medical health officer or the nearest public health inspector who shall immediately notify the district medical health officer.

94.(3) The notification under subsection (2) shall be made by a letter or card sent through the mail or by telegraph, telephone or direct personal communication and the information shall contain the name of the person infected or suspected to be infected, the place of residence and the name of the disease, if known.

Health Act, R.S.N.B. 1973, c. H-2.

Penalties

28.(1) A person who violates or fails to comply with paragraph 22(3)(b) or subparagraph 22(3)(c)(i) or who violates or fails to comply with any provision of the regulations or a rule made under this Act commits an offence punishable under Part II of the *Provincial Offences Procedure Act* as a category B offence.

Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1.

56.(2) Where an Act makes an offence punishable as a category B offence, a judge shall impose a fine of not less than one hundred and forty dollars and not more than three hundred and twenty dollars.

North West Territories

Communicable Diseases Regulations, R.R.N.W.T. 1990, c. P-13 (enabling legislation: *Public Health Act*, R.S.N.W.T. 1988, c. P-12).

3. Every person who believes or has reason to believe or to suspect that another person is infected or has died from a communicable disease shall notify the Chief Medical Health Officer of this fact by the quickest means available and provide him or her with any further information that the Chief Medical Health Officer may require.

Public Health Act, R.S.N.W.T. 1988, c. P-12).

Offences and Punishment

23. Every person who,

(a) contravenes this Act or the regulations,

(b) obstructs a Medical Health Officer or a Health Officer in the exercise of his or her powers or in the performance of his or her duties under this Act or the regulations,

(c) neglects, fails or refuses to comply with an order or direction given to him or her by a Medical Health Officer or a Health Officer in the exercise of his or her powers or the performance of his or her duties under this Act or the regulations,

(d) without the authority of a Medical Health Officer or a Health Officer, removes, alters or interferes in any way with anything seized or detained under this Act, or

(e) owns, constructs, operates or maintains any installation, building, place or thing mentioned in this Act or the regulations that does not comply with the requirements of this Act or the regulations,

is guilty of an offence and liable on summary conviction to a fine not exceeding \$500 or to imprisonment for a term not exceeding six months or to both.

Nova Scotia

Health Protection Act, S.N.S. 2004, c. 4.

Reporting notifiable disease or condition

31.(1) A physician, a registered nurse licensed pursuant to the Registered Nurses Act or a medical laboratory technologist licensed pursuant to the Medical Laboratory Technology Act who has reasonable and probable grounds to believe that a person

- (a) has or may have a notifiable disease or condition; or
- (b) has had a notifiable disease or condition,

shall forthwith report that belief to a medical officer.

(2) A principal of a public school or the operator of a private school under the Education Act who has reasonable and probable grounds to believe that a student in the school

- (a) has or may have a notifiable disease or condition; or
- (b) has had a notifiable disease or condition,

shall forthwith report that belief to a medical officer.

(3) An administrator of an institution who has reasonable and probable grounds to believe that a person who is a resident of the institution

- (a) has or may have a notifiable disease or condition; or
- (b) has had a notifiable disease or condition,

shall forthwith report that belief to a medical officer.

(4) An individual or member of a class of individuals, under such circumstances as prescribed by the regulations, who has reasonable and probable grounds to believe that a person

- (a) has or may have a notifiable disease or condition; or
- (b) has had a notifiable disease or condition,

shall forthwith report that belief to a medical officer.

Offences and penalties

71.(1) Every person who fails to comply with this Part or the regulations or with an order made pursuant to this Part or the regulations is guilty of an offence and is liable on summary conviction to

(a) in the case of a corporation, a fine not exceeding ten thousand dollars; or

(b) in the case of an individual, a fine not exceeding two thousand dollars or to imprisonment for a term of not more than six months, or both.

Ontario

Health Protection and Promotion Act, R.S.O 1990, c. H.7.

25.(1) A physician or a practitioner as defined in subsection (2) who, while providing professional services to a person who is not a patient in or an out-patient of a hospital, forms the opinion that the person has or may have a reportable disease shall, as soon as possible after forming the opinion, report thereon to the medical officer of health of the health unit in which the professional services are provided.

Carrier of disease

26. A physician who, while providing professional services to a person, forms the opinion that the person is or may be infected with an agent of a communicable disease shall, as soon as possible after forming the opinion, report thereon to the medical officer of health of the health unit in which the professional services are provided.

Duty of hospital administrator to report re disease

27.(1) The administrator of a hospital shall report to the medical officer of health of the health unit in which the hospital is located if an entry in the records of the hospital in respect of a patient in or an out-patient of the hospital states that the patient or out-patient has or may have a reportable disease or is or may be infected with an agent of a communicable disease.

Duty of superintendent of institution to report re disease

(2) The superintendent of an institution shall report to the medical officer of health of the health unit in which the institution is located if an entry in the records of the institution in respect of a person lodged in the institution states that the person has or may have a reportable disease or is or may be infected with an agent of a communicable disease.

When report to be given

(3) The administrator or the superintendent shall report to the medical officer of health as soon as possible after the entry is made in the records of the hospital or institution, as the case may be.

Duty of school principal to report disease

28. The principal of a school who is of the opinion that a pupil in the school has or may have a communicable disease shall, as soon as possible after forming the opinion, report thereon to the medical officer of health of the health unit in which the school is located.

Report by operator

29.(1) The operator of a laboratory shall report to the medical officer of health of the health unit in which the laboratory is located each case of a positive laboratory finding in respect of a reportable disease, as soon as possible after the making of the finding.

Confidentiality

39.(1) No person shall disclose to any other person the name of or any other information that will or is likely to identify a person in respect of whom an application, order, certificate or report is made in respect of a communicable disease, a reportable disease, a virulent disease or a reportable event following the administration of an immunizing agent.

Exceptions

(2) Subsection (1) does not apply,

(a) in respect of an application by a medical officer of health to the Ontario Court of Justice that is heard in public at the request of the person who is the subject of the application;

(b) where the disclosure is made with the consent of the person in respect of whom the application, order, certificate or report is made;

(c) where the disclosure is made for the purposes of public health administration;

(d) in connection with the administration of or a proceeding under this Act, the *Regulated Health Professions Act, 1991*, a health profession Act as defined in subsection 1 (1) of that Act, the *Public Hospitals Act*, the *Health Insurance Act*, the *Canada Health Act* or the *Criminal Code* (Canada), or regulations made thereunder; or

(e) To prevent the reporting of information under section 72 of the *Child and Family Services Act* in respect of a child who is or may be in need of protection.

Offence, reports

100.(2) Any person who contravenes a requirement of Part IV to make a report in respect of a reportable disease, a communicable disease or a reportable event following the administration of an immunizing agent is guilty of an offence.

Penalty

101.(1) Every person who is guilty of an offence under this Act is liable on conviction to a fine of not more than \$5,000 for every day or part of a day on which the offence occurs or continues.

Prince Edward Island

Notifiable and Communicable Diseases Regulations, P.E.I. Reg. EC330/85 (enabling legislation: Public Health Act, R.S.P.E.I. c. P-30).

Duty of person with knowledge of disease risk

7. All persons, and in particular those holding responsible positions in public-contact settings such as schools, child-care facilities and health-risk care or residential institutions, who have knowledge of or reasonable grounds for suspecting an instance of or condition associated with a notifiable or other regulated disease in such circumstances as to pose risk to the health of others, have an obligation to report the matter to a health officer and to provide such further information as may be requested.

Offences & penalties

20. Any person who fails to comply with or otherwise contravenes any penalties provision of this Act or any regulation or order made by a judge pursuant to this Act, or who obstructs any officer in carrying out any duties under this Act or any regulation or order made by a judge pursuant to this Act is guilty of an offence and is liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding six months or both.

Québec

Public Health Act, R.S.Q., c. S-2.2.

Mandatory reporting.

79. The Minister shall, by regulation, draw up a list of intoxications, infections and diseases that must be reported to the appropriate public health director and, in certain cases provided for in the regulation, to the Minister or to both the public health director and the national public health director.

Health threat.

80. The list may include only intoxications, infections or diseases that are medically recognized as capable of constituting a threat to the health of a population and as requiring vigilance on the part of public health authorities or an epidemiological investigation.

Report.

81. The report must indicate the name and address of the person affected and contain any other personal or non-personal information prescribed by regulation of the Minister. The report must be transmitted in the manner, in the form and within the time prescribed in the regulation.

Persons required to report.

82. The following persons are required to make the report in the cases provided for in the regulation of the Minister:

- 1) any physician who diagnoses an intoxication, infection or disease included in the list or who observes the presence of clinical manifestations characteristic of any of those intoxications, infections or diseases in a living or deceased person;
- 2) any chief executive officer of a private or public laboratory or of a medical biology department, where a laboratory analysis conducted in the laboratory or department under his or her authority shows the presence of any reportable intoxications, infections or diseases.

Omission.

138. The following persons are guilty of an offence and are liable to a fine of \$600 to \$1,200:

APPENDIX B — COMMUNICABLE DISEASES REPORTING LEGISLATION 339

- 1) any physician or nurse who fails to make a report required under section 69;
- 2) any physician or chief executive officer of a public or private laboratory or medical biology department who fails to make a report required under section 82;
- 3) any physician who fails to give a notice required under section 86;
- 4) any health professional who fails to give a notice required under section 90.

Saskatchewan

The Public Health Act, 1994, S.S., c. P-37.

Responsibility to report

32.(1) The following persons shall report to a medical health officer any cases of category I communicable diseases in the circumstances set out in this section:

- (a) a physician or nurse who, while providing professional services to a person, forms the opinion that the person is infected with or is a carrier of a category I communicable disease;
- (b) the manager of a medical laboratory if the existence of a category I communicable disease is found or confirmed by examination of specimens submitted to the medical laboratory;
- (c) a teacher or principal of a school who becomes aware that a pupil is infected with or is a carrier of a category I communicable disease;
- (d) a person who operates or manages an establishment in which food is prepared or packaged for the purposes of sale, or is sold or offered for sale, for human consumption and who determines or suspects that a person in the establishment is infected with, or is a carrier of, a category I communicable disease.

(2) A report pursuant to subsection (1) is to be made:

- (a) in the case of a physician or nurse, as soon as is practicable, and in any event not later than 48 hours after the opinion is formed;
- (b) in the case of a manager of a medical laboratory, not later than 48 hours after confirmation of the results;
- (c) in the case of a teacher or principal, as soon as is practicable, and in any event not later than 48 hours after the teacher or principal becomes aware;

and

- (d) in the case of a person who operates or manages an establishment described in clause (1)(d), not later than 48 hours after the person determines or first suspects the fact.

(3) A report submitted pursuant to subsection (1) must include:

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(a) the name, sex, age, address and telephone number of the person who has or is suspected to have, or who is or is suspected to be a carrier of, a category I communicable disease; and

(b) any prescribed information.

(4) In addition to the report required by subsection (1), the manager of a medical laboratory shall submit to the medical health officer or the co-ordinator of communicable disease control a copy of the laboratory report that identifies the disease.

Offence and penalty

61. Every person who contravenes any provision of this Act or a regulation, bylaw or order made pursuant to this Act is guilty of an offence and liable on summary conviction:

(a) in the case of an individual:

(i) for a first offence:

(A) to a fine of not more than \$75,000; and

(B) to a further fine of not more than \$100 for each day during which the offence continues; and

(ii) for a second or subsequent offence:

(A) to a fine of not more than \$100,000; and

(B) to a further fine of not more than \$200 for each day during which the offence continues.

Yukon

Communicable Diseases Regulations, C.O. 1961/048 (enabling legislation: *Public Health and Safety Act*, R.S.Y. 2002 c.176).

Notification and treatment

4. Every person who believes or has reason to believe or to suspect that another person is infected or has died from a communicable disease shall notify the nearest Medical Health Officer of such fact by the quickest means available and provide him with any further information that such officer may require.

Offences and punishment

22. Every person who

- (a) violates any of the provisions of this Act or the regulations;
- (b) obstructs a medical health officer or health officer in the exercise of their powers or in the carrying out of their duties under this Act or the regulations;
- (c) neglects, fails, or refuses to comply with an order or direction given to them by a medical health officer or health officer in the exercise of powers or the carrying out of duties under this Act or the regulations;
- (d) without the authority of a medical health officer or health officer removes, alters, or interferes in any way with anything seized or detained under this Act; or
- (e) owns, constructs, operates, or maintains any installation, building, place, or thing mentioned in this Act or the regulations that does not comply with the requirements thereof,

commits an offence and is liable on summary conviction to a fine of up to \$5,000 for each day the offence continues or imprisonment for a term not exceeding six months, or both fine and imprisonment.

1. CANON LAW AND THEOLOGY

1.1 — SOURCES

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- Kansas Statutes Annotated, § 60-429 (2006).
- Kentucky Revised Statutes Annotated, tit. XXVIII, § 422A00.0505 (2007).
- Louisiana Statutes Annotated, Code of Evidence, ch. 5, art. 511, tit. 13 (2007).
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- Maine Revised Statutes Annotated, Maine Rules of Evidence, art. V, Rule 505 (2006).
- Massachusetts General Laws, pt. III, tit. II, ch. 233, s. 20A (2007).
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- Missouri Revised Statutes, tit. XXXIII, § 491.060(4) (2007).
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- Puerto Rico Code, tit. 32, subtit. IV, ch. V, § 28 (Michie, 2007).
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- State of Rhode Island General Laws, § 9-17-23 (2007).
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- Utah Code Annotated, § 78-24-8(3) (2007).
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- West Virginia Code, § 48-1-301 (2007).
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- Wyoming Statutes Annotated, § 1-12-101(a)(ii) (2007).

2.5.3 — AUSTRALIAN / NEW ZEALAND LEGISLATION

Evidence Act, 1995 (New South Wales).

Evidence Act, 2001 (Tasmania).

Evidence Act, 1958 (Victoria).

Evidence Act, 2006 (New Zealand).

2.5.4 — CANADIAN LEGISLATION (CONSTITUTIONAL AND FEDERAL)

Canada Evidence Act, R.S. 1985 c. C-5.

Canadian Charter of Rights and Freedoms, Enacted as Schedule B to the *Canada Act*, 1982, (U.K.) c. 11 which came into force on April 17, 1982.

Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.).

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.

Privacy Act, R.S. 1985, c. P-21.

2.5.5 — CANADIAN LEGISLATION (PROVINCIAL)

Alberta Evidence Act, R.S.A. 2000, c. A-18.

Charter of Human Rights and Freedoms (Charte des droits et libertés de la personne), R.S.Q., c. C-12.

Child and Family Services Act, S.N.W.T. 1997, c.13.

Child and Family Services Act, R.S.O. 1990, c. C.11.

Child, Family and Community Service Act, R.S.B.C. 1996, c. 46.

Child Protection Act, R.S.P.E.I. 1988, c. C-5.1.

Child, Youth, and Family Enhancement Act, R.S.A. 2000, c. C-12.

Child, Youth and Family Services Act, S.N.L.1998, c. C-12.1.

Children and Family Services Act, S.N.S. 1990, c. C-5.

Children's Act, R.S.Y. 2002, c. 31.

The Child and Family Services Act, C.C.S.M. c. C80.

The Child and Family Services Act, S.S. 1989-90, c. C-7.2.

Code of Criminal Procedure (Code de procédure pénale), R.S.Q. c. C-25.

Code of Civil Procedure (Code de procédure civile), 1965, c. 80.

Communicable Diseases Act, R.S.N.L. 1990, c. C-26.

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Communicable Diseases Regulations, R.R.N.W.T. 1990, c. P-13 (enabling legislation: *Public Health Act*, R.S.N.W.T. 1988, c. P-12).

Consolidated Statutes, 1872, c. 23.

Diseases and Dead Bodies Regulation, Man. Reg. 338/88 (enabling statute: *The Public Health Act*, C.C.S.M. c. P210).

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Evidence Act, R.S.N.B. 1973, c. E-11.

Evidence Act, R.S.N. 1970, c. 115.

Evidence Act, R.S.N.L. 1990, c. E-16.

Evidence Act, R.S.N.S. 1989, c. 154.

Evidence Act, R.S.N.W.T. 1988, c. E-8.

Evidence Act, R.S.O. 1990, c. E.23.

Evidence Act, R.S.P.E.I. 1988, c. E-11.

Evidence Act, S.S. 2006, c. E-11.2.

Family Services Act, S.N.B. 1980 c. F-2.2.

General Regulation – Health Act, N.B. Reg. 88-200 (enabling legislation: *Health Act*, R.S.N.B. 1973, c. H-2).

Health Act Communicable Disease Regulation, B.C. Reg. 84/2006 (enabling legislation: *Health Act*, R.S.B.C. 1996, c. 179).

Health Protection Act, S.N.S. 2004, c. 4.

Health Protection and Promotion Act, R.S.O. 1990, c. H.7.

The Manitoba Evidence Act, R.S.M. 1987, c. E-150.

Notifiable and Communicable Diseases Regulations, P.E.I. Reg. EC330/85 (enabling legislation: *Public Health Act*, R.S.P.E.I. c. P-30).

Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1.

Public Health Act, R.S.A. 2000, c. P-37.

Public Health Act, R.S.N.B. 1998, c. P-22.4.

Public Health Act, R.S.N.W.T. 1988, c. P-12.

Public Health Act, R.S.Q., c. S-2.2.

The Public Health Act, S.S. 1994, c. P-37.

Youth Protection Act, R.S.Q., c. P-34.1.

2.5.6 — ENGLISH LEGISLATION

Act Against Recusants, 35 Eliz, c. 2.

Act for the Submission of the Clergy, 25 Hen. VIII, c. 19.

Act of Supremacy, 1 Eliz., c. 1.

An Act for Abolishing of Diversity of Opinions in certain Articles concerning Christian Religion, 1539, 31 Hen. VIII, c. 14.

Articuli Cleri, 9 Edw. 2, c. 10.

Leges, Hen. 1, c. 5.

The Relief Act, 31 Geo. III, c. 32.

Act for the Submission of the Clergy, 25 Hen. VIII, c. 19.

The Uniformity Act, 1 Eliz. I, c. 2.

Greg Zubacz was born on February 8, 1966 in Winnipeg, Manitoba. He graduated from Saint Paul's High School in Winnipeg in 1984, having won the E.J. Okins scholarship in Mathematics and English. He graduated from the University of Manitoba with a B.A. in Psychology and Criminology in 1987 and an LL.B. in 1990. He was called to the bar of Saskatchewan and Manitoba and practised law privately until he was appointed in 1995 by Order-in-Council to the Manitoba Legislature as Cabinet Secretary for the Regulatory and Legislative Review Committees. From 1997-2000 he studied at Holy Spirit Seminary in Ottawa, and served as prefect from 1998-1999. He received a Masters Certificate in Pastoral Studies from the University of Winnipeg in 1998, and graduated with a B.Th. (civil and ecclesiastical) in Eastern Christian Studies in 2000 from Saint Paul University. In the same year, he resumed his civil service career and was appointed an Officer of the Privy Council in Ottawa, and in 2001 became a senior business planner and legislative and treasury board analyst with Health Canada where he worked until 2005. While serving with Health Canada, he received the Assistant Deputy Minister's Award for his work in the area of Treasury Board Submissions in 2002. He also completed post-graduate seminars in 2004 in the areas of Clinical Drug Development and Regulation through Tufts University (Boston) and the University of Ottawa, and Current Legal and Ethical Issues for Health Care Providers, Osgoode Hall Law School and the Faculty of Medicine, University of Toronto in 2004. In 2005, he obtained his Certificate in Mediation through the Canada School of Public Service.

He received his M.C.L. and J.C.L. from Saint Paul University in 2002. He was a sessional lecturer for the Sheptytsky Institute at the same university where he taught two courses, one on the monastic canons and another on the marriage canons of *CCEO*. He

was ordained to the diaconate in 2003 and to the priesthood in 2004. Since being ordained to the priesthood, he has taken a leave from the federal government. He is currently pastor of 11 rural parishes in the Ukrainian Catholic Archeparchy of Winnipeg and serves as Defender of the Bond on the Intereparchial Marriage Tribunal. Greg married Melita Mudri in 2000, and they have two daughters, Sofia Rosemary born in 2002, and Helena Maria, born in 2005.