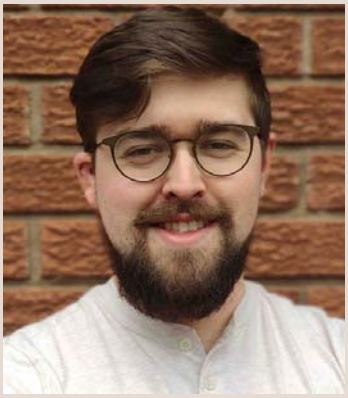
Evolving Attitudes Towards Authority in ADR: From Ecclesiastical Visitors to Contemporary Arbitrators



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The University of Ottawa was beset by internal strife during the first half of the 1960s because the University's Catholic owners were unable to continue funding a rapidly expanding university. Politics characterized by a sharp division between religious and non-denominational administrators, professors, and students created a tense atmosphere that burrowed into the university's owner's, the Oblates of Mary Immaculate's house and rent the religious community that, up to 1965, was the University's brain if not its heart.

The Missionary Oblates of Mary Immaculate remain a French religious order under the Roman Catholic rite. They were composed of priests and brothers working with a view to doing good works, missionary works, and they thus hold a firm place in Canada's colonial past. The University was a jewel in the Oblate crown. It was testament to the Oblates' long history in the Ottawa Valley, where the first Bishop of Ottawa in 1848, Joseph-Bruno Guigues, was a senior Oblate and founded the University.[1]

The struggle between members of the Oblate house mirrored those of the University community: would the University of Ottawa remain a religious institution without access to government funds or would the Oblates pass the institution on to a non-denominational board of governors? This question divided the priests, some of whom espoused a progressive integration into the broader community; others took a hard-line conservative stance against ceding control.[2]

No ready answer obtained, but the Oblates were due for a visit from a former colleague, Stanislas-A. LaRochelle, whose presence calmed the community and restored a semblance of hierarchical order.

The term "visit" in this context denotes more than a mere appearance for old times' sake. The former Rector was the Oblate Superior-General's legate. His presence comprised a care for souls even as he symbolized his order's central authority. The visitor ministered to the House, listened to the priests, convened debates on questions of the day, and (if necessary) carried with him the authority to decide all issues within the community.

The visitor was, in short, the law-giver and the justice.[3] A plenipotentiary, his authority was enough to create policy, force the execution of any action, and decide any dispute.

A plenipotentiary is anathema to our current adversarial legal system, if only because the rule of law promotes dividing heads of power so that they may be balanced. Practitioners of alternative dispute resolution are divided on the efficacy and ethics of a mediator-arbitrator, whose role slips between confidant and advisor—an executive or legislative role—to that of the adjudicator.

The institution of visitors challenges these positions; it also serves as a means of better understanding the role of *amiable compositeur*, where that phrase empowers an authority to settle a matter not just by deciding parties' rights, but by composing the parties' interests to obtain a peaceable outcome. The visitor occupied such a role throughout its history, for it is, in an ideal scenario, a friendly face familiar with the disputants' case.[4]

This note aims to draw those diverse strands together by showing that visitors are arbitrators appointed by common law to resolve the disputes of a particular corporation. The office limits internal strife, and it does so as amiable compositeur—a friend of the corporators with a creative power.[5] The visitor's role is, of course, disciplinary, but it adopts the view that dirty laundry ought to be aired in an inner courtyard rather than at the local marketplace.

A systematic refusal to air one's dirty laundry is under-appreciated in an adversarial legal system. Opposite points of view promote

inefficiency through strife, but not because conflict destabilizes societies. That's a tired argument anyway. Bitter disagreement festers and litigants ruminate, all of which limits creative solutions as parties retrench themselves.

We could use less of such squabbles, and practitioners of alternative dispute resolution have inherited much of visitors' powers to promote idiosyncratic dispute resolution. The present writing only draws attention to this point.

Visitors are an old form of dispute resolution dating to medieval religious institutions. Bishops used visitation to control priests and congregations in their diocese. The Roman Church more generally applied the concept to control corporations of religious orders within the church. In either case, the visitor appeared to control the foundation over which it was steward for the original founder. The jurisdiction continues in some cases, such as Bishop's University in Lennoxville, where the Anglican bishops of Montreal and Quebec share the right to visit and correct errors at the university.[6]

Given their positions of authority, visitors stood in the same position as arbitrators, yet they possessed further power to re-write policy or by-laws and to order any action.[7] These powers go beyond a traditional understanding of arbitral authority in an oppositional system. They serve, however, to underscore arbitrators' origins and, perhaps, an aspect of their future.

The means of visitation were symbolic as much as they were efficient. Bishops and other church officials could appear in person to visit themselves upon their subjects. Such visits were multi-day affairs and were conducted like a royal court. Parish

priests would present their accounts and disputes, for example, to the bishop. Religious orders would submit to their superiors.

Visitation eventually translated to English government via the Lord Chancellor, who was no stranger to the concept: Chancellors were, until Sir Thomas More in the sixteenth century, priests at the King's service.[8] The start of Thomas More's chancellorship begins an ongoing confluence of religious practice with legal principles. The fountain of the visitor's legal power derived from a gift or bequest that permitted the foundation of a charity in whatever form charities could take.[9] Hospitals, colleges, and prisons are examples of charities benefitting from visitation of one form or another.[10] Private individuals whose donations established charities passed the right to visit as inheritance.

By the fourteenth century, the keeper of the King's conscience was also the keeper of his charity. The Chancellor visited all royal eleemosynary corporations on behalf of the Crown.[11]

The legal inheritance wrought by this marriage of religion and royal power endured for the better part of English legal history. We have cases up to the nineteenth century where courts decline jurisdiction to review a visitor's decision: these were sacrosanct, if rendered within the visitor's jurisdiction.[12] They were acknowledged as final arbiters because settling disputes between members of a charity better preserved charities' missions, which aligned with religion's putative focus on good works. Every member of a charity pulled together toward a common goal. The discipline imposed by a visitor kept that little community's mission in view.

A growing administrative state dashed this concept in the measure that public conscience separated public and private acts. Visitors lost the legal protection borne out of property rights. Courts began to review visitors' decisions in growing frequency during the nineteenth and twentieth centuries; legislatures moved against the office so that administrative structures better aligned with government priorities.

These changes are endemic to a centralized legal system. Clear definitions create justiciable outcomes. These definitions, however, efface local circumstance. A judge will not know the form of peace that best suits a small community. The idiosyncrasies of such communities are not captured by the laws of evidence and the judge's experience.

II

Arbitration has run alongside the law of visitation, for private dispute resolution was popular in medieval England.[13] The reason for this popularity is, perhaps, the same as that for visitors' popularity: royal justice was far from most litigants' homes. Preserving local peace in medieval England meant finding friendly settlements, for disputants could and did resort to violent self-help.

This comparatively lawless world was characterized, as is current arbitration, by mercantile concerns. Civil disputes came before arbitrators, but their precedential value is less important because of the scope of the interests under adjudication and parties' typical means. Until John Locke and England Board of Trade established the *Arbitration Act* in 1698, arbitration was solely regulated, in a formal sense, when the courts recognized an award.[14] Parties were otherwise free to do what they could. The *Act* inverted the judicial analysis by presuming awards valid unless they fell afoul the *Act*.

Modern arbitration, of course, descends from Locke's legislative efforts. The present Canadian regime operates much like it did in 1698. The various arbitration acts authorize contracts of arbitration and provide for their judicial enforcement.[15] Arbitrators are appointed on mutual consent when a dispute arises, but contracts may also anticipate disputes by submitting all future issues regarding the contract to arbitration. Labour relations arbitration is a widespread example of this practice: arbitration is required to

prevent raging industrial disputes.

Labour relations carries with it some of the characteristic elements of the visitor's jurisdiction. Members of a unionized workplace submit to the collective agreement and the arbitrator's authority. These mandatory submissions are analogous to a visitor's jurisdiction: a college's students and professors, by virtue of their admission to membership, subject to the visitor's rule.

The labour arbitrator that decides an issue is rarely reviewed if their decision falls within their jurisdiction. Arbitrators must, of course, craft reasoned (and, one hopes, reasonable) decisions; the classic law of visitation does not hold visitors to such a standard. This distinction aside, courts grant both kinds of adjudicators deference. They may decide the best resolution to a dispute.

III

A signal difference between arbitration and visitation—one noted above—is the nature of the power accorded to each. Arbitrators, though they draw power from parties' submission, are constrained by their enabling legislation. Visitors are, to some extent, similarly restricted by the founder's laws. They are, however, supreme within their domain. They may legislate, execute, and decide.

One might reply that arbitrators have a latent jurisdiction, and it is one recognized by some arbitration acts. Ontario's, for example, allows parties to dispense with any part of the Act save the requirement of arbitral fairness, and the courts' powers to extend time limits, declaring an arbitration invalid, and enforcing the award.[16] Parties to arbitration may derogate from the oppositional model to authorize an *amiable compositeur*, who would be able to exercise powers resembling a visitor's.

The visitor serves as a holograph of this very fluid concept, which is recognized in international arbitration by the concept of *amiable compositeur*. This difference between the oppositional model and amiable composition is slight, for modern litigants may expect to find a winner and a loser. Arbitration already moderates these extremes. The economics of arbitration demand parties' respect for the arbitrator's style and decision. This force pushes the arbitrator toward more moderate awards. It does not remove the oppositional structure. Nor, to be fair, does amiable composition which moderates those extremes by valorizing parties' immediate interests and the context of those interests above legal principles. Law is not done away with; the parties instead submit to a jurisdiction designed to grant them law under which they may live.

IV

Stanislas-A. LaRochelle understood the jurisdiction of an *amiable compositeur*, even if he wasn't familiar with Canadian arbitral conventions. The powers that he exercised as Oblate visitor to the University and its religious house were, essentially, those of an *amiable compositeur*. LaRochelle's religious definition of the visitor's role may thus apply with equal force to a definition of amiable composition:

> *La Visite n'est pas une simple formalité extérieure, ni une pure enquête. Elle devrait plutôt se présenter comme une étude importante, soignée, à faire en commun, sur les réalisations et les possibilités d'un groupe et d'une oeuvre; mais après une révision objective, honnête et franche, de notre vocation oblate, et de l'obligation du devoir d'état actuel. L'ambiguité occasionne le malaise ou l'indifférence, tandis que la vérité acceptée, assimilée, devient notre propre vie, dans la paix et la confiance.*[17]

Arbitration captures so many similar elements in the term *amiable compositeur*; its greatest strength remains the ability to conduct the honest and frank assessments carried out by visitors in another life and other contexts.

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1 I give a potted history of Bishop Guigues' activities in the Ottawa Valley in *Warring Sovereignties: Church Control and State Pressure at the University of Ottawa* (Ottawa: University of Ottawa Press, 2020) c 1; see also Donat Levasseur, OMI, *A History of the Missionary Oblates of Mary Immaculate: 1815-1898* (Rome: General House, 1985); and Donat Levasseur, OMI, *A History of the Missionary Oblates of Mary Immaculate: 1898-1985* (Rome: General House, 1989).

2 Full details on this visit appear in Strömbergsson-DeNora, *supra* note 1 c 4.

3 A full review of visitors' powers is found in Adam P Strömbergsson-DeNora, "Caught by Private Law: A Review of Visitors' Jurisdiction in Canada" (2019) 36 Windsor Yearbook of Access to Justice 284–304.

4 *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch. 5, Sched. 2, art. 28(3).

5 *viz* Mauro Rubino-Sammartano, "Amiable Compositeur (Joint Mandate to Settle) and Ex Bono et Aequo (Discretional Authority to Mitigate Strict Law)" (1992) 9:1 Journal of International Arbitration 5–16 at 14–16.

6 *Royal Charter of the University of Bishop's College*, 16 Vict 1853.

7 *Philips v Bury*, [1694] Holt, KB 715, 90 Eng Rep 1294 [*Philips*] at 1299.

8 Gwilym Dodd, "Reason, Conscience and Equity: Bishops as the King's Judges in Later Medieval England" (2014) 99:2 (335) History 213–240 at 238–40.

9 e.g. *Philips v Bury*, [1694] 90 English Reports 1294 at 1299.

10 John Selden, ed, *Fleta*, EEBO Wing / F1290A (London: M.F., 1647) bk II.23 (sig. M2r).

11 For a modern example, see *Isaac v University of New Brunswick*, [1992] 130 NBR (2d) 382 at para 38.

12 *Saint John's College, Cambridge v Todington*, [1757] 1 Burr 158 (KB), 97 Eng Rep 245 [*Saint John's College*] at 199–200.

13 Edward Powell, "Arbitration and the Law in England in the Late Middle Ages" (1983) 33 Transactions of the Royal Historical Society 49–67 at 50–3.

14 *An Act for determining differences by Arbitration*, 9 Gul III c 15 1698; Henry Horwitz & James Oldham, "John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century" (1993) 36:1 The Historical Journal 137–159.

15 I use Ontario's *Arbitration Act, 1991*, SO 1991, c 17 for reference, but other provinces have unique regimes.

16 *Ibid*, s 3.

17 *Études Oblates* (Montreal: Maison Provinciale, 1964) at 190–1, "Visitation is not a mere external formality, nor purely an inquiry. It should be presented rather as an important, careful study, to be done in common, on the achievements and possibilities of a group and a work after an objective, honest and frank review of our Oblate vocation, and of the obligations arising from the present state of our affairs. Ambiguity causes discomfort or indifference, while the accepted truth, assimilated, becomes our own life, in peace and confidence" [my translation].