This study paper, prepared by the Evidence Project of the Law Reform Commission of Canada, is circulated for comment and criticism. The proposals do not represent the views of the Commission.

EVIDENCE

12. PROFESSIONAL PRIVILEGES BEFORE THE COURTS

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LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

EVIDENCE

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INTRODUCTION

Legislation regulating wiretapping[1] and recent studies of computers and data banks[2] are evidence of a growing concern over intrusions upon the privacy of Canadians. One cannot help but fear a society in which the State would exercise constant control and supervision over all activity. Thus, there exists the notion of a right to secrecy, a right to which each individual would be entitled which would protect a certain core area of individual privacy.

Perhaps the best known judicial manifestation of this right of secrecy is what jurists call "*privileged communications*". This expression refers to the exceptions to the legal rule which says that all competent witnesses must testify in court. It authorizes these witnesses to not divulge confidences received from someone else. The law gives priority to the respect of confidence over the search for the full and complete discovery of judicial truth. Although professional secrecy is not historically linked to rights of privacy, there nevertheless exists an obvious relationship between them.

The expression "*privileged communications*", is ambiguous. Under Anglo-American common law, it refers to the set of rules governing "privileges". The word "privileged" itself is confusing even though it generally relates to "*exemptions*" from testifying. In the law of evidence, a certain number of "privileges" relate to instances when, in order to promote a professional or personal relationship between two persons, the law grants a right to secrecy before the courts by exempting them from divulging confidential facts. Examples of such are the husband and wife privilege and the attorney-client privilege. Other "privileges" are created in order to protect the individual in one of his fundamental rights. The right not to be compelled to give evidence against oneself, except in specific cases provided by law, is thus known as the "privilege" against self-incrimination. Finally, other "privileges" focus on the protection of state, political or social interests, by preventing the public disclosure of certain information during the course of legal proceedings. Examples of such privileges are the Crown "privilege" (State secret) and the non-disclosure of the names of informers. Protection of journalists' sources also belong to this group.

This looseness in terminology may lead to the confusion of various situations which have but one common characteristic—the general acknowledgement of a right or obligation to silence. Thus, the privilege of journalists, which is not recognized by Canadian courts[3], is often compared by the public to that of the attorney, although

the former does not constitute true "professional privilege" in the classical sense of the word, but rather a right not to divulge a source of information in order to avoid being considered as a public informer. Journalists do not receive confidences in order to provide professional assistance to the persons who confide in them. Furthermore, whereas the identity of the persons who communicate in confidence with attorneys can generally be ascertained but not the content of such communications, the situation is exactly reversed with regard to journalists, since the information is made public, but not the identity of the persons who supplied it.

This study paper will limit itself to examining the first category of previously mentioned "privileges", with the exception, however, of the marital privilege which has already been considered to some extent by the Evidence Project[4].

The right to refuse to testify in court is but one of the legal manifestations that protect professional confidences. The code of ethics of most organized professions impose on members the obligation to respect confidences received by them in their professional capacity. Inappropriate disclosures detrimental to the client are subject to civil and disciplinary sanctions. Yet, under present Canadian federal law, this obligation yields when the confidant is called upon to testify in court. Except in the case of attorneys, no other professional "privilege" is recognized among those which are created for the purpose of promoting a professional relationship. For example, a doctor called as a witness in a judicial proceeding must, in principle, answer all the questions put to him, even though his answers may divulge confidential information confided to him by his patient. The admission of a right of secrecy in relations with the public in general, therefore, is not necessarily tied up with the respect or recognition of this right before a court of justice. The fact that the civil law and medical ethics impose an obligation to silence does not mean that our federal Parliament must automatically sanction it before the courts. The basic philosophies underlying these two levels of recognition are different and can hardly be compared.

The failure to recognize a right to secrecy in court is significant. On the judicial level, precedence is given to a free search for judicial truth, over the respect of confidences. This position is even more important for many professional groups who consider the recognition of a right to secrecy as a symbol of professional status. The granting of a privilege in court enhances the profession's position in society. It emphasizes the importance given to it by the legislator. The issue is therefore important—especially for a certain number of newly formed professions which seek greater recognition of their position in Canadian society.

This document is essentially a document for consideration and reflection. We will begin with a brief reminder of the present state of Canadian law and compare that with other judicial systems. We will then attempt to clarify the principles that underly the recognition of the right of professional secrecy, leading to comments and suggestions on the course that the reform of Canadian law should take in the future.

I. THE PRESENT STATE OF CANADIAN LAW

Canadian federal law follows the tradition of British common law in matters of professional privilege. Only the attorney-client relationship is protected in court. Neither doctors, psychoanalysts, nor religious confidants may claim professional privilege and thereby refuse to give testimony on a pertinent fact in litigation. Various historical reasons are behind this position. We refer the reader to studies made on this subject[5].

However, within the limits of their legislative jurisdiction, certain provinces have extended the protection of professional privilege to other categories of confidants. Thus, Newfoundland recognizes such a right to religious advisers[6]. Quebec gives the most extensive protection. Indeed, the Code of Civil Procedure of Quebec[7] grants a privilege to clergymen, lawyers, notaries, physicians and dentists[8].

The recognition in common law of the lawyer's professional secrecy, to the exclusion of all other professions, is sometimes looked upon by the public as a discriminatory measure, somewhat of a "privilege", advantage or favour which the jurists have granted themselves. Furthermore, the attorney's privilege is sometimes misunderstood by the public which often wrongly believes it to be absolute.

The principle traditionally invoked to justify the recognition of a right to privilege by a specific profession, is the desire to foster a particular type of professional relationship. Wigmore[9] sets four requirements for the establishment of a professional privilege:

(1) The communications must originate in confidence that they will not be disclosed;

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;

(3) The relationship must be one which in the opinion of the community ought to be sedulously fostered; and

(4) The injury that would inure to the relation by the disclosure of a communication must be greater than the benefit thereby gained for the correct disposal of litigation.

If the criteria proposed by Wigmore are applied to the medical profession, and compared with the legal profession, two logical conclusions may be reached: that the medical profession, like the legal profession, meets the set requirements, or,

alternatively, that the legal profession does not fulfill these requirements better than does the medical profession. One could thus conclude that the medical profession should enjoy the same protection as the legal profession or, alternatively, that the legal profession should no longer be entitled to professional privilege. Yet, the legal profession is a special case, distinct from all the other professions because of the very nature of the lawyer's role. A lawyer is not merely a professional among others. In addition to being his client's *alter ego*, he is also an auxiliary of justice and, as such actively participates in its administration. In our present judicial system the lawyer is as indispensable as the judge or jury. To oblige him to reveal in court what his client has revealed to him in all confidence for the purpose of defending his interest, is to interfere with the healthy and equitable administration of justice, irrespective of the effects upon the profession itself and upon its social image.

How is a lawyer to fulfill the role assigned by the judicial system if the existence of the professional relationship to protect the client in the defense of his rights is promoted on the one hand, and, on the other hand, if the disclosures made to him for the very purpose of carrying out such a task may be used against that client? In criminal law, the fundamental right of the accused to a full and complete defence would become illusory if his legal representative could, during the trial, be compelled to testify on the disclosures made to him by his client for the defence of his rights. The abolition of the privilege would transform the lawyer into an informer and since he is only his client's spokesman by way of representation, it would directly infringe upon the fundamental right of a citizen not to incriminate himself and not to be obliged to supply the prosecution with evidence that may be used against him. With respect to civil law, the abolition of the privilege would warrant a complete re-examination of the concept of representation by counsel. As in criminal law, the lawyer plays a representative role in civil trials. The adversary system, in which each litigant conducts his own case, presents his evidence and in which the judge merely acts as a referee, would disappear to make way to a veritable inquisition. In other words, to abolish the privilege of the legal adviser would question not only the lawyer's role, but also the whole fundamental principles governing our present system of administration of justice.

In contrast, the non-recognition of a privilege for the medical profession may have unfortunate effects upon its social image, may be very unfair, even prejudicial to the client's interests, but does not interfere per se with the administration of justice itself.

The lawyer's privilege is not absolute. It is subject to strict limitations, drawn from common law, and which can be summarized as follows:

(1) *The privilege exists only when the holder of this right, namely the client, does not exempt the lawyer from observing it:*

The privilege belongs to the client and not the lawyer. This rule is followed for all other professions in jurisdictions which extend the privilege protection to other than legal counsel. The only exception, in certain cases, is the religious confidant[10].

The privilege is granted to protect the interests of the client and not those of the professional. The client, therefore, controls it, and since it is not of public order, he alone has the opportunity of renouncing that right. The waiver results from an express or tacit act of will by the holder of the privilege, conscious of its existence, which establishes, without any doubt, an intention to renounce it. Numerous examples of these rules can be found in case law[11].

(2) *The privilege is not recognized when the relationship is carried with the aim of facilitating the commission of a crime or the perpetration of a fraud:*

When a person consults a lawyer to obtain information with the intention of committing a crime or offence, the privilege can no longer be recognized. Here, the privilege granted would completely detract from the aim. An English court[12] has held that a lawyer is bound to testify even though he was completely unaware of his client's illegal plans at the time of consultation[13]. There the attorney was obliged to clarify through testimony, certain facts surrounding the drawing up of a fradulent bill of sale. However, *prima facie* evidence of the conditions under which this exceptional rule is applied must be established in order to remove the right to remain silent.

(3) *The privilege may only be claimed for confidential communications made within the framework of the practice of the legal profession:*

Only those verbal or written communications made in confidence by the client for the purpose of obtaining an opinion or professional advice from his legal counsel, are protected. Communications of a non-confidential nature are not subject to the privilege, even though one may rightly presume from prevailing case law that any communication made to a lawyer is, in principle, of a confidential nature and made for the purpose of obtaining legal advice[14].

Secondly, it is no longer necessary, as was the case under the old common law, that the confidence be made with respect to or with a view of litigation[15]. True legal consultation is required, however. Therefore, when the attorney is acting as business adviser, it seems that the information disclosed for the purpose of obtaining such advice cannot benefit from the protection of the privilege[16].

Thirdly, certain cases have decided that protection applied only to the facts revealed by the client and not to those which the attorney established by himself, even though he would not have been able to do so except for the client-attorney relationship.

In our opinion, the logic of this last rule seems weak. Indeed, if the purpose of the privilege is to protect a professional relationship, it seems somewhat pedantic to make a distinction between those facts that are revealed and those that are established. In the exercise of the medical profession, for example, professional advice is the result of the information revealed by the patient as well as the findings of the doctor in his examination of the patient. Furthermore, is it not artificial to

limit the protection of communication to the facts that have been disclosed when the professional relationship itself is the result of a series of exchanges and discussions between the professional and the confidant?

Finally, it is important to note, that the fact that certain communications are privileged does not prevent one of the parties from establishing these facts by other means, by way of extrinsic evidence.

Canadian federal law therefore only recognizes, before the courts, the privilege of legal advisers. However, this right is limited. It is not absolute and can only be claimed by the client when each and all of the conditions set by the case law for its exercise are met. Certain judgements have sometimes suggested that the judge has discretion to grant the protection of the privilege in other cases. Thus, in *Dembie* v. *Dembie*[17], the court maintained a psychiatrist's objection to give testimony in a case of marital dispute. However, we find it difficult to consider that this ruling is a true reflection of the present state of the law.

II. ELEMENTS OF COMPARATIVE LAW

The legal outlook on professional privileges varies greatly from country to country[18]. A detailed examination of the law of the various legal systems would be too lengthy here. However, in order to offer contrast and comparison with Canadian law, we have considered two examples on which brief comments will be made, namely French law because it offers a striking contrast to Canadian law, and American law because it evolved differently from Canadian law in spite of a common legal tradition.

A. FRENCH LAW

French law[19] has traditionally shown great respect for the confidential nature of the disclosures made by a client to a professional. The obligation of professional secrecy is a matter of public order in France. Article 378 of the French Criminal Code[20], which served as an example and model to certain European legislations, such as Belgian[21] and Luxemburg[22] laws, punishes with a prison sentence of 1 to 6 months and a fine of 500 to 3000 francs any person who, having received confidences ". . . by reason of his position or profession or by temporary or permanent function . . . ", divulges such confidences. French law thus imposes an obligation of silence on physicians, surgeons, health officers, midwives, pharmacists, all specifically listed in article 378 of the Criminal Code, and also through judicial interpretation, on lawyers, solicitors, notaries, magistrates, religious advisers, brokers, stock-brokers, etc. . .[23].

The French courts deal severely with those who contravene the rule of absolute respect of confidences. The *Watelet* case[24] is one extreme example of this phenomenon. A French newspaper had inferred, in an article devoted to the death of painter Lepage, that his death had been caused by a venereal disease. In order to defend the public image of his patient, the physician who had treated him subsequently published a letter in the same newspaper explaining that the painter had died from cancer. Tried in criminal court, the physician was convicted pursuant to article 378.

Professional secrecy is therefore absolute under French law. The patient or client does not have the power to exempt the professional from its observation. It is based on public order and sanctioned not only by disciplinary or civil rules but also by penal rules. Traditional French society has always shown great respect for organized

professions and concern for promoting professional relationships. The fact that French criminal procedure is inquisitorial is perhaps another factor which may explain the position of French law. However, as several modern authors have pointed out[25], French law has repeatedly made legislative exceptions to the absolutist character of professional secrecy since the beginning of the XXth century. Some have even maintained that, because of various interpretations in judgements rendered in this respect, French case law is drifting towards an attenuation of professional secrecy based on a standard of relative social interest[26].

The French professional is therefore bound to absolute silence before the courts when the case does not come in one of the exceptions expressly provided for by legislation. Professional secrecy being a matter of public order and its violation constituting a criminal offence, the court is bound ex officio to make up for the lack of objection on the part of the witness. As one can see, French law is diametrically opposed to the common law on this point.

B. AMERICAN LAW

In the United States, the protection of professional privileges before the courts varies greatly from State to State. American law has adopted the rules of English common law in respect to the attorney-client privilege. It clearly separated from the latter, however, by passing legislation extending the privilege to other professions. Thus, most American States recognize medical privilege[27]. The State of New York seems to have been the first to sanction it as early as 1828[28]. A number of state legislations grant protection to religious advisers, others to psychologists, psychoanalysts, etc.[29].

There is no doubt that, American law favours an extension of the law of privileges. The "*Uniform Rules of Evidence*"[30] and the "*Model Code of Evidence*"[31] formally recognize the privilege of religious advisers, legal and medical advisers. More recently, the "*Proposed Federal Rules of Evidence*" suggested a codification of the privilege in favour of lawyers, psychotherapists and religious advisers[32].

In opposition to French law, however, the privilege is not established as an absolute right by the American legal tradition. Its exercise is also subject to a series of conditions and limitations which are similar to those associated with the attorney-client privilege in traditional common law. American law, however, makes a direct connection between the respect of professional secrecy and the respect of privacy.

Whatever the country, the problem raised by professional privileges in court always gives rise to the classic dilemma of the law of evidence. Must precedence be given to the free search and discovery of truth by recognizing few or no exemptions from testifying? Or, must this search be voluntarily restricted in the name of values

considered socially superior? The law of evidence has a number of rules whose aim is to exclude from the judicial debate evidence considered to be irrelevant or untrustworthy. However, as opposed to the other exclusionary rules (hearsay, opinion, etc. . .), the rule concerning privileges has the effect of eliminating evidence that is generally relevant, reliable and often likely to have a decisive impact on the case. Justice is therefore voluntarily depriving itself of quality evidence. The relevance and reliability of such evidence cannot generally be doubted since the disclosure of the confidential facts to the adviser is generally free and spontaneous and is not subject to an extrinsic constraint that could affect the credibility of its content.

III. PROSPECTS OF LEGISLATIVE REFORM

There are several possible legislative policies. The possibilities are extensive and range from the complete abolition of all privileges to the full recognition of legal protection for all confidential relationships; including intermediary solutions giving more importance to the freedom of evidence on the one hand or to the protection of individual rights on the other.

The complete abolition of professional privileges would mean the abolition of the client-attorney privilege under Canadian law. The law would thus break with a time-honoured tradition of common law, by placing all professions on a strictly equal footing and not creating privileges for any particular type of professional relationship. Such a solution seems unrealistic. In addition to making representation by legal counsel[33] and the present form of judicial administration practically impossible, it would eliminate a tradition based on long experience. Also, this solution would be unique in the western legal tradition, except perhaps under socialist regimes. To abolish the privilege of legal advisers would require the re-examination and total reformulation of the attorney's role in society.

At the other extreme, the legislator could consider "*deprofessionalization*" of the right of secrecy and protect confidences each time the person who confided reasonably expected confidentiality. In other words, the recognition of the privilege would no longer be necessarily connected with a professional relationship as such. In this perspective, the right to secrecy would apply to a much wider range of human relationships. It would no longer be theoretically based on the desire to promote a particular professional relationship, but on the intention to better respect a certain right to privacy. Protection would not relate to an objective typology of human relations (doctor-patient, attorney-client, etc. . . .) but to the confidential nature of the communication as subjectively perceived by the person who confided. This solution is attractive for several reasons. From the judicial viewpoint, the third classical criterion set forth by Wigmore[34] would not have to be applied, thus avoiding to make a value judgment on the social usefulness of a particular profession or of a particular type of confidence in relation to others. It would thus eliminate a selection based on a social perception of professions.

There are, however, two major obstacles to this solution. The first relates to the practical difficulties the application of this system would raise for the courts. Indeed, how are they to determine what is perceived as confidential by the person who confides? In a sense, at the extreme, everything could thus become

confidential. Whereas the existence of certain types of professional relationships at least allows the court to presume that the disclosure was made to the confidant with the reasonable expectation that the secret would be kept, total "deprofessionalization" of the right to secrecy eliminates this criterion and leaves the judge with vague and imprecise guidelines.

The second obstacle seems more significant. If everything revealed within the framework of a private relationship were to be considered as confidential, would this not constitute a serious obstruction of the administration of justice? Voluntary exclusion of relevant and reliable evidence likely to have a positive impact on the dispute is justified only when, in the long term, it serves to protect the interest of society more than the immediate discovery of the judicial truth. The general protection of privacy, aside from all other considerations, does not appear to be a determining factor considering the difficulties it would raise with respect to the administration of justice. In other words, not all confidential relationships should be protected before the courts but only those for which over and above the general motive of protection of privacy there exists specific imperatives.

A reasonable and rational solution cannot afford to be radical. It must take into account existing values and strive to reach a realistic and harmonious compromise between the respect of individual rights on the one hand, and the efficiency of the administration of justice on the other.

With the extreme solutions eliminated, two main avenues of reform appear possible. Based on the classical criteria of privilege recognition[35], the first consists of trying to identify, in the light of modern-day society, those professional activities deserving protection before the courts and to confer to them and to them only a privilege identical to that enjoyed by the legal profession.

The second solution, after legislative sanction of the rules developed for the attorney's privilege, would be to give the judge a discretionary power to recognize a privilege in other circumstances, without necessarily identifying them with a specific type of professional relationship, whenever he deems that a certain number of objective conditions have been met. In the hope of receiving comments we will discuss both of these approaches here.

A. RATIFICATION OF PRIVILEGE FOR OTHER PROFESSIONS

If one considers both the Canadian professional milieu, its development during the last few years, and the reasons used to justify the granting of a privilege to certain groups, at least two types of confidences reasonably warrant protection in court, namely confidences of a religious nature and confidences of a medical nature. Those follow from Wigmore's classical criteria.

Even authors who fiercely object to the extension of privileges support its recognition for religious confidences[36]. Wigmore, who favours no professional relationship other than that of attorney, concludes, after abundantly citing Bentham who himself is little inclined to favour the right to privileges, that:

> . . . on the whole then, this privilege has adequate grounds for recognition.[37]

Indeed, it appears to him that the relationship between the religious adviser and the individual who consults him meets the requirements of the four criteria. His main argument is that the prejudice that a forced disclosure could cause is more damaging than the benefit that the administration of justice can hope to derive from it.

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.

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[38]. 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 of new sects, associations, groups or movements of religious or supposedly religious character would no doubt create problems of precise identification of religious confidences.

The problem is more complex with respect to the medical profession[39]. In the first place, medicine is no longer the exclusive domain of physicians. Psychologists and psychoanalysts sometimes exercise functions similar to those of psychiatrists. Chiropractors and kinesitherapists treat the same physical ailments as members of the medical profession.

Secondly, the practice of modern medicine in large urban centres and the specialization of the medical profession have resulted in a certain depersonalizing of the patient-doctor relationship. The case of the family doctor who knew all the secrets of the town in which he practiced is almost a thing of the past.

Thirdly, in contrast to certain European countries, Canadians seem less reluctant to a limited public disclosure of their illnesses. Modern methods of communication inform us of the state of health of public figures, sports or theatre stars, without outrageous reactions from those concerned. From the social-cultural standpoint, there seems to be a certain degree of tolerance towards the public disclosure of certain medical facts. Illness is not generally perceived as a social stigma except when by its very nature it is likely to expose the patient to humiliation, disgrace or social ostracism. Such is not the case, however, in certain areas of medicine, especially in those dealing with mental and emotional health. The progress of techniques of the psychoanalytical sciences in our society are important[40]. One cannot seriously contest that the treatment of emotional and mental illnesses requires the establishment of an absolute atmosphere of confidence between the patient and the psychotherapist. The patient, who wishes to solve his problems by seeking cure or relief, must confide in all honesty and without reticence in the person who is treating him. Therapy would be thwarted if the patient did not believe from the very beginning that his disclosures would remain confidential. The patient would surely deem it grossly unfair if his psychotherapist were to be compelled to testify on confidential matters during legal proceedings. One can also conceive the dilemma faced by professionals under the present law.

One argument often advanced against the extension of the privilege is the fact that many professions which have not yet benefited from the right to secrecy have nevertheless developed and expanded. In other words, it is argued that the absence of privilege recognition in the case of psychotherapy has not stopped Canadians from consulting psychiatrists, psychologists and psychoanalysts. This argument, developed by Wigmore, is specious. It is suggested that the reason why a citizen continues to consult a psychotherapist, even when he knows that his confidential disclosures may eventually be divulged in a court of justice, are twofold. He is simply unaware of the state of the law on the matter or the need for consultation is pressing and stronger than the risk he is taking and he is thus simply forced to choose the lesser of two evils. Furthermore, in many cases, patients do consider public disclosure as a remote possibility. Some patients may also feel that the professionals would prefer to respect the confidence and would be ready to accept possible conviction for refusing to testify.

On the other hand, an important sociological factor must also be considered. The Canadian judicial system has built in enough self-restraint to avoid blunt confrontations in this regard. Present Canadian law does not prevent the police from allowing a Catholic suspect to confess to a priest and then summoning the latter as a witness! [41] Crown prosecutors do not resort to such methods and therefore, even

though no other privilege than that of the attorney is recognized, they seldom take advantage of the powers given to them by law, to summon confidants as witnesses. When this happens, however, as has sometimes been the case with social workers, the public reaction is vigorous and respect for justice in the eyes of the public is probably not enhanced. It should be noted that the exact role of certain social workers, such as probation officers, is somewhat confusing. Indeed, probation officers are not necessarily confidants but rather officers of the court who replace the judge in supervising the execution of the sentence.

These few observations lead to a question of a more general nature. Is it legitimate and fair, in our present society, to use the physical, mental or emotional state of a person as evidence against that person? Is it not somewhat inconsistent for society, which sees to the physical and mental well-being of all citizens by encouraging access to various therapies, to use against them the confidences made in seeking such well-being? Save the case of expert testimony and the case where, the individual having been found guilty, these facts are necessary to arrive at a fair and just sentence, is it not abnormal for justice to use physicians and psychotherapists in the same way as a common police informer?

However, the recognition of a professional privilege to the medical profession raises difficulties inherent with the very nature of that profession.

Should the law make a distinction between physical ailments and those of a mental or emotional nature? In our opinion, it is accurate to believe that confidentiality is, at the outset, more important in certain areas of medicine than others, for example, in psychiatry more than in surgery. In the first case, the professional called to testify divulges private information freely revealed to him by his patient, whereas in the second case, the surgeon may be called to testify only on material facts which he has established himself and which are often of a less personal nature. The issue could be discussed at length, for there are numerous secondary hypotheses. Indeed, certain facts disclosed by a patient to a psychiatrist could be matters of common knowledge, whereas certain other facts confided by a patient to a surgeon could be strictly confidential. Several models of legislation, especially the "*Proposed Federal Rules of Evidence*", recognize the privilege of psychotherapists but not that of physicians in general[42]. The main difficulty raised by this limitation is the impossibility that very often exists of distinguishing the physical ailment from the mental one.

As in the case of all the other categories of confidants, the recognition of a privilege in this matter should be subject to strict limitations. All legislation provide exceptions to the rule, dictated by higher legal or social considerations, even those which, like French law, sanctions the absolute character of the privilege[43]. Thus, disclosures made by a patient to a doctor for the purpose of perpetrating a crime, fraud or offence, should not be protected. Such is the classical case of fraud or false statements in matters of life insurance. Furthermore, the law should sometimes compel a physician to depart from his obligation to keep silent when this is required

by the superior interest of society or of the group, even when the patient objects. Such is the case when a patient suffering from a contagious or a venereal disease refuses treatment, thus creating the risk of an epidemic[44], or when a patient suffers from an illness which makes driving a car a hazard to others.

The recognition of privilege does not mean absolute protection for all confidences, in all cases and under all circumstances. It would be advisable for the legislator to list the specific limitations of the privilege and to waive it when its application stands to create serious public danger, or threatens the life or security of individuals. This matter raises the difficult legal question of determining whether or not the right to the privilege is personal and extra-patrimonial. In other words, when the holder of the right dies or becomes incapable, should the privilege disappear or should the holder's heirs or legal representatives be allowed to continue to claim it? Opinions are divided on this question. The solution to this problem must take into consideration the interests at stake. Thus, in the case of medical privilege the health and general well-being of the patient are involved. There should therefore be no basic objection to the disappearance of the privilege after the patient's death. However, the client-attorney relationship can involve patrimonial rights as well as material and financial interests which are likely to be transmitted to the heirs. It would seem logical in this case to maintain the privilege and to allow those who are continuing the deceased's judicial personality to benefit from it.

B. RECOGNITION OF A DISCRETIONARY JUDICIAL POWER

There are a number of professions in Canada today, such as the accounting profession, which could also legitimately ask for the recognition of judicial protection of confidences[45]. However, the most typical example in this regard is perhaps that of social workers[46]. Some of them argue with reason, that the efficient exercise of their profession requires the promotion of a relationship based on mutual trust. Furthermore, there are certain cases where social workers carry out functions similar to those of psychotherapists (e.g., those working in prison environments in connection with the social or psychological re-adaptation of inmates).

In order to promote the exercise and development of certain professions deemed socially useful, and in order not to limit the obligation to silence to religious, legal and medical advisers, it is possible to conceive a more flexible system which would allow the judge to refuse to accept relevant evidence that results from a breach of confidence, when specific conditions are met and without the law establishing a specific list of privileged professional communications. The granting of a privilege in cases other than the legal profession would therefore be left to the court's discretion. Irrespective of its intrinsic merits, this system could only function rationally if the court were provided with guidelines. Firstly, the principle according to which the privilege protects the person confiding, and not the confidant,

should be maintained. Secondly, the privilege should only apply to the facts revealed to the confidant for the purpose of obtaining professional assistance. In other words, not all confidences must be protected, but only those disclosed for the very purpose of obtaining physical or moral assistance or guidance. A true professional relationship, established for the purpose of consultation, must exist. Finally, in addition to the classic exceptions involving the attorney-client privilege, the court before granting the privilege, should be convinced that, under the circumstances, disclosure would be more prejudicial than helpful to the administration of justice. In this respect, the burden of proof would thus rest on the person invoking the privilege.

This second solution has two main advantages. It eliminates having to decide, perhaps arbitrarily, on the comparative "merits" of the various professions, and it is sufficiently flexible to be considered as a long term reform. By not focusing on the existence of a particular professional relationship but rather by insisting on the values to be preserved the law would not limit the protection of privileges to a specific segment of society. Moreover, no single profession can be said to enjoy an absolute presumption as guardian of the values that the right to secrecy is made to sanction and protect. It would be up to future courts to establish a judicial policy in this regard. Some may object to this general solution on the grounds that the courts of common law countries have had a very conservative attitude towards privileges and that there would thus be a risk of missing the aims of a reform directed to an extension of privileges. A clear legislative drafting showing clearly the intentions of the reform would probably be sufficient to overcome this difficulty.

The various solutions presented in this paper will undoubtedly give rise to comments. The law could be formulated on the basis of the following rules:

(1) The legislative recognition of the attorney-client privilege, of its conditions and limitations;

(2) The granting of discretionary power to the courts in all other cases, when the courts believe that it would be unfair and inequitable to compel a witness to testify as to facts confided in him in the exercise of his profession and for the purpose of obtaining professional assistance, and that the prejudice caused by disclosure would be greater than the benefit which the administration of justice might derive from it.

Furthermore, in any case, whatever the scope of privileged recognition, it would be advisable, in our opinion, to specifically outline in the legislation the framework of the law of privileges and to express the following principles:

(1) The protection privileges relate, without exception, to all the confidential facts revealed or observed during the professional relationship;

(2) The privilege belongs under all circumstances to the person who confides. The latter can renounce or waive his right provided he does so voluntarily, being aware of the consequences; and

(3) The protection disappears in the case of fraud or where an exception to the general rule is specifically provided by legislation, for reasons of public interest.

REFERENCES

1. Art. 178 of the Criminal Code.
2. L'ordinateur et la vie privée, Ottawa, 1972.
3. See *Wismer Publishing* v. *MacLean Hunter Publications Ltd.* (1953) 4 D.L.R. 349 (Supreme Court of British Columbia), (1954) 1 D.L.R. 501, (1954) 4 D.L.R. 334 (Court of Appeal of British Columbia); *McCornacky* v. *Times Publishers Ltd.* (1964) 50 W.W.R. 389 (Court of Appeal of British Columbia). See also *Banks* v. *Globe and Mail* [1961] S.C.R. 874.
4. See "Study Paper of the Evidence Project", no. 1: Competence and Compellability. In the light of numerous comments received, the Evidence Task Force has somewhat changed its position on the matter.
5. See, especially: WIGMORE, "Evidence in Trials at Common Law" 1961, vol. 8, no. 2285 and ff., p. 527 and ff., and especially no. 2290, p. 542 and ff., no. 2380, p. 818 and ff.; CROSS, "Evidence" 1967, p. 243 and ff.; McCORMICK, "Evidence" (1960) 16 Tex. Law Rev. 447; HAMMELMAN, "Professional Privilege: a Comparative Study (1950) 28 C.B.R. 750; FREEDMAN, "Medical Privilege" (1954) 32 C.B.R. 1; NOKES, "Introduction to Evidence" 1967, p. 195 and ff.
6. Newfoundland Evidence Act, R.S. Nf. 1952, ch. 120, art. 6: "A clergyman or priest shall not be compellable to give evidence as to any confession made to him in his professional character".
7. Art. 308, C.C.P.: "Similarly, the following persons cannot be obliged to divulge what has been revealed to them confidentially by reason of their status or profession:
   1 – Priests or other ministers of religion;
   2 – Advocates, notaries, physicians and dentists; unless, in all cases, they are expressly or implicitly authorized by those who confided in them; . . . "
8. A Quebec judgment in 1965: *La Reine v. Sauvé* [1965] C.S. 129, comments (1965) 15 R. du B. 562, had nevertheless held that, with respect to criminal justice, the courts must refer to civil law and not common law in matters of professional privileges.
9. WIGMORE, *op. cit.*, no. 2285, p. 527.
10. This seems to be the interpretation to be given to article 308 of the Code of Civil Procedure of Quebec.
11. See *Howley* v. *R.* (1927) 1 S.C.R. 520; *Minter* v. *Priest* [1930] A.C. 558; *Smith* v. *Smith* [1958] O.W.N. 135 (Ontario High Court). Also: *Kulchan* v. *Marsh* (1950) 1 W.N.R. 272 (Saskatchewan Court of Appeal).
12. *R.* v. *Cox and Railton* (1884) 14 Q.B.D. 153.
13. On the application of these principles: *Bullivant* v. *A.G. Victoria* [1901] A.C. 196; *Gosselin* v. *R.* (1903) 31 S.C.R. 225; *R.* v. *Smith* (1914) 11 Cr. Ap. R. 229, p. 239 (Court of Criminal Appeal); *O'Rourke* v. *Darbishire* (1920) A.C. 581 (House of Lords); *R.* v. *Coffin* (1954) 19 C.R. 222, p. 227 (Quebec Court of Appeal); *R.* v. *Workman and Huculak* (1963) 1 C.C.C. 297 (Supreme Court of Alberta); *Goodman and Carr and M. of N. Revenue* (1968) 2 O.R. 814 (Ontario High Court).

14. *Minter* v. *Priest* [1930] A.C. 558 (House of Lords); See also *Hicks* v. *Rothermel* (1949) 2 W.W.R. 705 (Saskatchewan Court of Appeal); *Kulchar* v. *Marsh* (1950) 1 W.W.E. 272 (Saskatchewan Court of Appeal). Also *R.* v. *Bencardino* (1974) 2 O.R. 2nd 351.

15. On this subject see: *Minet* v. *Morgan* (1873) 8 Ch. App. 361 and the position adopted by the Royal Commission of Inquiry into Civil Rights of the Province of Ontario, Toronto, 1968, no. 1, vol. 2, p. 819.

16. *Canary* v. *Vested Estates* (1930) 3 D.L.R. 989 (Supreme Court of British Columbia), see also: *R.* v. *Macender* (1966) 1 C.C.C. 328, p. 338; *United States of America* v. *Mammoth Oil Co.* (1921) 2 D.L.R. 966 (Ontario Court of Appeal); MAUBER, "Privileged Communications and the Corporate Counsel" (1967) 28 Ala. Law Rev. 352.

17. Un-reported judgment of the Ontario High Court of April 6, 1963. See excerpts published in (1964) 7 Crim. Law Quart. 305, p. 316.

18. See: "Droit de la preuve et secret professionnel" in Travaux du 4ième Colloque international de droit comparé, Presses de l'Université d'Ottawa, 1967, p. 1 to 54; BOUZAT, "La protection juridique du secret professionnel en droit comparé" (1950) Rev. Sc. Crim. 541; HAMMELMAN, "Professional Privilege: a Comparative Study" (1950) 28 C.B.R. 750; BAUDOUIN, J.L., "Secret professionnel et droit au secret dans le droit de la preuve", Paris, Librairie Générale, 1965.

19. With respect to this matter under French law, in addition to the classical treatises on criminal law, see: Encyclopédie Dalloz, Droit Pénal, Tome III, verbo: Secret Professionnel; Jurisclasseur de droit pénal, verbo: Violation du secret professionnel; PERRAUD-CHARMANTIER, "Le secret professionnel, ses limites, ses abus", Paris, Librairie Générale, 1926; LEGENDRI, R., "Secret médical et monde contemporain", Paris, Foulon, 1955.

20. Art. 378 of the French Criminal Code: (translation) "Save the cases where the law compels them to act as informers, the physicians, surgeons and other health officers, as well as pharmacists, midwives and all other persons receiving confidences by reason of their status or profession or by reason of temporary or permanent function, who divulge such confidences, shall be punished with imprisonment of one month to six months and a fine of 500 francs to 3000 francs. However, the above-mentioned persons, without being bound to inform on abortions which they deem to be criminal and of which they became aware in the exercise of their profession, do not incur the penalties provided in the preceding paragraph if they do inform on such abortions; when summoned to testify in court in a case of abortion, they are free to testify without making themselves liable to any penalty. These persons do not incur the penalties provided in the first paragraph when they inform the medical or administrative authorities in charge of health and social proceedings of deprivation or cruelty inflicted upon minors under fifteen years of age, of which they became aware in the exercise of their profession. When summoned to testify in court in a case of ill-treatment or deprivation of such minors, they are free to testify without rendering themselves liable to any penalty".

21. Art. 458 of the Belgian Criminal Code.

22. Art. 458 of the Luxemburg Criminal Code.

23. In this respect, see: LEGEAIS, "La violation du secret professionnel" in Jurisclasseur de droit pénal, art. 378, no. 21 and ff.

24. Cass. Crim. 19-12-1885, D.P. 86-1-86.

25. See especially: LEGEAIS, *op. cit.* no. 17; ALMAZAC, R., "Les seules exceptions au principe du secret professionnel" Gaz. Pal. 1971 1. Doct. 113, REBOUL, "Cas limite du secret professionnel médical" J.C.P. 1950, Doct. 825.

26. See GULPHE, "Le secret professionnel en droit français", Rapport au Congrès de l'Association Henri Capitant, Beyrouth, 1974. Also LEGEAIS, *op. cit.* no. 17.

27. WIGMORE, *op. cit.* no. 2380, p. 818 and ff.

28. N.Y. Rev. Stat. (1828) ch. 7, art. 9, sec. 73.

29. WIGMORE, op. cit., no. 2286, p. 533, no. 2394, p. 869 and ff. See also the authors cited note 40.

30. Arts. 26, 27, 29 and 37.

31. Arts. 209, 213, 219, 220 to 223.

32. Art. V. Rules, 503, 504, 506. These rules have, however, been strongly criticized. See especially: KRATTENMAKER, "Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence" (1973) 62 Georgetown Law J. 61; ROTHSTEIN, "The Proposed Amendments to the Federal Rules of Evidence" (1973) 62 Georgetown Law J. 125.

33. See *supra.*

34. See *supra.*

35. See *supra.*

36. In this respect, see, among other works, NOKES, "Professional Privilege" (1950) 66 Law Q. Rev. 88; LABONTE, "Le secret de la confession devant les tribunaux", Ph.D. Thesis, University of Montreal, 1958; "Note on Privileged Communications to Clergymen" (1955) 1 Cath. Law Rev. 200; LYON, "Privileged Communications, Penitent and Priest" (1964) 7 Crim. Law Q. 327.

37. WIGMORE, *op. cit.*, no. 2396, p. 878.

38. See NOKES, *op. cit.*, p. 98 and ff.

39. With respect to medical profession, see, among other, DE WITT, "Privileged Communications between Physician and Patient", Springfield Thomas, 1958; FREEMAN, "Medical Privilege" (1954) 32 C.B.R. 1; BALDWIN, "Confidentiality between Physician and Patient" (1962) 22 Mod. Law Rev. 181; BROCK, "Medical Privileges" (1967) 36 Man. B. News 122; BAUDOUIN, J.L. "Le secret professionnel du médecin, son contenu, ses limites" (1963) 41 C.B.R. 491.

40. With respect to psychotherapists, see, among other, GUTTMACKER and WEIKOFEN, "Privileged Communications between Psychiatrist and Patient" (1952) 28 Ind. Law J. 32; SLOVENKO, "Psychiatry and a Second Look at the Medical Privilege" (1960) 6 Wayne L. Rev. 175; "Psychotherapy, Confidentiality and Privileged Communication", Springfield Thomas, 1965. FISHER, "The Psychotherapeutic Professions and the Law of Privileged Communications" (1964) 10 Wayne L. Rev. 609; LOUISELL and SINCLAIR, "Reflection and the Law of Privileged Communications: The Psychotherapist-Patient Privilege in Perspective" (1971) 59 Cal. Law Rev. 30; MALONEY, "Psychiatrist-Patient Communications in Canadian Courts" (1971) Mod. Med. 9; KENNEDY, "The Psychotherapist Privilege" (1971) 12 Wash. Law J. 296.

41. LYON, "Privileged Communications between Penitent and Priest" (1964) 7 Crim. Law Q. 327, p. 328.

42. Proposed Federal Rules of Evidence, art. V, rule 504.

43. See *supra*, works cited notes 19, 25 and 26 and LARGUIER, "Certificats médicaux et secret professionnel", Paris, Daloz, 1963.

44. This case is provided by Quebec legislation, "*Public Health Act*" R.S.Q., 1964, ch. 161, art. 70; "*Venereal Diseases Act*" R.S.Q., 1964, ch. 168, art. 3, 4, 12. See also "*Ontario Venereal Diseases Prevention Act*" R.S.O., 1960, ch. 415.

45. See "Privileged Communications: Accountants and Accounting" (1968) 66 Mich. L. Rev. 1264.

46. In this respect, see, KIRKPATRICK, "Privileged Communications in the Correction Services" (1964) 7 Crim. Law Quart. 305; BARNETT, and GRONEWOLD, "Confidentiality of the Presentence Report" (1962) 26 Fed. Prob. 26; "The Social Worker-Client Relationship and Privileged Communications (1955) Wash. U. Law Q. 362; LEBLANC, P., "Privileged Communications and the Counsellor" (1972) 7 McGill J. of Education 11.