Confidentiality in the Law of Evidence

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CONFIDENTIALITY IN THE LAW OF EVIDENCE

by Edward Koroway*

A. INTRODUCTION

B. COMMUNICATIONS INVOLVING THE STATE
1. Exclusion on the Ground of Public Policy
2. The Informer
3. Use in Civil vs. Criminal Cases

C. COMMUNICATIONS BETWEEN PRIVATE PARTIES
1. Marital Conciliation
2. Communications Between Husband and Wife
3. Eavesdropping
4. Legal Professional Privilege
5. Religious Advisers
6. Journalists

D. CONCLUSION

A. INTRODUCTION

Every society cherishes certain basic principles but problems arise when an attempt is made to reconcile these principles since they often contradict one another. An individual may have a right of free speech, but that does not permit him to slander his neighbour nor to utter seditious words. In short, any assertion of a fundamental principle must always be a cautious one, tempered by the necessity of giving due regard to balancing competing and often conflicting fundamental tenets. Policies in any society are not absolute but relative, and the lawmaker's quest is not to distinguish white from black, but constantly to weigh ever so similar shades of grey.

That justice be done is certainly one, but only one, cherished aim in society. In a criminal trial this means the innocent must be acquitted and the guilty convicted. To achieve this, the court must find the facts. The trial becomes a quest for truth.

But how obstinate should that quest be? One solution would be to permit any and all relevant material to come before the court. The law of evidence

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has long divorced itself from so simple an approach. Indeed, it is character-
ized by its pronounced exclusionary rules. Evidence may be excluded because
it is too unreliable,\(^1\) as is true of much hearsay, or it may be excluded as being
too prejudicial, as in similar fact cases. Both these reasons focus on eviden-
tiary value: since the jury may attach too much weight to past misconduct by
the accused, they do not hear of it, thereby furthering the quest for truth.
Evidence may also be excluded for reasons totally unrelated to its probative
force. In such circumstances another public policy is deemed to override that
which demands that the trial be a search for truth.

Confidentiality is an elusive concept and one that is far from static.
Cabinet documents may be highly secret today but require no concealment
twenty years hence.\(^2\) Confidences may be of many kinds and to many different
sorts of individuals. They may also be made to or within the government. At
the same time, a husband and wife may exchange confidences. There is no
reason to think the same rule should apply to all cases, nor for that matter
that there should be a rigid rule at all. It may differ, depending on whether
the evidence is tendered in a civil or in a criminal case, whether by the prose-
cution or by the accused, the plaintiff or the defendant.

There are arguments for giving the trial judge discretion to determine the
extent to which confidences are to be protected in a given trial, as where ade-
quate alternative evidence is available.\(^3\) There is no need for the court to pry
if it does not have to, but if there is no general rule, then individuals will not
know whether or not they can freely exchange confidences. A discretionary
rule will not do if the confidential relationship is one that is to be encouraged,
such as that between the informer and the police.

It is not with the substantive law of confidence,\(^4\) but with confidentiality
in the law of evidence that this paper is concerned. Cases such as A. G. v.
Jonathan Cape Ltd.\(^5\) fall outside the present topic. There the diaries of a
cabinet minister were said to be confidential but they were not being adduced
in evidence in a court of law. Rather, an attempt was being made to publish
a book and extracts from it in a newspaper.

Part B will examine various confidential communications where at least
one, if not both, of the parties are agents of the state. It is often said that such
evidence is excluded on the ground of public policy, which has also been

\(^1\) Criminal Law Revision Committee Eleventh Report (Evidence — General), (1972; Cmnd. 4991) para. 16.


\(^3\) Law Reform Committee Sixteenth Report (Privilege in Civil Proceedings), (1967; Cmnd. 3472) paras. 1, 3 and 54.


\(^5\) Supra, note 2.
B. COMMUNICATIONS INVOLVING THE STATE

1. Exclusion on the Ground of Public Policy

"'Confidentiality' is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest." With these words Lord Cross precluded any attempt to create a new exception to the general principle stated by Wigmore that when "the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private." The need for any exemption from the general duty to testify must be clearly proved as the investigation of truth demands the restriction and not the expansion of such privileges. The presumption should always be that the tribunal will not be deprived of evidence in its quest for truth. Only the most cogent reasons will suffice to hinder that investigation.

There are two points to bear in mind in discussing public policy. In the first place, the distinction drawn here and elsewhere between exclusion because of "privilege" and that on the ground of "public policy" is spurious, since there is always an element of public policy behind every privilege. What is really meant is that where evidence is excluded on the ground of public policy, there can be no waiver of the exclusion and no secondary evidence adduced. Secondly, in every piece of litigation not only the private parties, but society as a whole, has a genuine interest in seeing that justice is done.

There are two main situations where evidence is excluded on the ground of public policy: internal communications within the state, and communications by the public to the state. The first head can be further subdivided into state secrets, diplomatic exchanges, cabinet minutes, and internal civil service and police communications.

At common law the Crown possessed a prerogative right to refuse to produce documents and would not have been obliged to make discovery.

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However, section 28(1) of the English *Crown Proceedings Act, 1947*\(^1\) provided that in any civil proceedings in the High Court to which it was a party, the Crown could be required by the court to make discovery, subject to "any rule of law" which authorized or required refusal to answer on the ground that disclosure would be injurious to the public interest. Furthermore, section 28(2) stated that the mere existence of a document need not be disclosed if, in the opinion of a Minister, it would be injurious to the public interest to do so. It is the "rule of law" which precludes disclosure on the ground of injury to the public interest that is outlined in the pages that follow. One cannot sufficiently emphasize, however, that the public always has an interest in the proper determination of any private piece of litigation.

The principle of public interest may have originated in state trials for high treason,\(^2\) an early example of its application being *Bishop Atterbury's Case\(^3\)* in 1723. Then, in *Smith v. The East India Company*,\(^4\) it was argued that correspondence between the board of directors of the East India Company and the commissioners for the affairs of India should not be produced because the correspondence was a confidential one. Lord Lyndurst L.C. indicated that was not "of itself" sufficient reason for the nonproduction of the documents. He relied on a legislative provision designed to ensure that the most unreserved communications should take place between the company and the commissioners, and that these should not be subject to any restraints or limitations. Admittedly, the statutory enactment played a role in the case; nevertheless, it should be noted that even in 1841, confidence in itself was dismissed as a ground for nonproduction.

Evidence may be excluded on the ground of public interest where both parties to a communication are private, as in *Asiatic Petroleum Co. v. Anglo-Persian Oil Co.*\(^5\) where an attempt was made to obtain discovery of a letter from a private company to its agents. Swinfen Eady L.J. held that "[t]he foundation of the rule is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their nonproduction . . . ."\(^6\) The Board of Admiralty had entered into a contract with a company for the supply of oil. The company's pipe line had been broken by hostile natives. The letter in question dealt with the progress of a military campaign in Persia, and the policy, views, and intentions of the authorities, including the board, in relation thereto. The Secretary of the Admiralty had instructed the company not to disclose the letter on the ground of its confidential nature and the interests of the state lest the enemy obtain any assistance from it.

The "modern" series of English cases on the subject begins with the

\(^1\) 10 & 11 Geo. 6, c. 44.
\(^3\) 16 How. State Trials 322 at 495.
\(^4\) [1841] Ch. 50; 11 L.J. Ch. 71; 6 Jur. 1; 41 E.R. 550.
\(^6\) Id. at 830 (K.B.).
wartime decision of the House of Lords in *Duncan v. Cammell, Laird & Co., Ltd.*, an action for negligence arising from a submarine disaster. The defendant held a government contract and was directed by the Minister to object to the production of certain documents which concerned the structure of submarines. The House of Lords accepted the decision of the Minister as final in adopting the rules that relevant evidence must be excluded if its reception would be contrary to state interest. There is no question of privilege as there is no choice; exclusion is mandatory. Hence the expression "Crown privilege" is not a happy one. Given that the case arose during the war and involved the design of naval apparatus, the outcome is hardly surprising. The difficulty lay with Viscount Simon’s broad assertion that the court ought to regard the Minister’s objection, when validly and formally taken, as conclusive. However, the Minister would not be justified in objecting to production simply because papers were “state documents” or “official” or were marked “confidential.”

Viscount Simon L.C. stressed that the decision was limited to civil actions, and that the practice in criminal cases was not necessarily the same. He distinguished between two categories of cases. Sometimes objection is taken by the state as to a particular class of communications on the ground that the candour and fullness of such communications might be prejudiced if they were ever liable to be disclosed, rather than upon the contents of the particular document itself. A class of documents may be kept secret if it is “necessary for the proper functioning of the public service.” The contents cases, on the other hand, include matters where disclosure would be injurious to national defence, cabinet secrecy, or good diplomatic relations.

In *Conway v. Rimmer* there was no war to cloud their Lordships’ reasoning, nor any military or naval blueprints whose importance to national security would be unquestioned. Instead, both parties, in an action for malicious prosecution, were anxious to obtain police probationary and other reports concerning the plaintiff who had been dismissed from his post as probationer police constable after allegedly stealing a torch from another probationer. The Home Secretary stated in an affidavit that he had personally examined the documents and objected to their production on the ground that they were confidential police reports to superior officers, or police reports on investigations of crime, and disclosure of such a class would be injurious to the public interest. The effect of the decision was to reverse *Duncan* insofar as their Lordships held that the determination of a Minister was not binding on the courts. Though it is open for a judge to accept what the Minister says, and though great weight attaches to his views, the judge has the final deci-

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17 Supra, note 6.
18 Id. at 641 (A.C.).
19 Id.
21 Supra, note 6.
The court may examine the documents privately, and in fact that is what their Lordships proceeded to do, and eventually took the view the reports should be made available.

Lord Upjohn did not think Lord Simon in *Duncan* had in mind "routine" reports on a probationer constable when he made his general observations. The test was whether the information could be disclosed without injury to the public interest, not whether the documents were "confidential or official." His Lordship observed that with the relations between the Crown and the subject becoming increasingly more intimate, it was legitimate for the courts from time to time to make "a reappraisal in relation to particular documents of just what it is that the public interest demands in shielding them from production." His Lordship conceded that there were many cases in which documents by their very nature require protection, such as cabinet papers, Foreign Office dispatches, high level inter-departmental minutes and correspondence, and documents pertaining to the general administration of the armed forces. He felt that communications such as those concerning the promotion or transfer of reasonably high level personnel in the service of the Crown would fall within the category of exclusion as "it would be quite wrong and entirely inimical to the proper functioning of the public service if the public were to learn of these high level communications . . . ." It had nothing whatever to do with "candour or uninhibited freedom of expression."

I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day.

Although Lord Reid had "no doubt" that *Duncan* was rightly decided, he considered it "grotesque" to speak of the interest of the state being put in jeopardy by disclosure of routine reports on a probationer constable. He found it difficult to see why it should be necessary to withhold whole classes of routine communications involving public departments, but quite unnecessary to withhold similar communications with or within a public corporation where the safety of the public may also depend on the candour and completeness of reports made by subordinates.

Lord Hodson indicated that the principal difficulty arises in the case of documents for which protection is claimed on the ground of their class, irrespective of their contents, on what may be called the "candour" ground. Lord Morris explained the argument in this way:

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22 As Lord Upjohn put it, "the claim of privilege by the Crown, while entitled to the greatest weight, is only a claim and the decision whether the court should accede to the claim lies within the discretion of the judge: and it is a real discretion." Supra, note 20 at 992 (A.C.).

23 Id. at 991-992 (A.C.).

24 Id. at 993 (A.C.).

25 Id.

26 Id. at 941 (A.C.). Lord Upjohn also noted that "those in other walks of life which give rise to equally important matters of confidence in relation to security and personnel matters as in the public service can claim no such privilege." Id. at 995 (A.C.).
Those who make such reports expect them to be confidential, so that they will only be seen by police officers, and . . . if such reports could ever be subject to production, then the future candour of future writers of such reports would be affected, and . . . this would be disadvantageous to, and therefore injurious to, the public interest.27

Of course if disclosure of confidential communications were allowed, that would not mean that every report would be disclosed in a court of law. A civil servant preparing a document would be aware of only a very slight possibility that his report would be used in evidence. The alleged inhibition of his candour would be a function of the minimal frequency of disclosure of such reports.

As Lord Upjohn points out, communications between officials in private enterprise are not protected. Why should state officials receive any special treatment?28 Inasmuch as they are servants of the public, there is ample justification for that public to know what they are doing, saying, and thinking. The public remunerates them, it is the public they serve, and it is about the public that they communicate. As Wigmore puts it: “[t]he responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.”29

One of the difficulties lies in making the assumption that candour is a good thing. This is not necessarily so. The fact that a communication is frank does not guarantee that it is a proper one. A civil servant can display bias, prejudice, incompetence, unfairness, or plain stupidity when he is being candid. Why should the public be deprived of the opportunity of learning this? If the civil servant is aware that what he writes in a report may enter the public scrutiny some day, then he may be less frank, for example, in repressing his bigotry, but the public will be much the better if this forces him to adopt fairer standards. Take the situation in Conway where the reports concerned a probationer constable and led to his dismissal. The reports involved a very judicial matter in that they assessed and passed judgment on the conduct of an individual. If the writer knows his report may be made public, it is as if he knew that someone was watching over his shoulder. This is not at all a bad thing, and indeed, would lead the civil servant to exercise greater care and fairness. The interests of society will be better served by a civil service that has nothing to hide because it has acted properly, than by one which is protected from all external investigation and thus is free to act improperly.30

27 Id. at 972 (A.C.).

28 Or as Lord Hodson observed: “[t] is strange if civil servants alone are supposed to be unable to be candid in their statements made in the course of duty without the protection of an absolute privilege denied other fellow subjects.” Id. at 976 (A.C.).

29 Wigmore, supra, note 8, para. 2378a.

30 Supra, note 20.

31 As Lord Morris put it, “[i]f there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report would be encouraged rather than frustrated.” Supra, note 20 at 891 (All E.R.). See also the following: D. G. T. Williams, Crown Privilege (1968), 26 Cam. L.J. 173; H. W. R. Wade, Crown Privilege Controlled at Last (1968), 84 L.Q.R. 171; D. H. Clark, The Last Word on the Last Word (1969), 32 Mod. L.R. 142.
A civil servant is not coerced into the employ of the Crown; he goes there voluntarily. If he cannot endure the prospect of occasional judicious scrutiny of his acts, then he is free to find employment elsewhere. The civil service exists to serve the public, and not the reverse. Vital interests of the Crown, such as national defence, cabinet minutes, and diplomatic documents, can be safeguarded; but in other cases, where information, confidential or otherwise, is in the hands of civil servants, it should be available to a court of law, provided always that it is relevant to the case at bar. The test of relevance will be adequate to weed out unwarranted snooping or frivolous requests.

It should be remembered, however, that section 28(2) of the English Crown Proceedings Act, 1947 states that the existence of a document need not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to do so. Surely the Crown should not have a right to conceal the mere existence of any document. If the court is to be the final arbiter on the issue of admissibility, the Minister should not be permitted to prevent such a determination. The Crown is adequately protected at the admissibility hearing so that there is no real need to permit it to keep secret that which may be highly relevant and probative. At present the effect of Conway v. Rimmer can be nullified if the Minister feels that it is not in the public interest that the mere existence of a document be disclosed. Such an unhappy state cries out for reform.

In Conway the confidentiality was within internal communications of the civil service. A claim for exclusion on the ground of public policy may also be made where confidential communications are made by a private citizen to a state employee. In the criminal sphere this raises the question of the former. Outside the criminal area there may also be communications to government agencies as in Norwich Pharmacal Co. v. Commissioners of Customs and Excise.

Norwich owned a patent which covered a certain chemical compound and wished to bring proceedings against third parties which it believed were infringing that patent, but it did not know their names and addresses. The Commissioners of Customs and Excise had in their possession documents showing who imported each of some thirty consignments of the chemical substance into the United Kingdom over a period of ten years, and Norwich sought discovery of the names. The Commissioners argued disclosure would be injurious to the public interest because the documents contained confidential information furnished to them pursuant to The Customs and Excise Act, 1952, but all of their Lordships agreed to order production of the documents.

In reading the reasons advanced by the law lords, the impression created is that they ordered the documents to be produced because the persons named

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82 10 & 11 Geo. 6, c. 44.
84 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44.
therein were wrongdoers. Their Lordships sympathized with Norwich's plight and, in the context of so appealing a set of facts, naturally rejected the claim for nondisclosure.

Lord Reid noted that each of the consignments involved a tortious infringement of Norwich's patent right. He also felt there was nothing secret or confidential in the information sought or in the documents which came into the hands of the Commissioners containing that information. They were simply ordinary commercial documents. To the argument that disclosure might cause resentment and impair good relations with other traders, Lord Reid found it impossible to believe that "honest" traders would resent failure to protect wrongdoers. He based his reasons, then, on a combination of moral condemnation of those named in the documents and lack of anything confidential in them.

Viscount Dilhorne did not accept the proposition that "all information given to a government department is to be treated as confidential and protected from disclosure." He did agree, however, that:

... information of a personal character obtained in the exercise of statutory powers, information of such a character that the giver of it would not expect it to be used for any purpose other than that for which it is given, or disclosed to any person not concerned with that purpose, is to be regarded as protected from disclosure, even though there is no statutory prohibition of its disclosure.

He did not think it was established that the names of the importers were given in confidence here. In fact, the document did not seem to him more confidential than "consignment notes completed for British Railways and British Road Services." Although Viscount Dilhorne did not doubt that a great deal of the information obtained by customs was of a highly confidential character which it would be most improper for them to disclose, he did not think that the information here, even if it was of a "confidential character, was of a highly confidential nature." Unfortunately, his Lordship did not explain what the distinction was between something of a "confidential character" and a "confidential nature."

Furthermore, Viscount Dilhorne rejected the argument based on the need for candour. It was unrealistic to suggest that the vast majority of importers who did not infringe patents or do other wrongs would be deterred from giving proper information to customs by the knowledge that pursuant to an order of the court the names of the wrongdoers would be disclosed by customs. He concluded that if a degree of confidentiality did attach to the names and addresses of the importers, "on the balance of national interest the interests of justice in this case far outweigh any interest there may be in non-disclosure."

35 *Supra*, note 33 at 949 (All E.R.).
36 *Id.* at 961 (All E.R.).
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.* at 962 (All E.R.).
Lord Cross stated that, outside of the field of legal professional privilege, the fact that information has been imparted confidentially is not any bar to the court ordering its disclosure in the absence of an express statutory prohibition. He pointed out that the legislature has power expressly to provide that information of a certain character shall not be disclosed as in section 17(2) of The Agricultural Marketing Act, 1931.41 Had Parliament wished to preclude disclosure of the names involved here it could have so enacted. As did the other law lords, he noted that the great majority of those whose names would be disclosed had infringed the patent. As for the argument based on the efficient working of the customs service, Lord Cross felt that while "dishonest traders" might be disturbed by the knowledge that such disclosure could be ordered, any "honest" trader would be a most unreasonable man to be so disturbed.

His Lordship listed the factors that should be considered in deciding whether to disclose the documents: the strength of the applicant's case against the unknown alleged wrongdoers, the relation subsisting between the alleged wrongdoer and the Commissioners, whether the information could be obtained from another source, and whether the giving of the information would put the Commissioners to trouble which could not be compensated by the payment of all expenses by the company.42

The decision in Norwich was soon followed by that in Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customs and Excise (No. 2).43 The appellants manufactured amusement machines on which they paid purchase tax calculated on a formula related to their wholesale value. A dispute arose as to the basis of the formula between the company and the Commissioners of Customs and Excise, and the latter proceeded to investigate the company's affairs in order to fix the wholesale value of the machines. They obtained information from various customers. The information was given voluntarily, though the disclosure could be compelled under section 24(6) of The Purchase Tax Act, 1963.44 The company objected to the Commissioners' assessment of the wholesale value and sought a reference to arbitration. The Commissioners claimed privilege in respect of several classes of documents including internal communications passing between the Commissioners and their officers, servants and agents which had been prepared, sent or received confidentially in connection with the arbitration, and documents received from third parties in confidence as information and evidence for the purposes of the arbitration, including orders, invoices, confidential price lists, credit notes, extracts from ledgers, and correspondence between third parties. Lord Cross held that while confidentiality was not a separate head of privilege, it might be a very material consideration to bear in mind when privilege was claimed on the basis of public interest.

What the court has to do is to weigh on the one hand the considerations which

41 21 & 22 Geo. 5, c. 42.
42 Supra, note 33 at 970 (All E.R.).
43 Supra, note 7.
44 11 & 12 Eliz. 2, c. 9.
45 Lords Reid, Morris and Kilbrandon concurred.
suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other.\textsuperscript{46} The information constituted an important part of the material on which the Commissioners based their conclusion. Were it not disclosed, the company would be at a serious disadvantage.

On the other hand, Lord Cross felt there was much to be said against disclosure, though the case was not as strong as that against disclosing the name of an informer, for the result of doing so would be that the source of information would dry up whereas here the Commissioners would continue to have their statutory powers of compulsion. Yet Lord Cross felt the case against disclosure was "far stronger" than in *Norwich\textsuperscript{47}\) where it was probable that "... all the importers whose names were disclosed were wrongdoers and the disclosure of the names of any, if there were any, who were innocent would not be likely to do them any harm at all."\textsuperscript{48} His Lordship believed that disclosure would be very much resented by the third parties and that knowledge that such information could be revealed might be harmful to the efficient working of the Act. Unfortunately, he went on to say the following:\textsuperscript{49}

In a case where the considerations for and against disclosure appear to be fairly evenly balanced the courts should I think uphold a claim to privilege on the ground of public interest and trust to the head of the department concerned to do whatever he can to mitigate the ill-effects of non-disclosure.\textsuperscript{50}

One would have thought that the burden lay on the party claiming exclusion to prove that the public interest demanded the evidence not be disclosed, and that if he could only leave the court evenly balanced, he would fail.\textsuperscript{51} The primary assumption is that there is a general duty to give what testimony one is capable of giving, and that any exemptions from that duty are distinctly exceptional, and therefore there must be good reason shown for their existence. If the state is to seek exclusion in an area so close to the borderline as this, it should have the onus, if only on a balance of probabilities, of convincing the court that the public interest of keeping the document secret outweighs the public interest in obtaining its disclosure. Lord Cross was prepared to trust the department head to mitigate the ill-effects of non-disclosure.\textsuperscript{52} Such confidence is not shared by all.

\textsuperscript{46} Supra, note 7 at 1184 (All E.R.).
\textsuperscript{47} Supra, note 33.
\textsuperscript{48} Id. at 1185 (All E.R.).
\textsuperscript{49} Id.
\textsuperscript{50} See C. Tapper, *Privilege and Policy* (1974), 37 Mod. L.R. 92, where it is pointed out that it will be very difficult for the ordinary private litigant to satisfy the onus. He will not usually have seen the document in question, nor will he know the practices of the department, nor the full implications of disclosure, though all of these will be familiar to the administration.
\textsuperscript{51} In *A.G. v. Jonathan Cape Ltd.*, supra, note 2, Lord Widgery C.J. proceeded on the basis that the burden lay on the Attorney General to prevent publication: at 496 (All E.R.).
His Lordship later makes a further point. He states that if any of the third parties concerned "is in fact willing to give evidence, privilege in respect of any documents or information obtained from him will be waived." To assess this statement one should remember that evidence may be excluded on the ground of public policy either because of its contents, as with military secrets and cabinet documents, or because it forms part of a class of communications that is protected in order to encourage people to speak more freely. Crompton is an instance of the latter case. If the party for whose benefit the exclusionary principle has been established is willing to reveal the communications, there is no reason why he should not be allowed to do so. This is a situation analogous to communications without prejudice. Such an approach does not apply to the contents cases where exclusion is not a matter of choice, but an obligation.

The Supreme Court of Canada rejected the approach of Duncan in Re R. v. Snider, a criminal prosecution for conspiracy in which the Minister of National Revenue sought to prevent the prosecution from obtaining production of income tax returns filed by the accused persons. The Supreme Court held that it, and not the Minister, had the final power to decide whether or not the public interest demanded that the documents be withheld.

Under the Federal Court Act, section 41(1) empowers that court to examine any document which the Crown would like to have withheld from production to determine whether the public interest claimed by the Minister is adequate. The decision of the Minister is final and the court cannot go behind his determination if he certifies under section 41(2) that the production of the document in question would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose cabinet confidences. As well, under the Crown Liability (Provincial Court) Regulations, a Minister may object to production of any document on grounds of public policy. The Law Reform Commission of Canada in section 43 of its Proposed Code recommended that the present law should be changed so that a judge would have the final say on the merits of a claim of Crown privilege, and indeed, a judge of the Supreme Court of Canada, if the matter were sufficiently sensitive.

In Ontario, under section 12 of the Proceedings Against the Crown Act, 

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53 Supra, note 7 at 1185 (All E.R.).
54 Supra, note 7.
55 Supra, note 6.
57 S.C. 1970-71-72, c. 1; see also the Federal Court Rules, S.O.R./71-68.
the Crown may refuse to produce a document or to answer a question on the
ground that the production or answer would be "injurious to the public in-
terest." However, the Ontario Law Reform Commission concluded that this
section is only a procedural one,\footnote{Ontario Law Reform Commission, Report on the Law of Evidence (Toronto:
Ministry of the Attorney General, 1976) at 231. Similarly, s. 31 of The Evidence Act,
R.S.O. 1970, c. 151, would also be procedural: \textit{id.} at 229.} and that it is up to the court to decide
whether the ground of privilege is justified. The Commission concluded that
the Executive Council collectively, and not an individual Minister, should
have the power under sections 42 and 43 of the Draft Act to make an un-
reviewable claim of privilege based on injury to the security of Canada or
Ontario, or to federal-provincial relations, or that would disclose a cabinet
confidence. Otherwise the court must inquire into any claim of privilege to
determine whether production would be contrary to the public interest.

2. \textit{The Informer}

\textit{Compton}\footnote{\textit{Supra}, note 7.} involved a member of the public communicating information
to the civil state authorities with the possibility of compulsion in the back-
ground. In the criminal sphere this raises the whole question of the informer.
Public policy is said to demand that the names of individuals who provide the
police with information leading to the detection of crime should not be re-
leased. This encourages individual members of the public to provide information
who might not do so if they knew their names would be revealed, and
they exposed to retaliation and revenge by the wrongdoers whom they had
incriminated. Of course, there is nothing to prevent the informer from reveal-
ing his own identity. This is the possibility Lord Cross contemplated in
\textit{Crompton} when he said that though the evidence was being excluded on the
ground of public interest, the third parties for whose benefit the ruling was
being made could disclose the information if they so wished. It is not the in-
formation communicated that is protected, as that will invariably be used in
the course of the prosecution; rather it is the identity of the informer which
public interest requires to be safeguarded.

The principle, however, is not absolute. \textit{In R. v. Richardson}\footnote{\textit{(1863)}, 3 F. & F. 693.} a domestic
servant was charged with administering beer containing a quantity of corro-
sive sublimate to her employer. After the event, a communication was made
to the police, as a result of which they conducted a search and found a phial
containing a small quantity of the substance. At the trial the policeman re-
fused to say from whom he had received the information. Cockburn C.J.
ordered him to answer and the policeman stated that two girls who were not
called as witnesses for the prosecution had given him the information.

It may be that the true guilty party, or simply someone who wished to
see the accused wrongly convicted, could plant incriminating evidence and
then inform the police in order to divert suspicion from himself and fix it on
the accused. If the identity of the informer were known, he could be cross-
examined. In this case, for example, the informer might have been asked how
he knew where the phial was located. One of the problems in this area is that those who provide information to the police regarding criminal activity are often criminals themselves — persons whose integrity and credibility may leave something to be desired.

In *Marks v. Beyfus* the Director of Public Prosecutions declined, on grounds of public policy, to give the names of his informers after he testified that a prosecution for fraud against the plaintiff was instituted by the Director and not the defendants whom the plaintiff was suing for malicious prosecution. It was held that in a public prosecution the name of an informer cannot be disclosed on the ground of public policy, the rule being not a matter of discretion but of law. Even if the Director of Public Prosecutions were willing to answer, the judge could not allow him to do so. The rule applies not only to the trial of the accused, but extends to a subsequent civil action between the parties on the ground that the criminal prosecution was maliciously instituted. Lord Esher M.R. made the following important qualification, however.

I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner’s innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.65

Under section 44(1) of the Proposed Code of the Law Reform Commission of Canada, the Crown is given a privilege against disclosure of the identity of an informer, unless the interests in maintaining secrecy are outweighed by the “interest in arriving at a fair determination of the issues.” This would appear to represent the common law position. The privilege may be claimed by any person, but may be waived under section 44(2) by a person charged with the duty of enforcing the law in question. The Ontario Law Reform Commission did not expressly deal with this privilege, so presumably the common law would continue.

A recent case which is not completely analogous to *Marks v. Beyfus*, but closer to it perhaps than to *Crompton* or *Norwich*, is *Rogers v. Secretary of State for the Home Department*. Under *The Gaming Act, 1968*, the Gaming Board was established, one of its functions being to deal with applications for a gaming licence. It was required to investigate the character, reputation, and financial standing of all applicants, and it was the custom of the board to obtain confidential information about such persons from the

65 Id. at 498 (Q.B.D.). See also Sopinka and Lederman, *supra*, note 56 at 258-261 for the Canadian position.
66 *Supra*, note 7.
67 *Supra*, note 33.
69 16 & 17 Eliz. 2, c. 65.
police. The applicant and a company of which he was a director had sought a licence. He said a copy of a letter written about him to the board by an assistant chief constable came into his possession from an anonymous source. The copy had been obtained illegally. As the letter allegedly contained highly damaging libellous statements about him, the applicant sought to prosecute the police officer for criminal libel. To succeed he had to prove the letter was sent, so he applied for its production against the board and chief constable.

The case is replete with negative aspersions on the applicant. No one should condone wrongful conduct; but the difficulty with this sort of approach is that exposition of principles of law is overshadowed by excessive concentration on the individual merits of the parties. In *Norwich*,\(^{70}\) an innocent company seeking disclosure to reveal wrongdoers obtained discovery; in *Rogers*, a non-meritorious party naturally failed to do so.

This was a class case and not one of contents. The contents of the documents did not contain material which would be damaging to the national interest to divulge; rather the documents were said to be of a class which demanded protection. Lord Reid reiterated that the correct test was the one he laid down in *Conway*,\(^{71}\) namely, whether the withholding of a document because it belonged to a particular class was really “necessary for the proper functioning of the public service,” and in this case, whether the withholding was really necessary to enable the board adequately to perform its statutory duties.

The board needed to have information in order to identify and exclude persons of dubious character and reputation from obtaining a licence. Furthermore, unlike the situation in *Crompton*,\(^{72}\) there was no obligation on anyone to give information to the board. His Lordship observed that it had long been recognized that the identity of police informers must be kept secret in the public interest, and the same consideration applied to persons who volunteered information to the board. Many apparently refused to speak unless assured of absolute secrecy.

In this case the letter came from the police who would not be deterred from giving full information by any fear of consequences to themselves if there were any disclosure. Even so, it was excluded because the police were merely intermediaries who had conveyed to the board information they had in turn obtained from various informers. Disclosure of the reports would be tantamount to identifying the informers.

Lord Simon agreed that “Crown privilege” was a misnomer. “It is not a privilege which may be waived — by the Crown . . . or by anyone else.”\(^{73}\) This should be compared with Lord Cross’ view that the informers could have waived the privilege in *Crompton*. He proceeded to deal with the board’s claim that the documents were inadmissible because the information contained therein was imparted in confidence.

\(^{70}\) *Supra*, note 33.
\(^{71}\) *Supra*, note 20.
\(^{72}\) *Supra*, note 7.
\(^{73}\) *Supra*, note 52 at 1066 (All E.R.).
I am not, for myself, convinced that there is any general privilege protecting communications given in confidence . . . . though, no doubt, the circumstances may be such that certain confidential communications will be privileged — for example, communications for the purpose of marriage conciliation . . . . 74

Similarly, Lord Salmon had no doubt that while the letter was written in confidence, that fact alone did not confer immunity from its production. 75 He felt it better that a respectable citizen was occasionally denied the privilege of running a gaming club than to risk gaming clubs getting into the wrong hands.

The applicant here did not have an absolute right to a licence. Nothing was being taken from him; rather he was being denied the conferral of a privilege. This should be contrasted with Norwich 76 where the appellants were not seeking a privilege but damages for improper use of their patent by unidentified wrongdoers. The harm had already been done, and to that extent, the granting of disclosure is not inconsistent with its withholding in Rogers. 77 Crompton 78 would appear to be the least satisfactory of the three cases in that the company there was merely asserting its right to challenge an assessment of tax against it, and it should have had the benefit of obtaining the confidential documents in order to argue its case fully.

3. Use in Civil vs. Criminal Cases

The principles under discussion may vary depending on whether the confidential evidence is to be used in criminal or civil proceedings. For example, in Duncan, 79 Viscount Simon made the following important qualification: "[t]he judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same." 80

In Marks v. Beyfus 81 it was stressed that the case involved a public prosecution, implying that different considerations could apply if the prosecution were a private one, in which case disclosure might well have been ordered. One would have thought, however, that the damage to the flow of information to the public authorities would be just as great if informers feared their names would be disclosed in private prosecutions.

R. v. Barton 82 provides an analogy involving the legal professional privilege. The accused was charged with fraudulent conversion, theft and falsification of accounts alleged to have been committed in the course of his employment as a legal executive with a firm of solicitors. An application was

74 Id. at 1067 (All E.R.).
76 Supra, note 33.
77 Supra, note 52.
78 Supra, note 7.
79 Supra, note 6.
80 Id. at 591 (All E.R.). See also Miles v. Miles, supra, note 56.
81 Supra, note 64.
made by a solicitor who was a partner in the firm to set aside a subpoena and notice to produce certain documents served on him on the ground that the documents in question were subject to legal professional privilege. Counsel for the accused argued that the documents would help to further the defence, or in other words, that justice would not be done unless they were disclosed. Caulfield J. assumed that was "absolutely correct" for the purposes of his ruling which he restricted to these particular facts raised in a criminal trial.

If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgment no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown.83

The clear dichotomy suggested here and earlier between criminal and civil cases should be contrasted with the approach in the interesting Irish case of A.G. v. Simpson.84 The accused was charged with showing for gain an indecent and profane performance of a play in a theatre. A police officer testified he had attended one such performance and that he was directed to go to see the play by a superior officer. He objected to answering questions as to what his instructions were on the ground of privilege. Another police witness also gave evidence that he attended a performance, and indicated he had made a written statement to his superior as to what he had seen on the stage and the impression it gave him. The witness objected to producing the report for the defence on the ground of privilege.

Dixon J. indicated that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be satisfied having regard either to the contents of the particular documents, or the fact they belong to a class which, on grounds of public interest, must as a class be withheld from production.85 In the present case, exclusion depended on the documents belonging to a class excluded in the public interest and not on their contents which were quite innocuous from the point of view of public policy. The class involved communications between members of the police force in connection with the detection and prosecution of a suspected crime.

The important point is that Dixon J., concurred in by Teevan J., concluded that communications of the type under consideration were "privileged and inadmissible, both in civil and in criminal proceedings."86 Davitt P. noted that Viscount Simon's reasons in Duncan87 were expressly limited to civil actions, but went on to say that whatever the position was in England, the practice in Ireland was the same both in criminal and in civil cases.

Certain classes of communications ... including confidential reports made in the

83 Id. at 1194 (All E.R.).
84 Supra, note 12.
85 Id. at 139.
86 With perhaps one exception in the case of criminal proceedings — presumably of the Marks v. Beyfus kind.
87 Supra, note 6.
course of duty by a police officer to his superiors and instructions given by
superior to subordinate police officers, even if otherwise admissible in evidence,
must, in both civil and criminal cases, be excluded where a proper claim of
privilege is made.88

Accordingly, the court held the communications were inadmissible in evi-
dence. The case is a very strong one against any special rule for criminal
cases of the kind proposed in Barton.89

It is useful to examine the situation in the United States. In U.S. v.
Reynolds,90 widows of civilians killed in the crash of an Air Force plane which
was on a secret mission brought civil actions for damages. They sought pro-
duction of the Air Force’s official accident investigation report and the state-
ments of three surviving crew members taken in connection with the investi-
gation. The government claimed privilege as the flight was highly secret and
production would damage national security. The Supreme Court upheld the
claim, but Vinson J. observed the following:

Respondents have cited us to those cases in the criminal field, where it has been
held that the Government can invoke its evidentiary privileges only at the price
of letting the defendant go free. The rationale of the criminal cases is that, since
the Government which prosecutes an accused also has the duty to see that justice
is done, it is unconscionable to allow it to undertake prosecution and then invoke
its governmental privileges to deprive the accused of anything which might be
material to his defense. Such rationale has no application in a civil forum where
the Government is not the moving party, but is a defendant only on
terms

In U.S. v. Andolschek92 the accused governmental tax inspectors com-
plained of the exclusion of certain official reports made by them to their su-
periors. The reports would bear upon how the accused had in general per-
formed their duties. Learned Hand J. held that the government could not
suppress such reports in a criminal prosecution founded upon the very deal-
ings to which the documents related, and whose criminality they would or
might tend to exculpate. “So far as they directly touch the criminal dealings,
the prosecution necessarily ends any confidential character the documents
may possess.”93 Accordingly, a new trial was ordered.

To summarize, there are three cases where the distinction between civil and
criminal cases may be relevant. In the area of private privilege, it would
appear that Barton94 represents the law. Privileges that apply in civil cases

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88 Supra, note 12 at 133. But in criminal cases if the needs of justice so require,
the court may direct disclosure of the name of an informer.
89 Supra, note 82.
90 (1953), 345 U.S. 1; 73 S. Ct. 528.
91 Id. at 12 (U.S.). In Jencks v. U.S. (1957), 353 U.S. 657; 77 S. Ct. 1007, the
Supreme Court held that “the criminal action must be dismissed when the Government,
on the ground of privilege, elects not to comply with an order to produce . . . relevant
statements or reports, in its possession, of Government witnesses touching the subject-
matter of their testimony at the trial,” as summarized by Davitt P. in Simpson, supra,
ote 12 at 130.
92 (1944), 142 F. 2d 503.
93 Andolschek was followed in U.S. v. Beekman (1946), 155 F. 2d 580.
94 Supra, note 82.
must yield in criminal cases to the policy that an accused person must be allowed every opportunity to establish his innocence.

In the public sphere, where evidence is excluded on the ground its reception would be contrary to state interest, one should distinguish between the contents and the class cases. Simpson95 makes it clear that in Ireland there is no difference between civil and criminal cases and the evidence is to be excluded in both. However, in England, in the class cases, where there is nothing in the communication itself that is vital to public interest but a desire to preserve certain channels of communication, one would have thought that the principles canvassed in Barton would apply.

Difficulties arise in the contents cases, involving such matters as military secrets, cabinet minutes, and diplomatic exchanges. In civil cases these would invariably be excluded. But what if the submarine plans in Duncan96 had been sought by the accused in a criminal prosecution for manslaughter? Would the House of Lords have precluded their disclosure? Viscount Simon emphasized that different considerations could apply in criminal cases. But if such evidence is to be admitted in a criminal case, how can one justify coming to an opposite decision in a civil action when it has been claimed that public policy demands that his evidence be suppressed? It is illogical to make such a distinction since the danger to the state is identical whether such documents are revealed in civil or in criminal cases. Illogical though it be, however, the justification is that the public interest in national security yields to the public interest in ensuring that an accused person is able to establish his innocence. Perhaps the solution is that in the United States where the state is entitled to keep its privilege but then must forego the prosecution.97 This reasoning applies equally well where the state institutes civil proceedings.98

C. COMMUNICATIONS BETWEEN PRIVATE PARTIES

Part B dealt with situations where either a private party was communicating with the state or the communication was an internal one within the

95 Supra, note 12.
96 Supra, note 6.
97 The United States authorities tend towards the view that a conviction cannot stand where the accused has been denied access to documents relevant to his defence which are in the possession of a department of the government whose regulations make them unavailable at trial: U.S. v. Grayson (1948), 166 F. 2d 863 at 870. Thus the government is entitled to keep the documents secret, but the conviction will fall unless perhaps there has been no prejudice from non-disclosure: Williamson v. U.S. (1960), 272 F. 2d 495 at 497.
98 Where the government is the party-plaintiff in a civil action, many courts have held that the government waives its "privilege" in bringing the action, as in criminal cases: Maguire et al., Cases and Materials on Evidence (5th ed. Brooklyn: Foundation Press, 1965) at 874-875. Thus if the government fails to comply with an order to produce the documents, the action can be dismissed: U.S. v. Certain Parcels of Land (1954), 15 F.R.D. 224 at 232; U.S. v. Cotton Valley Operators Committee (1949), 9 F.R.D. 719 at 721, aff’d. by an equally divided court (1950), 339 U.S. 940; 70 S. Ct. 793. In Certain Parcels the decision was based on Rule 41(b) of the F.R.C.P.: "[f]or failure of the plaintiff . . . to comply with these rules or any order of court, a defendant may move for dismissal of an action . . . ."
state. Part C turns to those cases where the interchange is solely between private citizens. The main concern will be with marital communications and those arising from a professional relationship with the lawyer, priest, and journalist.

Wigmore lists four essential conditions necessary for the establishment of a privilege against the disclosure of communications between persons standing in a given relation:

1. The communications must originate in a confidence that they will not be disclosed;
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

The mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. For example, in *Hopkinson v. Lord Burghley* the defendants refused to produce two letters written by a stranger, one of which was marked "private" and the other "private and confidential." Lord Cairns L.J. (as he then was) stated that the writer of a letter is supposed to intend that the receiver may use it for any lawful purpose, and if there is a lawful purpose for which a letter can be used, it is the production of it in court to further the ends of justice. Thus, production was ordered.

In the trials of the 1600's, the obligations of honour among gentlemen were often used to justify silence. However, in the *Duchess of Kingston's Case* Lord Camden rejected this approach.

I hope that your lordships, sitting in judgment on criminal cases, the highest and most important, that may affect the lives, liberties, and properties of your lordships, that you shall not think it befitting the dignity of this high court of justice to be debating the etiquette of honour, at the same time when we are trying lives and liberties.

One of the problems that pervades this whole area is that regardless of what the law says, it is impossible to compel someone to disclose a confidential communication if he refuses to do so. Furthermore, there is always the danger that any attempt to force a disclosure may only lead to perjury.

1. **Marital Conciliation**

When marital difficulties arise, either one or both spouses may seek the assistance of a third party to conciliate the dispute. Such an endeavour demands absolute candour. If the mediator is to make progress, he must know all the facts and to obtain these he must have the full trust and confidence of

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99 Wigmore, *supra*, note 8, para. 2285. (Italics omitted.)
100 (1867), 2 Ch. App. 447; 36 L.J. Ch. 504; 15 W.R. 543 (C.A.).
101 Wigmore, *supra*, note 8, para. 2286.
103 *Id.* at 587 (S.T.).
the parties. Should the efforts prove unsuccessful, divorce proceedings may ensue and either or both parties may seek to adduce evidence of what transpired during the negotiations. The issue that arises is whether such confidential communications are privileged, and if so, whose privilege it is.

This is really part of the wider topic of negotiations "without prejudice." If there exists a dispute which is the subject of pending or contemplated litigation, any party to it is entitled "to make an offer to compromise for which he can claim privilege if the negotiations initiated by his offer ultimately fail." The purpose of the device is to encourage as many settlements as possible and to avoid the necessity of a trial. The privilege is not based on confidence so much as on the desire to prevent statements made in the course of such negotiations from being relied upon as admissions in the litigation to which they relate. When the dispute is between husband and wife, the promotion of marital harmony is an additional reason for the fullest possible privilege. A reconciliation between estranged spouses is not the same thing as the settling of an insurance claim. In matrimonial disputes, the state is also an interested party and is more interested in reconciliation than in divorce. However, it also has an interest in seeing that justice is duly administered in courts of law through having all relevant evidence before the trier of fact. It should be remembered that the highly laudable policy of marital reconciliation is extrinsic to the ascertainment of truth function of a trial.

In McTaggart v. McTaggart the spouses were interviewed by a probation officer. In subsequent divorce proceedings, the husband and wife gave conflicting evidence as to what was said during the interview. The probation officer claimed privilege, but Cohen L.J. in the Court of Appeal held that any privilege belonged to the parties and not the officer. Had one of the parties objected, that objection would have been upheld. Since, however, they had given evidence of what was said at the interview, they could not assert it. His Lordship felt the result was unfortunate as knowledge that the probation officer could be called subsequently to give evidence could prejudice the success of attempts at reconciliation. Lord Denning agreed that the probation officer had no privilege of his own in respect of disclosure any more than a priest, medical man, or banker. Here neither party claimed the privilege

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104 Supra, note 3, para. 35. See also Law Reform Commission of Canada, supra, note 59 at 67-68.
105 Id.
107 See as well: Matrimonial Proceedings (Magistrates' Courts) Act, 1960, 8 & 9 Eliz. 2, c. 48, s. 4.
109 In Mole v. Mole, [1951] P. 21; [1950] 2 All E.R. 328; 66 (pt. 2) T.L.R. 129; 94 Sol. Jo. 518 (C.A.), Lord Denning added that the principle of McTaggart applies "not only to probation officers, but also to other persons such as clergy, doctors, or marriage guidance counsellors, to whom the parties resort with a view to reconciliation when there is a tacit understanding that the conversations are without prejudice. I see no reason why the solicitors of the parties should be in any different position." At 329 (All E.R.). See also G. v. G., [1964] 1 O.R. 361 (H.C.); and Cronkwright v. Cronkwright, [1970] 3 O.R. 784; 14 D.L.R. (3d) 168 (H.C.).
and must therefore be taken to have waived it and thus the appeal was dis-
missed.

The connection of this topic with the public policy sphere, with which Part B was concerned, comes out strongly in *Broome v. Broome.*\(^{110}\) In a petition for divorce, the wife caused a subpoena *ad testificandum* to be served on a representative of the Soldiers’, Sailors’, and Airmen’s Families Association in Hong Kong, and a subpoena *duces tecum* to be served on the Secretary of State for War to bring all letters sent or received and records made by the S.S.A.F.A. concerning the spouses. The association was an independent body and its staff were not Crown employees; its work included family welfare and service family problems. The Secretary felt that it was not in the public interest that the documents should be produced or the evidence of the representative given orally.

Counsel for the Crown wished the protection from disclosure in court given the efforts of probation officers and others within the *McTaggart*\(^{111}\) decision be extended to those works of the S.S.A.F.A. which were concerned with maintaining good relations between husband and wife and which often involved attempts to reconcile them after troubles had arisen. In that case the privilege could be waived by the parties, whereas here the Minister of War desired there should be no such waiver. To justify this, the head of public interest put forward was “the maintenance of the morale of the armed forces.”\(^{112}\) Sachs J. felt this was going a bit far because claims of “Crown privilege” should not be used unnecessarily to hinder the search for truth.

One cannot help noting that the steps which would extend the heads of public interest from “maintaining the morale of the forces” to “maintaining general public morale” and thence to “maintaining the faith of the public in specific institutions serving it” are neither very large nor unduly illogical.\(^{113}\)

All this was *obiter* as Sachs J. set aside the subpoena in respect of the documents, but declined to do so in respect of the subpoena to testify.\(^{114}\)

*Theodoropoulas v. Theodoropoulas*\(^{115}\) differed somewhat from the preceding cases. A private individual had a discussion with the wife after she had left her husband, the approach being made at the request of the husband with a view to reconciliation. The husband’s counsel sought to cross-examine the wife as to this conversation with the private conciliator and to call the latter as a witness. A second conversation took place between the husband


\(^{111}\) *Supra*, note 108.

\(^{112}\) *Supra*, note 110 at 205 (All E.R.).

\(^{113}\) *Id.* at 206-207 (All E.R.).

\(^{114}\) Though the claim of “Crown privilege” was successful insofar as the documents were concerned, it should be remembered that the case predates *Conway v. Rimmer* and the court therefore accepted the certificate of the Secretary of State for War without question, something it would not do today. As for the subpoena to testify, the court rejected a certificate by the Minister in “blanket form” as that would have prevented the witness from giving evidence on any fact, even one not against the public interest to disclose.

and the wife alone, after the petition had been filed. The wife had called on the husband, emphasized that the visit was without the knowledge of her solicitor, and discussed financial terms on which she might consider returning home. Counsel wished to cross-examine the wife as to her approach and to call an individual who was said to have been present during part of the conversation.

As for the first exchange, Sir Jocelyn Simon P. (as he then was) held that the policy reasons in McTaggart applied with equal force to a private individual's attempts at reconciliation as to those of an official person. Where any private individual is enlisted specifically as a conciliator, any admissions or disclosures by the parties are privileged in subsequent matrimonial litigation. Thus, the evidence of the conversation between the wife and the private person was inadmissible.

As for the second conversation, his Lordship indicated that in the case of without prejudice communications with a view to settlement of actual or pending litigation, the privilege "equally attaches whether the communication is directly between the parties, or through an intermediary such as a solicitor." The interesting point is that he went on to say that it also extends to exclude the evidence of an independent witness who was fortuitously present when those communications were made and who overheard or read them. Thus, secondary evidence is to be excluded. Normally, third parties may prove privileged communications, although secondary evidence of matters excluded by public policy is inadmissible. Theodoropoulas, therefore, suggests that without prejudice negotiations could equally well be treated under the head of public policy, especially negotiations between estranged spouses where the element of public policy is most pronounced.

In Pais v. Pais a priest who had been served with a subpoena ad testificandum by a husband petitioner in a defended matrimonial cause applied to set aside the subpoena on the ground that the only evidence he could give had been derived from the parties while he was acting as a marriage guidance counsellor and trying to effect a reconciliation between them. Baker J. noted that the privilege attaching to communications between lawyer and client belongs to the client, not the lawyer. So too, here, if there was a privilege, it was not that of the priest but of the spouse. Both spouses must waive it where both have been present, and although waiver must be in unmistakable and unequivocal terms, it may be confined to only part of the conciliator's evidence.

The Law Reform Committee in England felt the privilege "should continue to be the joint privilege of the parties and to be capable of being waived

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116 Supra, note 108.
117 Supra, note 115 at 774 (All E.R.).
118 Supra, note 115.
119 Cross, supra, note 106 at 263. Cross suggests that if the privilege ever became that of the conciliator, there would be even more reason to deal with the matter under the head of public policy.
by them if both so wish." The refusal of the conciliator to give evidence if he had the privilege "could only deprive the court of the best means of resolving the conflict and ascertaining the truth" where both spouses give conflicting evidence, as in McTaggart. 122

In Canada, section 21(1) of the Divorce Act 123 provides that a person nominated by a court under the Act to act as a conciliator is not competent or compellable to disclose any statement made to him in that capacity. Under section 21(2), evidence of any statement made in the course of a conciliation attempt is inadmissible.

Section 41 of the Proposed Code of the Law Reform Commission of Canada creates a general professional privilege. A person who has consulted someone to obtain professional services has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship if, in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice. This would appear to cover marriage counsellors and conciliators. The privilege, however, belongs to the client and not to the professional. As well, section 24 of the Proposed Code provides that evidence of attempts to settle a claim or of conduct or statements made in compromise negotiations is generally inadmissible.

Cook v. Carroll 124 provides an interesting Irish comparison. A girl had charged seduction and her mother later brought an action for damages against the man in question. A parish priest had acted as conciliator in the dispute which involved the paternity of a still unborn child. Gavan Duffy J. felt the meeting with the priest and the two antagonists must have been held without prejudice by necessary implication. At the trial the girl and afterwards the man waived privilege by giving evidence of the conversation, and their stories did not tally—somewhat reminiscent of McTaggart. 125 The priest claimed privilege based on his office and the claim was upheld. Hence, the court here recognized a privilege belonging to the conciliator-priest, something the Law Reform Committee and the English common law have refused to do. Duffy J. felt this was "not at all the ordinary case of negotiations without prejudice between two adverse parties, who may agree to waive a privilege which belongs to them alone." 126 The "express permission of the parish priest" should be required for any publication of the secret conversation, and their stories did not tally—somewhat reminiscent of McTaggart. The priest claimed privilege based on his office and the claim was upheld. Hence, the court here recognized a privilege belonging to the conciliator-priest, something the Law Reform Committee and the English common law have refused to do. Duffy J. felt this was "not at all the ordinary case of negotiations without prejudice between two adverse parties, who may agree to waive a privilege which belongs to them alone." 126 The "express permission of the parish priest" should be required for any publication of the secret conversation, though "he will almost invariably refuse it." To deny the tripartite character of the privilege would be to do an injustice to the priest who has a "real and distinct interest as the parish priest in maintaining the compact of secrecy." 127

This decision lends further support for the inclusion of the marital con-

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121 Supra, note 3, para. 40.
122 Supra, note 108.
125 Supra, note 108.
126 Supra, note 124 at 524.
127 Id.
conciliation privilege in the area of public policy. For not only is secondary evi-
dence inadmissible, in Ireland the privilege cannot be waived by the parties, but only by the conciliator, who would virtually never do so.

2. Communications Between Husband and Wife

The preceding section considered the topic of "without prejudice" con-
ciliation negotiations between spouses. It was argued that the topic could be con-
sidered under the rubric of public policy rather than privilege, secondary
evidence of the communications being inadmissible. This section examines the
case where there is a private communication between man and wife and the
to which such communications should be excluded on the ground of confi-
dence. Wigmore strongly favoured such a privilege as he felt that the four
conditions at the base of every rule of privileged communications were
amply satisfied. But any privileged communication should be one that was
intended to be private. Thus, the presence of a third person within hearing or
the intended transmission of the communication to a third person will negate
a marital confidence.

This is not the topic of competence and compellability of spouses. That
is a broader question than privilege because competence involves testifying as
to matters learned wholly apart from marital confidence.

In Shenton v. Tyler the Court of Appeal considered the question
whether this privilege of non-disclosure of matrimonial communications exist-
ed at common law and found that it did not. The plaintiff sought to question
the defendant widow as to communications that passed between her and her
late husband during their married life. Sir Wilfrid Green M.R. referred to the
Second Report of the Commissioners on Common Law Procedure in 1853 which
recommended that the common law rule making husbands and wives incompete-
tent to testify for or against one another be abrogated, but that all
communications between them should be privileged. The reason for the latter
recommendation was this:

So much of the happiness of human life may fairly be said to depend on the
inviolability of domestic confidence that the alarm and unhappiness occasioned
to society by invading its sanctity and compelling the public disclosures of con-
fidential communications between husband and wife would be far a greater evil
than the disadvantage which may occasionally arise from the loss of light which
such revelations might throw on questions in dispute.

Under section 1 of The Evidence Amendment Act, 1853, the husbands and
wives of parties were made competent and compellable except in criminal

128 Theodoropoulos v. Theodoropoulos, supra, note 115.
129 Wigmore, supra, note 8, para. 2285.
130 Id., para. 2336.
132 At 13. The report is extracted in Wigmore, supra, note 8, para. 2332.
133 Supra, note 131 at 833 (All E.R.).
134 16 & 17 Vict., c. 83.
proceedings or proceedings instituted in consequence of adultery.\textsuperscript{186} However, section 3 enacted a privilege by which no one was compellable to disclose any communication made to him by his spouse during the marriage. The same wording was used in section 1(d) of The Criminal Evidence Act, 1898,\textsuperscript{188} and now appears in section 4(3) of the Canada Evidence Act\textsuperscript{137} and section 11 of The Evidence Act\textsuperscript{138} of Ontario.

Two points should be stressed: first, the privilege is not confined to "confidential" communications; secondly, it is the privilege of the recipient spouse and not that of the maker. It was a "mystery" to Lord Reid why it was decided to give the privilege to the recipient spouse.\textsuperscript{189} If the latter can disclose all confidential communications made to him by his spouse, however unwilling that spouse may be, the policy can hardly be to protect marital confidence. Thus, as the only rule was the statutory one contained in section 3 of the Act of 1853,\textsuperscript{140} upon its true construction the privilege ceased to exist after the marriage had come to an end.

In \textit{Rumping v. D.P.P.},\textsuperscript{141} a mate on a ship wrote a letter which he handed to a member of the crew in a closed envelope addressed to his wife and requested that it should be posted as soon as the ship arrived at a port other than an English one. When the ship reached Liverpool, the accused was arrested and charged with murder, and after his arrest the member of the crew handed the envelope to the captain of the ship who handed it over to the police. The letter amounted to a confession on the part of the accused and was admitted in evidence. As the wife never received the letter, the statutory privilege that attaches to the recipient of communications was inapplicable. But even if she had received it, secondary evidence would still have been admissible, in view of their Lordships' decision.

It was argued that there was a rule of common law applying both in civil and in criminal cases that all communications made between husband and wife during marriage were inadmissible in evidence and that the rule applied with equal force to a communication intended by one spouse for the other

\textsuperscript{186} See now the \textit{Canada Evidence Act}, R.S.C. 1970, c. E-10, ss. 4(1), 4(2), and \textit{The Evidence Act}, R.S.O. 1970, c. 151, ss. 8(1) and 10.

The Ontario Law Reform Commission also proposed in s. 9 of its Draft Act that a spouse be compellable in proceedings instituted in consequence of adultery. The federal Proposed Code provides in s. 57 that in a criminal proceeding, a person who is related to the accused by family or similar ties is not compellable for the prosecution if, having regard to the nature of the relationship, the probable probative value of the evidence and the seriousness of the offence charged, the need for his testimony is outweighed by the possible disruption of the relationship or the harshness of compelling the person to testify.


\textsuperscript{188} R.S.O. 1970, c. 151 as amend. S.O. 1976, c. 17.


\textsuperscript{140} 16 & 17 Vict., c. 83.

\textsuperscript{141} \textit{Supra}, note 139.
even though never received. Lord Morris referred to the case of *R. v. Simons* where Alderson B. ruled that "what a person is overheard saying to his wife, or even saying to himself, is evidence." His Lordship concluded that there never was a rule of law making communications between spouses inadmissible, but the guarding of confidence was one reason for a rule as to the incompetency of a husband or wife in a cause in which the other was a party. The privilege regarding spousal communications was introduced in the Act which removed incompetency, or as Lord Pearce put it, "Parliament did not... wholly immolate matrimonial confidences on the altar of truth." Thus, after 1853, a husband was not compellable to disclose a communication made to him by his wife during the marriage, but he could if he wished. That was quite inconsistent with any rule making such a communication inadmissible in evidence. A privilege against disclosure was given and it could be waived, but only by the spouse to whom the communication was made.

Viscount Radcliffe dissented. The letter's contents were intended for the wife's eye alone and it amounted to a confession of a very grave crime which raised the problem of self-incrimination.

A husband may gasp or mutter to his wife some agonised self-incrimination, intended for no ear in the world but hers; yet the law will receive and proceed on the evidence of the successful eavesdropper, professional, amateur or accidental. ... An incriminating letter may be intercepted by any means: it may be snatched from the wife's hand after receipt, taken into custody if she has mislaid it accidentally, withdrawn from her possession by one means or another: in all these cases, it is said, the trophy may be carried into court by the prosecution and, given proof that the prisoner is its author, the law has no rule that excludes it from weighing against him as a confession.

His Lordship concluded that there was a principle of law which called for the exclusion of the letter in whatever form it was tendered as evidence. He was not content to rely on the exercise of an inherent discretion in the trial judge to exclude evidence which he regarded as unfairly prejudicial to the accused because the law should not leave the prisoner's fate to be determined by so vague and uncontrollable a thing as judicial discretion. One can do little more, in summary, than to quote Lord Morris' weighing of the policies involved. "Respect is due to the confidences of married life: but so is respect due to the ascertainment of the truth. Marital accord is to be preserved: but so is public security."

The Law Reform Committee examined section 3 of the Act of 1853 and complained that this "curious" provision did not make sense because it gave liberty to disclose to the spouse in whom the confidence was reposed and not to the spouse who reposed the confidence. The Model Code and

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142 (1834), 6 Car & P. 540; 172 E.R. 1355; 2 Nev. & M.M.C. 598.
143 Id. at 1355 (E.R.).
144 Supra, note 139 at 280 (All E.R.).
145 Id. at 260 (All E.R.).
146 Id. at 266-267 (All E.R.).
147 See also *R. v. Keeton*, infra, note 164.
148 Supra, note 139 at 276 (All E.R.).
149 16 & 17 Vict., c. 83.
the Uniform Rules of Evidence in the United States make the privilege that of the communicator alone and exclude the privilege in actions between spouses.\(^{150}\) The Committee felt that if a privilege were to be retained, it should be that of the communicator and waivable by him alone. There can be no breach of marital confidence if the spouse who made the communication is willing that it should be disclosed. However, the Committee recommended the repeal of section 3 in civil proceedings, it being unrealistic to suppose that candour of communication between husband and wife was influenced today by section 3 of The Evidence Amendment Act, 1853.\(^ {151}\) This was achieved by section 16(3) of The Civil Evidence Act, 1968.\(^ {152}\)

The Criminal Law Revision Committee recommended that the provisions of the 1968 Act be extended to criminal proceedings.\(^ {163}\) They believed it would be undesirable that witnesses in criminal proceedings should enjoy greater privileges than witnesses in civil proceedings: there is a greater need for the ascertainment of truth in a criminal trial where the very liberty of an individual is at stake.

The Law Reform Committee also noted that other family relationships, such as that between parent and child, were "equally close," yet it has never been suggested that communications between parent and child should be privileged.\(^ {154}\) It is at least debatable whether the parent-child relationship is in fact "equally close." A man and wife are joined together in one body; they remain united for life. Intimate though the relationship between parents and their children may be, it lacks that quality and degree which in the past has given spouses a privilege denied their offspring. As Wigmore puts it:

\[
\text{The privilege concerns solely the relation of husband and wife; it cares nothing for the family as such, — nothing for parent and child, nothing for brother and sister, nothing for master and servant. It is the peculiar interest of the marital relation, and of that alone, which requires unrestricted confidence; and therefore that relation alone is protected and those confidences alone which spring from that relation are protected. Domestic conduct, therefore, may doubtless be private and confidential, but the confidence is towards the family at large, and not towards the wife in particular. It is only so far as there has been a special confiding of it to the wife (or husband) that it comes within the privilege.}\]

If an individual genuinely feels unable to disclose a family confidence, he may well risk being in contempt of court. Where there are extenuating circumstances, there is much to be said for imposing a light penalty, for example a nominal fine instead of a period of imprisonment. There may be justification here for the trial judge to exercise his discretion, at least in a criminal case, not to require the witness to answer an otherwise admissible question.

The Ontario Law Reform Commission agreed with the conclusion of

\(^{150}\) Supra, note 3, para. 42.
\(^{151}\) 16 & 17 Vict., c. 83.
\(^{152}\) 16 & 17 Eliz. 2, c. 64.
\(^{163}\) Supra, note 1, para. 173.
\(^{154}\) Supra, note 3, para. 43.
\(^{155}\) Supra, note 8, para. 2337.
the English Law Reform Committee that marital privilege should be abolished as it does not accomplish any policy objective which might justify its retention. If the privilege were to be retained, then the Commission felt it should be a joint privilege, enabling either spouse to object to the disclosure of marital communications. The Commission Chairman, on the other hand, preferred retention of a modified privilege or at least the approach of the Law Reform Commission of Canada. The majority of that Commission took a totally different approach from that of its Ontario counterpart. In section 40 of the federal Proposed Code, a person has a privilege against disclosure of any confidential communication between himself and a person who is related to him by family or similar ties if, having regard to the nature of the relationship, the probable probative value of the evidence and the importance of the question in issue, the need for the person’s testimony is outweighed by the public interest in privacy, the possible disruption of the relationship, or the harshness of compelling disclosure of the communication. Commissioner La Forest, however, would restrict the privilege to husbands and wives. The majority’s proposal would seem to be an excessively wide and unwieldy section, though the Ontario proposal may go too far in the other direction. Given the fact that these two bodies have reached such opposite results, it is submitted that the marital privilege should be retained, but as a joint privilege of either party.

3. Eavesdropping

This section examines the case where two persons, who may be alleged offenders, engage in a confidential private conversation which is overheard by a representative of the state who seeks to adduce evidence of it in court. Such evidence has not been obtained illegally and the issue is whether it is to be excluded.

In R. v. Maqsud Ali the police were investigating a murder. The two appellants, escorted by a police superintendent, voluntarily went to a room at the town hall. In the room there was a microphone behind a waste paper basket which was connected to a recorder in another room. The two men were left alone together and, of course, did not know of the presence of the microphone. The conversation which took place between them was in their native tongue, a Punjabi dialect.

The appellants argued that the trial judge, in the exercise of his discretion, should have excluded all evidence of the tape recording. Marshall J. in the Court of Criminal Appeal conceded that the appellants had come voluntarily to the town hall, they were not in custody, no charge was brought against them until later, and they had not been warned of the presence of the microphone. However, he felt these considerations were outweighed by other factors.

The police were inquiring into a particularly savage murder and it was a matter of great public concern that those responsible should be traced. . . . The criminal does not act according to Queensberry Rules. The method of the informer and of the eavesdropper is commonly used in the detection of crime. The only difference

166 Cross, supra, note 106 at 284.
here was that a mechanical device was the eavesdropper. If, in such circumstances and at such a point in the investigations, the appellants by incautious talk provided evidence against themselves, then . . . it would not be unfair to use it against them. The method of taking the recording cannot affect admissibility as a matter of law although it must remain very much a matter for the discretion of the judge.\(^{108}\)

This case is a good example of how the question of confidentiality relates to the problem of self-incrimination. The appellants uttered words which were tantamount to a confession of guilt. Had they known there was a microphone planted in the room, there is little doubt they would have refrained from speaking so candidly. Admittedly, the confession was obtained quite legally in that they came voluntarily and were not subjected to any pressure to speak. However, they certainly did not incriminate themselves voluntarily in the sense of desiring to tell the police all they knew. That they spoke in their Punjabi dialect reveals their belief that what they were saying was only between themselves and for no one else.

If a given conversation constitutes a crime, no one would suggest that it should be privileged simply because it was intended to be confidential. Parties who conspire are hardly likely to intend to broadcast their exchanges in public, but where the conversation is in itself a perfectly innocent act, then it is not at all clear that the same rules regarding admissibility should apply. Admittedly in this case there was a murder to be investigated. There is, however, a sense of unfairness when two men, believing they are alone and speaking confidentially, in their native dialect, during the course of a conversation which is in itself perfectly legal, are deprived of that privacy. It is one thing for the police to acquire information by eavesdropping that will assist them in their investigation. It is quite another to permit the conversation to be admitted into evidence itself.

In \textit{R. v. Senat}\(^{159}\) the accused were convicted of conspiracy to pervert the course of public justice by misleading the court in two divorce cases. The evidence tendered against them was obtained through telephone tapping by private individuals over a party line, so that there was always the known possibility that someone else might listen in. Unlike \textit{Maqsud Ali},\(^{160}\) the conversations were not in a rare foreign dialect. Hence, the circumstances were not as confidential as those in the preceding case.

In \textit{R. v. Stewart}\(^{161}\) the issue involved the admissibility of the evidence of a detective constable who had overheard a conversation between two co-accused when they were both confined in separate, adjoining cells at a police station. He had put on civilian clothes and was placed into a nearby cell in a manner so as to persuade the co-accused that he was a fellow prisoner. The detective constable took notes of their highly incriminating conversation in the hope of finding out where the stolen property, which was the subject of the charge, was hidden.

\(^{108}\) Id. at 469 (All E.R.).


\(^{160}\) \textit{Supra}, note 157.

Phillimore L.J. referred to R. v. Mills, R. v. Rose\textsuperscript{102} where two prisoners in cells at a police station carried on a conversation in very loud voices so that it was all noted by a tape recorder which the police had put in a neighbouring cell and also listened to by a police officer who was not far away. There the evidence was admitted. In the present case his Lordship observed that since there had been such an extensive number of break-ins, the police were rightly concerned to try and trace the stolen property, very little of which had been recovered. Moreover, the conversation disclosed that the accused were preparing to concoct alibis to deceive the court. The case differs from Maqsud Ali\textsuperscript{163} in that here the accused were in custody and not merely voluntarily present; on the other hand, the crime involved was not as serious as the murder in Maqsud Ali.

In R. v. Keeton\textsuperscript{164} the accused, while in custody at a police station, requested permission to telephone his wife. He was allowed to make the call from a telephone booth in the station sergeant's office. Unknown to the accused, a detective constable listened at a switchboard to the incriminating conversation to try to trap him, and not for reasons of security. In the face of Rumping,\textsuperscript{165} counsel did not contend that the conversation was legally inadmissible, but argued that the recorder should have exercised his discretion to exclude evidence obtained by such means. Fenton Atkinson L.J. agreed that in a criminal case the trial judge "always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused."\textsuperscript{166} However, the police often very properly used some form of subterfuge or deception in the detection and prevention of crime. It is true that the accused was hoping and expecting to have a private conversation with his wife, but that was only one of the factors to consider. It was he who asked for permission to use the telephone and there was no undertaking by the police that his call would not be overheard. It was made from the police station in circumstances involving "an obvious risk that the conversation might be overheard,"\textsuperscript{167} so that the appeal was dismissed. Why there was an "obvious risk" is not clear.

The difficulty with this reasoning is that the police had already charged the accused and presumably they would not have done this without sufficient proof. Hence, evidence of this confidential communication should not have been needed. Another problem is that once the court sees the evidence and realizes its probative value, it will always be reluctant to exclude it. There are extensive rules about voluntary confessions, but once a man goes out of the interrogation room and makes a telephone call that is overheard, there is no protection against self-incrimination. When an attempt is made to exclude

\textsuperscript{163}Supra, note 157.
\textsuperscript{165}Supra, note 139.
\textsuperscript{166}Supra, note 164 at 270 (Cr. App. Rep.), citing Kuruma v. R., [1955] A.C. 197 at 204, \emph{per} Lord Goddard C.J.
\textsuperscript{167}Supra, note 164 at 273.
evidence of such a communication, the fact it was made in confidence carries no weight.

The Ontario Law Reform Commission has proposed in section 12 of its Draft Act that evidence not be admissible to prove a communication which is inadmissible by reason of the fact that it is privileged either at common law or by reason of any statute. This means secondary evidence of any privileged communication, even if it had been legally intercepted, would not be admissible. This provision would not really affect the question of admissibility in any of the preceding cases. The first requirement is that the communication must be privileged, which those in Maqsud Ali,168 Senat,169 Stewart170 and Mills171 were not. In Keeton172 the marital privilege was involved, but then the Ontario Draft Act would abolish that privilege, so the new rule would not be of assistance.

However, the Ontario Law Reform Commission also proposed in section 26 of its Draft Act that a court may refuse to admit evidence that otherwise would be admissible if it finds that the evidence was obtained by methods that are repugnant to the fair administration of justice and likely to bring the administration of justice into disrepute. This provision might be interpreted widely enough to cover some of the situations in the preceding cases. Similarly, section 15 of the federal Proposed Code provides that evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute, having regard to various specified factors.

4. Legal Professional Privilege

The next sections consider the role played by confidentiality in professional relationships, especially that of the client and his lawyer or religious adviser, and between a journalist and his informant. "A breach of the confidence reposed in professional advisers is usually subordinated to the need for disclosure of these secrets to a court."173 Thus, there is no privilege for confidential communications with medical advisers,174 spiritual advisers,175 accountants,176 agents,177 or bankers.178 The general proposition is that only...
confidential communications with legal advisers are excluded. As Jessel M.R. stated in *Wheeler v. LeMarchant*: 179

In the first place, the principle protecting confidential communications is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, are not protected. Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honour or reputation, are not protected. Therefore it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that the legal advice may be obtained safely and sufficiently. 180

The legal professional privilege goes back to the reign of Elizabeth I and is therefore the oldest of the privileges for confidential communications. 181 The original theory behind it was a consideration for the oath and the honour of the attorney, rather than for the apprehensions of his client. Consequently, the privilege was that of the lawyer and not of the client. 182 The original doctrine, however, was entirely repudiated by the end of the eighteenth century. "The judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy, nor was there any moral delinquency or public odium in breaking one's pledge under force of law." 183

The modern theory behind the privilege was outlined in *Greenough v. Gaskell*. 184 There it was held that a solicitor could not be compelled to disclose matters that had come to his knowledge as a legal adviser for a client even though there were no legal proceedings pending or in contemplation. Brougham L.C. refused to confine the privilege to situations where proceedings had begun, for then the rule would exclude the most confidential and perhaps the most important of all communications — those made with a view to being prepared either for instituting or defending an action.

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179 *Supra*, note 175.
180 *Id.* at 681-82 (Ch. D). Jessel M.R. held that communications between a solicitor and a third party are privileged only if they were made after litigation was in progress or in contemplation, and if they were made with a view to such litigation.
181 Wigmore, *supra*, note 8, para. 2290.
182 This was of little practical importance, however, because at that time a party was not competent to testify.
183 Wigmore, *supra*, note 8, para. 2290.
The foundation of this rule is not difficult to discover. It is not . . . on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.

But it is out of regard to the interests of justice, which cannot be uphelden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all . . . a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous.185

The Law Reform Committee in England did not recommend any alteration in the existing rule regarding the legal professional privilege the true rationale of which it considered to be as a privilege in aid of litigation. Legal advice, unlike other kinds of professional advice, is concerned exclusively with rights and liabilities enforceable in law, that is, in the ultimate resort by litigation in the courts or in some administrative tribunal.186

Although Wigmore concluded that the privilege was worth preserving, it remained as an obstacle to the investigation of truth and needed to be strictly confined within the narrowest possible limits.187 The privilege assumes that the communications are made with the intention of confidentiality. The moment confidence ceases, privilege ceases.188 Thus, the presence of a third person, not being the agent of either client or solicitor, will make it apparent that the communication is not confidential.189 The privilege has long been regarded as that of the client, not that of the lawyer. Hence, though the client may waive the privilege, the adviser may not do so without the consent of his client.190

Of course, the subject of the communication must be a bona fide professional one. If the advice is sought to enable the commission of a crime or fraud, then no privilege attaches.191 An improper communication would be just as confidential as a proper one, yet it is admissible. This further indicates that the rationale of the privilege is not based on confidence but on the need to ensure that individuals will be able to seek legal advice freely to protect their interests in any litigation that may eventually arise. Another rationale of

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185 Id. at 103 (My. & K.).
186 Supra, note 3, para. 19.
187 Supra, note 8, para. 2291. Earlier, one limitation on the legal professional privilege in criminal cases was examined in R. v. Barton, supra, note 82.
188 Per Lord Eldon in Parkhurst v. Lowten (1819), 2 Swanst. 194 at 216.
189 Wigmore, supra, note 8, para. 2311.
190 Supra, note 9 at 196.
the privilege is that the adversary process will only work if the lawyer is identified with his client.

Although the original of a confidential communication may be privileged, secondary evidence will often be available. Where evidence is excluded on grounds of public policy, secondary evidence is never admitted. In the private sphere different considerations will apply. If there is a confidential relationship between A and B, and C discovers information arising from it, if C produces the evidence in court, the confidence is not being breached by one who is a party to it. A and B can have no complaint against each other. Consequently, it is unnecessary to protect more than primary evidence of a confidence.

In *Lloyd v. Mostyn*192 a copy of a bond was tendered in court and it was objected that as the bond had been held in confidential custody, a copy could not be used in evidence even though it had not been obtained by any improper means. In the course of argument, Parke B. indicated that where “an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced.”193 *Lloyd* was followed in *Calcraft v. Guest*194 where the defendant accidentally discovered certain documents prepared for the defence of a previous action dealing with the same subject-matter and then made copies of them. It was held that while the documents themselves remained privileged, the defendant was not precluded from giving secondary evidence of their contents by means of the copies.

Problems arise when one attempts to reconcile *Calcraft* with *Lord Ashburton v. Pape*.195 Lord Ashburton brought an action against several defendants, including Pape, for an injunction restraining them from disclosing other than to the plaintiff or by deposit in court, any documents received by or communicated to the solicitor of the plaintiff, or copies thereof. Pape was a bankrupt whose discharge was opposed by Lord Ashburton, one of his creditors. Pape had in his possession a number of letters written by Ashburton to his late solicitor which were admitted to be privileged. Pape had obtained the letters improperly from one of the late solicitor’s clerks and Pape’s solicitors took copies of the letters. Upon an interlocutory motion Neville J. ordered all original letters to be returned and the defendants to be restrained “until judgment or further order from publishing or making use of any of the copies of such letters . . . except for the purpose of the pending proceedings in . . . Pape’s bankruptcy . . .”196 Thus, there were two separate actions involved: first, the bankruptcy proceedings, and secondly, an action for an injunction restraining disclosure of the original letters or copies thereof. The present decision was on an interlocutory motion in the latter action be-

193 Id. at 481-482 (M. & W.).
196 Id. at 470 (Ch.).
fore Neville J. who made an order in the terms indicated above. The Court of Appeal removed the exception and made the injunction unrestricted.

Cozens-Hardy M.R., who led for the successful defendant in Calcraft,\textsuperscript{197} was a member of the court in Ashburton and attempted to reconcile the decisions, but at a very technical level.

The rule of evidence as explained in Calcraft \textit{v. Guest} \ldots merely amounts to this, that if a litigant wants to prove a particular document which by reason of privilege or some circumstance he cannot furnish by the production of the original, he may produce a copy as secondary evidence although that copy has been obtained by improper means. \ldots But that does not seem to me to have any bearing upon a case where the whole subject-matter of the action is the right to retain the originals or copies of certain documents which are privileged. It seems to me that, although Pape has had the good luck to obtain a copy of these documents which he can produce without a breach of this injunction, there is no ground whatever in principle why we should decline to give the plaintiff the protection which in my view is his right as between him and Pape. \ldots \textsuperscript{198}

This last sentence appears to contradict what precedes it in suggesting that the copies can be used in later litigation.\textsuperscript{199} The problem may be solved by taking “this injunction” to refer to Neville J.’s limited injunction.\textsuperscript{200} Furthermore, other reports remove the contradiction from what Cozens-Hardy M.R. says, for example, “although, if Pape has the good luck to obtain a copy of these documents which he can produce without a breach of this injunction.”\textsuperscript{201} This implies that Pape could only use copies if he obtained them in some completely innocent way.\textsuperscript{202} Phipson attempts to state the rule thus:

But, unlike the rule as to affairs of state \ldots if the privileged document, or secondary evidence of it, has been obtained by the opposite party independently, even through the default of the legal adviser, or by illegal means, either will be admissible, \textit{for it has been said the court will not inquire into the methods by which the parties have obtained their evidence. \ldots [T]his, however, will not apply where the right to retain or use the privileged documents is the very subject-matter of the action, so that if the owner has obtained an injunction against the party, who desires to use the document or a copy of it in a subsequent case, restraining him from revealing it, such injunction will effectually prevent the party from using either.}\textsuperscript{203}

It has been pointed out\textsuperscript{204} that it is odd that the result of Calcraft can be thwarted by obtaining an injunction in separate proceedings. Alternatively, if Ashburton is sound in holding that an injunction can be obtained in separate proceedings, why should a party not be able to plead it in the main proceedings? The fact of the matter is that the two decisions are irreconcilable.

\textsuperscript{197} Supra, note 194.

\textsuperscript{198} Supra, note 195 at 473 (Ch.).


\textsuperscript{200} Heydon, \textit{Cases and Materials on Evidence}, \textit{id.} at 403-404.

\textsuperscript{201} Id. at 404.

\textsuperscript{202} Id.


\textsuperscript{204} Heydon, \textit{Cases and Materials on Evidence, supra}, note 199 at 404.
Butler v. Board of Trade has recently cast new light on this doctrine. The plaintiff was being prosecuted by the Board of Trade and sought a declaration that the board was not entitled to use a letter written to him by his solicitor. The intention was to prevent the board from adducing a copy of the letter in evidence against the plaintiff at his criminal trial. The letter was one written to him by his solicitor in which she volunteered a warning that he might incur serious consequences if he did not take care. A special case was stated for the opinion of the court whether there was any equity to prevent the defendants from tendering a copy of the letter in evidence in criminal proceedings.

Goff J. held that the original of the letter was protected by legal professional privilege and that the copy was a confidential document. Although in the present case there was no impropriety on the part of the defendants in the way in which they received the copy, unlike the case in Ashburton, that was irrelevant because his Lordship stated that an innocent recipient of information conveyed in breach of confidence was liable to be restrained. However, the defendant here was a department of the Crown and intended to use the copy letter in a public prosecution brought by them and this distinguished the case from Ashburton.

[It would not be a right or permissible exercise of the equitable jurisdiction in confidence to make a declaration at the suit of the accused in a public prosecution in effect restraining the Crown from adducing admissible evidence relevant to the crime with which he is charged. It is not necessary for me to decide whether the same result would obtain in the case of a private prosecution, and I expressly leave that point open.]

What is striking is Goff J.'s assertion that "an innocent recipient of information conveyed in breach of confidence is liable to be restrained." Prima facie, this would encompass such relationships as doctor-patient, priest-penitent, and banker-client, for which there is presently no privilege. However, it has been suggested that the dicta in Butler should be confined to the particular context of confidential information gained by a third party to the lawyer-client relationship. Regrettably, much of the academic discussion of Butler tends to treat as ratio what was only the obiter of a single judge of first instance who went out of his way to "expressly" leave open the applicability of his remarks to non-criminal cases. It is submitted that the case really does no more than indicate that Ashburton is inapplicable in public criminal proceedings. Any erosion of Ashburton is welcome because although exclusion of primary evidence arising out of a confidential relationship may be justified in some cases, the quest for truth is unnecessarily hindered when

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206 Id. at 689 (Ch.).
207 Supra, note 195.
208 Supra, note 205 at 690 (Ch.).
209 Id.
210 Id.
211 Supra, note 205.
212 Heydon, Cases and Materials on Evidence, supra, note 199 at 404.
213 Supra, note 195.
secondary evidence is excluded as the third party is not subject to any obligation of confidence himself.

The Ontario Law Reform Commission concluded that since the legal professional privilege was reasonably well defined and was working satisfactorily, there was no need to define the privilege by statute, and was therefore content with the common law. With respect to secondary evidence, the Commission proposed section 12 in its Draft Act by which evidence is not admissible to prove a communication which is inadmissible by reason of the fact it is privileged, either at common law or by any statute, even though the secondary evidence was obtained by legal means. This would reject the Calcraft v. Guest\textsuperscript{214} approach in Ontario.

The Law Reform Commission of Canada, on the other hand, has decided to codify the law of evidence, including questions of privilege, and has proposed some changes in the common law. First of all, section 41 of the Proposed Code confers a general professional privilege. Anyone who has consulted a member of a profession has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship if, in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice. This provision also applies to communications between lawyers and their clients. Section 42(1), however, confers an express privilege where a person has consulted a lawyer in contemplation of litigation which may include work done by the client or the lawyer or someone hired by the lawyer. The privilege may be claimed by either the lawyer or the client, whereas at common law the privilege belonged only to the client. In confining the privilege to communications related to contemplated litigation, the provision restricts the common law, though the general professional privilege could be invoked in situations not covered by the express provisions of section 42. Furthermore, it would not be all that difficult to argue that virtually every approach to a lawyer is made with a view, ultimately, to contemplated litigation. Secondary evidence, however, would appear to be admissible, subject to possible exclusion under section 15 if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.

5. Religious Advisers

An individual may have occasion to communicate confidentially with his spiritual adviser under a variety of circumstances. He may speak to him in the confessional, in private outside the confessional, he may use the mail, or he may speak in the presence of another person involved in the matter under discussion. This section considers the extent to which such communications should be excluded from evidence on the ground of their confidentiality in civil and criminal proceedings.

The English Law Reform Committee pointed out that to the best of its knowledge, "in the whole history of English law there never has been a civil case in which a minister of religion has been required to disclose a confession of sinful conduct made to him," and the same can be said with respect to

\textsuperscript{214} Supra, note 194.
Ontario. In the criminal sphere there is a greater possibility of the question arising. An individual may be under surveillance by the police who may follow him to a church and see him enter a confessional. The priest could be asked to testify as to what words passed between him and the penitent. This is, of course, a matter of hearsay, yet informal admissions are admissible as an exception to the hearsay rule by the accused or a party litigant.

There is a difference of opinion as to whether at common law a clergyman could be compelled to disclose confessions made to him. Stephen wrote that the question had never been solemnly decided in England, although the text writers said that he could. To the argument that the privilege must have been recognized before the Reformation and that it had never been taken away, Stephen replied that the modern law of evidence was not so old as the Reformation and had come into existence at a time when exceptions in favour of auricular confessions to Catholic priests were not likely to be made.

There are three arguments for conferring a privilege for communications to a religious adviser. The Criminal Law Revision Committee stated the first in these words:

[I]t is in the interests of religion, morality and society generally that a person who is willing to confide in a minister about his wrongdoing or his wicked propensities should be encouraged to do so in the hope that the minister will be able to persuade him to lead a better life and that a person will be more ready to confide in the minister if there is no danger that the minister will be compelled to reveal the confidence in legal proceedings.

Secondly, to require a priest to reveal a communication might be to command him to break his sacred vows. He would be faced with a conflict between the duty to his church to keep secret a confidence and his legal duty to obey a requirement to reveal the confidence in court. This also puts a judge in the embarrassing position of having to decide whether to punish a priest for refusing to disobey a rule of his church. The third argument focuses more on the penitent than on the priest. Jeremy Bentham, the greatest opponent of privileges, explained it in these terms:

[Confession] is an essential feature of the catholic religion, and . . . the catholic religion is not to be suppressed by force. . . . I set out with the supposition, that . . . the catholic religion was meant to be tolerated. But with any idea of toleration, a coercion of this nature is altogether inconsistent and incompatible. In the character of penitents, the people would be pressed with the whole weight

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216 Supra, note 3, para. 46; Sopinka and Lederman, supra, note 56 at 209-210.
218 However, in R. v. Hay (1860), 2 F. & F. 4, a Catholic priest refused to reveal from whom he received a watch he had given to a policeman in the course of a trial of an accused for robbery of a silver watch. Hill J. pointed out that the priest was not being asked to disclose anything stated to him in the confessional, only a simple fact, from whom did he receive the watch, thereby implying that there was a privilege relating to communications in the confessional. And in Ruthven v. DeBour (1901), 45 Sol. Jo. 272, Ridley J., in an action for libel, held that the plaintiff was "not entitled to ask what questions priests put in the confessional or the answers given," (at 272), but the matter did not appear to have been carefully considered.
219 Supra, note 1, para. 273.
220 Id.
of the penal branch of the law; inhibited from the exercise of this essential and indispensable article of their religion.\textsuperscript{220}

Wigmore tested the propriety of the privilege by his four canons for confidential communications and concluded that, on the whole, the privilege had adequate grounds for recognition.\textsuperscript{221} He added that in no system of law should the party’s own confession be relied upon as a chief means of proof as it tempts prosecutors to “lack of diligence and thoroughness in the investigation of the entire case against an accused.”\textsuperscript{222}

It will be recalled that \textit{Cook v. Carroll}\textsuperscript{223} was an action brought by the plaintiff for the seduction of her daughter. The parish priest was called by the plaintiff and was asked to testify as to matters which passed at a conference held by him at his house in the presence of the defendant and of the plaintiff’s daughter. The priest refused to give evidence as to these matters and was fined £10 for contempt of court. This case did not involve communications in the confessional, but rather a conference between two persons and the priest which was implicitly held “without prejudice.” At the trial the girl and man waived the privilege by giving evidence of the conversation and their stories did not tally.

Gavan Duffy J. indicated that, at present, “the preponderance of judicial opinion in England has denied any privilege whatever to the priest for confidences made either inside or outside the confessional.”\textsuperscript{224} However, the learned judge indicated that the issue under consideration had to be decided in conformity with the Constitution of Ireland which then expressly recognized the special position of the Catholic Church.\textsuperscript{225} He considered Wigmore’s four conditions and concluded that they were satisfied in the present case, although this would not necessarily be so vis-à-vis every confidential communication made by anyone to any priest or any clergyman as such. Thus, in upholding the privilege, he confined himself to the relation constituted by the consultation in strict confidence of a parish priest as such by a parishioner.

One of the problems is to decide who should have the privilege.\textsuperscript{226} If

\textsuperscript{220} Wigmore, \textit{supra}, note 8, para. 2396.
\textsuperscript{221} \textit{Id}.
\textsuperscript{222} \textit{Id}.
\textsuperscript{223} \textit{Supra}, note 124.
\textsuperscript{224} \textit{Id.} at 517. Reference was made to \textit{Wheeler v. LeMarchant, supra}, note 175 at 681 (Ch. D.), where it was held that “communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune are not protected.”
\textsuperscript{225} This is no longer true, however, as Art. 44(2) has been eliminated by the \textit{Fifth Amendment of the Constitution Act, 1972}.
\textsuperscript{226} The Criminal Law Revision Committee concluded that the fact that this question would arise was an additional reason for its preference for not legislating but for leaving it to the courts and prosecuting authorities to deal with any case which might arise in practice: \textit{supra}, note 1, para. 274. Newfoundland and Quebec have protected the relationship statutorily with an absolute privilege which belongs to the clergyman, and not the communicant. The Newfoundland provision is confined to communications made by way of confession, whereas the Quebec Act allows a priest or other minister of religion to decline to divulge any information revealed confidentially to him by reason of his status or profession: \textit{The Evidence Act}, R.S.N. 1970, c. 115, s. 6; \textit{Code of Civil Procedure}, S.Q. 1965, c. 80, art. 308.
one stresses the importance for an individual penitent to feel he can confide in a clergyman, then the privilege should be the penitent's. But if one considers the position of the priest who is asked to choose between obeying the canons of his church or the law of the state, then it is he who should have the right to decline to reveal the communications. Duffy J., in Cook, concluded that the privilege had to be a "tripartite" one as the parish priest, like each of his two parishioners, had an interest of his own in the maintenance of the secret.

Cook v. Carroll should, however, be read in light of the decision of John J. in Forristal v. Forristal and O'Connor227 wherein the defendant wrote a letter to a priest containing statements defamatory of the plaintiff. The priest regarded the letter as confidential and privileged. It was held that no sacerdotal privilege covered the letter and its production was ordered. First, one of the parties was not a parishioner and the decision in Cook228 was "clearly confined to cases where that relationship exists."229 Secondly, the communication was of "dubious confidentiality."230 The defendant chose to write to the priest and sent the letter by post, thereby taking the risks that the letter might miscarry, accidentally fall into strange hands, or be read by someone other than the priest. Furthermore, the priest gave the letter to the plaintiff for use by him in consulting with his solicitor and this destroyed the confidential nature of the communication and of the privilege.231

The English position may also be usefully contrasted with that in the United States. In Mullen v. U.S.232 the issue was whether statements made to the witness clergyman by an accused as a penitent in preparation for receiving communion as a Lutheran were privileged. The minister testified that the woman admitted she had chained her children after the minister urged her to confess her sins as a condition to receiving communion. Fahy J. considered the question:

Was the disclosure of appellant to the minister a confidential confession to a spiritual adviser? The answer would be clearer were the relationship of priest and penitent involved, where the priest is known to be bound to silence by the discipline and laws of his church. The present witness appears not to have felt bound in this manner. But I think the privilege if it exists includes a confession by a penitent to a minister in his capacity as such to obtain religious or other advice, as was sought and held out in this instance. . . . such a confession is a privileged communication which is not competent evidence on a trial, at least in the absence of the penitent's consent to its use.233

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227 (1966), 100 Ir. L.T. 182.
228 Supra, note 124.
229 Supra, note 227 at 184.
230 Id.
231 In U.S. v. Wells (1971), 446 F. 2d 2, a letter from the defendant to a priest contained no hint that its contents were to be kept secret or that its purpose was to obtain religious or other advice, and merely requested assistance by putting the defendant in touch with an F.B.I. agent. It was held that the privilege, while recognized in the federal courts, appeared to be restricted to confidential communications of a penitent seeking spiritual rehabilitation. The priest here took the letter as not intended to be kept in confidence and turned a copy of it over to the F.B.I.
232 (1958), 263 F. 2d 275.
233 Id. at 277.
This topic is related to the question of self-incrimination. There is no better example of how breach of a confidential relationship can result in an admission being adduced in evidence from a man who had no intention to confess his misdeeds to the world. When an individual confesses during a police station interrogation, he realizes that his statement will be available to the prosecuting authorities, but if a communication is made to a spouse, lawyer, or priest, then there is no intent to tell the world at large, and certainly not the prosecuting authorities. Consequently, any breach of this confidential communication will amount to an individual being forced to incriminate himself. If society as a whole favours resort to extrinsic and forensic methods of proving guilt, then it should seek to protect such confidential communications, at least when they do not in themselves constitute criminal conduct but are only admissions of already completed offences.

The Law Reform Committee did not recommend any change in the existing law and practice on the topic of priest and penitent privilege noting that the problem was “without practical importance”\(^{234}\) in civil cases. If a priest were asked about a penitential communication, the Committee believed his refusal to answer would be upheld by the trial judge in the exercise of his general discretion in the conduct of the trial.\(^{235}\) It noted that one of the problems that would arise in any attempt to create a statutory privilege was the difficulty of defining a priest and a penitent. It might be unfair to confine a statutory privilege to religious denominations with a “professional priesthood authorized to give absolution or spiritual consolation.”\(^{236}\) But if there is to be no discrimination between religions, it is still necessary to define “religion.” There are so many philosophies of life that could claim to fall within this rubric, that it could even be argued that Maoism fits within the category of “religion.”

The Criminal Law Revision Committee in its Eleventh Report rejected any privilege for communications to ministers of religion on the ground that there should be no restriction on the right of a party to criminal proceedings to compel a witness to give any relevant information in his possession unless there were a compelling reason in policy for the restriction. The arguments for the proposal were not considered strong enough for this purpose.\(^{237}\)

The Ontario Law Reform Commission was opposed to any privilege for religious advisers. The Canada Law Reform Commission, on the other hand, proposed a general professional privilege in section 41 of its Proposed Code for any person who has consulted a professional provided that, in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice. The privilege, though, would not be that of the religious adviser but would belong to the person who had consulted him.

Under the present law, if a priest were asked to reveal communications

\(^{234}\) *Supra*, note 3, para. 46.

\(^{235}\) *Id.*

\(^{236}\) *Id.* para. 47.

\(^{237}\) *Supra*, note 1, para. 274.
which had been made to him in the confessional and he declined to give evidence on this subject, the trial judge would have a choice whether or not to compel him to do so. Best C.J. once stated that he, for one, would "never compel a clergyman to disclose communications made to him by a prisoner." In a criminal case the trial judge has a discretion to exclude otherwise admissible evidence. Even if the judge felt that he had to compel the priest to testify, it would be perfectly sensible under the circumstances to reduce the penalty for contempt of court to a minimum. A nominal fine, for example, could be imposed instead of imprisonment. Above all, it is essential to rely on the good judgment of counsel and trust that, as a matter of practice, no responsible barrister would ever demand of a priest to break his sacred vow not to disclose a confession made to him by a penitent in the confessional.

6. Journalists

The claim of the journalist does not involve the non-disclosure of communications. On the contrary, their contents will have already been deliberately published. The claim seeks rather to protect the identity of the source of the information.

A. G. v. Clough arose when a journalist refused to disclose to a tribunal of inquiry the name of the person from whom he had obtained information that the activities of an Admiralty clerk had led to Russian trawler spying fleets turning up in the precise area of secret NATO sea exercises. He argued that as a special correspondent, and not a general reporter, he relied on confidences from persons in defence departments and felt that if he disclosed the source of information, he would be breaking a trust. His future career as a defence correspondent would be jeopardized: "nobody would then feel prepared to speak to me... on an off-the-record basis for fear that their name might be disclosed at some later date." One would have thought that if that were the case, then so much the better. Officials in the defence department have no right to speak on an "off-the-record" basis to journalists or to any other unauthorized person.

Lord Parker C.J. began with the proposition that while any privilege hinders the discovery of truth, the public is nevertheless better served by recognizing certain limited privileges and immunities, although confidentiality "of itself has never been recognized as a ground for a valid claim of immunity." However, his Lordship made one important qualification.

[In regard to the press, the law has not developed and crystalized the confidential relationship in which they stand to an informant into one of the classes of privilege known to the law. . . . [But] it still, as I conceive it, would remain open to this court to say in the special circumstances of any particular case that public policy did demand that the journalist should be immune. . . .

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239 See the discussion in C(6), infra.
241 Id. at 776 (Q.B.).
242 Id. at 787 (Q.B.).
243 Id. at 792 (Q.B.).
In the present case, however, his Lordship did not feel any such special circumstances existed and the journalist was imprisoned for six months.

Lord Parker also referred to the rule that in actions for libel, a defendant newspaper proprietor or journalist will not be required on discovery\(^\text{244}\) to give the source of his information.\(^\text{245}\) This principle applies only to interlocutory matters and has nothing to do with what may be ordered or required at the trial itself. It depends not on privilege, but on the limits of discovery.

In *A.G. v. Mulholland, A.G. v. Foster*\(^\text{246}\) two more journalists were called upon to give evidence before the same tribunal of inquiry as in *Clough*\(^\text{247}\) and both refused to reveal the sources of information contained in their articles which had been published. Sentences were passed upon them and they appealed to the Court of Appeal. Lord Denning M.R. observed that only the legal profession has a privilege from disclosing information to a court of law, and then it is not the privilege of the lawyer but of his client. Neither the clergyman, the banker nor the medical man is entitled to refuse to answer when directed to do so by a judge.\(^\text{248}\) However, Lord Denning stated:

> The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered.\(^\text{249}\)

His Lordship concluded that if the interests of justice or of the public required that there should be disclosure, the newspapers must reveal the source of their information as they had no absolute privilege in law to refuse. Hence, his Lordship envisaged the possibility that the sources could be protected in certain circumstances.

Donovan L.J. also indicated the need for some residual discretion in the court in a case where a journalist was asked for the source of his information.

> While the journalist has no privilege entitling him as of right to refuse to disclose the source, so I think the interrogator has no absolute right to require such disclosure. . . . [The question] ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand. . . . [A judge may] conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer.\(^\text{250}\)

His Lordship emphasized that even if a question were technically admissible, a judge always retained an ultimate discretion and did not invariably need to order an answer or punish a refusal. This is not confined to journalists but extends to other cases where information is given and received under the seal

\(^{244}\) Ord. 26, r. 1. See also Ord. 82, r. 6.

\(^{245}\) The person who is defamed has his remedy against the newspaper and that is enough, without letting him delve round to see who else he can sue: *per* Lord Denning M.R. in *A.G. v. Mulholland, infra*, note 246 at 490 (Q.B.). The Canadian position is thoroughly canvassed in Sopinka and Lederman, *supra*, note 56 at 211-216.


\(^{247}\) *Supra*, note 240.

\(^{248}\) *Supra*, note 246 at 489 (Q.B.).

\(^{249}\) *Id.*

\(^{250}\) *Id.* at 492 (Q.B.).
of confidence, for example, information given by a patient to his doctor.\textsuperscript{251} In the present case there was no consideration calling for the exercise of a discretion in favour of the accused and thus the appeal failed.

Two arguments have been suggested\textsuperscript{252} to support a privilege for the journalist: first, fear of a breach of confidence may discourage potential informants and thereby impede the free flow of news, and secondly, compulsory disclosure may force the journalist to break a confidence. These arguments must be weighed against the obstacle this privilege, like all privileges, places in the quest for truth.

The difficulty with the first point is that it justifies a privilege being accorded not to the journalist but to the informer, as in the solicitor-client relationship.\textsuperscript{263} As for the second, if the journalist makes a promise not to testify, such a promise shows willingness to disobey the law. This argument may lack weight, but it is at least one for making the privilege that of the journalist.\textsuperscript{264}

The Law Reform Committee took the view, relying mainly on Clough\textsuperscript{265} and Mulholland,\textsuperscript{266} that the judge had a wide discretion to permit a witness to refuse to disclose information where disclosure would be "a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed,"\textsuperscript{267} and that this discretion could be used at the trial to permit a witness to withhold information obtained by him by virtue of a confidential relationship.\textsuperscript{268} On the other hand, certain members of the Criminal Law Revision Committee, though agreeing that some of the statements in Mulholland supported the existence of such a discretion, had "serious doubts whether the statements, if they were right for civil proceedings, had any general application to criminal proceedings."\textsuperscript{269}

The Committee noted that in criminal proceedings the judge has a general discretion to exclude evidence in order to prevent injustice to the defence. Whether he could ever excuse a witness from answering a relevant question asked by the defence on the ground that this would be a breach of a confidence reposed in the witness seemed to some members to be "highly questionable."\textsuperscript{270}

The difficulty with a discretionary approach is that it does not provide a guarantee for an individual who contemplates making a confidential communication that he will receive protection. If a particular confidential rela-

\textsuperscript{251} Id.
\textsuperscript{252} P. B. Carter, \textit{The Journalist, His Informant and Testimonial Privilege} (1960),\textsuperscript{35} N.Y.U. Law Rev. 1111.
\textsuperscript{263} Id. at 1124.
\textsuperscript{264} Id. at 1123.
\textsuperscript{265} Supra, note 240.
\textsuperscript{266} Supra, note 246.
\textsuperscript{267} Supra, note 3, para. 1.
\textsuperscript{268} Id., para. 41, 54.
\textsuperscript{269} Supra, note 1, para. 275.
\textsuperscript{260} Id.
relationship is to be encouraged, then an individual should know that what he says either will or will not be subject to compulsory disclosure in a court of law.

The majority of the Ontario Law Reform Commission was opposed to extending a privilege to newsmen and their sources of information. Section 41 of the Canada Law Reform Commission's Proposed Code would confer a privilege, in certain circumstances, on a person who had consulted a member of a profession for the purpose of obtaining professional services or who had been rendered such services by a professional. This section would not give the professional a privilege; the privilege belongs to the person who seeks professional services. An informant does not consult a journalist "for the purpose of obtaining professional services," but rather to help the journalist in his profession. Thus, no privilege for journalists or their sources of information would be available in the Proposed Code.

D. CONCLUSION

Whenever a confidence is protected in a court of law and evidence thereby excluded, an obstacle is raised to the ascertainment of truth, the trial's primary purpose. Exclusion on the ground of confidence is not based on the insufficient reliability of the evidence in question, but on a policy totally extrinsic to that of the trial. To justify such a restraint, the policy sought to be furthered should be a particularly important one.

If the confidential material pertains to the security of the state, then it is clear such evidence should be withheld, at least in civil cases. In a criminal matter, the very liberty of a subject is at stake, though the danger to the state of disclosure is identical. The only fair solution may well be for the Crown to withdraw the prosecution if it is to keep its secrets. Where the question does not encompass state secrets, cabinet minutes, or diplomatic exchanges, but only confidential communications involving civil servants, something much more than the spurious "candour" argument should be proffered before any exclusion is upheld.

Relatively few confidential communications between private parties are protected and it is only where there are strong policy reasons put forth that a privilege will be recognized. For example, the solicitor-client privilege exists not because of the confidential nature of the relationship, but because the possibility of litigation is always present during such discussions. Marital conciliation negotiations are protected because of the desirability of preserving the marital union.

Confidential communications, then, are not excluded per se, although many communications that are excluded happen to be confidential. The quest for truth should not be hindered unnecessarily, but neither should the private exchanges of individuals be unduly exposed. Where adequate alternative evidence is available, there is no need to pry. The police should also be encouraged to resort to independent acquisition of evidence and not be content to rely on admissions made by an individual in an otherwise innocent private conversation. For in our present society every expansion of the state's involvement in our lives brings a commensurate erosion of individual liberties. The quest for truth should not be needlessly restricted; nor should the right of privacy.