Sexual Abuse By a Member of a Religious Organization: Obligations and Preventive Measures

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Introduction

Recent allegations of sexual abuse of children by religious advisors have led religious leaders of all denominations to ask themselves what preventive and protective measures can be taken to limit the risk of a complaint of sexual abuse being made.

This paper is not written from the perspective of the abused victim. It is intended to provide a general overview of the conflicting obligations owed by the religious organization, both to the accused member and to the congregation/victim and to suggest guidelines which should be adopted by the religious organization to prevent the abuse from occurring and, in the event that the abuse does occur, to try to limit the religious organization's legal liability for that abuse. Nothing in this paper should be viewed as an attempt to trivialize the damage suffered by the victims nor to condone or otherwise cover up abuse.

Duty of Confidentiality/Religious Communications Privilege

Example: An employee of a religious organization tells his religious advisor that he has sexually abused a parishioner. The employee is subsequently criminally charged and the religious advisor is asked to testify about the conversation at the trial.

Problem: Should the religious advisor inform the authorities of his conversation with the employee? Does it make a difference who the victim is? Should the religious advisor agree to testify? Can the advisor be forced to testify?

These questions all revolve around the complex issue of whether religious communications are privileged and whether the religious organization has a positive duty to keep those communications confidential.

I. *Duty of Confidentiality and Privilege Generally*

A privilege recognized by law confers the right to maintain confidentiality and withhold relevant evidence from the judicial process. Privilege requires as its essential condition that there be a public interest recognized as overriding the

general principle that all relevant evidence is admissible and that in a court of justice every person and every fact must be available for the execution of the court's supreme functions.[2]

The communications may be subject to a "blanket" or a "prima facie" or a "class" privilege, in which case (once it has been established that the relationship fits within the class) there is a prima facie presumption that the communications are inadmissible—unless the party urging admission shows why the communications should not be privileged. Or, the communications may be subject to a "case-by-case" privilege, in which case there is a prima facie assumption that the communications are *not* privileged and are therefore admissible unless the party urging the exclusion shows why the communications should be privileged.[3]

The case-by-case analysis generally involves the application of the test derived from Professor Wigmore[4] which was endorsed by the Supreme Court of Canada in *Slavutych* v. *Baker*.[5] The test sets out the following criteria to be applied by a court in determining whether a communication should be privileged and thus excluded from evidence:

(a) the communications must originate in *confidence* that they will not be disclosed;

(b) this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;

(c) the *relation* must be one which, in the opinion of the community, ought to be sedulously *fostered*; and

(d) the *injury* that would enure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

It was not until 1991, in the case of *Gruenke* v. *The Queen*,[6] that the Supreme Court of Canada specifically addressed the question of whether religious communications were prima facie privileged (either at common law or as a result of the application of the *Canadian Charter of Rights and Freedoms*[7]) or whether religious communications were simply to be subject to a case-by-case privilege.

The type of privilege accorded religious communications was of particular importance to many religious organizations because religious confidentiality was viewed as being vital to the exercise of an individual's freedom of religion and conscience as guaranteed by the *Charter*.

II. *The Supreme Court of Canada's Decision in* Gruenke *v.* The Queen

Gruenke v. *The Queen* involved the question of admissibility of evidence given by a pastor and a lay counsellor of a fundamentalist Christian church regarding communications made to them by Ms Gruenke about her involvement in a crime. According to the Crown, Ms Gruenke had enlisted the aid of her boy friend in planning and carrying out a murder which she committed not only to stop the victim's sexual harassment of her but to benefit from the provisions of his will. Upon hearing of the death, the lay counsellor visited Ms Gruenke who began speaking of her involvement. The pastor was then called and conversation continued. At trial, defence counsel sought to have the testimony of both the pastor and the layperson excluded on the grounds that it was inadmissible privileged communication both under the common law and section 2(a) of the *Charter*. The motion was denied and Ms Gruenke was subsequently convicted of first degree murder. Her appeal to the Court of Appeal was similarly dismissed.

The Supreme Court of Canada found that it could not be said that the policy reasons to support a prima facie privilege for religious communications were as compelling as the policy reasons which underlay the prima facie privilege for solicitor-client communications. As a result, the Court found that there was no basis for departing from the fundamental "first principle' that all relevant evidence is admissible in court until proven otherwise.

The Court held that religious communications were subject to a case-by-case privilege and that the extent, if any, to which disclosure of communications will infringe on an individual's freedom of religion will depend on the particular circumstances involved.

The Court also held that it was absolutely crucial that the communications originate with the expectation of confidentiality. While the lack of formal practice of "confession" was not determinative of the issue of confidentiality, such a formal practice may be a strong indication that the parties expect the communication to be confidential. The fact that the communications were not made to an ordained priest or minister was also not a bar to the possibility of the communications being excluded.

In this case, the communications were found not to be the subject of religious communication privilege as they were neither given nor received in the expectation of confidentiality.

III. *Statutory Duty of Confidentiality*

Two Canadian provinces have legislated a limited statutory privilege with respect to religious communications.

Section 9 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 (history : c. C-25, s.275 amend. 1972, c.17, s.14) provides:

> 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.

Section 6 of Newfoundland's *Evidence Act*, R.S.N. 1970, c. 115 provides:

> [a] clergyman or priest shall not be compellable to give evidence as to any confession made to him in his professional character.

All 50 of the United States of America have also legislated privilege with respect to religious communications.[8]

IV. *Statutory Abrogation of Duty of Confidentiality – Duty to Report*

Legislatures may expressly override the duty of confidentiality; however, a statutory provision will be found to have abrogated entitlement to privilege only if such an interpretation is required by clear and unambiguous terms. Furthermore, any statutory provision requiring disclosure of otherwise privileged religious communication should be construed so as to limit the disclosure to what is strictly required by the legislation.[9]

When dealing with the abuse of a child, whether sexual or otherwise, the legislatures have expressly abrogated any duty of confidentiality and have, in addition, imposed a positive duty to report the abuse to the appropriate authorities.[10]

For example, in British Columbia, section 7 of the *Family and Child Service Act*, S.B.C. 1980, c.11, provides:

> (1) a person who has reasonable grounds to believe that a child is in need of protection shall forthwith report the circumstances to the Superintendent or to a person designated by the Superintendent to receive such reports.
>
> (2) the duty under subsection (1) overrides the claim of confidentiality or privilege by a person following any occupation or profession, except a claim founded on a solicitor and client relationship.
>
> (3) no action lies against the person making a report under this section unless he makes it maliciously or without reasonable grounds for his belief.
>
> (4) a person who contravenes subsection (1) commits an offence.

A child "in need of protection" includes a child who is abused.

Clearly, if a confider shows a pattern of continued abuse or implies that he or she intends to abuse a child in the future, there are reasonable grounds to believe that the child is in need of protection and the religious organization will be statutorily obliged to report. In such cases, however, the religious organization should be careful to disclose only what it is required to disclose under the legislation.

In cases where a confider is "confessing" past abuse or the religious advisor only has a suspicion of abuse, the obligation to report is more difficult to determine as it will depend on whether it is "reasonable" to believe that the child is in need of protection. While a consideration of the reasonableness of the belief should be made without regard to the duty of confidentiality, it is likely that this conflicting duty will be a subconscious factor. Any hesitation to report on the grounds of religious communication privilege should not be taken as condoning the criminal act of child abuse nor should the religious organization be perceived as protecting abusers. The religious organization is the unenviable position of having to balance two conflicting duties.

V. *Factors to be Considered When Applying the Wigmore Test as it Relates to Religious Communications*

The following factors have been considered by the courts in determining whether a religious communication is privileged:

a) Is there a practice of confidentiality by the religious organization?

b) Was there an expectation of confidentiality by the confider?

c) Was the communication required in the course of a discipline or practice of the religious organization?

d) Is there evidence that the confider is, or ever was, a member of that religious organization or that he or she has any religious practices or beliefs?

e) Does the communication involve some aspect of religious belief, worship or practice?

f) Is the religious aspect the dominant feature or purpose of the communication?

g) Would the communication have been called into being without the religious aspect?[11]

VI. *Documentary Privilege*

The Supreme Court of Canada has laid down the principle that places of worship should be approached with greater care and sensitivity in the case of authorized searches than ordinary premises need be and that the authorization

to search these places should generally be granted only with reticence and, where necessary, with more conditions attached than searches of other places.[12]

Each document seized from a religious organization's premises must be considered on a case-by-case basis to determine whether it will be exempt from disclosure on the grounds of privilege.[13]

It is recommended that the claim for privilege be made at the time of the search and that the documents be sealed following seizure to preserve the status quo until such time as the question of a confidential religious communication privilege can be determined.

VII. *Conclusion*

The confidentiality of religious communications is important to the long-term maintenance of religious organizations. Disclosure of confidential communications could destroy continuing counselling relationships and could deter members from seeking counselling or from trusting their religious advisors sufficiently for effective ministration. Without the requirement of confidentiality, there would be a lessening of the trust that a congregation has in its religious advisor which could arguably constitute an infringement of fundamental religious freedom by interfering with central aspects of the religious practice of the organization.

Upon consideration of their religious doctrines it is likely that most religious organizations will decide that they owe some duty to their members to keep religious communications confidential.[14] As a result, they should be hesitant to report religious communications with their members unless they are expressly required to do so by statute or court order or unless their members have waived the privilege and permitted the disclosure. Disclosure of confidential information by a religious organization in the absence of the member's consent may result in an action being commenced against the religious organization for "breach of confidence".[15]

Religious organizations should review their doctrines having regard to the question of confidentiality of religious communications. They should thereafter clearly communicate their position to their members. If they support the concept of a privilege, they should also ensure that they have clear guidelines on how to deal with requests to breach that confidentiality.

Liability of Religious Organization to Parishioners

Example: An employee of a religious organization is accused of sexually abusing a child at the parish school. Criminal charges against the

employee are dismissed. A civil action is subsequently commenced against the employee and the religious organization.

Problem: Is the religious organization liable for the actions of its employee? What duties does the religious organization owe to its parishioners? Does the fact that the criminal charges were dismissed preclude a civil suit?

Civil court actions for monetary damages suffered as a result of past sexual abuse are becoming more prevalent.[16] Religious organizations with "deep pockets" will be particularly vulnerable to such actions in the future. Religious organizations can minimize their exposure by recognizing their obligations and taking certain protective measures. As discussed below, the first protective measure which should be immediately adopted is to formulate a clear policy prohibiting any form of sexual abuse.

There are in general three main causes of action against religious organizations and the accused employees: intentional torts (such as assault, battery and intentional infliction of emotional harm), negligence (including vicarious liability of the religious organization for the actions of its employee), and breach of fiduciary duty.

I. *Intentional Torts*

If the accused employee is found not liable to the victim as a result of the alleged wrongdoing, then the religious organization will in most cases also not be liable to the victim.

As a result, the first line of defence for the religious organization will be to examine the facts and consider whether it is possible to deny that an "assault" took place.

The primary defence in sexual assault cases is consent of the victim. In order to succeed, the "victim" must have both legally consented and had the capacity to consent. The Supreme Court of Canada has held that whether there has been legally effective consent to a sexual assault in situations where there is a power/dependency relationship (arguably such as the relationship between a religious advisor and a parishioner or a teacher and a student) involves a consideration of whether there is (1) an inequality of the parties and (2) an exploitation of same. Consent is a function of individual autonomy and free will and may not be considered legally effective if it can be established that there is a disparity in the relative positions of power of the parties such that the weaker party was not in a position to choose freely.[17] The fact that criminal charges were dismissed against the accused employee does not preclude a civil action. In a criminal action, the burden of proof is on the Crown which must establish "beyond a reasonable doubt" that the accused committed the assault.

In civil actions, on the other hand, the plaintiff has only to prove "on the balance of probabilities" that the defendant committed the assault.

II. *Vicarious Liability and Agency Principles*

Assuming that there is no denying that the assault took place, the next issue is whether the religious organization is vicariously liable for the intentional or negligent action of its employee.

If the tortious act was performed while the employee of the religious organization was acting within the course of his or her employment, that is while the employee was engaged on the employer's business and was performing either duties falling within the scope of this authority which he or she was employed to perform or functions which were at least incidental to the employment, the employer will be liable for the negligent or wilful act of the employee. Generally in such cases, whether the act was performed within the course of the employment will depend on whether the act in some way was intended to facilitate or promote the business for which the employee is employed. On the other hand, if the act is committed not by reason of the employment but rather for purely personal reasons disconnected from the authorized business of the employer, then the employer will not be liable.

It is extremely unlikely that a religious organization will ever be found to be vicariously liable for the intentional or negligent actions of its abusive employee since the court would have to find that the abuse was in some way incidental to, or facilitated or promoted by the religious organization. On the other hand, it is likely that the claim will at least be made against the religious organization and that it will have to be defended on the facts of each case.[18]

III. *Negligence*

In order for a plaintiff to succeed in an action in negligence against a religious organization, the plaintiff must establish the following:

a) The religious organization's conduct must be negligent, i.e., in breach of the standard of care set by the law;

b) The plaintiff must have suffered some damage;

c) The damage suffered must be caused by the negligent conduct of the religious organization;

d) There must be a duty recognized by the law to avoid this damage;

e) The conduct of the religious organization must be a proximate causes of the loss. (In other words, the damage should not be too remote a result of the religious organization's conduct.);

f) The conduct of the plaintiff should not be such as to bar his or her recovery, that is, he or she must not be guilty of contributory negligence, and he or she must not have voluntarily assumed the risk.[19]

To put it more simply, the plaintiff must establish that (a) the religious organization owed a duty of care in all the circumstances to the plaintiff; (b) the religious organization breached that duty; and (c) damage has resulted from that breach.

If no duty is owed to the plaintiff, then even if the religious organization is considered negligent, it will not necessarily be held liable for that conduct.

A duty of care will arise where "as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or to reduce or to limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise..."[20]

Claims against religious organizations and other institutions for sexual abuse will probably be based on a claim of "negligent supervision" or breach of a "duty to warn". The courts have not as yet imposed liability where the employer had no actual or constructive knowledge of the propensity or potential for the employee of the organization to abuse a victim[21]. In other words, the claimant will have to establish that the religious organization knew, or ought to have known, that the employee would be likely to commit the assault.

A religious organization which has received previous complaints about a religious advisor or who transfers a suspected religious advisor to another parish or, possibly, who hires a religious advisor with a history of abuse will be at risk.

Finally, it is important to keep in mind that civil action for damages for sexual assault is a relatively new and developing area of the law.[22] The duty and standard of care owed by the religious institution in cases of past abuse must be judged by the standards which exist *at the time of the abuse*. Today an organization will be expected to be alert to the possibility of abuse and to have procedural guidelines both for dealing with a complaint and to attempt to prevent the abuse from ever occurring.[23]

IV. *The Fiduciary Relationship*

Relationships in which fiduciary obligations have been imposed possess three general characteristics:

1. The fiduciary has scope for the exercise of some discretion of power;

2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interest; and

3. The beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.[24]

It is clear that a religious advisor who performs teacher-like functions will be viewed as being in a fiduciary relationship with his or her students. As stated in *R.* v. *Kelly* "[t]here are two classes of people outside the family with whom young children will almost inevitably have contact as they grow up. These are clergymen and teachers. Society generally and parents particulary must have confidence that these people are worthy of the trust that is placed in them. They are essential to the very foundation of our society. They are almost as important as the parents in the formation of young lives...Clergyman and teachers must act with the utmost good faith. When they do not, they must pay the price—not only to be deterred themselves, but so that others in positions of trust will also be deterred".[25] It is also clear that a religious advisor who provides therapy or counselling to individual parishioners will be viewed as being in a fiduciary relationship with those parishioners.[26] The full extent of the fiduciary relationship which will be held to exist between a religious organization and/or advisor and their parishioners generally is not yet clear.

In a recent decision of the Ontario Court of Justice (General Division), the Court held that a mother who failed to take steps to remove her child and thus prevent sexual abuse by the child's stepfather, had breached her fiduciary duty to the child.[27] In addition, the Supreme Court of Canada has held that the standard of care to be exercised by school authorities in providing for the supervision and protection of students for whom they are responsible is that of the careful or prudent parent.[28] Arguably, the same standard will extend to other institutions performing the same school-like/fiduciary functions (Sunday-schools, daycare, etc.). As a result of these two decisions, a religious organization may be under a legal duty to take reasonable steps to protect those parishioners with whom it is in a fiduciary relationship from harm from sources that it actually knows about or foresees or ought reasonably to have known about or foreseen. It is likely that the religious organization will itself be in a fiduciary relationship with the parishioner whenever such a relationship exists between its employee/member and the parishioner.

V. *Consequences of Breach*

If the court finds that the religious organization owes a duty of care or fiduciary duty to the claimant in the circumstances, that it has breached that duty and that the claimant has suffered damages as a result of that breach, then the claimant will be entitled to either recover the full amount of the judgment from the

religious organization or that portion of the judgment which has been attributed to the religious organization.

Assuming that a claimant's damages are assessed at $100,000, if a religious organization is found to be jointly liable with its employee for the damage caused to the claimant as a result of the assault (and thus it is considered to be a "joint concurrent tortfeasor") then, even though the religious organization may have only been five per cent at fault, the claimant may recover the full $100,000 from the religious organization and leave the religious organization with the burden of recovering from its employee the $95,000 owed by the employee.

On the other hand, if the religious organization is found to be a "several concurrent tortfeasor", then it is only responsible for paying the damages equal to its apportioned liability (in this example $5,000).

Two or more tortfeasors are joint tortfeasors where one is the principal of, or vicariously responsible for, the other or where a duty imposed jointly upon them is not performed or where there is concerted action between them to a common end.

Several or separate or independent tortfeasors are of two kinds: several tortfeasors whose acts combine to produce the same damage and several tortfeasors whose acts cause different damage.

Concurrent tortfeasors are tortfeasors whose torts run together to produce the same damage.[29]

Thus "joint concurrent tortfeasors" exist where the chain of causation leads to the same damage and there is mental concurrence of the same act and "several concurrent tortfeasors" exist where there is no mental concurrence but simply a chain of causation which leads to the same damage.

Whether there is "mental concurrence" between the abuser and the religious organization will depend on the facts of each particular case and may depend on such things as the position in the religious organization held by the abuser (the more senior the position the more likely the mental concurrence), the degree of knowledge of the abuse that can be attributed to the religious organization, and whether the religious organization in any way condoned the abuse or assisted the abuser in covering up the abuse.

Liability of Religious Organization to Employees

Example: A complaint of sexual abuse is made against an employee of a religious organization. The employee is suspended and then dismissed from his employment. No criminal or civil proceedings have yet been commenced against the employee for the

abuse. The employee starts a civil action against the religious organization.

Problem: What obligations does the religious organization have to its employees? When a complaint is made against an employee can the religious organization suspend the employee pending investigation? Can the religious organization end his employment? What if the employee had been offered a different job? What if the employee had been found civilly or criminally liable for the abuse?

Generally, the courts will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order. Some property or civil right of the member must have been affected by the actions of the religious organization.[30] Even then, the courts will usually not intervene to protect one group or another when disputes arise in a voluntary association, but rather will set down rules by which their relationship must be governed.[31]

The courts will ensure that a religious organization's internal disciplinary code for dealing with breaches of church discipline is strictly complied with and that it encompasses at least the basic requirements of natural justice. A failure to give the member adequate notice, an opportunity to make representations, and an unbiased tribunal, may result in judicial review of the procedure by the courts.[32]

In cases involving religious advisors, the first issue to be determined is whether the individual is an "employee" of the religious organization. A minister who is retained by his congregation but receives salary and benefits from the parent church may be an employee of the church and not of the congregation.[33] Likewise, a religious organization which has control over a minister's eligibility to earn his or her living as a minister within a church may be responsible for any pecuniary loss to the minister if that eligibility is taken away. In such cases, the property or civil rights nexus is obvious and the courts have intervened to ensure that the religious organization has complied with its internal disciplinary requirements and the principles of natural justice and that, within the context of its particular religious doctrine, it had cause to dismiss the employee.

In other words, if the accused member is an employee of the religious organization, the religious organization will owe a duty to the employee not to dismiss him or her from employment without just cause. If the religious organization cannot establish that it had cause for the dismissal, it will owe the employee damages for wrongful dismissal.

Religious organizations should ensure that they have an internal policy which clearly prohibits any form of sexual abuse. The policy should not only set out

what constitutes abusive behaviour but should specify that a breach of the policy will be grounds for immediate dismissal.

I. *Dismissal for Cause*

Generally, an employee is entitled to notice of termination of employment or damages in lieu of notice unless the employer has dismissed the employee for "just cause".

"Just cause" will depend on the circumstances of each case. The fact that criminal charges may have been dismissed against an employee will not necessarily determine the issue of whether the employee has been wrongfully dismissed since the burden of proof in criminal cases is higher than in civil cases. On the other hand, if the employee is convicted of the sexual assault, the religious organization will probably be able to show cause for the dismissal and in any event the employee is unlikely in these circumstances to commence or continue with an action for wrongful dismissal.

While an employee can be quietly dismissed on "reasonable notice" and a religious organization might wish to proceed in this manner in order to avoid any dispute as to whether it had "just cause" to dismiss the employee, the religious organization should, at the same time, avoid any public perception that it condones or is otherwise covering up the behaviour.

II. *Wrongful Dismissal*

If the criminal charges are dismissed but the employee has nevertheless been dismissed from employment, there is a chance that he or she will commence a wrongful dismissal action against the religious organization for damages suffered as a result of the dismissal. As stated above, the religious organization will have to establish that it had cause for the dismissal and that it complied strictly with its internal disciplinary procedures.

Alternatively, depending on the circumstances and the publicity surrounding the dismissal, the employee may start an action for libel and slander against the religious organization and others.

III. *Constructive Dismissal*

If the employee under suspicion is transferred to another position (for example a position where there would be no contact with children), the religious organization may face a constructive dismissal action.

An employer will be found to have constructively dismissed the employee where it has unilaterally changed a fundamental term (such as a change in remuneration or job function) of the employee contract. Whether a constructive dismissal has occurred is a question of fact and will depend on the terms of the contract and the relationship between the parties. If the employee does not treat

the contract as at an end within a reasonable time after the job transfer he or she will be deemed to have condoned the change.

On the other hand, if the employee subsequently abuses another person, the religious organization that has transferred the employee to another position is at risk of being found to be in breach of its duty to warn or duty to supervise properly. In such a case, the religious organization will be found to have known of the propensity or potential for the employee of the organization to abuse a victim.

As a result, when dealing with cases of suspected sexual abuse, it is not recommended that the religious organization simply transfer its suspected employee to another position.

Matters for Consideration by the Religious Organization

In anticipation of a possible complaint being made, religious organizations should ensure that they have, at a minimum, considered and taken the following protective measures:

1. *Insurance liability for institutional sexual abuse:* Review policy to ensure that there is adequate coverage (both defence and indemnity coverage) in the event the religious organization is found liable.[34] Consider general adequacy of insurance policies.

2. *Corporate restructuring:* Consider how religious organization's assets are being held. Consider corporate structure of religious organization. Do the different levels of governance have different supervisory roles and thus owe different duties? Are there ways to protect the church assets through corporate restructuring, asset protection trusts, parallel trusts? Will liability for actions of a member at one level of the religious organization flow upwards? Are there ways of separating the different levels of the religious organization more effectively?

   What is the effect of the *Statute of Elizabeth*[35] and other fraudulent conveyance legislation on the proposed transfer of assets?

3. *Examine guidelines relating to confidentiality of religious communications:* Examine internal doctrine of religious organization with respect to confidentiality of religious communications. Clearly communicate position of religious organization to members. Set out clear guidelines on how to deal with requests (including subpoenas to seize documents) to breach that confidentiality. Ensure that members are aware of statutory reporting requirements.

4. *Examine rules of ethical conduct or internal doctrine:* Ensure that there are clear guidelines setting out religious organization's intoler-

ance of sexual or other abuse of parishioners by religious organization's members/employees.

5. *Examine hiring practices:* Review internal policies regarding keeping personnel files, investigations prior to hiring, checking of references, transfers to other parishes and so on.

6. *Establish procedures for dealing with situations where an internal complaint has been made against a employee, when an employee is criminally charged and when a civil action is commenced:* Consider such questions as whether reports should be kept (privilege issues), how to fulfil possible duty to warn, how to deal with the media to minimize loss of reputation of religious organization and whether religious organization should have legal counsel separate from that of accused employee (because of conflict and privilege problems).

7. *Review internal disciplinary procedures:* Ensure that they meet the basic requirements of natural justice.

FOOTNOTES

1. A.L. Kirby is a member of both the Ontario and the British Columbia Bars.
2. *R.* v. *Snider*, [1954] S.C.R. 479 at 482 (S.C.C.).
3. *R.* v. *Gruenke*, [1991] 3 S.C.R. 263 at 286.
4. *R.* v. *Gruenke*, [1991] 3 S.C.R. 263 at 286. (See also Wigmore, footnote 11.)
5. *Slavutych.* v. *Baker et al.*, [1976] 1 S.C.R. 254 at 260.
6. *Supra*, footnote 3, at 263. See also *Re Church of Scientology et al. and The Queen (No.6)* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused 23 O.A.C. 320n (S.C.C.).
7. *Canadian Charter of Rights and Freedoms*, section 2(a).
8. R. Chambers and M. McInnes, "Evidence – Privilege – Priest-Penitent Privilege: *R.* v. *Church of Scientology of Toronto and Zaharia*" (1989), 68 C.B.R. 176 at 183 and 184 and M.H. Mitchell, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion" (1987), 71 Minn. L.R. 723.
9. *Solosky* v. *The Queen* (1979), 105 D.L.R. (3d) 745 at 760 (S.C.C.); *Re Director of Investigation and Research and Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745 at 748 (B.C.C.A.); *Descoteaux et al.* v. *Mierzwinski*, [1982] 1 S.C.R. 860 at 875.
10. *Family and Child Service Act*, S.B.C. 1980, c. 11, s. 7. Other family law statutes with a limited abrogation of the duty of confidentiality include *Family Maintenance Enforcement Act*, S.B.C. 1988, c.125, ss. 8 and 9; *Family Relations Act*, R.S.B.C. 1979, c. 121, ss. 37.2 and 63.3. With respect to permissive obligation to report the abuse of an adult see *Adult Guardianship Act*, S.B.C. 1993 c. 35, ss. 18(3), 27 and 46; *Public Guardian and Trustee Act*, S.B.C. 1993 c. 64, s. 17.

11. Cases dealing with claim to priest and penitent privilege: *Garnett's Trial* (1606), 2 Howell's State Trials 218 cited in Wigmore, *Evidence*, Vol.8 (McNaughten rev. 1961), p. 869, para 2394, note 1; *Broad* v. *Pitt* (1828), 3 Car. & P. 518, 172 E.R. 528 at 529 (C.P.); *R.* v. *Griffin* (1853), 6 Cox C.C. 219; *R.* v. *Hay* (1860), 2 F & F. 4, 175 E.R. 933 (Assizes); *Wheller* v. *Le Marchant* (1881), 17 Ch. D. 675 at 681 (C.A.); *Normanshaw* v. *Normanshaw* (1893), 69 L.T.R. (N.S.) 468 (P.D.A.); *Cook* v. *Carroll*, [1945] I.R. 515; *Dembie* v. *Dembie* (1963), 21 R.F.L. 46 at 48 (Ont. S.C.); *A.G.* v. *Mulholland*; *A.G.* v. *Foster*, [1963] 2 Q.B. 477 At 4889, [1963] 1 All E.R. 767 (Q.B.) (leave to appeal to the House of Lords refused March 7, 1963); *Conkwright* v. *Conkwright* (1970), 14 D.L.R. (3d) 168, [1970] 3 O.R. (2d) 784 (H.C.); *Pais* v. *Pais*, [1971] P. 119, [1970] 3 All E.R. 491; *United States* v. *Nixon et al.* 418 U.S. 683, 41 L Ed 2d 1039 at 1065 (U.S. Supreme Ct., 1974); *Mullen* v. *United States*, 263 F. 2d 275 at 280 (D.C. Ct. App., 1985); *Re Church of Scientology* (1987), 31 C.C.C. (3d) 449, 18 O.A.C. 321 (C.A.) (leave to appeal to Supreme Court of Canada refused 23 O.A.C. 321, 82 N.R. 392); *R.* v. *Gruenke*, [1991] 3 S.C.R. 263; *R.* v. *Medina*, [1988] O.J. No. 2348 (Ont. H.C.).

12. *Descoteaux et al.* v. *Mierzwinski and A-G of Quebec et al.*, [1982] 1 S.C.R. 860 at 889.

13. *Solosky* v. *The Queen* (1979), 105 D.L.R. (3d) 745 at 758 (S.C.C.); *Re Church of Scientology and the Queen (No. 6)* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.).

14. From H.R.S. Ryan, "Obligation of the Clergy Not to Reveal Confidential Information", (1990) 73 C.R. (3d) 217 and W.A. Cole, "Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis", (1986-87) 21 Colum. J.L. & Soc. Probs. 1:

    a) Roman Catholic Church: obligation not to reveal information received during confessional recognized in 21st Canon of the 4th Laterean Council (1215) and incorporated in the medieval *Corpus Juris Canonici*, now Canon 983 of the Roman Catholic *Codex Juris Canonici* of 1983. The traditional penalty for breach of this obligation was lifelong relegation to a monastery. The present Codex threatens a priest who so offends directly with *"excommunicatio latae sententiae"*.

    b) Church of England: obligation included in a proviso to Canon 113 of the *Constitutions and Canons Ecclesiastical of the Church of England* adopted in 1603 (with the exception in cases where non-disclosure would expose the priest to liability to be executed), now, *Canon on Absolution* numbered B29. Also see *Book of Alternative Services* in the preface to the Rite for the Reconciliation of a Penitent.

    c) American Baptist: *American Baptist Policy Statement on Privileged Communications*, June 19, 1978: "The effective pastoral counselling of the ministry depends upon the assurance of those who seek it that the information they reveal in confidence to their pastoral counsellor may be given with full freedom".

    d) Episcopal Church: the new *Book of Common Prayer*'s rite The Reconciliation of a Penitent "...The secrecy of confession is morally absolute for the

confessor, and must under no circumstances be broken". See General Convention of the Episcopal Church, N.Y., memorandum on "Privileged Communications" in *The Episcopal Church*, 3 (n.d.).

e) American Lutheran Church: *Minutes of Church Council of the American Lutheran Church* 16 (1960) "...it is part of the traditional discipline and practice of the Lutheran Church that the pastor hold inviolate and disclose to no one the confessions and communications made to him as a pastor without the specific consent of the person making the communication".

f) Judaism: *Krugilov* v. *Krugilov* 29 Misc. 2d 17, 217 N.Y.S.2d 845 (N.Y. Sup. Ct. 1961) appeal dismissed, 16 A.D.2d 735, 226 N.Y.S.2d 931 (1962) quoting letter from The New York Board of Rabbis "The New York Board of Rabbis deems it essential for the proper work of the Rabbi in the community, that any confidence reposed in him...not be divulged..."

g) Church of Jesus Christ of Latter Day Saints: *General Handbook of Instructions* 8-3 (1985).

h) The First Church of Christ Scientist: *Manual of The Mother Church* – The First Church of Christ Scientist in Boston, Massachusetts – 46 (89th ed. 1915) Article VIII, Section 22 of the Church's By-laws.

15. See for example, *Franck* v. *Webster*, Man.Q.B., April 20, 1994, Master Lee (unreported) (Suit No. CI-94-01-79104, in which the emerging tort of breach of confidence was pleaded against the defendant Robert Webster, an agent of the Parish of St. Mary Magdalene, Diocese of Rupertsland.

16. See for example: *Norberg* v. *Wynrib*, [1991] 2 S.C.R. 226; *M.M.* v. *K.K. et al.* (1987), 39 C.C.L.T. 81 at 95 (B.C.S.C.); *A.M.* v. *Ryan*, B.C.C.A., July 28, 1993, Rowles J.A., (unreported) (Vancouver Registry CA017510).

17. *Norberg* v. *Wynrib*, [1991] 2 S.C.R. 226 at 247; *R.* v. *M. (M.L.)* (1992), 18 C.R. (4th) 186 (N.S.S.C.-A.D.). (Leave to appeal to S.C.C. granted May 4, 1993.)

18. No vicarious liability: *Doe* v. *Village of St. Joseph*, 415 SE 2d 56 (Court of Appeals Georgia, January 29, 1992); *Andrews* v. *United States of America*, 732 Federal Reporter 2d 336 (U.S.C.A. 4th circuit July 1984); *Stock* v. *Pressnell*, 527 NE 2d 1235 (Supreme Court of Ohio, August 24, 1988); *Destafano* v. *Grabin and the Catholic Diocese of Colorado Springs*, 763 P2d 275 (Supreme Court of Colorado, November 1988). Vicarious liability; *Erickson* v. *Christenson and the American Lutheran Church*, 781 P.2d 383 (Oregon Court of Appeals, October 25, 1989); *Marston* v. *Minneapolis Clinic of Psychiatry and Neurology*, 329 NW 2d 306 (Supreme Court of Minnesota, 1983)—in the latter case, vicarious liability was not ruled out but was to be considered as a question of fact on a case-by-case basis.

19. C.A. Wright and A.M. Linden, *Canadian Tort Law, Cases Notes & Materials* (7th ed., 1980) at p. 4-2.

20. *Anns* v. *Merton London Borough Council*, [1977] 2 W.L.R. 1024 (H.L.).

21. *Lyth* v. *Dagg et al.* (1988), 46 CCLT 25 (B.C.S.C.); *Doe* v. *Village of St. Joseph Inc.* 415 S.E., 2d 56 (Georgia Court of Appeals), January 29, 1992; *Byrd* v. *Faber*, 565 N.E., 2d 584 (Supreme Court of Ohio), January 16, 1991.

22. *A.M.* v. *Ryan*, B.C.C.A., July 28, 1993, Rowles J.A. (unreported) (Vancouver Registry CA017510) at page 5.

23. *Lyth* v. *Dagg et al.* (1988), 46 C.C.L.T. 25 (B.C.S.C.).

24. *J.(L.A.)* v. *J.(H.)* (1993), 13 O.R. (3d) 306 at 312 (Gen. Div.); *Frame* v. *Smith*, [1987] 2 S.C.R. 99 at 136; *Norberg* v. *Wynrib*, [1992] 2 S.C.R. 226 at 274.

25. *Her Majesty the Queen* v. *Kelly* (1988), 68 Nfld. & P.E.I.R. 236 at 238 (Nfld. C.A.).

26. *I.H.* v. *Isaac*, Man.Q.B., September 13, 1993, Morse J., (unreported) (File No. CI 92-01-63693) in which the plaintiff alleged she had been abused by a pastoral counsellor at a mental health centre and in which the relationship between the plaintiff and defendant was described as "a professional and fiduciary one founded on trust and confidence reposed by the applicant in Mr. Isaac not only as a therapist but also as a pastor".

27. *L.A.J.* v. *H.J.* (1993), 13 O.R. (3d) 306 (General Division).

28. *Myers* v. *Peel Regional School Board* (1991), 123 D.L.R. (3rd) 1 at 10 (S.C.C.); *Lyth* v. *Dagg* (1988), 46 C.C.L.T. 25 at 33 (Ont. S.C.).

29. Glanville Williams on *Joint Torts and Contributory Negligence* (London: Stevens & Sons Limited, 1951), c.1., at p. 1; *Tucker* v. *Asleson* (1993), 78 B.C.L.R. (2d) 173 at 216 (C.A.) per Southin J.A.

30. *Ukranian Greek Orthodox Church* v. *Trustees of Ukranian Greek Orthodox Cathedral of St. Mary (no. 2)*, [1940] S.C.R. 586; *Lakeside Colony of Hutterian Brethren* v. *Hofer*, [1992] 3 S.C.R. 165.

31. *Ibid.*, *Lakeside Colony of Hutterian Brethren* v. *Hofer.*

32. *Ibid.*

33. *McCaw* v. *United Church of Canada* (1988), 64 O.R. (2d) 513 (H.C.), var'd 4 O.R. (3d) 481 (C.A.); *Davis* v. *United Church of Canada* (1992), 92 D.L.R. (4th) 678 (Ont. Gen. Div.).

34. D.B. Wenger, "Insurance Liability for Institutional Child Abuse: What's New In Insurance Law and Practice", Canadian Institute, November 22, 1993.

35. *An Acte agaynst fraudulent Deedes Gyftes Alienations etc.*, 1571, 13 Eliz. 1, c. 5 (Statute of Elizabeth) continues to apply in many common law jurisdictions notwithstanding its repeal in England. Under the Statute, any transfer of assets undertaken for the purpose of delaying, hindering or defrauding creditors and others, regardless of whether such creditors are known at the time of transfer, is void.