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# DISCOVERY OF CIVIL LITIGATION TRIAL PREPARATION IN CANADA

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## *Introduction*

Civil procedure in Canada does not generally allow a party to use discovery to find out what evidence the other side has gathered for the purpose of trial. Specifically, a party cannot compel the adversary by answers on oral examination or by production of documents to identify witnesses or to disclose what their testimony will be. This protection is derived not from one source, but from several. These are, first, the rule that a party can get discovery of the facts of the opposing case but not of the evidence which supports those facts, secondly, solicitor and client privilege, particularly that aspect of the privilege which covers communications between a third party and the solicitor or client made in relation to litigation, and, finally, the privilege for documents that relate exclusively to the claim or defence of the party giving discovery.

Each ground of protection has a separate history and, in origin at least, a distinct rationale. Collectively the grounds protect from disclosure the names and evidence of the witnesses for the party giving discovery. Individually, however, the grounds do not provide the identical measure of protection, with the result that information may be shielded under one ground but not under the others. Nor is every ground applicable at both the examination and document production stages of discovery. For example, oral examination is the appropriate time for invoking the rule against the disclosure of evidence, while the privilege for documents that relate exclusively to the case of the party giving discovery has no place in that process and solicitor and client privilege can be claimed at both discovery steps.

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This article examines these grounds for withholding the trial preparation of a party from disclosure from the point of view of their origin, the connection between them, the kind of information each protects and the stage of discovery at which they apply. It is an appropriate time for the examination as the subject of discovery is now or recently has been under review in Canada at various levels,[1] and the direction of change is definitely toward breaking down the barriers that traditionally have prevented discovery from being used to ascertain the opposing evidence. It is hoped the study will help in assessing the need for change by identifying the forces that have shaped the present limitations, thus allowing their validity to be tested in light of modern notions of the function and goals of dispute adjudication. Also, if the range of discovery is to be broadened, an account of the source and extent of the existing protection should provide a base for defining what the shield under a new discovery scheme is to be. Before re-defining the scope of protection from disclosure it is essential to understand exactly what cover the present law provides.

The article examines first the rule as to the non-disclosure of evidence and then the ground of privilege which is associated closely with the rule, namely, the privilege to withhold documents relating exclusively to the case of the party giving discovery. It looks at the history of these heads of protection in both England and Canada, and in the case of the evidence rule it is a history with roots in the civil and ecclesiastical law. Next, the history and scope of the anticipation of litigation aspect of solicitor and client privilege is examined, with special attention being given to the role of the privilege as an attribute of the adversary mode of trial. Finally, in the course of this study the article assembles the arguments that are made for and against maintaining the discovery limits set by the several grounds of protection and examines how the grounds operate in relation to each other.

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[1] New rules for civil proceedings, including rules for discovery, have been introduced in Nova Scotia (Civil Procedure Rules 1972) and British Columbia (Rules of Court 1977). Rule 18. 12 (2) in Nova Scotia and Rule 27 (22) in British Columbia remove the prohibition against obtaining the names of witnesses on examination for discovery. At the federal level a re-definition of the litigation aspect of solicitor and client privilege has been proposed (Law Reform Commission of Canada, Report on Evidence, (1975), Evidence Code, s. 43 (2)). In Ontario the Civil Procedure Revision Committee had made similar proposals. See Civil Procedure Revision Committee, Working Draft of Proposed Ontario Rules of Civil Procedure (April 1978), 32.07 (2) (examination for discovery). The Working Draft also abolished the objection to producing a document on the ground that it constitutes evidence (*ibid.*, rule 31.01(4)). All of these changes were omitted from the April, 1979 Final Working Draft of the Committee. However, retained from the original Draft was a provision (now rule 32.06 (1)) that would abolish the objection on examination for discovery to disclosing the identity or testimony of witnesses.

### A. *The Early History of the Evidence Rule.*

#### 1. *The Civil Law.*

Prior to the middle of the nineteenth century the power of the common law courts to grant discovery was extremely limited[2] and the Court of Chancery had a virtual monopoly of the procedure. However, the roots of discovery can be traced even further back to the canon and civil law of the Middle Ages. Ecclesiastical courts in England were established by an ordinance of William the Conqueror, which directed expressly that the new courts were to be governed by the canon law and not by the municipal law of England. Though the ordinance did not mention procedure it was assumed that the application of canon law included its procedure.[3] The early Chancellors were ecclesiastics[4] and in developing the procedure of the Court of Chancery they were heavily influenced by experience in the spiritual courts. By the end of the sixteenth century the principal procedural characteristics of the chancery system, which included the discovery of parties and the pre-hearing examination of witnesses, had become established and they were largely to remain until the reform period just over a century ago.[5]

Of special significance for the growth of discovery in chancery was the Romano-Canonical procedure of *positiones*.[6] Both in the secular courts of the civil law and in the ecclesiastical tribunals the plaintiff would first narrate, in the preliminary pleading, the *libel,* the facts which collectively formed the basis of his prayer for relief, and would then, in a separate document, assert the same facts as a series of affirmative propositions.[7] Each proposition was called a position. The defendant would follow the same procedure in respect of any affirmative allegations in his own pleading, which was the *exception.* Each party was then obliged to appear before the court and respond on oath to the propositions of his opponent by affirming or denying them.[8] Assent to the proposition constituted an admission which was conclusive, while a denial left the fact propounded

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[2] *Infra*, footnote 61.

[3] Langdell, Summary of Equity Pleading (2nd ed., 1883), p. 17.

[4] With few exceptions churchmen were appointed Chancellors until the first part of the sixteenth century (Jones, The Elizabethan Court of Chancery (1967), p. 27).

[5] Kerly, An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery (1890), p. 118.

[6] Millar, The Mechanism of Fact Discovery: A Study in Comparative Civil Procedure (1937), 32 Ill. L. Rev. 261, 424, at p. 268; Holdsworth, History of English Law, vol. 9 (3rd ed., 1944), p. 337.

[7] Millar, *op. cit.*, footnote 6, at p. 269.

[8] Langdell, *op. cit.*, footnote 3, at p. 12.

unproved. A failure or refusal to answer came to be treated as an affirmation of the position.[9]

When facts in the position were denied the propounding party could examine witnesses in order to prove them. The examination took place before the court prior to the actual hearing and was made on written statements of facts, called *articles*. The party to whom the witness was adverse was given a copy of the articles but was not permitted to attend the examination nor did he receive a copy of the witness' answers. This meant that when the party cross-examined with articles of his own, which he was allowed to do, he had to prepare them without knowing the witness' testimony in chief. He knew only what each witness *might* have testified to. Furthermore, the party who had first examined the witness was not furnished with a copy of the articles of cross-examination. It was feared that if the party had this information he would instruct the witness how to answer. The court fixed a time, called the term probatory, before which the examination of witnesses had to be completed. The term could be extended on application to the court, but once it had expired the testimony of the witnesses was published and no more testimony could be taken.[10] The object of the secrecy surrounding the examination and cross-examination of witnesses "was to prevent the perjury and subornation of perjury, which it was thought would be committed if parties were permitted to examine witnesses at their leisure with a full knowledge of what had already been testified to".[11]

2. *The Court of Chancery.*

It was these features of the canon and civil law that shaped the development of the chancery procedures for getting binding admissions from the defendant and for the taking of evidence. As the initiating process the chancery *bill* stood in place of the libel of the ecclesiastical courts. The bill usually consisted of nine parts, of which the most important were the stating part, the charging part, the interrogating part and the prayer for relief.[12] By the stating part the plaintiff had to state a case upon which, if admitted by the defendant's answer, or proved at the hearing, the court could make a decree, and it had to be made with sufficient certainty as to give the defendant full information of what he was called on to answer.[13] The

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[9] Millar, *op. cit.*, footnote 6, at p. 272.

[10] Langdell, *op. cit.*, footnote 3, pp. 13, 14.

[11] *Ibid.*, p. 14.

[12] Maddock, Principles and Practice of the Court of Chancery, vol. 2 (3rd ed., 1837), p. 205.

[13] Daniell, Chancery Practice, vol. 1 (1837), pp. 465, 476.

charging part did little more than "unfold and enlarge the statement", and so was frequently omitted.[14] It was inserted, however, when the plaintiff sought discovery of the defendant for the charging part was the foundation of the assertions in the interrogating part of the bill.[15] The objective of the bill was an answer that supplied proof of the plaintiff's case. Accordingly, in the interrogating part the plaintiff prayed that the defendant answer on oath the matters contained in the former part of the bill, not only according to positive knowledge, but also according to recollection, information and belief. But as defendants would frequently evade the substance of the matter stated in the bill by answering to the letter only, the practice developed of adding "a repetition, by way of interrogatory, of the matters most essential to be answered, adding to the inquiry after each fact an inquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subject, with a view to prevent evasion, and compel a full answer".[16]

There was a procedural distinction between the civil law and chancery as regards the examination of the defendant. Under the former, the defensive allegations of the defendant to the plaintiff's libel were quite separate and distinct from his personal answers to the positions, while in chancery "these two things, so different in their nature, are indiscriminately blended in the answer".[17] (The answer was the defendant's responsive pleading.) This meant that a given statement in the answer might well have the character of both a defensive allegation and disclosure.[18] Essentially, however, the two systems provided for the pre-trial examination of the parties for the purpose of securing admissions. No less than under the civil law, a party in chancery was compellable to be a witness against himself. The incongruity of English procedure in this period was that a party at law was under no such compulsion.

Chancery also followed the procedure of the civil law as regards the evidence of witnesses. It was obtained by deposition prior to the hearing. Indeed, there was no hearing in chancery of the kind that

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[14] *Partridge* v. *Haycraft* (1805), 11 Ves. Jun. 575, 32 E.R. 1210; Daniell, *op. cit.*, *ibid.* p. 484; Story, Commentaries on Equity Pleadings (8th ed., 1870), §33.

[15] Daniell, *op. cit.*, *ibid.*, p. 485; Mitford, Equity Pleading (4th ed., 1827), p. 43.

[16] Mitford, *op. cit.*, *ibid.*, p. 44.

[17] Langdell, *op. cit.*, footnote 3, p. 65; Wigram, Discovery (2nd ed., 1840), p. 10. Chancery procedure also differed from the civil law as regards the form of the defendant's examination. Under the latter the examination was conducted before the court. Originally chancery followed the same procedure, but in the 15th century written answers, corresponding to the written pleas allowed at law, were introduced (Kerly, *op. cit.*, footnote 5, p. 66).

[18] Millar, *op. cit.*, footnote 6, at p. 439.

took place in the common law courts at the time or of the kind known in the courts today. Oral testimony was not given at the hearing. Nor was evidence taken *en bloc*. It was taken piecemeal before the hearing and consisted of the sworn answers of the defendant to the interrogating part of the bill and the depositions of witnesses.[19] In short, evidence-taking in chancery was completed before the hearing and was accomplished solely by means of interrogatories and depositions. Today discovery is neither the final nor the exclusive process for taking the evidence; the court which determines the facts also hears the evidence, and discovery is just one of several procedures for getting evidence and bringing it to the court.

In examining witnesses chancery followed a similar procedure to the system of articles under the civil law. The examination was by written interrogatories drawn by the parties and administered to the witnesses by an examiner of the court or, in country cases, through the medium of specially appointed commissioners.[20] The interrogatories were read to the witness and his sworn answers recorded as his deposition. The deposition was then signed by the witness, sealed up and sent to the court. When the depositions of all witnesses were returned the court made an order for their publication, that is, for "the open showing of depositions, and giving copies of them to the parties, by the Clerks or Examiners in whose custody they are."[21]

The deposing of witnesses in chancery was kept as secret as under the civil law. Not even the interrogating party was present at the examination so it was not until publication that the party learned what the witness had said.[22] Moreover, further witnesses could not be examined after publication except by leave, which was only granted in special circumstances.[23] Interrogatories by way of cross-examination were allowed before publication, and in order to

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[19] Daniell, *op. cit.*, footnote 13, vol. 1, p. 623; Fleming James Jr. and Hazard, Civil Procedure (2nd ed., 1977), §6.1. Chancery professed generally to follow the common law rules of evidence and so a person who was not capable of testifying at law was not a competent witness in equity. Parties in chancery were therefore barred from testifying by the same ground of interest which disqualified the parties as witnesses at common law. In this respect chancery practice conformed to the common law (Daniell, *ibid.*, p. 446; 2 Wigmore, Evidence (1940), §575; Holdsworth, *op. cit.*, footnote 6, vol. 9, p. 195). Where equity departed from the common law was in the procedure for the compulsory examination of the defendant by bill of discovery on written interrogatories. See Millar, *op. cit.*, footnote 6, at p. 439; Daniell, *op. cit.*, footnote 13, vol. 2, p. 815.

[20] Daniell, *op. cit.*, *ibid.*, vol. 2, p. 466.

[21] Daniell, *op. cit.*, *ibid.*, vol. 2, p. 562.

[22] Holdsworth, *op. cit.*, footnote 6, p. 355.

[23] Daniell, *op. cit.*, footnote 13, vol. 2, p. 592; *Willan* v. *Willan* (1816), 19 Ves. Jun. 591, 34 E.R. 635.

give the other side the opportunity of preparing and filing cross-interrogatories, the examining party was required to serve notice of the name and address of the witness before the witness was examined in chief.[24] (The opponent was not entitled to get this information on discovery.)[25] However, since the cross-examining party did not see the interrogatories on which the witness was first examined, let alone the witness' answers, "it is obvious that . . . cross-examination was useless if not dangerous".[26] Indeed, the Chancellors appear to have recognized that the chancery system for taking evidence was inferior to the common law method of *viva voce* examination. In the sixteenth and early part of the seventeenth centuries the Chancellors had frequently allowed evidence after publication to inform the conscience of the court, and even oral evidence, but one hundred years later these steps had become obsolete for by then the Chancellors had developed the practice of sending disputed questions of fact to be tried by a court of common law.[27]

The premature disclosure of evidence was not a problem which confronted the common law courts since witnesses at law gave their evidence for the first time at trial. Also, at common law the parties could not have discovery of each other. Discovery for a common law action could be obtained by a bill of discovery in chancery but it was the procedure of that court which determined what information had to be given. The pre-hearing discovery of the parties and examination of witnesses was a peculiar characteristic of equity procedure which had been inherited from the Romano-Canonical system, and so only the Court of Chancery needed to regulate the extent and timing of disclosure of the evidence. In addressing the problem the Chancellors were moved by the same fear of perjury that had shaped the civil law practice. Like the civil law, equity made a distinction between the party's own testimony and the testimony which the party's witnesses could give. The adversary was allowed to find out the personal knowledge of the party but because of the danger of perjury, could not use discovery to compel the party to disclose the names of witnesses or his belief as to what their evidence would be.[28]

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[24] Daniell, *op. cit., ibid.*, vol. 2, p. 485. See also *infra,* footnote 37.

[25] *Preston* v. *Carr* (1826), 1 Y. & J. 175, 148 E.R. 634. See *infra,* footnote 41.

[26] Holdsworth, *op. cit.*, footnote 6, p. 355. In *Flight* v. *Robinson* (1844), 8 Beav. 22, at p. 34, 50 E.R. 9, Langdale M.R., contrasted chancery's procedure for discovery of the parties favourably with "its imperfect mode of examining witnesses".

[27] Holdsworth, *op. cit., ibid.*, p. 356.

[28] Wigram stated this restriction in the second of what he termed were "the two cardinal rules of discovery". The rules were: "First, the right, as a general proposition, of every plaintiff, to a discovery of the evidences which relate to his

The concern to avoid perjury explains the chancery practice of sealing up the depositions of witnesses until publication and of not allowing further witnesses to be examined after that time except in special circumstances. It was on motions to extend the time of publication to allow further examination that the Chancellors revealed this apprehension. On a motion to enlarge publication the practice was established as early as 1617 of requiring an affidavit that the party and his solicitor had not seen or been informed of the contents of the depositions.[29] According to Lord Eldon: "That [practice] is founded upon this; that no more dangerous mode of proceeding can take place than permitting parties to make out evidence by piecemeal, and to make up the deficiency of original deposition by other evidence."[30] In 1682 Lord Nottingham had been more explicit when refusing to allow a fresh examination once the purport of the previous examination had become known to the parties. According to the report: "The Lord Chancellor took notice of what dangerous consequence it would be; that if after publication passed, and people seeing where a cause pinched, they should then be at liberty to look out witnesses to bolster up the faulty part of a cause, the necessary consequence would be perjury . . . ."[31] And in 1721 Lord Macclesfield was no less emphatic, stating that: ". . . there would be no end of things, and such a thing would tend to perjury as well as vexation."[32]

The fear of witness tampering accounts for the contrast between the practice on the examination of further witnesses after publication and the practice where *a party* was to be examined by further interrogatories.[33] The former step required a motion to the court and a showing of special circumstances[34] while the Master had a discretion to re-examine a party without a new order of the court.[35]

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case, and, secondly, the privilege of every defendant to withhold a discovery of the evidences which exclusively relate to his own" (Wigram, *op. cit.*, footnote 17, p. 14). See also, *Lyell* v. *Kennedy* (1883), 8 App. Cas. 217, at p. 224; Kerly, *op. cit.*, footnote 5, p. 262.

[29] Holdsworth, *op. cit.*, footnote 5, p. 356, n. 2; Daniell, *op. cit.*, footnote 12, p. 571.

[30] *Whitelocke* v. *Baker* (1807), 13 Ves. Jun. 511, 33 E.R. 385. See also *Willan* v. *Willan* (1816), 19 Ves. Jun. 591, 34 E.R. 635.

[31] *Jones* v. *Purefoy* (1682), 1 Vern. 45, 23 E.R. 299.

[32] *Cann* v. *Cann* (1721), 1 P. Wms. 723, 24 E.R. 586.

[33] As a supplement to the examination carried out initially by the bill the plaintiff could examine the defendant on interrogatories. A decree directing a reference to the Master to make inquiries or take accounts would almost always provide that the parties were to produce documents and be examined upon interrogatories as the Master should direct. (Daniell, *op. cit.*, footnote 13, vol. 2, pp. 807, 815; Maddock, *op. cit.*, footnote 12, pp. 545, 673).

[34] Daniell, *op. cit.*, *ibid.*, vol. 2, pp. 568, 592.

[35] *Ibid.*, p. 815.

As Lord Hardwicke explained: "If a witness is once examined, it might be dangerous without an order to let him be examined again; but that is from the danger of drawing in a witness, when it is known, what he has already sworn to: but there is no danger as to the party interrogated, who may be examined *toties quoties* without a new order of the court."[36]

The practice of keeping the depositions of witnesses secret until publication and of not allowing further examination thereafter supposedly removed the inducement for a party to attempt to persuade fresh witnesses to give false testimony to rebut the adverse testimony of the witnesses who had been examined first. Surprisingly, the practice contained no safeguards against the opposing party meddling with witnesses who were due to be examined before the date of publication. This opportunity certainly existed for prior to the examination the opposing party was to be notified of the name of the witness so that he could prepare cross-interrogatories.[37] Nonetheless, that which was prohibited directly, namely, the disclosure of what the witnesses had said before all of them had been examined, could not be gained indirectly by discovery of the opposing party. Discovery consisted of the defendant's response in the answer to the interrogating part of the plaintiff's bill (or the plaintiff's response in the case of a cross-bill for discovery by the defendant),[38] and of production of documents, and certainly the former mode of discovery would be completed before witnesses were examined.[39] Publication was the proper time for disclosing the testimony of witnesses and so on discovery a party could not be forced to state

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[36] *Cowslade* v. *Cornish* (1751), 2 Ves. Sen. 270, 28 E.R. 175. To draw in means, "To induce to come in or take part; to allure, entice, inveigle; to ensnare, 'take in', delude" (*Oxford English Dictionary,* vol. 3, p. 649).

[37] Daniell, *op. cit.*, footnote 13, vol. 2, p. 485. See also *supra,* footnote 25. For convenience the cross-examining party was supposed to file his interrogatories before the examination-in-chief of the witness was completed, but strict adherence to the rule was not insisted on (Daniell, *ibid.*, p. 486). As the Commission which was set up to inquire into the Court of Chancery discovered, communications between a witness and the opposing party after the witness had been examined as to the contents of the evidence-in-chief, and before the preparation of cross-interrogations, were not unknown. The Commission in its First Report of 1852 concluded that: "The theory of the Court is, that the witnesses are subject to cross-examination; but the cross-examination by written interrogatories of witnesses, if examination in chief is not known, is so ineffective and dangerous that it is seldom resorted to except when the witness is known to be friendly to the cross-examining party, and has communicated facts the subject of such cross-examination." (Parlt. Papers 1852, xxi, 7).

[38] For this procedure, see Mitford, *op. cit.*, footnote 15, p. 80.

[39] *Ibid.*, p. 323; Langdell, *op. cit.*, footnote 3, p. 96. The parties could be examined on interrogatories by direction of the Master, but the Master only had this jurisdiction on a reference by the court and after the court had made a decree. See *supra,* footnote 33.

what he expected the witness would say when they came to be examined. Not even the names of the witnesses to be examined were to be revealed at this stage for then the other party might "tend to prepare or otherwise tamper" with them.[40] Paradoxically, however, as noted already, this information had to be given in time for the preparation of interrogatories by way of cross-examination.[41]

Equity's dread of the corruption that might follow the premature disclosure of evidence extended also to document discovery. The rule was that a party was not required to produce documents that were part of his evidence as to allow discovery "would be opening a wide door to perjury".[42] Since the parties were not competent to testify on their own behalf,[43] it was only the perjury of witnesses that had to be prevented, and presumably chancery was moved by the same danger that had led to the ban on revealing what witnesses had deposed to until all had been examined; if the discovering party's documents showed that a particular witness could be expected to testify adversely to the other side when he came to be examined, on production of the documents an unscrupulous opponent might be tempted to try to persuade the witness to give a less damaging account.

Equity's fear of witness tampering and subornation of perjury was scarcely idiosyncratic; the integrity of the fact-finding process ought to be a vital concern of any regime of dispute adjudication that sets the ascertainment of the truth as an objective. One problem is to ensure that in reaching a decision the tribunal does not rely on a witness who has been persuaded or influenced by a party to give untrue testimony. Since chancery lacked the procedures of the common law for exposing subornation by oral examination and cross-examination before the court, it sought instead to prevent subornation from occurring. The solution was to keep witnesses out of reach of the parties, which could be done, it was supposed, by concealing their identity and testimony until all had been examined. This explains the elaborate procedural framework for deposing witnesses which chancery developed from the ecclesiastic law model. Another way to insulate witnesses was to prevent the other side from using discovery to get information about them. Accordingly, on discovery a party was not allowed to find out the names of the opponent's witnesses. Nor could the party see documents forming part of the opponent's evidence, presumably because

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[40] *Anon.* (1681), 2 Ch. Cas. 84, 22 E.R. 859.

[41] Though not acknowledged as an anomaly, the distinction was recognized in *Preston* v. *Carr, supra,* footnote 25.

[42] *Bligh* v. *Benson* (1819), 7 Price 205, 146 E.R. 948.

[43] See *infra,* footnote 54 and text.

production would disclose both the identity of witnesses and the evidence it was expected they would give. From these limitations on the range of discovery, imposed to protect witnesses from interference, was derived the fundamental rule of discovery: a party could get discovery of the facts of his opponent's case but not of the evidence to support it.[44]

This rule does not, however, provide an exhaustive statement of the information that a party can be compelled to give on discovery. Discovery serves two broad functions, and the particular function that is being pursued will determine what information can be obtained. The rule relates only to the function of discovery in giving notice. The theory underlying the rule acknowledges that the other side must have notice of the case of the party making discovery sufficient to avoid the risk of prejudice caused by surprise,[45] and it assumes this can be done without disclosing *how* the case is to be proved. The rule, however, does not affect the other function of discovery, which is to enable a party to get admissions from the adversary that advance his own case or destroy or impeach the adversary's case.

The rule to protect evidence *for* the party giving discovery could have no application when the discovery objective was to procure admissions to be used *against* the party. Under chancery practice the defendant (or plaintiff to a cross-bill) was compellable to answer interrogatories in the bill as to matters within his knowledge and belief and to produce material documents in his possession where the answer or the document would furnish proof of the plaintiff's case. The practice of requiring a party to produce evidence against himself that was in his possession, established originally in the ecclesiastical courts, rested on the notion that it would be against conscience to allow him to withhold it.[46] The principle was the same whether that evidence consisted of answers to interrogatories[47] or documents.[48]

Also, compelling a party to reveal what he knew of the matters in question did not carry the same risk of corruption as the disclosure of the identity and testimony of witnesses. As Wigmore noted, the

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[44] *Att.-G.* v. *Corporation of London* (1849), 2 Mac. & G. 247, at p. 257, 42 E.R. 95, at p. 99; Kerly, *op. cit.*, footnote 5, p. 262; Wigram, *op. cit.*, footnote 17, pp. 261, 285; Bray, Principles and Practice of Discovery (1885), p. 446.

[45] Wigram, *op. cit.*, *ibid.*, p. 285; *Horton* v. *Bott* (1857), 2 H. & N. 249, 157 E.R. 104; *Bayley* v. *Griffiths* (1862), 1 H. & C. 429, 158 E.R. 953; *Ingilby* v. *Shafto* (1863), 33 Beav. 31, at p. 42, 55 E.R. 277, at p. 282; *Saunders* v. *Jones* (1877), 7 Ch.D. 435, at p. 445.

[46] *Bligh* v. *Benson*, *supra*, footnote 42; Langdell, *op. cit.*, footnote 3, p. 196.

[47] *Moor* v. *Roberts* (1857), 26 L.J.C.P. 246.

[48] *Bligh* v. *Benson*, *supra*, footnote 42; *Firkins* v. *Lowe* (1824), 13 Price 193, at p. 198, 147 E.R. 962, at p. 963.

danger of improper interference with witnesses was totally lacking as the witness was the party himself and he was hardly open to tampering, and the risk of counter-evidence being manufactured was no greater than would otherwise exist in any case.[49] (Similarly, a document adverse to the case of the party giving discovery could be safely produced as the other side would have no cause to interfere with it or to persuade witnesses to controvert it).[50] It was for this reason, according to Wigmore, that chancery conceded from the very beginning an exception to the general rule against the pre-trial disclosure of testimony that applied in English courts: by bill of discovery a party could get the adversary to state *his* testimonial knowledge in advance.[51] The inflexibility of the method of interrogatories by bill makes it doubtful that in practice a party could be forced to yield as much information as Wigmore suggests, but equity certainly did make a distinction as regards disclosure between the personal knowledge of the party and what was known only to his witnesses: the party was not obliged to answer questions or to produce documents when to do so would reveal what evidence he had to support to his case other than his own testimony.[52]

3. *Trial at Law.*

By the year 1850 the common law method of obtaining the evidence of witnesses was generally regarded as being superior to that in chancery.[53] *Viva voce* examination and cross-examination before the court and in the presence of the parties was considered a more effective method for reaching the truth than the taking of

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[49] 6 Wigmore, Evidence (Chadbourn rev., 1976), § 1847(3).

[50] *Ibid.* Also, the document *itself* would not be imperilled by merely allowing the adversary to read it and take a copy (*ibid.*).

[51] 6 Wigmore, *op. cit.*, footnote 49, § 1847 (2); Bray, *op. cit.*, footnote 44, p. 129; *Flight* v. *Robinson, supra,* footnote 26, at p. 34, per Langdale M.R.: "However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, [the party] is required and compelled, under the most solemn caution, to set forth all he knows, believes, or thinks in relation to the matters in question."; *Lyell* v. *Kennedy (No. 2)* (1883), 9 App. Cas. 81 (H.L.). In Canada, where the examination is made orally, the party giving discovery also must disclose what he knows of the relevant facts (*Hopper* v. *Dunsmuir* (No. 2) (1903), 10 B.C.R. 334 (B.C.C.A.); *Phillips* v. *Horne*, [1960] O.W.N. 656, [1961] O.W.N. 53; *Perini* v. *Toronto Parking Authority* (1975), 6 O.R. (2d) 363, 52 D.L.R. (3d) 683 (Ont. C.A.)). With oral examination the information is much easier to elicit than under a system of written interrogatories, it being a "broader and more elastic" procedure (*McKergow* v. *Comstock* (1906), 11 O.L.R. 637, at p. 646; Fleming James Jr., Civil Procedure (1965), §6.3).

[52] 6 Wigmore, *op. cit.*, footnote 49, §1856b.

[53] Commons Journals (1705), XV, p. 198, quoted in Holdsworth, *op. cit.*, footnote 6, p. 356. See also, *Flight* v. *Robinson, supra,* footnote 26, per Langdale M.R.

depositions in secret. A trial at law was flawed, however, by the refusal of the court to hear the testimony of the parties, the persons who were most likely to know the facts.[54] The parties were not competent because of their interest in the outcome; they could not be trusted to tell the truth. They also could not be compelled to testify for the other side and it seems that this privilege was regarded as accompanying the disqualification as witnesses for themselves.[55] In the Court of Chancery the position of the parties as witnesses was different. Chancery followed the law as regards their competence to testify; they were disqualified on the ground of interest. But this was not a reason for preventing the party from being made to admit the truth in his adversary's favour, and under the system of examination by bill inherited from the ecclesiastical law chancery effectively overcame the party's common law privilege of not being compellable to testify against himself. And equity went further. As part of its auxiliary jurisdictions it was prepared to subject a party to an action at law to this procedure by examination by bill of discovery. Thus, by resort to chancery a party at law was able to get the oath of the other side for use in the trial at law.[56] However, discovery in aid of a common law action was far from satisfactory. It was time-consuming, cumbersome and expensive.[57] Also, it was not available automatically as the Chancellors were careful to limit the situations in which they would assist the litigant at law.[58]

The removal of the bar to receiving the testimony of the parties was the first step toward reforming common law evidence and procedure, and this was accomplished by the Evidence Act of 1851.[59] The statute made the parties generally competent and compellable to testify for and against each other in all courts of justice. However, while the adversary could now be compelled to give evidence against himself at trial, the common law courts still lacked any discovery machinery of the kind equity had developed for forcing the disclosure of his own evidence *before* trial. The need for

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[54] A situation condemned by Bentham. See Rationale of Judicial Evidence b. IX, pt. V., c.I, quoted in 2 Wigmore, *op. cit.*, footnote 49, §577.

[55] 8 Wigmore, Evidence (McNaughton rev., 1961), §2217; Holdsworth, *op. cit.*, footnote 6, p. 198.

[56] At common law a party's out-of-court admission was evidence in the cause and it did not matter whether the admission had been made voluntarily or obtained through the compulsory processes of chancery (Langdell, *op. cit.*, footnote 3, p. 196).

[57] Blackstone, Commentaries, iii, p. 382, quoted in Holdsworth, *op. cit.*, footnote 6, p. 198, n.6; Day, Common Law Practice (4th ed., 1862), p. 16.

[58] Mitford, *op. cit.*, footnote 15, p. 185; Wigram, *op. cit.*, footnote 17, p. 5; Bray, *op. cit.*, footnote 44, p. 348; *Lyell* v. *Kennedy, supra,* footnote 28.

[59] 14 & 15 Vict., c. 99, s.2.

effective discovery in all courts had been acknowledged by the several commissions set up at this time to inquire into common law and chancery procedure,[60] and for the common law this was satisfied finally with the enactment in 1854 of the Common Law Procedure Act. The statute gave the common law courts power to order discovery by way of discovery and production of documents and sworn answers to written interrogatories.[61] The legislation was also

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[60] Discovery was "indispensable to the due administration of justice" (Chancery Commission (The Commissioners Appointed to Enquire into the Process, Practice and System of Pleading in the Court of Chancery), First Report (1852), p 23). The Common Law Practice Commission agreed. It recognized that the 1851 change in the law allowing a party to call the opponent as a witness did not go far enough. This was a course that would ". . . only be resorted to in the most desperate emergency" (Common Law Practice Commission (The Commissioners for Enquiring into the Process, Practice and System of Pleading in the Superior Courts of Common Law), Second Report (1853), p. 35).

[61] 17 & 18 Vict., c.125, ss 50, 51. Discovery of documents was introduced by s. 50. Previously, general document discovery could be obtained in chancery by means of interrogatories. They were either so framed as to compel the defendant to set forth the short contents of the documents in his answer, or that by means of a general charge of possession of documents such an admission was obtained as would found an order for production (Bray, *op. cit.*, footnote 44, p. 155). Also, the common law courts had a limited power of ordering discovery of particular documents. This power existed (a) under the practice of profert and oyer, by which a party who relied in his pleading on an instrument under seal in his possession could be ordered to bring the document into court to read to his opponent; (b) under what was termed the equitable jurisdiction of the court a party might have inspection of a document in the adversary's possession when this was necessary for framing his own pleading, he being a party to the document either in fact or interest, and the document being held by the adversary to produce it when necessary; (c) by way of mandamus or by a rule in the action itself in respect of public documents such as court rolls and corporation books and records (*ibid.*, pp. 264, 281). Profert and oyer was abolished in 1852 (15 & 16 Vict., c. 76, s.55), but this did not affect the right to inspection under the equitable jurisdiction (*Penarth Harbour, etc. Co.* v. *Cardiff Waterworks Co.* (1860), 7 C.B. (N.S.) 816, 141 E.R. 1036; Bray, *op. cit.*, footnote 44, p. 265). That jurisdiction had been enlarged by statute in 1851, it being provided that inspection could be granted in cases in which discovery might have been obtained in equity (14 & 15 Vict., c.99, s.6; *Hunt* v. *Hewitt* (1852), 7 Exch. 236, 155 E.R. 931; *Republic of Peru* v. *Weguelin* (1872), L.R. 7 C.P. 352, at p. 356). However, the jurisdiction was still limited to an inspection of documents, a narrower right than discovery (Day, Common Law Practice (4th ed., 1862) p. 269). A party could not get discovery as to the *existence* and *description* of documents in the other party's possession, which in equity he would have in answer to his bill of discovery, but only the inspection of documents as to the existence and description of which he had supplied the information (*Hunt* v. *Hewitt, supra*; Pollock, Treatise on Inspection of Documents at Common Law (1851), pp. 9-10). It took the 1854 enactment to establish the power of the common law courts to award the broader remedy of discovery.

Written interrogatories were introduced by s. 51. The long tradition of *viva voce* testimony in the common law courts pointed to the alternative of an oral method of examination, but this step was not taken, the reason perhaps being that examination by written interrogatories would bring common law procedure into line with that in chancery. By the 1852 Chancery Practice Amendment Act the chancery methods of discovery had been recast, and, among other things, interrogatories, which formerly

significant for the Court of Chancery as the court lost what had been virtually a monopoly of discovery procedure. In most actions at law after 1854 the jurisdiction of chancery to grant discovery was not required,[62] and in fact was seldom invoked.[63]

B. *Privilege for Documents Relating Exclusively to the Case of the Party Giving Discovery.*

1. *In England.*

The history of the rule for the protection of a party's evidence once the common law courts could grant discovery will be considered later. First there needs to be examined another aspect of discovery, one closely related to the rule, namely, the privilege to withhold documents which relate solely to the case of the party making discovery. In a study of the origins and rationale of the shield for a party's trial preparation in the common law system the privilege has an important place. Though the privilege and the rule have different origins, their practical effect is the same and over time they have virtually ceased to be distinguishable. The privilege really embodies the rule as it applies to documents. Also, the privilege came largely to be replaced by the head of privilege that protects communications in anticipation of litigation which was developed after the mid-nineteenth century. In practice, as a general rule, most documents that relate exclusively to the case of the party making discovery have been brought into existence in circumstances that will attract the anticipation of litigation privilege. However, in three major common law jurisdictions, England, British Columbia and Ontario, the privilege for documents relating only to the case of the party making discovery has been abolished. The privilege was struck down as being out of harmony with modern notions of the functions and objectives of the trial process. What is significant is that despite the disappearance of the privilege, two other grounds of protection, the rule as to evidence and the privilege for communications made in anticipation of litigation, remain intact.

The privilege[64] for documents that relate exclusively to the case of the party giving discovery was brought into existence to shield

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had been incorporated in the plaintiff's bill, were to be administered separately (Fraser, Discovery of Fact in Ontario and British Columbia (unpublished LL.M. thesis, University of Toronto, 1970), p. 24; Millar, *op. cit.*, footnote 6, at p. 442).

[62] Archbold, New Practice of the Courts of Common Law (2nd ed., 1855), p.v.

[63] Bray, *op. cit.*, footnote 44, p. 609; *Bustros* v. *White* (1876), 1 Q.B.D. 423; *Norwick Pharmacal Co.* v. *Commrs. of Customs and Excise*, [1974] A.C. 133(H.L.).

[64] The tradition seems to have been to treat the claim to withhold production on this ground as a privilege. See, for instance, *O'Rourke* v. *Darbyshire*, [1920] A.C. 581 (H.L.); *Perini Ltd.* v. *Toronto Parking Authority, supra,* footnote 51; Law Reform Committee, Sixteenth Report (Privilege in Civil Proceedings), Cmnd. 3472 (1967).

title deeds from disclosure to strangers. The practice was that ". . . although a plaintiff has a right to discovery or production of documents which tend to make out his own title affirmatively, he has no right to a discovery or production which are not immediately connected with his own title, and which form part of his adversary's".[65] The special protection for documents of title evolved in early times when there was no system for the public registration of ownership of land and title was evidenced largely by possession. The courts were careful to safeguard the person in possession from undue inquiries as to his title, and in actions to recover land the plaintiff was generally not permitted to use discovery to ransack the defendant's title deeds in the hope of uncovering some flaw, that is, to embark on a fishing expedition.[66] The rule helped maintain security of tenure by concealing any defects in the formal chain of descent from persons opposed in claim or from blackmailers prepared to exploit the defects.[67] Since a plaintiff in ejectment had to succeed on the strength of his own title rather than upon any defects in the defendant's,[68] documents that impeached the defendant's title but which did not support the plaintiff's were not discoverable. To gain immunity it was sufficient if the defendant swore that the documents related solely to his own title.[69]

By the middle of the last century the privilege had been extended beyond title deeds to include any documents that formed the evidence for the party making discovery.[70] The privilege applied to documents which constituted evidence (title deeds were an example) and also to documents which set forth or disclosed what the party's evidence would be though they were not admissible in evidence themselves. As Viscount Findlay explained in *O'Rourke* v. *Darbyshire*, ". . . to exempt from inspection only documents which

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[65] Daniell, *op. cit.*, footnote 13, vol. 2, p. 63.

[66] Bray, *op. cit.*, footnote 44, p. 516; *Philipps* v. *Philipps* (1878), 4 Q.B.D. 127, at p. 140.

[67] 8 Wigmore, *op. cit.*, footnote 55, § 2211.

[68] *Lyell* v. *Kennedy, supra,* footnote 28.

[69] Wigram, *op. cit.*, footnote 17, p. 299; Bray, *op. cit.*, footnote 44, pp. 520, 525; *Lyell* v. *Kennedy* (1882), 20 Ch.D. 484, at p. 492 (C.A.); *Morris* v. *Edwards* (1890), 15 App. Cas. 309 (H.L.).

[70] Wigram, *op. cit.*, footnote 17, p. 243; Bray, *op. cit.*, footnote 44, p. 493; *Jenkins* v. *Bushby* (1866), 35 L.J. Ch. 400; *Bewicke* v. *Graham* (1881), 7 Q.B.D. 400, at p. 409 (C.A.); *O'Rourke* v. *Darbyshire, supra,* footnote 64, at p. 606. *Maclean* v. *Jones* (1892), 66 L.T. 653, limited the privilege to title documents, but this was dissented from in *Budden* v. *Wilkinson*, [1893] 2 Q.B. 432 (C.A.). The conditions of the protection were laid down by Knight Bruce V.C. in *Combe* v. *Corporation of London* (1842), 1 Y. & C.C. 631, and they were accepted as applying equally to documents that were the party's evidence as to title deeds. See Bray, *op. cit.*, footnote 44, p. 479; *A.-G.* v. *Emerson* (1882), 10 Q.B.D. 191 (C.A.).

are admissible in evidence would leave open to inspection many documents which might reveal what the case of the opponent is and the evidence by means of which it is proposed to establish it".[71] What grounded the privilege was the assertion that the document in question related exclusively to the case of the party giving discovery in that it contained nothing either to impeach that case or to support the adversary's case.[72] The privilege evolved as the common law equivalent of the protection that had originated in chancery for documents which formed the party's evidence.[73] Indeed, the scope of the privilege may have been wider as it is not altogether certain that the chancery rule covered documents that simply related to the evidence for the party's case as distinct from documents that constituted the evidence.[74]

In England the privilege for documents relating exclusively to the case of the party making discovery was abolished by statute in 1968 following the recommendation of the Law Reform Committee.[75] The Committee reported that the privilege had been very rarely relied upon in practice in recent years,[76] and concluded that to retain it would be out of harmony with the principles which ought to regulate civil litigation. As regards a document which *ex hypothesi* relates to the matters in question and is not otherwise privileged, it was not right, the Committee reasoned, that a party himself should be allowed to decide that a document did not support the opposing case, especially as the decision is usually made at an early stage of

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[71] *Ibid.*, at p. 606.

[72] While it was clear that a defendant in ejectment was not required to assert that the documents contained nothing to impeach his title or defence, the question whether the defendant could safely omit the assertion in other cases seems never to have been settled. See, *A.-G.* v. *Newcastle-upon-Tyne Corporation*, [1899] 2 Q.B. 478; *Johnson* v. *Whitaker* (1904), 90 L.T. 535; Annual Practice (1963), p. 700. In *Ricketson* v. *Smith* (1896), 17 L.R. N.S.W. (Eq.) 203, Owen C.J. in Eq. rationalized the cases on the basis that the assertion was required whenever as a matter of substantive law it was necessary for the party seeking discovery to impeach the title or claim of the opposite party. This was not the case in ejectment, for example. See also *Duncan* v. *Royal Bank of Canada* (1971), 19 D.L.R. (3d) 334 (B.C.S.C.).

[73] The form of the objection to produce documents raised in *Frankenstein* v. *Gavin's Cycle Cleaning & Insce. Co.*, [1897] 2 Q.B. 62 (C.A.) indicates that this was recognized. It was claimed that the documents were part of the evidence supporting the defendant's case, and did not support the plaintiff's case, and contained nothing impeaching the case of the defendant.

[74] *O'Rourke* v. *Darbyshire, supra,* footnote 64, at pp. 592, 606; Bray, Digest of the Law of Discovery (1904), p. 36.

[75] Civil Evidence Act 1968, 1968, c.64, s.16(2); Law Reform Committee, Sixteenth Report (Privilege in Civil Proceedings), Cmnd. 3472 (1967).

[76] *Brookes* v. *Prescott*, [1948] 2 K.B. 133 (C.A.) was the only reported decision on the privilege after *O'Rourke* v. *Darbyshire, supra,* footnote 64, in 1920.

the action and when the real significance of the document may not have emerged.[77]

The Law Reform Committee offered no explanation for the decline in use of the privilege claim for documents relating exclusively to the case of the party giving discovery. The reason, it is suggested, is that the privilege had been largely superseded by the litigation aspect of solicitor and client privilege, the limits of which had become more or less settled by the end of the last century. A document did not relate exclusively to the party's case, and hence could not be withheld from production on that ground, if it would advance or tend to advance the case of the adversary in the sense that it would be admissible in evidence for the adversary or, while not itself admissible, would disclose the existence of evidence for the adversary. Such a document would be protected, however, if it had been brought into existence in relation to pending or anticipated litigation. The litigation privilege thus conferred an immunity from production that did not exist before. Given the necessary litigation connection, a document was privileged whether or not it supported exclusively the case of the party making discovery. For a century at least the litigation privilege has provided the shelter for all litigation related documents passing between a third party and the solicitor or party. (Communications between solicitor and client are protected irrespective of litigation.) It is invoked indiscriminately to cover both documents which but for litigation would not be protected and documents which actually do relate exclusively to the party's own case and so would have been protected irrespective of litigation.[78] In practice, therefore, the original ground of privilege has been relied on only for documents that have not been prepared for litigation.[79]

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[77] The Committee might have added that in practice the party's claim in the discovery affidavit that the document related exclusively to his own case was virtually treated as conclusive (*Brookes* v. *Prescott, ibid.*; Annual Practice (1967), p. 362).

[78] See, *e.g.*, *Litwin* v. *Great American Insce. Co.*, [1932] 4 D.L.R. 195 (Man.S.C.).

[79] Arguably, it is the only ground of protection from production when the party has acted without a lawyer, the litigation privilege not applying. The traditional formulation of the litigation privilege assumes that the party will be legally represented since it speaks of documents brought into existence for the purpose of being laid before the party's solicitor for advice in pending or anticipated litigation (see, for instance, *Birmingham and Midland Omnibus Co. Ltd.* v. *London and North Western Rly. Co.*, [1913] 3 K.B. 850). See Bray, *op. cit.*, footnote 44, pp. 392, 410; *Anderson* v. *Bank of British Columbia* (1876), 2 Ch.D. 644, at p. 658; *Lyell* v. *Kennedy* (1884), 27 Ch.D. 1, at p. 25, per Cotton L.J.: ". . . when a man will act for himself, and not do that which is the very ground of privilege, *viz.*, act by a solicitor, whatever he learns, where the proper interrogatories are put to him he must produce or disclose it"; *National Employers' Mutual General Insurance Association Ltd.* v. *Waind* (1979), 53 A.L.J.R. 355 (Aust. H.C.).

2. *In Canada.*

In the United Kingdom the privilege for documents that related exclusively to the case of the party making discovery was abolished by statute. In two Canadian jurisdictions, British Columbia and Ontario, the same result has been achieved through judicial decision.[80] In *Duncan* v. *Royal Bank of Canada*[81] Seaton J. of the British Columbia Supreme Court found that nothing in the British Columbia Rules of Practice or case law compelled him to uphold the privilege, and then concluded that the claim ought not to be recognized since on oral examination for discovery a party could be questioned as to facts that related exclusively to his own case and there was no reason that document discovery should be any less searching. The privilege reflected a "sporting approach" to litigation which had been rejected for oral examination and it would not be consistent to retain the protection for documents. In *Perini* v. *Toronto Parking Authority,*[82] the Ontario Court of Appeal reached the same conclusion as regards the existence of the privilege in Ontario, and for reasons similar to those of Seaton J. The court assumed that the privilege did exist originally in the province but held that it had disappeared when new Rules of Practice were introduced in 1913. The 1913 Rules, as did the Rules now in force, contemplated the examination of a party as to all relevant facts, including those which supported only his own case. In the words of Arnup J.A.: "Having in mind the scope of oral discovery, the scope of the liability to produce documents before trial should be the same. Subject to the existing well-recognized grounds of privilege, the test is relevancy to 'any matters in question in the action' (Rule 347)."[83]

These rulings against the existence of a privilege for documents relating exclusively to the case of the party making discovery call for two comments. First, though they accord with the tendency of Canadian decisions over the last fifty years to broaden the reach of discovery,[84] that reach does not necessarily extend to everything

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[80] The existence of the privilege was recently affirmed in New Brunswick. See *Lebreton* v. *Brunswick Oxygen* (1976), 13 N.B.R. (2d) 693.

[81] *Supra*, footnote 72.

[82] *Supra*, footnote 51.

[83] *Ibid.*, at p. 698 (D.L.R.).

[84] A tendency which the courts themselves proclaim. See for instance, *Henderson* v. *Mercantile Trust Co.* (1922), 52 O.L.R. 198, at p. 200; *Walkinshaw* v. *Drew,* [1935] O.W.N. 233, at p. 236; *Modriski* v. *Arnold,* [1947] O.W.N. 483, [1947] 3 D.L.R. 321 (Ont. C.A.); *Turta* v. *C.P.R. and Imperial Oil,* [1951] 2 W.W.R. (N.S.) 628 (Alta S.C.); *Perini Ltd.* v. *Toronto Parking Authority, supra,* footnote 51. A recent example is the holding that the rule for communications, "once privileged always privileged", should apply only to communications between solicitor and client (*Wujda* v. *Smith* (1974), 49 D.L.R. (3d) 476 (Man. S.C.); *Meaney* v. *Busby* (1977), 15 O.R. 71).

within the bounds of relevance. This was acknowledged by Arnup J.A. in *Perini*. A document that relates solely to the party's own case is no longer protected on that ground but nonetheless it can be withheld from production if it was obtained in connection with the litigation. The sporting approach to litigation is therefore far from obsolete. Secondly, subject only to the application of solicitor and client privilege, the rulings represent a rejection of the rule that the party giving discovery cannot be compelled to disclose his evidence, at least where the evidence consists of a document or where a document will disclose what the evidence of witnesses will be. With that qualification as regards privilege, in British Columbia and Ontario a document that relates only to the case of the party giving discovery, that is, one that either constitutes or discloses the evidence for his case, must be produced for inspection.

The rule as to evidence non-disclosure was founded on the fear that a party might tailor his own testimony or interfere with witnesses were he to find out the other side's evidence before trial. Implicit in the two Canadian decisions (and in the statutory abolition in England) is a judgment that outweighing this danger is the need to take care that the adversary is not prejudiced by the surprise presentation of evidence at trial, an objective which broader discovery helps to promote. It is a judgment, however, which, with one exception,[85] the courts have declined to make in regard to the evidence rule in another context, that of witness' names. On oral examination for discovery a party is generally not obliged to reveal the identity of witnesses, but the retention of this protection is difficult to justify, certainly in Ontario,[86] now that, subject only to the litigation privilege, a party must produce any document that sets forth his evidence. Production will necessarily reveal the names of witnesses. Furthermore, since the judgment in favour of disclosure would seem to be no less valid for trial information protected by the anticipation of litigation privilege, it is pertinent to determine what justification there can be for maintaining that protection. In pursuing the two questions, which are closely related, there will be examined first the history of the rule as to evidence once the common law courts in England assumed the administration of discovery after 1854, and next the birth, which occurred at about the same time, of the privilege for communications made in relation to litigation.

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[85] *Ansley* v. *Ansley*, [1973] 5 W.W.R. 181 (B.C.S.C.). See, *infra*, footnote 132 and text.

[86] British Columbia, which also does not recognize the privilege for documents relating to the case of the party giving discovery, has abolished the protection for witness' names by Rule of Court. See, *supra*, footnote 1.

### C. *Later History of the Evidence Rule.*

#### 1. *In England.*

After 1854 parties at law, instead of bringing a suit for discovery in equity, could deliver interrogatories to one another in the action itself. The interrogatories were the counterpart of the questions in the interrogating part of the chancery bill of discovery.[87] The enabling statute stipulated that by leave of the court the parties could interrogate "upon any matter as to which discovery may be sought",[88] and it was not long before the common law courts had concluded that discovery was to be restricted to the cases where discovery would be given in equity.[89] The courts were ". . .to be governed by the principles which had been recognized in the Courts in which this branch of our jurisprudence was originally planted, nurtured and grown up".[90] Thus, it was decided that there could not be a discovery of the evidence for the opposing case,[91] and upon the enactment of the Judicature Act the principle was reiterated.[92] Yet it

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[87] See, *supra*, footnote 12; Bray, *op. cit.*, footnote 44, pp. 97, 111. In chancery interrogatories were part of the bill until 1852, when it was enacted that they were to be filed and delivered separately (Chancery Procedure Act, 15 & 16 Vict., c.86, ss 10, 12).

[88] 17 & 18 Vict., c.125, s.51.

[89] *Whately* v. *Crowter* (1855), 5 El. & Bl. 709, 119 E.R. 645; *Edwards* v. *Wakefield* (1856), 6 El. & Bl. 462, 119 E.R. 937; *Horton* v. *Bott* (1857), 2 H. & N. 249, 157 E.R. 104; *Blyth* v. *L'Estrange* (1862), 3 F. & F. 154, 176 E.R. 69; *Pye* v. *Butterfield* (1865), 34 L.J.Q.B. 17.

[90] *Pye* v. *Butterfield, ibid.*, per Cockburn J. It seems that the common law judges at first were far from being conversant with those principles. Thus, in *Horton* v. *Bott, ibid.*, Bramwell B., speaking for the Court of Queen's Bench, admitted to ". . . our want of familiarity with the subject", and in *Edwards* v. *Wakefield, ibid.*, the same court acknowledged that in deciding whether a particular interrogatory could have been properly included in a discovery bill it was assisted by the concession made by ". . . the learned gentleman who attended on this occasion from a Court of Equity".

[91] *Whately* v. *Crowter, supra*, footnote 89; *Edwards* v. *Wakefield, supra*, footnote 89; *Moore* v. *Roberts, supra*, footnote 47; *Bayley* v. *Griffiths, supra*, footnote 45. For a time the common law courts took a narrower approach than chancery to the use of discovery to get particulars, that is, to find out what the opposing case was. Discovery could be used for this purpose in chancery (Wigram, *op. cit.*, footnote 17, p. 285; *Saunders* v. *Jones* (1877), 7 Ch.D. 435, at p. 445), but at common law an interrogatory had to advance the case of the interrogating party. One that related exclusively to the case of the adversary, that is, inquired as to the nature of that case, would not be allowed (*Whately* v. *Crowter, supra*, footnote 89; *Moor* v. *Roberts, supra*, footnote 47; Bray, *op. cit.*, footnote 44, p. 451; *cf.*, *Bayley* v. *Griffiths, supra*, footnote 45, per Pollock C.B.). The common law practice gradually changed and by the time of the Judicature Acts it was the same as that in chancery (*Saunders* v. *Jones, ibid.*, at p. 451).

[92] *Eade* v. *Jacobs* (1877), 3 Ex.D. 335 (C.A.); *Bolckow* v. *Fisher* (1882), 10 Q.B.D. 161 (C.A.); *Bradbury* v. *Cooper* (1883), 12 Q.B.D. 94.

was not inevitable that the common law should have adopted the equity limitation on the scope of discovery. One court, the Court of Queen's Bench, considered that the new statute did not direct that discovery was to be administered according to the chancery mode of procedure so that the court was "not fettered by the rules of the Courts of equity". It was decided, nonetheless, that those rules should be taken as a guide.[93]

It is significant that the common law should have chosen to adopt the equity ban on the pre-trial disclosure of evidence, for a strong case could have been made for abandoning it. The original prohibition reflected the distinctive fact-finding methods of the Court of Chancery. There, witnesses were examined by written interrogatories, the examination was not before the court or in the presence of the parties and there was no effective right of cross-examination. Also, the parties were generally not examined as witnesses and the court was only informed of their version of the facts from what they had sworn to in the answer to the interrogating part of the bill or cross-bill. Understandably, the common law system for finding the facts was thought to be superior. In 1853 the Common Law Practice Commissioners had declared, ". . .the circumstances which gave the system of English procedure its peculiar and characteristic merits to be *viva-voce* interrogation, cross-examination, publicity, examination in the presence of the tribunal".[94] Of these features, the efficacy of cross-examination drew special praise as a weapon for reaching the truth,[95] an assessment shared by the common law judges themselves.[96]

2. *Rationale Judicially Examined.*

But after 1854 the common law courts accepted without question the equity rule as to the discovery of evidence. Not until

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[93] *Pye* v. *Butterfield, supra,* footnote 89.

[94] Quoted in 5 Wigmore, Evidence (Chadbourn rev., 1974), §1367, n.2. The House of Commons had compared the two systems and reached the same conclusion 150 years earlier (Commons Journal (1705), XV, p. 198). See also *The Berkeley Peerage Case* (1811), 4 Camp. 401, 171 E.R. 128, per Macdonald C.B.

[95] Wigmore, *op. cit.,* footnote 94, reproduces many of the tributes. In Bentham's opinion, concurred in by Wigmore, the great contribution of English law to the process of fact determination was not trial by jury, but "Trial by oral and cross-examined evidence" (Bentham, Rationale of Judicial Evidence (1827), book 3, c. 20, quoted in Wigmore, *ibid.*). Cross-examination was ". . .the greatest legal engine ever invented for the discovery of truth" (Wigmore, *ibid.*). However, as Professor Homburger has observed, if this were so, ". . .one wonders why other legal systems have not imported that 'fabulous' engine" (Functions of Orality in Austrian and American Civil Procedure (1971), 20 Buffalo L. Rev. 9, at p. 36).

[96] The absence of the opportunity to cross-examine was the principal reason for the common law's rejection of hearsay as evidence (*The Berkeley Peerage Case, supra,* footnote 94).

1880, after the fusion of the separate systems of law and equity, did any rationalization of the restriction surface in a reported decision. In language as forceful and emphatic as that of the early Lord Chancellors, Jessel M.R. explained that:[97]

> If you give one side the opportunity of knowing the particulars of the evidence that is to be brought against him, then you give a rogue an enormous advantage. He then may be able, although he has no evidence in support of his own case, to shape his case and his evidence altogether in such a way as to defeat entirely the ends of justice.

That a party might fabricate a case were he to get discovery of the opposing evidence was not the only fear. As well, the identity of witnesses for the other side was not to be disclosed ". . .generally speaking, for the obvious reason that people might tamper with them".[98] Ultimately, therefore, the faith of the courts in the value of cross-examination in exposing falsehood was not so strong that they would allow this kind of information to be exchanged before trial.

As early as 1836, in what became the classic text on discovery, Wigram had acknowleged that "arguments of some weight might *a priori* be addressed in support" of the disclosure of evidence before trial. His conclusion was, however, that experience ". . . has shewn—or (at least) Courts of Justice in this country act upon the principle—that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred, when either party is permitted, *before* a trial, to know the precise evidence against which he has to contend".[99] Apart from the danger of surprise, what the "arguments of some weight" might be Wigram did not say. It was only in the post-Judicature Act era that the courts gave them any attention. They were examined in just three cases, then only briefly and each time the conclusion was the same.[100] Among the judges some were prepared to concede the force of the case for allowing the discovery of evidence but finally all were agreed it could not be permitted. Time has not diminished the validity of the arguments that were then put forward in support of broader discovery and the three cases provide a convenient framework for dealing with them.

3. *Exposure of Lying Witness* v. *Prejudice through Surprise.*

The first argument against the rule as to evidence is that the prohibition against disclosure rests on an assumption that is not

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[97] *Benbow* v. *Low* (1880), 16 Ch.D. 93, at p. 95.

[98] *Bishop* v. *Bishop,* [1901] P. 325, at p. 327, per Jeune P.

[99] Wigram, *op. cit.,* footnote 17, p. 265.

[100] *Benbow* v. *Low, supra,* footnote 97; *Re Strachan,* [1895] 1 Ch. 439; *Knapp* v. *Harvey,* [1911] 2 K.B. 725.

sound. From a tactical point of view the effectiveness of evidence that contradicts or weakens the opposing case will depend on the timing of its disclosure, and the most opportune moment will often be at the trial itself.[101] If the opponent hopes that a lying or obstructive witness will be brought to tell the truth by sudden and unexpected confrontation with adverse evidence, then clearly the evidence must not be revealed beforehand. Its shock value would be lost. Nor should the evidence be revealed before trial if the other party will then proceed to fabricate his own testimony or seek to suborn witnesses. On either premise, however, the case for concealment posits that as between the parties the party in possession of the impeaching evidence has a monopoly of truth and virtue. It posits that the impeaching evidence is true, and also a dishonest adversary. But there is no reason *a priori* that this should be so. Though undoubtedly premature disclosure creates the risk that an unscrupulous opponent will respond in a corrupt way, the danger no less is that if the evidence is false, the opponent, whether honest or not, will not have the opportunity to expose the falsehood unless he gets advance notice of the evidence. This was probably the danger that Wigram apprehended when he referred to "the possible mischiefs of suprise at a trial". Also, even if the impeaching evidence is true prior notice it would give the opponent time to search for other evidence to qualify it and thus reduce its unfavourable impact. As Wigmore observed, whether the method followed be analysis, experience or deduction, it simply cannot be said of any particular category of evidence that it is susceptible of falsification, while of another it is not. Evidence cannot be classified in this way. It is therefore not possible to prescribe disclosure in one case but not in another. Either way there is a danger injustice will result; a choice must be made between requiring notice as a general rule or not requiring notice at all.[102] The common law opted for the second alternative.

In a trial at law surprise had never been a ground for excluding evidence that was relevant and otherwise admissible.[103] An adjournment was the most the other side could hope to get by objecting.[104] Thus, in accepting the equity restrictions on the reach of discovery the common law was certainly consistent; surprise was

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[101] See Hawkins, Discovery and Rule 34: What's So Wrong About Surprise? (1953), 39 A.B.A. Jo. 1075; *cf.* Holtzoff, The Elimination of Surprise in Federal Practice (1954), 7 Vanderbilt L. Rev. 576.

[102] 6 Wigmore, *op. cit.*, footnote 49, §1845.

[103] *Bain* v. *Whitehaven & Furness Ry.* (1850), 3 H.L.C. 1, at p. 16, 10 E.R. 1, at p. 7.

[104] *Benbow* v. *Low* (1880), 16 Ch.D. 93, at p. 96; *Humphries* v. *Taylor* (1888), 5 R.P.C. 687; *Wakefield & Co. Ltd.* v. *Board* (1928), 45 R.P.C. 261.

not a bar to admissibility at trial nor could a party use discovery to guard against surprise by finding out the evidence for the other side in advance. Yet one judge saw that discovery of the opposing evidence might be advantageous. In *Benbow* v. *Low*,[105] Cotton L.J. agreed that ". . . it may be very convenient for the defence to have such discovery, and it may enable the defendants to prepare for trial with less apprehension and with less expense". He concluded, however, that the discovery could not be allowed because it came ". . . within the principle that you are not entitled to see what evidence your opponent is prepared to give in support of his own case". The witnesses for the adversary were in the same position. In *Knapp* v. *Harvey*, Vaughan Williams L.J. considered that a party was not to be allowed their names ". . . in order that he may make inquiries about them, and, if necessary, . . . interview them,"[106] and Buckley L.J. ruled it ". . . an inadmissible contention" that a party be given this information so that ". . . he would be in a better position to meet their evidence".[107]

Generally speaking equity and the common law took the same position as regards the disclosure of evidence. Neither would force a party to show his evidence before the hearing. Chancery, however, did not ignore the danger of surprise altogether for with one particular type of evidence, the out-of-court admissions of the opposite party, it departed from the common law and required the evidence to be set forth in the pleadings. At common law evidence was not to be pleaded[108] and equity as a rule took the same approach, requiring that the plaintiff in the bill should only set out the ultimate facts that formed the basis of the prayer for relief. But when a fact

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[105] *Ibid.*, at p. 99.

[106] [1911] 2 K.B. 725, at p. 730.

[107] *Ibid.*, at p. 732.

[108] "Evidence shall never be pleaded, because it tends to prove matter in fact; and, therefore, the matter in fact shall be pleaded" (*Dowman's Case*, 9 Coke Rep. 9b, 77 E.R. 745). "It is one of the first principles of pleading that you have only occasion to state facts, which must be done for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it" (*The King* v. *Lyme Regis* (1779), 1 Doug. 14, at p. 59, 99 E.R. 149, per Buller J.). See also, *Eaton* v. *Southby* (1738), Willes 131, 125 E.R. 1094; *Digby* v. *Alexander* (1832), 8 Bing. 416, 131 E.R. 454. The object of common law pleading was to bring the parties ". . .to an issue on a single and certain point" (*Williams* v. *Wilcox* (1838), 8 Ad. & E. 314, 112 E.R. 857, per Denman C.J.), and so evidence was to be ". . .brought forward, for the first time, at the trial, when the issue comes to be decided" (Stephen, Treatise on the Principles of Pleading (6th ed., 1860), p. 265). The distinction between fact and evidence was integral to 0.19 r.4, the principal pleading rule in the new system under the Judicature Acts (*Philipps* v. *Philipps, supra,* footnote 66, at p. 133). In contrast to the earlier practice, under 0.19 a party could plead evidence without penalty provided it was not scandalous or did

was to be proved by the admission of the defendant, whether written or oral, the admission had to be stated in the bill.[109] This was not necessary in a trial at law, and, as Story commented, "the [equity] doctrine does not seem to be founded upon any very clear and intelligible principle.... Why the rule should be otherwise in equity, it is not easy to say".[110] However, in *Austin* v. *Chambers*,[111] Cottenham L.C., though not attempting to account for the variance from common law practice, did explain the principle of the equity rule on the basis that ". . . it would be a most unjust thing to bind the interests" of a party by an admission which had not been pleaded and which he had not had the opportunity to meet by other evidence, and that ". . . it would be a way of giving facility for producing false evidence, and be very dangerous and injurious to the general interests of suitors". After the Judicature Act, Cotton L.J. called the rule "a wholesome [one] . . . because it prevented the opposite party from being taken by suprise".[112]

Viewed now, the aberration in nineteenth century English procedure as regards notice was not so much the divergence between equity and common law in the case of proof of an admission, but rather that the notice requirement did not extend to evidence of whatever kind and apply to both court systems. (Of course, the anomaly is perpetuated today in the rule that a party must plead only the facts, and in the rule that discovery does not extend to the evidence that supports the facts). Chancery did not look beyond admissions, but at least with that category of evidence it did recognize the risk of prejudice from surprise and further that danger in the other direction of perjury and witness tampering was not so overwhelming that the evidence ought to remain concealed. The risk of prejudice was no less in a trial at law yet not even for admissions did the common law make the same judgment as Chancery.[113]

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not tend to embarrass, prejudice or delay the fair trial of the action (*Millington* v. *Loring* (1880), 6 Q.B.D. 190). Notwithstanding this change, Jessel M.R. adhered to the view that ". . .the whole object of pleading is to bring the parties to an issue" (*Thorp* v. *Holdsworth* (1876), 3 Ch.D. 637, at p. 639).

[109] Daniell, *op. cit.*, footnote 13, vol. 2, pp. 413, 414; *Hall* v. *Maltby* (1819), 6 Price 240, 146 E.R. 797 (evidence of defendant's declaration of fraud not admitted, the declaration not having been charged in the bill).

[110] Story, Equity Pleadings (8th ed., 1870), §265, n.3. See also, 6 Wigmore, *op. cit.*, footnote 49, §1864.

[111] (1838), 6 Clark & Fin. 1, 7 E.R. 598.

[112] *Eade* v. *Jacobs, supra,* footnote 92, at p. 337.

[113] In Ontario, *Modriski* v. *Arnold, supra,* footnote 84, suggests that on examination for discovery a party may not inquire as to his own verbal admissions to the adversary, the reason being that such admissions constitute evidence for the adversary's case. If that was the holding in *Modriski,* the later decision of the Court of Appeal in *Perini* v. *Toronto Parking Authority, supra,* footnote 51, and text, is inconsistent with it.

To have required the pleading of evidence, whether of an admission or of any other matter, would have frustrated the object of common law pleadings, which was to bring the parties to a definite issue, and the fewer issues the better.[114] But there was also another force that worked against the pleading of evidence. This was the strong commitment of the common law to the notion of litigation as an adversary proceeding. By the start of the nineteenth century Chancery was taking an adversarial approach to the conduct of suits, though the emphasis seems to have been less pronounced than in the common law courts, due perhaps to the influence of equity's procedural origins, the Romano-Canonical system with its insistence on fairly extensive disclosure.[115] Trial at law was permeated by what Wigmore termed the instincts of sportsmanship, an attachment to sports and games that was distinctly British.[116] Litigation was conducted in the spirit of a game. It was governed by rules that were known to the parties in advance, and that the rules were observed was no less important than the actual outcome of the contest. And just as players in a game were allowed to decide when to show their hand so was the litigant to be free to select the most propitious moment to present his evidence. Also, the system stressed the virtue of industry and self-reliance, qualities that reflected the prevailing laissez-faire economic and social philosophy of the nineteenth century.[117] "Initiative is rightly rewarded, laziness or ignorance penalized."[118] In this climate it would hardly be expected that the system would aid a party in getting the evidence in the case from the other side. Evidence was something that was to be obtained through the exercise of individual initiative and endeavour.

The common law attitude concerning the responsibility of the parties in litigation helps account for the wholesale adoption of the chancery evidence rule once the common law courts began to administer discovery after 1854. The rule matched the litigation philosophy of the common law and it is not to be wondered that the courts did not even address the question whether *viva voce* examination and cross-examination, that "peculiar and characteris-

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[114] The rule against alleging evidence ". . .perhaps, more than any other principle of the science [of pleading], . . .tends to prevent that minuteness and prolixity of detail, in which the allegations, under other systems of judicature, are involved". (Stephen, *op. cit.*, footnote 108, p. 266).

[115] 6 Wigmore, *op. cit.*, footnote 49, §1846.

[116] *Ibid.*, §1845.

[117] Frank, Courts on Trial (1949), p. 92; Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure (1973), 121 U. Pa. L. Rev. 506, at p. 565. Both quoted in Brooks, The Judge and The Adversary System (1976), chapter on The Canadian Judiciary, pp. 89, 98.

[118] Brooks, *op. cit.*, *ibid.*, p. 99.

tic'' merit of common law procedure, could be relied on to guard against the distortion of truth which chancery had feared would follow from the disclosure of evidence, and thus permit the rule to be relaxed.

But allegiance to an adversary mode of trial does not explain entirely the common law's adoption of the equity evidence rule. That course was really necessitated by the existence of the privilege for communications. The common law courts began to recognize a privilege for such communications in the 1850's, the decade in which they acquired jurisdiction to grant discovery. Indeed, it was on discovery motions for the production of documents that had been withheld on the ground that they constituted litigation related communications that the courts worked out the limits of the new privilege. The privilege was a concomitant of the adversary system and once its place was secure the application of the equity evidence rule had to follow.[119] The privilege and the rule more or less protected the same material and they had to stand or fall together.[120]

4. *Mutuality of Process.*

The case for maintaining the present limitations on the range of discovery is flawed in another respect. To oppose the disclosure of evidence on the ground that on learning of the opposing evidence a party would be tempted to manufacture evidence in rebuttal is to disregard the fact that discovery is a mutual process. This means that the party whom it is supposed has twisted the truth must himself provide information about the evidence: if he has fabricated the evidence, he must divulge what his evidence is. Under mutual disclosure ''the potential fabricator is himself tied down in his version of the occurrence before a material chance for fabrication is offered''.[121]

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[119] Under the adversary system the litigants and not the court are responsible for finding the evidence. It is argued that the privilege for what the lawyer uncovers in the course of investigation contributes to the efficiency of the adversary process because if there were disclosure each litigant would be tempted to rely on the other to search for evidence rather than on their own independent effort. Brooks, *op. cit., ibid.*, p. 107. See further, *infra,* footnote 182, and text.

[120] Repudiating the evidence rule would have meant, in effect, that a party could not have been asked, ''What did the witnesses tell your solicitor or you?'', while the question ''What do you expect your witnesses to say?'' would be in order.

[121] Fleming James Jr., Civil Procedure (1965), §6.2. The problem is that the potential fabricator (assuming there is one) will not necessarily be examined first. Middleton J. faced the question in *Pearlman* v. *National Life Assurance Co. of Canada* (1917), 39 O.L.R. 141. The plaintiff applied for particulars of the statement of defence on matters within his own knowledge. His Lordship ordered the particulars but directed that they not be given until after the plaintiff had been examined for discovery. Furthermore, the timing of the party examinations is

The mutual nature of discovery was noted in one of the trilogy of post-Judicature Act decisions in England that have been mentioned. In *Re Strachan,*[122] A.L. Smith L.J. considered that if a party lost a tactical advantage on being forced to make early disclosure of his evidence, there was compensation in finding out the opposing evidence. But what this implied as regards the broadening of discovery was not pursued. The conclusion was simply that it was not the practice to allow the discovery of the other side's evidence.

5. *Impact on Rate and Quality of Settlement.*

Another argument for broader discovery is that by compelling the disclosure of evidence the parties would gain a better understanding of the opposing case, its strengths as well as its weaknesses, and thus have a more rational basis than is available at present for deciding whether to bring the action forward to trial or to compromise. A compromise reached after the parties have been made to share what they know of the relevant facts is likely to reflect the actual merits of the claim and defence more accurately than a compromise arrived at when a crucial fact is known to only one of the parties. Also, if instead of settling the dispute the parties proceed to trial, the court's findings on the facts ought to be closer to the truth when each party has access to the entire body of available evidence.[123]

Among practising and academic lawyers in the United States the belief is widely held that broader discovery not only leads to better

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significant only as regards the risk that a party will fabricate his *own* evidence. Being examined first would not inhibit a dishonest party from attempting to suborn witnesses, not even those identified by the adversary when examined. With the adversary's witnesses, however, an obligation of continuing discovery to trial might check attempted subornation for the adversary would get notice of the witness' change of story.

[122] *Supra,* footnote 100, at p. 447: ". . . that the real truth might be arrived at upon the trial . . . is the paramount object to be arrived at in every trial; but . . . to allow one side to see the parol evidence about to be given by the other, and who his witnesses are and where they reside, is not, in my opinion, the means by which the real truth will be ordinarily arrived at nisi prius or in any other hostile litigation. To give one side the opportunity of knowing [this information] will give an advantage to that side, which, from experience, I say would be most unjust to the other side. If each side, before trial, were to see [this information], well and good, for, in such a case, each side would at any rate be upon an equality of advantages; but that is not our practice, and I need not discuss its advisability."

[123] Fleming James Jr. *op. cit.,* footnote 121, §6.2. A survey of United States federal pre-trial discovery showed that 85% of plaintiffs and 79% of defendants used evidence at trial which had been obtained on discovery, and that 49% of plaintiffs' counsel and 45% of defendant's counsel said that none of the discovered evidence presented at trial could have been obtained by other means (Glaser, Pre-Trial Discovery and the Adversary System (1968), p. 104, Table 23).

settlements but also that the number of settlements is increased.[124] The remarks of Lindley L.J. in *Re Strachan,*[125] indicate that he would have agreed. His Lordship, while observing that the rules of English discovery were ". . .not based upon the theory that it is advantageous to let each side know what the other side can prove, but rather the reverse", and that to compel a party to disclose his evidence before trial "... is considered contrary to justice", accepted nonetheless that "an honest and fair-dealing litigant, on seeing how strong a case his opponent had, might at once withdraw from further litigation". Thus, though the benefits of broader discovery were acknowledged, the commitment of the system to the shielding of evidence was re-affirmed.

In *Re Strachan,* Lindley L.J. spoke of a litigant who was "honest and fair-dealing". In *Knapp* v. *Harvey,*[126] Fletcher Moulton L.J. made quite the opposite assumption in reaching the conclusion that a party was not to be allowed to use interrogatories to force the other side to disclose what witnesses would be called. If this could be done, the party might find out ". . .not that his opponent's case is untrue, but that his opponent is not aware of some awkward fact or facts, and he may for that reason be emboldened to persevere with an unrighteous claim or defence, as the case may be". This argument assumes a rather special fact situation, namely, that but for discovery the offending party would have believed that the adversary was in possession of the damaging information.[127] The hypothesis is hardly a sound foundation for a prohibition against disclosure of universal application. Furthermore, the argument ignores the fact that the discovery of evidence would be mutual. Thus, even if a party who was aware of some item of evidence adverse to his case did use discovery to find out that the other side did not know of it, the party would be compelled to disclose the evidence when the time came for him to give discovery. If evidence were made subject to discovery, a party would be required to disclose the evidence in his possession both for and against his own case.

6. *The Rule in Canada.*

Canadian courts have generally followed the English rule that restricts discovery to the facts of the opposing party's case.[128] What

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[124] See Glaser, *op. cit., ibid.*, p. 91, n.4. Investigation suggests, however, that this generally is not correct. Where discovery is employed, the tendency is toward disagreement and trial rather than toward compromise. The explanation probably is that the information obtained by discovery yields new insights about the case which the parties (or their lawyers) tend to believe they can exploit to their advantage, and they then raise the price for settlement (Glaser, *ibid.*, pp. 91-116).

[125] *Supra,* footnote 100, at p. 445.

[126] *Supra,* footnote 100, at p. 730.

[127] Fraser, *op. cit.*, footnote 61, p. 67.

[128] *E.g., Pearlman* v. *National Life Assurance Co. of Canada, supra,* footnote

the party's witnesses will say and the identity of those witnesses are beyond the reach of the process.[129] Furthermore, the courts on the whole have accepted the rule without questioning its rationale. Nonetheless the rule's impact has been softened somewhat in recent years. In one case the court declined to apply the rule in the context of witness' names, and other courts, while abiding by it, have acknowledged that the distinction between fact and evidence which the rule postulates is not always easy to make, and where there has been a doubt, in the interests of broader discovery, have opted to treat the information sought as a fact and thus discoverable. Two jurisdictions, while retaining the evidence rule, at the same time have abandoned the ground of protection which is closely associated, the privilege for documents that relate exclusively to the case of the party giving discovery.[130] The result of these developments has been to increase the amount of information that can be obtained from the other side on discovery.

On the few occasions Canadian courts have considered the policy justification for the evidence rule the supposed danger of perjury and witness tampering was the stated rationale.[131] Recently, however, in *Ansley* v. *Ansley*,[132] a custody action, Berger J. of the British Columbia Supreme Court declined to follow the rule, and ordered the petitioner wife to disclose on examination for discovery the names of a number of psychiatrists whom she had consulted for treatment. Admittedly, as the court itself recognized, it was not an ordinary case. Since the welfare of an infant was at stake the court had a special responsibility to reach the truth. Nonetheless the decision represents the first assault by the judiciary on the traditional protection for witness' names, and Berger J.'s reasons for ordering

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121, *Haigh* v. *Britton*, [1936] O.W.N. 55; *Wilson* v. *Stark* (1966), 58 W.W.R. 545 (Sask.); *Rubinoff* v. *Newton*, [1967] 1 O.R. 402.

[129] *Gibbons* v. *Metcalfe* (1902), 14 Man. R. 364; *Pryor* v. *Clifton Hotel* (1910), 16 O.W.R. 1018; *Zimmerman* v. *Gray Coach Lines Ltd.*, [1946] O.W.N. 238; *Symerose* v. *Chapman*, [1949] O.W.N. 27; *Kellie* v. *Maley*, [1949] 1 W.W.R. 923 (Alta S.C.).

[130] See *supra*, footnote 80 and text.

[131] The discovery of evidence ". . . would be, no doubt, most advantageous if all men were honest and reasonable. But that, human nature being what it is, the experiment would be too hazardous" (*Hamilton Provident and Loan Society* v. *White* (1904), 3 O.W.R. 687). To allow the discovery of evidence and witness' names would enable a party ". . . to prepare answers to cover up his own misdeeds" (*MacDonald* v. *Norwick Union Fire Insurance Co.* (1884), 10 P.R. 501). The disclosure of witness' names is something ". . . which unscrupulous persons would not be slow to take advantage of" (*Jones* v. *Pemberton* (1897), 6 B.C.R. 69), *i.e.*, by interfering with them, as was argued by counsel in *Decarie Manufacturing Co.* v. *City of Winnipeg* (1909), 11 W.L.R. 102, at p. 108.

[132] *Supra*, footnote 85.

disclosure are persuasive for litigation generally. They were as follows:

> *Jones* v. *Pemberton*[133] is based on the necessity of protecting witnesses from harassment. It is difficult to see how that rationale can sustain the rule today. . . . I do think it right to say that there is likely to be harassment of people whose names are disclosed. There is every reason why both sides should have an opportunity of finding out what they can from people who have knowledge of material facts. If the sporting theory of justice still survives, it should not be allowed to stand in the way of full disclosure in this case. . . . At the hearing the petitioner can be compelled to disclose [the doctor's names]. They can be subpoenaed at that time. How can there be any justification for a game of hide and seek now?

The rule that a party cannot be compelled on discovery to reveal his evidence has never been absolute. Qualifying it is the requirement that the party must give notice of his claim or defence sufficient to prevent the other side from being prejudiced at the trial through surprise. Hence the proposition that discovery can be obtained of the facts of the opposing case but not of the evidence in support of those facts. The problem is that the dichotomy of fact and evidence which the proposition posits is sometimes difficult to make even at a conceptual level so that it is not always a useful guide in fixing discovery limits in actual cases. A clear-cut distinction simply cannot always be drawn between *what* a party intends to prove and *how* that proof will be made. Wigmore's comment that ". . . the law of evidence has suffered in its most vital parts from an ailment almost incurable—that of confusion of nomenclature",[134] is apt to describe this aspect of discovery. In practice, however, the courts have treated the fact and evidence categories not as mutually exclusive but rather as overlapping. Sometimes information falls within both.[135] In that event the courts have resolved the conflict between disclosure of the information as a fact and its protection as evidence by directing the former. Also, characterization of the information is not a problem when pleading convention requires that the information be alleged in the statement of claim or defence notwithstanding that of necessity the proposed mode of proof will be revealed. Reliance on a written contract is a good example.[136] But in the absence of precedent, whether information which undoubtedly is evidence is also "a fact" of the case of the party giving discovery, and thus something to be disclosed, is often hard to determine. The question has arisen with witness' names, which traditionally have been protected as evidence. Disclosure will be directed when the

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[133] *Supra*, footnote 131.

[134] 4 Wigmore, Evidence (Chadbourn rev., 1972), §1058.

[135] *Smith* v. *West*, [1876] W.N. 55 (". . . facts and evidence are so mixed up as to be almost indistinguishable"); *Rubinoff* v. *Newton*, *supra*, footnote 128.

[136] Encyclopedia of Court Forms and Precedents, vol. 13 (1949), p. 165.

court concludes that the information is a material part of the adversary's case.[137] What this means is that if proof of the occurrence of some transaction or event is integral to the adversary's claim or defence and the party seeking discovery is not able to identify the transaction or event unless he knows what individuals participated in it, then the adversary must name the individuals notwithstanding they are his witnesses.[138] Thus, in a slander action the plaintiff was ordered to identify the persons to whom the defendant was alleged to have spoken the defamatory words,[139] in a personal injury damages action for the value of work the plaintiff was not able to perform for certain persons by reason of her injuries, the plaintiff was ordered to identify those persons,[140] and in an action in which the defendant in answer to a claim for the value of excise stamps it had not affixed pleaded that it had followed a practice established by brokerage houses which the plaintiff had approved, the defendant was ordered to identify the houses.[141]

But Canadian courts have gone even further to reduce the area of the protection afforded by the rule as to evidence. They have held not only that the right of the party seeking discovery to "the facts" of the opposing case must prevail where the information in question bears the dual characteristics of fact and evidence, but also that where the category into which the relevant information falls is uncertain, the resolution must be for disclosure, that is, for treating the information as "a fact".[142] This approach reflects the modern movement toward broadening the range of discovery.[143] On occasions, however, the court in its anxiety to give effect to this new spirit has ordered the discovery of information which really could

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[137] *Marriott* v. *Chamberlain* (1886), 17 Q.B.D. 154; *Williamson* v. *Merrill* (1904), 4 O.W.R. 528; *Hays* v. *Weiland* (1918), 42 O.L.R. 637; *Permanent Mortgage Corp.* v. *Gostick* (1932), 41 O.W.N. 169.

[138] In some cases, however, disclosure of a witness' name was ordered when the opposite party, the plaintiff, required the information not to know what the defendant's case was, but rather to add the witness as co-defendant. See *Van Horn* v. *Verral* (1911), 3 O.W.N. 337; *Tossy* v. *Robert Simpson Co. Ltd.*, [1949] O.W.N. 57, (where the defendant in a motor vehicle accident action, sued as owner of the vehicle, and who had denied that the driver was negligent, was ordered to name the driver).

[139] *Bradbury* v. *Cooper, supra*, footnote 92.

[140] *Lapinska* v. *Arenberg*, [1962] O.W.N. 249.

[141] *A.-G. of Canada* v. *Fields & Co.*, [1942] O.W.N. 361.

[142] "The line of demarcation between disclosure of facts on which a party relies and the evidence in support of the fact may at times be very fine and when it occurs the resolution must be in favour of fact disclosure" (*Rubinoff* v. *Newton, supra*, footnote 128, per Haines J.).

[143] See *supra*, footnote 84.

not be properly classified as "fact", and has thus undermined the very distinction it was purporting to uphold.

This occurred in two negligence cases that dealt with the discovery of surveillance evidence. The facts were essentially the same in both. The plaintiff claimed damages for personal injury and the defendant denied the injuries and alleged in the alternative that the plaintiff was exaggerating the complaint. It was held that observations made of the plaintiff by the defendant's investigators were "facts" of which the plaintiff was entitled to notice. In *Ohl* v. *Cannito*,[144] the defendant was asked on examination for discovery, "Have any observations been made of either of the plaintiffs with regard to injuries sustained?". The defendant was ordered to answer on the ground that such an observation ". . . would be a fact upon which the defendant might well rely in supporting the allegation that the injuries claimed were excessive. The report made by any such observer, having been prepared for the purposes of litigation and at the request of the defendant or his solicitor, would in itself be privileged. The fact that the plaintiff had been observed, however, would not be something which the defendant would be entitled to refuse to disclose on the ground of privilege". In *Spatafora* v. *Wiebe*,[145] the defendant was ordered to state the dates on which any photographs and movies had been taken of the plaintiff's activities following the accident and also what conclusions he had reached based on such observations. However, since disclosure would infringe the rule against the discovery of evidence, Holland J. directed that the defendant ". . . should not be required to supply the evidence in detail of the observers and, of course, should not be required to provide the name or names of the observers".[146]

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[144] [1972] 2 O.R. 736.

[145] [1973] 1 O.R. 93.

[146] Holland J. also held that photographs and movie film are documents for the purpose of discovery, and must, therefore, be disclosed on document discovery. However, privilege from production could be claimed if they had been made in anticipation of litigation. A plaintiff will thus learn of the *existence* of surveillance, which in itself may do much to weaken the surprise impact of the surveillance evidence. But *Spatafora* also means that the plaintiff is entitled to know *what* he was observed to do, *i.e.* the substance of the surveillance evidence. At this point the impeachment value of the evidence is so diminished that the interest of the plaintiff in viewing the material to check its accuracy and guard against falsification ought to be allowed to prevail.

In the United States evidence that serves solely to impeach a party or witness is generally immune from discovery. Courts that have treated surveillance evidence as admissible solely for impeachment purposes have therefore denied discovery of the evidence. However, other courts have allowed discovery, recognizing that surveillance evidence also goes directly to the issue of the extent of the plaintiff's injury and thus has an important substantive aspect (Wright & Miller, Federal Practice and Procedure: Civil (1970), §2015).

Implicit in the defence that a plaintiff is exaggerating the effect of injuries is the allegation that the plaintiff is able to perform activities which he or she claims to be incapacitated from performing or that in performing those activities the plaintiff suffers less pain and discomfort or has greater freedom of movement than he or she claims is the case. The plaintiff is certainly entitled to get from the defendant full and precise particulars of this allegation, together with any necessary dates. What is equally clear, however, is that once this information is provided, to also require the defendant to state whether the information was given through an investigator and, if so, whether the observations were recorded by movie films, photographs, tape recorders, and so on, is to require the party to disclose how the defence will be proved, in other words, to disclose the evidence.[147]

7. *Relation to Solicitor and Client Privilege.*

The recent treatment of the evidence rule by Canadian courts has diminished the ambit of protection which the rule provided previously. But even if the rule were now to be abolished altogether, full disclosure between the parties of their trial preparation would not result. The evidence rule protects just a segment of the information gathered by a party or his lawyer for the action. The bulk of that information is covered by solicitor and client privilege, and were the evidence rule to disappear the privilege would continue to protect it. To understand the relation between the privilege and the evidence rule there must be distinguished (a) trial preparation information protected exclusively by the evidence rule, and (b) other protected trial preparation information. Information within category (a) is shielded by the evidence rule only at the stage of examination for discovery. The rule allows the party examined to refuse to answer questions which in effect ask, "How will you prove your case?", and, "Who are your witnesses?". By contrast, on discovery of documents the evidence rule gives no independent protection, at least not in British Columbia or Ontario. This can be demonstrated by examining the position of a litigant who acts without a lawyer or that of a party who, though represented by a lawyer, has documents which were brought into existence before litigation was contemplated. Since in either situation solicitor and client privilege does not apply,[148] only the evidence rule can save from disclosure documents that set forth the evidence to be given by the party or his

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[147] On examination for discovery the defendant would probably be obliged to provide this information if he had observed the plaintiff himself since one purpose of the procedure is to allow the examining party to find out what the adversary's own testimony will be. See *supra,* footnotes 51, 113.

[148] As to the situation of the party acting in person, see *supra,* footnote 79.

witnesses. In the case of documents, the evidence rule finds expression in the privilege for documents that relate exclusively to the case of the party giving discovery in the sense that they contain nothing adverse to that case. But in British Columbia and Ontario, the privilege no longer exists, so that in those jurisdictions a party must produce documents relating exclusively to his own case. And, of course, in jurisdictions that have retained the privilege, documents that contain material adverse to the case of the party making discovery must be produced.

For trial preparation information within category (b), the source of protection from disclosure is solicitor and client privilege. (In jurisdictions that have retained the privilege for documents relating exclusively to the case of the party giving discovery documents may be protected under both sets of privilege.) On examination for discovery the party examined may invoke solicitor and client privilege in order to avoid answering questions which in effect ask, "What have you been told regarding the matters in question by your lawyer or by your witnesses or by an expert employed by you or your lawyer to give an opinion?". Essentially the privilege prevents the content of certain kinds of communications from being disclosed. Disclosure might reveal what advice the party had received from the lawyer. It might also show what evidence the party expected the witnesses to give, and so in this respect the privilege and the evidence rule shield the same kind of information. The privilege and the rule also are similar in another respect on examination for discovery. Like the evidence rule, solicitor and client privilege will be made to yield to the requirement that the party under examination must provide adequate information about his claim or defence in order to guard against the adversary being prejudiced by surprise at the trial. Thus, if the adversary is entitled to notice of "a fact" of the examined party's case and the information is not within the party's personal knowledge, the party is obliged to get the information notwithstanding that the actual communication with the lawyer, witness or other person by which he acquires the information is privileged.[149]

On document discovery, in contrast to oral examination for discovery, the object is not to inquire of the knowledge or belief of the party under discovery but to get production of material documents in the party's possession. A distinction does not have to be drawn, therefore, between a document that constitutes a privileged communication and what the party has learned from the

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[149] *Carmichael* v. *Hydro-Electric Power Commission of Ontario,* [1938] O.W.N. 467; *Cook* v. *Cook,* [1947] O.W.N. 354; *April Investments Ltd.* v. *Menat Construction Ltd.* (1975), 11 O.R. (2d) 364.

communication. If the document is privileged, the party will simply refuse to produce it.

The way Canadian courts have dealt with the evidence rule in recent years indicates that they are now less apprehensive of the dangers of early disclosure of a party's trial preparation than was the case in the past. They recognize that a rigid application of the rule may produce injustice, and that on occasions the disclosure of evidence is essential in order to give the adversary the opportunity to prepare adequately to face the real questions in controversy notwithstanding the risk of abuse this creates. But while the courts have been ready to compel a party under examination for discovery to name witnesses and to reveal the tenor if not the details of the witness' evidence, there has been no corresponding move to narrow the scope of solicitor and client privilege and thus release for inspection by the other side documents that hitherto have been protected.[150] When the courts are beginning to relax the hold of the evidence rule over portion of a party's trial preparation material, why have they not shown the same flexibility toward the ground that protects the rest from disclosure, solicitor and client privilege? This question will be addressed after the subject of solicitor and privilege is dealt with.

### D. *Anticipation of Litigation Privilege.*

#### 1. *Solicitor and Client Privilege.*

The rule as to the non-disclosure of evidence is a product of the Court of Chancery, though it originated even earlier in ecclesiastic law. On the other hand, the common law courts first recognized a privilege for communications made in relation to litigation. The privilege was developed as an extension of the privilege for communications between a client and his attorney, and as compared

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[150] Unless it be the effort of the Supreme Court of Alberta in *Strass* v. *Goldsack* (1976), 58 D.L.R. (3d) 397, to adopt the notion of confidence as the rationale of the protection for litigation instigated communications. The test was formulated originally by Wigmore, and was applied by two members (D.C. McDonald J. (*ad hoc*) and Clement J.A.) of the five-member Alberta Supreme Court, Appellate Division, in denying the defendant a claim of privilege for a statement taken from the plaintiff by an insurance adjuster in connection with the accident the subject of the plaintiff's claim. Previously, in *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254, the Supreme Court of Canada had approved the Wigmore test, but the question arose in the rather different context of a suit between the parties in a confidential relationship, in which one party sought to prevent the other from taking action to his detriment on the basis of what he had communicated. For a valuable analysis of *Strass*, see Lederman, (1976), 54 Can. Bar Rev. 422. As the test of confidentiality was explained by D.C. McDonald J., its substitution for the existing rule would not necessarily lead to a narrowing of the scope of the protection for trial preparation information.

to the evidence rule it is quite modern. It was brought into existence only a short time after the common law acquired jurisdiction to administer discovery in the mid-nineteenth century and reached maturity in the sixty or so years that followed.

Originally only communications between solicitor and client were privileged. The privilege was established by the end of the sixteenth century at the latest, and it is the oldest recognized privilege for confidential communications. During the formative years the privilege rested exclusively on the notion of confidence.[151] "A man of honour would not betray a confidence, and the judges as men of honour themselves would not require him to", and since the honour of the attorney was at stake the privilege belonged to him and not the client.[152] Indeed, since the parties in a trial at law were not competent or compellable witnesses it was not really necessary to recognize a privilege in the client. But the notion of honour as the basis for the privilege had virtually disappeared even before the reforms of the 1850's that removed the bar to getting the evidence of the parties on discovery and at trial. At the start of the century Lord Eldon had endorsed the view that the privilege belonged to the client,[153] and this marked the emergence of a new rationalization for the privilege. The courts came to recognize that what needed protection was not the honour of the attorney but the freedom of mind of the client in consulting the attorney. To receive effective legal advice it was necessary that the client should make full and frank disclosure of all the pertinent facts, something he might be inhibited from doing unless he were assured that what he said would not be divulged without his consent. Other types of confidences such as those reposed in medical and spiritual advisers might merit protection but because of the close connection with the administration of justice protection could only be conferred upon the solicitor-client relationship. In the words of Lord Brogham in *Greenough* v. *Gaskell*:[154]

> It is out of regard to the interests 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 a privilege did not exist at all, everyone would be thrown on his

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[151] 8 Wigmore, *op. cit.*, footnote 55, §2290.

[152] *D* v. *National Society for the Prevention of Cruelty of Children*, [1977] 1 All E.R. 589, at p. 611, per Lord Simon.

[153] *Wright* v. *Mayer* (1801), 6 Ves. Jr. 281, 31 E.R. 1051.

[154] (1833), 1 Myl. & K. 98, at p. 103, 39 E.R. 618, at p. 103. According to Jessel M.R. in *Anderson* v. *Bank of British Columbia, supra,* footnote 79, at p. 649, ". . . to use a vulgar phrase, . . . [the client] should be able to make a clean breast of it to [his lawyer]". Professor Edmund M. Morgan could not accept this rationale. "Is the privilege retained in order to protect perjurers?", he asked (Foreword, Model Code of Evidence (1942), pp. 26-27).

> own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

Solicitor and client privilege had been restricted originally to litigation-related communications and the adoption of a new theory for the privilege did not at first lead to any broadening of its scope. However, by 1833 Lord Brogham in *Greenough* v. *Gaskell* was able to declare that the privilege existed irrespective of litigation actual or contemplated.[155] A communication between solicitor and client is immune from disclosure provided it is a professional communication made in a professional capacity.[156] What attracts the protection is not the confidential nature of the communication, but the fact that the advice sought and provided is concerned exclusively with rights and obligations that in the last resort are enforceable by litigation. Litigation may not be what the client intends or expects, but since it is legal advice that he seeks the risk that litigation will eventuate is inevitable.[157]

If the need to encourage a party to speak candidly to his lawyer is the rationale of the privilege for communications between them, what is the justification for the litigation aspect of the privilege, which extends the shield to communications from a third party to the client or to the lawyer made in connection with litigation? These communications hardly touch upon the state of mind of the client in consulting his solicitor. As Wigmore remarked: "Since the privilege is designed to secure subjective freedom of mind for the *client* in seeking legal advice, it has no concern with other persons' freedom of mind nor with the attorney's own desire for secrecy in conduct of a client's case."[158] This consideration probably helps account for the fact that in the United States the privilege has not been extended beyond attorney and client communications. As the privilege for third party communications is not required to ensure the freedom of mind of the client in consulting with his lawyer, and as the privilege

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[155] The notion that to attract privilege the communication must have been made in connection with litigation did not disappear altogether. Three years later Cottenham L.C. considered that litigation at least had to be contemplated at the time for the communication to be privileged (*Storey* v. *Lord Lennox* (1836), 1 My. & Cr. 525, 40 E.R. 476). Wigmore considered that Lord Brougham's proposition in *Greenough* was not established finally until the decision in *Minet* v. *Morgan* (1873), L.R. 8 Ch. 361 (8 Wigmore, *op. cit.*, footnote 55, §2294). However, it had certainly been accepted earlier than then by Kindersley V.-C. in *Lawrence* v. *Campbell* (1859), 4 Drew. 485, 62 E.R. 186.

[156] *Lawrence* v. *Campbell, ibid.; Lyell* v. *Kennedy (No. 2), supra,* footnote 51, at p. 90; *Cook* v. *Cook and Kelterbourne,* [1947] O.R. 287, at p. 289.

[157] Law Reform Committee, Sixteenth Report (Privilege in Civil Proceedings) (1967), p. 9; Cross, Evidence (4th ed., 1974), p. 249.

[158] 8 Wigmore, *op. cit.*, footnote 55, §2317.

only attaches to litigation-connected communications, the explanation for its existence must lie in the nature of trial in the common law system.

2. *Privilege for Litigation Related Third Party Communications.*

At first, in conformity with the theory that the privilege promoted candour in the client when communicating with his attorney, it was possible to extend the privilege to communications with a third party when the third party had acted as intermediary, that is, as agent of either solicitor or client for the purpose of transmitting information or advice from one to the other.[159] Also, a communication from third party to attorney fell within the privilege when it could be said that in collecting information the third party was doing what the attorney would normally do himself so that the third party stood in the position of the attorney.[160] Unless the third party could be so identified with the attorney, however, not even the existence or threat of litigation made the third party's communication privileged.[161] Similarly, privilege did not ordinarily attach to a communication from a third party to the client in relation to the litigation.[162] To be privileged, it had to be shown that the solicitor, rather than collect the information from the third party himself, had requested the client to go to the third party for the information.[163] This emphasis on the identity of the third party communicant with the solicitor indicates the influence in the formative period of the privilege for litigation-related communications of the notion that the justification for the privilege was the need to ensure that the client could consult with the lawyer in complete confidence. As Lord Chancellor Truro stated in 1851: "Professional privilege is a ground of exemption from production adopted simply from necessity, . . . and ought to extend no further than absolutely necessary to enable the client to obtain professional advice with safety."[164]

But during the same period that the courts were striving to contain the privilege within limits fixed by the need to assure the client of confidentiality in consulting with the solicitor a new and different theory for the privilege was appearing, one that would

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[159] Bray, *op. cit.*, footnote 44, p. 398.

[160] *Mackenzie* v. *Yeo* (1841), 2 Curt. 866, 163 E.R. 612; *Steele* v. *Stewart* (1844), 1 Phill. 471, 41 E.R. 711; *Goodall* v. *Little* (1851), 1 Sim. (N.S.) 155, 61 E.R. 60.

[161] *Dartmouth Corporation* v. *Holdsworth* (1840), 10 Sim. 476, 59 E.R. 700.

[162] *Kerr* v. *Gillespie* (1844), 7 Beav. 572, 49 E.R. 1188; *Goodall* v. *Little*, *supra*, footnote 160.

[163] *Lafone* v. *Falkland Islands Co.* (1857), 4 K. & J. 34, 70 E.R. 14.

[164] *Glyn* v. *Caulfield* (1851), 3 Mac. & S. 463, 42 E.R. 339.

allow the privilege a much wider scope. This was the notion that for litigation to be conducted properly it was necessary that what the party or his solicitor gathered for the action should be kept from the other side. The freedom of mind of the client in communicating with the solicitor was just one aspect of the privilege. Another was the freedom of the client and the lawyer to make investigations without being required to divulge what was turned up. In *Curling* v. *Perring*,[165] Pepys M.R. (later Lord Cottenham) had observed that it would be impossible for a party to write a letter for the purpose of obtaining information on the subject of the suit were he to be obliged to disclose what he learned. Thirty years later Page-Wood V.C. took up the theme again, saying that: "It would be impossible—resting it again on the same ground of necessity on which all these cases as to protection are decided for persons to have their causes fairly conducted, unless solicitors were protected in all their communications with such persons as they supposed capable of giving evidence in favour of their clients." It was essential to allow a solicitor "the liberty of free and uninterrupted communication as he may think fit, and through any agent he may wish to employ, with reference to the evidence to be procured for the defence he has in hand".[166] No case in chancery actually held, however, that communications from a third party to either solicitor or client in relation to the litigation were privileged regardless of whether in collecting the information which was transmitted the third party had performed work that ordinarily would be performed by the solicitor. This was a proposition that would be established finally by the common law courts after 1854, the year they acquired jurisdiction to administer discovery.

In 1858 Pollock C.B. in the Exchequer Chamber echoed a sentiment expressed earlier in chancery, namely, that material which a lawyer through his own effort had assembled for the presentation of his client's claim or defence deserved special protection. After referring to *Curling* v. *Perring*, the Chief Baron said: "It would be monstrous if an attorney could not write to a stranger for information respecting the suit without being liable to have his correspondence called for. The simple answer is, that he is an attorney and has acquired his knowledge of certain facts in that character."[167] As regards material coming into the hands of the client from a third party, in 1863 the Court of Queen's Bench upheld an objection to produce correspondence between a party and its agent in connection with contemplated litigation, and for the first time no attempt was made to justify the protection on the basis that the agent was really

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[165] (1835), 2 My. & K. 379, 39 E.R. 989.

[166] *Lafone* v. *Falkland Islands Co. supra*, footnote 163.

[167] *Colman* v. *Trueman* (1858), 3 H. & N. 871, 157 E.R. 720.

doing the work of the solicitor.[168] One reason the court refused production was that the correspondence fell within the equity principle that a party seeking discovery was only entitled to documents that related to his own case. Another reason, stated by Cockburn C.J. and concurred in by Blackburn J., was as follows: "I cannot think that communications, which are clearly of a most confidential character, made by a party for the purpose of getting up the case which he afterwards intends to prove in a Court of Justice, are those which he is bound to disclose." Six years later in *Woolley* v. *North London Ry. Co.*[169] the Court of Common Pleas placed the privilege squarely on the ground of litigation actual or contemplated. Bovill C.J. said that: "If opinions are obtained confidentially with a view to litigation, they are privileged on the ground laid down by the Court of Queen's Bench in *Chartered Bank of India* v. *Rich* . . .we may safely lay it down that, when information and opinions are obtained with a view to litigation, they are to be considered as privileged." Were such documents to be produced ". . .it would obviously encourage parties to expect to have the contents of their opponents' brief disclosed". Subsequent decisions in the three courts of common law entrenched the privilege further[170] and in 1876 Lindley J. was able to declare ". . .it to be well established both at law and in equity that documents obtained by a party or his solicitor with a view to and in contemplation of litigation, either pending or anticipated, are protected even though received from persons unconnected with the litigation".[171]

What justification is there for protecting communications by a third party made in connection with the litigation? Since the privilege was created by the courts it is legitimate to at least start the search for a rationale with the reasons expressed by the judges themselves. For the evidence rule, the rule that discovery does not extend to the evidence in support of the adversary's case, the courts had never hesitated to state the rationale, which was the concern to avoid perjury and witness interference. In the case of the privilege for litigation-connected communications, however, though the privilege protected what was essentially the same material as that covered by the evidence rule, namely, information gathered in

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[168] *Chartered Bank of India* v. *Rich* (1863), 32 L.J.Q.B. 300.

[169] (1869), L.R. 4 C.P. 602.

[170] *E.g., Cossey* v. *London, Brighton Railway Co.* (1870), L.R. 5 C.P. 146; *Fenner* v. *London & South Eastern Railway Co.* (1872), L.R. 7 Q.B. 767; *Skinner* v. *Great Northern Railway Co.* (1874), L.R. 9 Ex. 298. In all these actions the plaintiff was denied inspection of the report of a medical doctor made after examining the plaintiff on behalf of the defendant. In this period chancery also adopted the same rule. See *Ross* v. *Gibbs* (1869), L.R. 8 Eq. 522.

[171] *M'Corquodale* v. *Bell* (1876), 1 C.P.D. 471, at p. 481.

preparation for trial, the common law courts were initially somewhat hesitant in coming forward with a reasoned justification. The reported decisions in the early period of the privilege leave no doubt that the courts felt strongly that there was a core of trial preparation information into which the adversary could not be allowed to pry, but they also reveal that there was considerable uncertainty as to exactly what should be protected and as to the grounds for providing protection. Indeed, it is not easy to understand why the privilege was found to be necessary at all as the equity rule against the disclosure of evidence would seem to have been sufficiently flexible to shield whatever information it was thought should be kept from the other side. However, rather than just adapting the rule, the common law developed the litigation communication privilege as its own basis of protection. There is nothing to indicate that this was done in response to some perceived deficiency in the equity rule. If the common law judges found the rule to be inadequate, they did not say so. It was never explained why such communications could not have been guarded from disclosure simply on the ground that they constituted the party's evidence. Though at this distance an explanation is necessarily a matter for conjecture, there are indications of what one reason at least might have been. First, the common law judges who originally had to administer discovery were not at all familiar with the process as previously it had been used exclusively in the Court of Chancery.[172] Also, they had to adapt discovery to a system of adjudication the basic features of which were very different from those of the equity system which had produced it.[173] Thus, though the judges may initially have been disposed to go to chancery precedent for guidance in handling the new procedure, at times that source must not have been completely illuminating. These circumstances suggest that the judges were probably not altogether comfortable with the equity rule and that they used the opportunity which the new responsibility over discovery presented to recognize a ground of protection that could be identified distinctly with the common law.

3. *Rationale of Privilege for Third Party Communications.*

The terms of the privilege for litigation related communications from a third party had become more or less settled by 1869.[174] It was

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[172] See, *supra,* footnote 90, *ante.*

[173] See *supra,* footnote 53 and text.

[174] See *supra,* footnote 169. Even today the question still to be resolved is the extent to which the purpose of use in litigation is intended to be served by the preparation of the document before the document will attract privilege. The issue is whether the test should be use in litigation as one purpose for which the document was prepared or use in litigation as the primary or substantial purpose of preparation.

not until then that the courts attempted to explain the need for the privilege. One suggestion was that the communications deserved protection because they were materials for the brief.[175] The brief was a compendious term for the material the party's solicitor had collected for the instruction of the barrister who would present the client's case at trial. It was the key to the party's case.[176] However, to refuse disclosure on the ground that the communications were material for the brief was really only another way of saying that they formed the party's evidence.

A more credible explanation, at least superficially, was that the privilege was grounded in necessity. It was in order that legal advice might be obtained "safely and sufficiently"[177] that a privilege had been recognized originally, limited though to communications between solicitor and client. The same consideration of necessity lead the Court of Appeal in *Wheeler* v. *Le Marchant*[178] to deny a privilege for communications between solicitor and third party which, though made to enable the solicitor to advise the client, were not made in relation to litigation. It was held that such a privilege "was not necessary in order to enable persons freely to communicate with their solicitor and obtain their legal advice".[179] The court in

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Authorities that support the former test include *Birmingham and Midland Omnibus Co. Ltd.* v. *London and North Western Railway Co.*, [1913] 3 K.B. 850, per Buckley L.J. and Vaughan Williams L.J.; *Bourbonne* v. *Union Insurance Society of Canton* (1959), 19 D.L.R. (2d) 445 (Alta S.C.); *Vernon* v. *North York Board of Education* (1975), 9 O.R. (2d) 613. Authorities for the alternative test include *Woolley* v. *North London Railway Co., supra,* footnote 169; *Birmingham and Midland Omnibus Co. Ltd.* v. *London and North Western Railway Co., ibid.*, per Hamilton, L.J.; *Blackstone* v. *Mutual Life Insurance Co.*, [1944] O.R. 329 (C.A.); *Seabrook* v. *British Transport Commission,* [1959] 2 All E.R. 15; *Alfred Crompton* v. *Customs and Excise Commissioners,* [1974] A.C. 405; *Grant* v. *Downs* (1977), 11 A.L.R. 577 (Aust. H.C.); *National Employers' Mutual General Insurance Association Ltd.* v. *Waind, supra,* footnote 79 (use in litigation the sole purpose of preparation); *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169.

[175] Pollock, C.B. and Cockburn C.J. had hinted at the notion (footnotes 167, 168 *ante*), while Bovill, C.J. stated directly that the opposing brief was not to be disclosed (*supra,* footnote 169). See also, *Anderson* v. *Bank of British Columbia, supra,* footnote 79, at p. 657, per James L.J. (". . .as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief."), approved by Brett, L.J. in *Southwark Water Co.* v. *Quick* (1878), 3 Q.B.D. 315, at p. 320; *Wheeler* v. *Le Marchant* (1881), 17 Ch.D. 675, at p. 685, per Cotton L.J. ("[They] are, in fact, the brief in the action, and ought to be protected."); *Lyell* v. *Kennedy (No. 2), supra,* footnote 51, at p. 86, per Lord Blackburn ("It was hardly disputed that on a discovery of documents you could not discover that brief.").

[176] 8 Wigmore, *op. cit.*, footnote 55, §2294.

[177] *Wheeler* v. *Le Marchant, supra,* footnote 175, at p. 682, per Jessel M.R.

[178] *Ibid.*

[179] *Ibid,* at p. 685, per Cotton L.J. The other members of the court, Jessel M.R. and Brett L.J., agreed.

*Wheeler* did not say so, but presumably it reasoned that the client would not be discouraged from seeking the solicitor's advice out of fear that information which the solicitor would need to obtain from a third party in order to give that advice might subsequently be disclosed, and the client would not have that fear, indeed would not have even considered the possibility of disclosure, because at the time litigation had neither commenced nor was contemplated. In other words, protection for the third party communication was not necessary because the client had no cause not to authorize or allow the solicitor to make the communication.[180]

In contrast to third party communications not related to litigation, necessity was said to justify a privilege for communications that *were* so connected. In *Lyell* v. *Kennedy (No. 2)*, Lord Blackburn stated that it was well established that for the purpose of pending litigation, ". . .the policy of the law says that in order to encourage free intercourse between [the client] and his solicitor, the client has the privilege of preventing his solicitor from disclosing anything which he gets when so employed, and of preventing its being used against him, although it might otherwise be evidence against him".[181] Cotton L.J. in *Re Thomas Holloway,*[182] put the matter more succinctly: If information obtained by a solicitor for promoting his client's cause were not privileged, ". . .it would be impossible to employ a solicitor to obtain the evidence and information necessary to support a case". Though it was not acknowledged by Cotton L.J., what produces the conclusion that it would be "impossible" for a litigant to employ a solicitor to get the evidence for his case if the evidence could not be concealed is the adversary character of trial in the common law system. Under the adversary model the parties are expected to present only the evidence that supports their own case, the onus resting on the other side to bring forward any opposing evidence. Moreover, it is the responsibility of

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[180] The difficulty with this analysis, however, is that it rests on a circular argument. The proposition that necessity does not warrant the recognition of a privilege assumes a client who has not had to consider the prospect of disclosure of the information which the solicitor will obtain. Yet by the court's own ruling the client will be compelled to disclose that information if, contrary to what was expected at the time, litigation eventuates. It is not realistic, therefore, to postulate a client for whom there was never a prospect of disclosure. Where litigation has commenced or is anticipated, disclosure is a threat, but it will remain just that since privilege attaches to litigation-related third party communications, but where there was no actual or pending suit, might not the hypothetical client be deterred from allowing or authorizing his solicitor to obtain information from a third party were he to know that the information would be disclosed if, despite what was believed at the time, litigation did ensue?

[181] *Supra,* footnote 51, at p. 86.

[182] (1887), 12 P.D. 167, at p. 170.

the parties and not of the court to locate the evidence favourable to their respective positions. Given this premise, the objection to complete disclosure is understandable as the efficacy of the adjudicative process depends on the readiness and ability of each party to vigorously search for evidence. A party might be discouraged from making anything but the most cursory inquiries were he to be required to hand over unfavourable evidence to the adversary. Also, under such a system each party might be temped to simply rely on the adversary to investigate the facts and then wait for discovery to get the results.[183] Either situation would likely produce inaccurate fact-finding as the court would not be presented with all the information that would have been uncovered from a diligent search made by both parties.

It was by resorting in this way to the notion of the brief and the theory of necessity that the common law courts at first justified the privilege for litigation communications from a third party. In 1895 yet another account of the rationale appeared. In *Re Strachan,* Lindley L.J. stated that, "In England it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before trial the evidence to be adduced against him. It is considered that so to do would give undue advantages for cross-examination and lead to endless side issues; and would enable witnesses to be tampered with, and give unfair advantage to the unscrupulous".[184] This suggests that the privilege had no other foundation than that which for centuries had sustained the equity prohibition on the disclosure of the names and addresses of witnesses.[185] But, vague

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[183] ". . .so long as we depend upon thorough advanced preparation by opposing trial counsel to accumulate the necessary information about law, fact and evidence, we must not let the drones sponge upon the busy bees. Otherwise it would not be long before all lawyers become drones", Maguire, Common Sense and Evidence (1947), p. 91, quoted in Brooks, *op. cit.,* footnote 117, *ante.* See also, *Hickman* v. *Taylor* (1946), 329 U.S. 495, at p. 516, per Jackson J. ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary"); Developments in the Law— Discovery (1961), 74 Harv. L. Rev. 940, at p. 1029; Fleming James, Jr., *op. cit.,* footnote 121, p. 204; Glaser, *op. cit.,* footnote 123; *Walczak* v. *Detroit-Pittsburgh Motor Freight, Inc.* (1956), 140 F. Supp. 10. For the opinion that discovery has not been abused by lazy lawyers seeking to profit from the other side's investigation, see Judge Bard, The Practical Operation of Federal Discovery (1952), 12 F.R.D. 131, 154. The study by Glaser, *ibid.,* does not suggest it has been abused in this way.

[184] *Supra,* footnote 100, at p. 445. The judgment of A.L. Smith L.J., *supra,* footnote 122, was to the same effect.

[185] The citation by Lindley, L.J. of *Benbow* v. *Low, supra,* footnote 97, indicates the close identification of the privilege with the equity rule as regards the concern to minimize the risk of perjury. The question in *Benbow* was whether certain information that was sought by interrogatories constituted the evidence for the party being interrogated.

and obscure as they were, the references in the earlier cases to the party's brief and to the factor of necessity did point to a rationale that was quite unrelated to any fear of perjury, one not even addressed in *Re Strachan*. The other rationale was that the privilege was integral to the English mode of trial. The courts in England were certainly not unique in seeking to prevent the subversion of the fact-finding process by dishonest litigants; the concealment of the opposing evidence simply represented the English approach to achieving this objective. What did set the English system apart, however, was the adherence to the adversary model. From that perspective the privilege was but a logical consequence of the principal characteristics of the system—party responsibility for the collection of evidence and party autonomy in presenting the evidence that would best advance the party's case or destroy that of the adversary. What rendered the privilege "necessary" were these characteristics, and the assertion that the material deserved protection as belonging to the party's brief reflected the same idea. The brief represented more than just the actual documents that constituted or set forth the party's evidence. It also symbolized the party's investment of time, expense and effort in searching out the facts. Under an adversary system, how the yield from that investment was to be dealt with, whether it was to be withheld or disclosed, was the prerogative of the party to decide.

The English cases of the nineteenth century which dealt with the rationale of the privilege for litigation-related communications are scarcely notable for their clarity of exposition. No cases presented a coherent reasoned account of the factors that shaped the creation of the protection. Rather, the courts attempted to rationalize the privilege by appeal to notions such as the brief and necessity, even to the "interests of justice", which were far from self-explanatory and really only intelligible in the context of the distinctive English system of adjudication. However, it was a connection the courts did not explain. From experience as practitioners the judges must have been familiar with what today are identified as attributes of an adversary system. They must have understood that it was the responsibility of the parties rather than of the court to define issues and search for evidence, and that in presenting evidence the parties were not expected to aid one another. But what the judges did not do was acknowledge that these were characteristics of the system. The reason, it is suggested, is that the judges had yet to develop a perspective of the system in its totality, a theory of the system that recognized its adversary nature. They of course must have sensed the combative spirit that pervaded the conduct of litigation but they never followed the implications through to arrive at a definition or description of the system. It was an exercise that had to await the

attention of writers and commentators in this century.[186] Had the courts been able and willing to conceptualize the system earlier a more persuasive case for the privilege might have been made out than that simply of protection as part of the brief or of necessity.[187]

4. *Position in Canada.*

The Canadian law for legal professional privilege adopts the distinction established by English decisions between solicitor and client communications and communications by a third party with either solicitor or client. The former are privileged whether or not made in relation to litigation, "if they are confidential and are made by or to the legal adviser in his professional capacity for the purpose of rendering legal advice or assistance",[188] while third party communications are not privileged unless brought into existence for the purpose of litigation actual or contemplated.[189] Nonetheless, as regards the latter category of privilege Canadian acceptance of the English position in recent years has not been entirely automatic and there has been a shift toward recognizing the notion of confidence as the proper rationale.[190] Canadian courts have also acknowledged that

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[186] The author's research has not disclosed when and by whom the term "adversary system" was used first. Pollock and Maitland were among the earliest commentators to note the distinctive role played by the judge in the English trial. "The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, "How's that?" (2 History of English Law, (1895), p. 667). Modern writing on the subject is now considerable. It is surveyed in Brookes, *op. cit.*, footnote 117.

[187] It has to be conceded, however, that even today English courts seem a long way from this position. In *Re Saxton,* [1962] 3 All E.R. 92, the Court of Appeal, in denying production of the report of a potential expert witness, said simply that production would be, ". . . contrary to the interests of justice . . . and most unjust and most unfair", and in *Re Duncan,* [1968] 2 All E.R. 395, Ormrod J. was content to rationalize the privilege by quoting *Re Strachan, supra,* footnote 100, and *Anderson* v. *Bank of British Columbia, supra,* footnote 79, in which James L.J. spoke of "the materials for the brief".

[188] *Cook* v. *Cook and Kelterbourne, supra,* footnote 156, at p. 289, per Gale, J. See also *Blackstone* v. *Mutual Life Ins. Co., supra,* footnote 174; *Re Alcan-Colony Contracting Ltd.* v. *Minister of National Revenue* (1971), 18 D.L.R. (3d) 32 (Ont. H.C.); *Re Director of Investigation and Research and Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745, at p. 746 (B.C.S.C.); *R.* v. *Ben Cardino and de Carlo* (1974), 2 O.R. (2d) 351, at p. 358 (C.A.).

[189] *Blackstone* v. *Mutual Life Ins. Co., ibid.; Re Goodman & Carr and Minister of National Revenue,* [1968] 2 O.R. 814 (H.C.).

[190] See *Strass* v. *Goldsack, supra,* footnote 150. Also in *Mitsui & Co. (Canada Ltd.* v. *Pacific Bulk Carrier Inc.* (1977), 3 C.P.C. 275 (B.C.), Craig J. appears to have applied the test of confidentiality in holding that a marine surveyor's report as to damage done to a shipment of steel whilst in transit was not privileged, stating that, "While one of the purposes of preparation of the report was the anticipation of litigation, I do not think this was the main consideration. In the circumstances, the report lacks "confidentiality", which is the basis of privilege . . .". If, as this

the privilege is an attribute of the adversary mode at trial. As Jackett, P. explained in *Susan Hosiery Ltd.* v. *Minister of National Revenue:*[191]

> . . .under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were being prepared. . . If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

In what sense trial would become a travesty of our present system if the litigation privilege were not available Jackett P. did not explain, but in another case, *Strass* v. *Goldsack,*[192] a closer analysis of the implications of such a situation for an adversary system was undertaken. The Appellate Division of the Alberta Supreme Court had to decide whether privilege would be allowed the defendant in a motor vehicle accident action for a witness statement taken from the plaintiff by an adjuster engaged to investigate the accident by the defendant's insurer. McGillivray C.J., dissenting, held that the statement was privileged on the ground that it was a communication made in anticipation of litigation.[193] To the argument that a party ought to be allowed to see his own statement before trial and that otherwise he might be unfairly taken by surprise, the answer was:

> But why not? It is to be given to him before examination for discovery or trial so that he may tailor his evidence to be consistent? If he has been consistent in his version of the accident, his statement cannot hurt him. If he has a new version from that which he gave to investigators immediately following the accident, why should not his new version be tested by the production of the statement, not before he has given evidence, but after, by cross-examination? The proceedings are adversary proceedings.[194]

In other words, it made no difference that the plaintiff could have seen the statement had he given it to anyone in the world but the defendant's insurer,[195] and that in any such case there was equally a

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reasoning suggests, a report will not be regarded as "confidential" unless use in litigation was a substantial purpose of its preparation, the approach is erroneous. It confuses the notions of "confidentiality" and "substantial purpose", which, like the tests that are derived from them, are really quite distinct. As to the matter of substantial purpose, see *supra*, footnote 174.

[191] [1969] 2 Ex. C.R. 27, at p. 33.

[192] *Supra,* footnote 150.

[193] Two members (D.C. McDonald J. (*ad hoc*) and Clement J.A.) ordered production on the ground that the statement had not been given in confidence. See *supra,* footnote 150. Moir J.A., with McDermid J.A. concurring, seems to have concluded that the plaintiff was entitled to production on the narrower ground that what passes between one party and another can never be privileged.

[194] *Supra,* footnote 150, at p. 408.

[195] The plaintiff would have been entitled to see the statement if, for instance, the statement was embodied in a letter which the plaintiff had written to the defendant. *Strass* v. *Goldsack, ibid.*, at pp. 420, 427.

danger that he might tailor his evidence. The answer was that by the rules of the litigation game a party had to wait until the trial before he could see his own statement when it was given under the circumstances in question. Put in another way, the particular circumstances constituted a rare situation in which the rules gave the adversary the opportunity to trap the party by proof of a prior inconsistent statement. That the party might have legitimate cause for wanting to read the statement, such as to refresh memory[196] was not a sufficient ground for denying the other side this chance.

5. *Lawyer's Work Product.*

As noted already, one basis on which the courts in England sought to rationalize the privilege for documents consisting of communications received by the client or solicitor from a third party in connection with litigation was that the documents were materials for the brief. The brief, however, will invariably include a class of documents which strictly are not communications at all and which equally the party will want to withhold from the other side. These documents are, in effect, the notes of the lawyer to himself, the material which the lawyer has produced in the exercise of his professional skill for his own assistance and instruction setting forth the results of his research and the opinions and mental impressions he has formed about the case. In England, Canada and other common law jurisdictions, including the United States, a privilege has always attached to the lawyer's own notes. In the United States the material enjoys a special status under the lawyer's work product rubric that was acknowledged by the Supreme Court in *Hickman* v. *Taylor*,[197] but elsewhere in the common law world it has traditionally been protected by solicitor and client privilege.

Nonetheless in England and Canada there has been some recognition that the lawyer's own preparation work has a distinct place. The first intimation of this appears to be the Chancery case of *Wright* v. *Vernon*,[198] decided a year before the Common Law Procedure Act in 1854. In a claim to be entitled as tenant in tail under a will the pedigree of the plaintiff was in question. Kindersley V-C. held that the plaintiff was not entitled to production of ". . . copies of a *supposed* pedigree made for the use of the counsel for the defendants to instruct counsel in particular proceedings; not as an admission of pedigree, but made merely for the purpose of informing

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[196] A point noted in *Strass* v. *Goldsack, ibid.*, by Clement J.A., at p. 416, who also observed that the suggestion that the party might tailor his evidence ". . . is to cast doubts on his integrity before he is heard".

[197] (1946), 329 U.S. 495.

[198] (1853), 1 Drew. 344, 61 E.R. 483.

counsel what was the representation of the defendants as to their own and the plaintiff's pedigree". In a sense these copies were communications between the solicitor and counsel whom he had engaged for the defendant, but in substance they constituted the lawyer's (whether the solicitor or counsel is not important) reflections on how the client's case could best be presented.

The notion that the lawyer's work was in a special position was also recognized in *Lyell* v. *Kennedy (No. 3)*,[199] another pedigree suit. The plaintiff sought production of (*inter alia*) copies of entries in registers and public records which the defendant's solicitor had obtained and which were material to the question of the plaintiff's descent. In no sense could these documents be said to be communications. The court refused production.

Cotton L.J. stated that:[200]

> . . . they were obtainted for the purpose of his defence, and it would be to deprive a solicitor of the means afforded for enabling him to fully investigate a case for the purpose of instructing counsel if one required documents, although perhaps publici juris in themselves, to be produced, because the very fact of the solicitor having got copies of certain burial certificates and other records, and having made copies of the inscriptions on certain tombstones, and obtained photographs of certain houses, *might shew what his view was as to the case of his client as regards the claim made against him.*

Bowen L.J. agreed, stating that:[201]

> A collection of records may be the result of professional knowledge, research, and skill, just as a collection of curiosities is the result of the skill and knowledge of the antiquarian or virtuoso, and even if the solicitor had employed others to obtain them, it is his knowledge and judgment which had probably indicated the source from which they could be obtained. It is his mind, if that be so, which has selected the materials, and those materials, when chosen, seem to me to represent the result of his professional care and skill, and *you cannot have disclosure of them without asking for the key to the labour which the solicitor has bestowed in obtaining them.*

*Lyell* v. *Kennedy (No. 3)* is authority for the proposition that the mental processes of the lawyer are inviolable, that the opposite party is not to have access to the legal theory the lawyer has developed for his client's cause. The decision was not cited in the opinions of the United States' Supreme Court in *Hickman* v. *Taylor*[202] but it was by reasoning closely analagous that the court articulated the concept of the lawyer's work product.[203] The court recognized that a distinction was to be made between witness' statements and other third party

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[199] (1884), 27 Ch.D. 1.

[200] *Ibid.*, at p. 26, italics added.

[201] *Ibid.*, at p. 31, italics added.

[202] *Supra*, footnote 197.

[203] 4 Moore's Federal Practice, §26.63 [2.-2].

communications in the possession of the lawyer and material prepared by the lawyer for his own use in prosecuting the client's claim or defence, and held that in neither case did the traditional attorney-client privilege apply. Nonetheless, witness statements, and so on, would generally be protected, the basis of protection being the adversary system. In a concurring opinion, Jackson J. observed:[204]

> [Counsel for the petitioner argues that] the Rules [the Federal Rules of Civil Procedure] were to do away with the old situation where a law suit developed into "a battle of wits between counsel". But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

The court accepted, however, that there was power to order production of this kind of material on a showing of necessity or an indication that denial of such production would cause undue prejudice or hardship or injustice.[205]

The lawyer's work product also fell outside the privilege for attorney and client communications. It comprised the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting the client's case and writings which reflected his mental impressions, conclusions, opinions or legal theories. These writings were not to be produced to the adversary. Murphy J., who delivered the opinion of the court, propounded the rationale of protection in these terms:[206]

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interest. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer". Were such materials open to opposing counsel on mere demand, much of what is not put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.

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[204] *Supra*, footnote 197, at p. 516.

[205] Authority to allow production in these circumstances is now given to the court under an amendment made in 1970 to the Federal Rules of Court Procedure (F.R.C.P. 26 (b) (3)).

[206] *Supra*, footnote 197, at p. 511.

> The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

In Canada a special position on discovery has now been given to the lawyer's own trial preparation.[207] In *Re Evans and Banffshire Apartments Ltd.*,[208] a file of memoranda, said to be a solicitor's "personal notes and memos", was held to be privileged. Dryer J. recognized that the memoranda were strictly speaking outside the scope of the solicitor-client communication privilege but held, citing *Hickman* v. *Taylor*,[209] that they were ". . . in other than exceptional cases, privileged from production under the general policy against invading the privacy of a solicitor's preparation". In *Strass* v. *Goldsack*,[210] D.C. McDonald J. accepted that these materials were not communications at all, stating that, "If . . . the solicitor's own notes and memoranda to himself are to be privileged, then it is this separate 'solicitor's brief' rule which recognizes the privilege, and in no way a privilege attaching to communications". Finally, the proposition that the mental reflections of an attorney are sacrosanct is implicit in the order made in *Mancao* v. *Cacino*.[211] Steele J. ordered discovery of notes taken by the plaintiff's solicitor of an interview held with the defendant prior to the commencement of the action on the basis that the notes ought to be treated in the same way as a statement which the defendant had made and signed himself. His Lordship directed, however, that the defendant was not to be allowed to see any ". . . comments or impressions recorded by the solicitor for the plaintiff in his notes as to the credibility or otherwise of the defendant as a witness", and that if the parties could not agree as to the proper editing of the notes, the Master was to do so in order ". . . to remove any comment or remark that may be personal to [the solicitor] and which does not specifically reflect statements made by the defendant".

## *Conclusion*

For at least a century now the rule from equity against the disclosure of evidence and the common law-created privilege for third party communications made in relation to litigation have existed side by side. It is a situation which the courts have never explained, indeed,

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[207] In *Susan Hosiery Ltd.* v. *Minister of National Revenue, supra,* footnote 191, Jackett P. spoke of the "lawyer's brief" rule. However, the term was used to contrast solicitor and client communications with materials generally that had been obtained for the lawyer's brief for litigation, and not to describe a category of documents consisting of the lawyer's mental impressions, etc., about the case.

[208] (1968), 70 D.L.R. (2d) 226.

[209] *Supra,* footnote 197.

[210] *Supra,* footnote 150, at p. 424.

[211] (1978), 17 O.R. (2d) 458.

have scarcely recognized. Silence has also prevailed as regards the place of the privilege for documents that relate exclusively to the case of the party making discovery. The privilege reflects the evidence rule in the context of documents, while functionally (in the jurisdictions that have retained it) it resembles closely the litigation privilege. The three grounds of objection protect the trial preparation of a party from disclosure yet they are far from being identical, whether in origin, the scope of their operation or the discovery stage at which they apply.

The reason, it is suggested, the courts have not examined the connection between the various heads of discovery protection or the justification for maintaining them all, is that almost always the party resisting discovery will have invoked just one of them, thus making it unnecessary for the court to consider any other ground. That the party should not have raised the other heads of protection has been due as much to changing fashion as to ignorance or inadvertence. Through the history of discovery one ground of protection has succeeded another, the ground in vogue in one era becoming all but forgotten in the next. Initially, in the Court of Chancery, the rule as to evidence was the source of protection. The others came into existence later. The rule covered the names of witnesses and their testimony as well as documents that constituted evidence. Then, in the nineteenth century, the privilege that existed originally for title deeds was extended to all documents that constituted evidence. From this developed the privilege for documents relating exclusively to the case of the party giving discovery. It was this privilege that expressed the evidence rule as it applied to documents. Finally, after 1854, the privilege for litigation connected documents emerged, and this ground of protection has virtually covered the field for most of the present century. The practice has been to invoke the litigation privilege for all documents that properly can be withheld from production, that is, for documents that fall strictly within the privilege and also for documents outside the privilege but which are nonetheless protected under the evidence rule or, which is the same thing, are protected because they relate exclusively to the party's claim or defence.

The reality is that the question of rationalizing the existence of the various heads of protection has never been confronted. Instead the approach has been piecemeal. Examples are the attention given by the courts in British Columbia and Ontario to the privilege for documents relating exclusively to the case of the party giving discovery,[212] and the examination of the notion of confidentiality as

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[212] Text at footnotes 81-82.

a rationale of the privilege for litigation-related documents that was undertaken by the Alberta Supreme Court in *Strass* v. *Goldsack*.[213]

The subject of discovery is under close study in this country and change in the direction of broadening the scope of the procedure is inevitable. The key to effective reform lies in understanding the present law, and whatever the position in the past, it is now essential to develop a perspective of discovery that will provide this foundation. It involves identifying the various heads of protection for the party's trial preparation, exposing the rationale of each and the connection between them, and describing what protection each provides and at what discovery stage it is available, for to deal with one ground of protection in isolation may mean simply that the original immunity will be asserted in another guise.

As regards the scope of discovery, this article has not sought to make a case for altering the present limits, either by expanding or narrowing them. Rather the purpose has been to examine the factors that have brought discovery to those limits and to canvass the arguments for and against maintaining them. What weight the arguments deserve is a question for those entrusted with the responsibility of reform to decide. None of the arguments are new. They were familiar to the courts one hundred years ago. It is the attitude to the idea of broader discovery that has changed. Influenced possibly by developments in civil procedure in the United States over the past forty years, the courts and legal profession in Canada have shown a willingness to discard some of the harsher features of the adversary mode of trial. As compared to the past there is not such a strong attachment today to the view that it is in the prerogative of the parties to decide the extent and timing of disclosure of the evidence they have uncovered. In the adjudication of factual disputes modern courts strive for a decision as near to the truth as the constraints set by time, expense and convenience will allow. This objective of dispute resolution is certainly not a new one. What is new, however, is a climate which accepts that disclosure rather than concealment is likely to bring the result (whether arrived at by adjudication or by compromise) closer to the real facts. Opinions as to where the line should be drawn will inevitably differ, but amovement toward curtailing the existing limits of protection is unmistakably in progress.

Fear of perjury and witness interference was the rationale of the original head of protection for trial preparation information, the rule that discovery did not extend to the names of witnesses and the tenor of their evidence, and arguably it was a valid rationale in the context of the peculiar evidence-taking process of the Court of Chancery, the

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[213] *Supra*, footnote 150.

jurisdiction from which the rule emerged. The common law courts expressed the same apprehension in reaching the decision to adopt the evidence rule once they began to administer discovery in 1854, and they cited the fear again to explain the privilege which was created after that time for third party communications made in relation to litigation. Yet the common law had developed its own safeguard against the subversion of the fact-finding process. Supposedly, oral examination and cross-examination of witnesses before the court would make it difficult for perjury and subornation to pass undetected. In this new arena, therefore, the rationale of the evidence rule lost much of the force it might have had in the quite different setting of the Court of Chancery. For the same reason, the fear of corruption is not a convincing explanation for the litigation privilege.

In some provinces witness' names are now discoverable.[214] Presumably this represents a judgment that despite the dangers of witness tampering, the trial outcome is likely to be more accurate if the parties exchange information about witnesses rather than keep it to themselves. Also, it is a judgment which diminishes the force of the argument that the litigation privilege is needed to prevent perjury and witness interference. (Equally, by deciding not to recognize a privilege for documents that relate exclusively to the case of the party giving discovery the courts of British Columbia and Ontario have indicated that the possibility that an unscrupulous opponent will exploit in a corrupt way the opportunities presented by broader discovery is a risk worth accepting.) The privilege continues to protect the actual communication made by a witness to the party or lawyer in relation to the litigation, but since the name of the witness can be obtained there is nothing to prevent the adversary from finding out from the witness the content of the communication other than the witness' refusal to co-operate.

The willingness to accept the risk of witness interference in the context of the disclosure of witness' names and the privilege for documents relating exclusively to the case of the party giving discovery in effect eliminates the avoidance of corruption as a rationale of the privilege for litigation communications. The search for a rationale therefore leads to the adversary system. The privilege is both a product and a characteristic of the adversary mode of trial. The vigorous pursuit of the evidence by the parties is essential to effective adjudication under an adversary system since the court is powerless to take the initiative, and the privilege is the reward which the system bestows on the parties for fulfilling the obligation to act. Each party has the right to conceal from the other side evidence

[214] *Supra,* footnote 1.

turned up that harms the party's case. The more information a party can get from the adversary the less will he need to exert himself independently. Thus, the character and flavour of the adversary model undergoes change as the area of protection from disclosure shrinks in size. Each shift toward allowing the parties greater access to one another's trial material means a reduction in emphasis on party self-reliance and initiative, a major attribute of the system. (In theory the adjudication system would break down if each party relied exclusively on the other to get the evidence.)

Canadian courts have recognized the lawyer's brief as a distinct component of a party's trial preparation information. If the trial system is to retain any resemblance to an adversary model, then as an essential minimum the lawyer's notes and thoughts about the case, his conclusions, opinions and mental impressions, all the product of the exercise of his professional skill and experience, must continue to be inviolable.[215] Starting with that core of protection, the fate of the adversary character of trial will depend on what is done with witness communications. Naming witnesses will not necessarily lead to disclosing what they will say; unless they are prepared to speak with the other side their evidence will remain confidential. Not so, however, if discovery were to extend to the witness' actual communication to the party or lawyer. Whether disclosure were made on oral examination or by document production is hardly important. Consonant with the theme of party self-reliance and initiative which prevails now exception could be made for communications from experts, that is, for reports from professional witnesses engaged for a fee to give an opinion.[216] Such a reservation would only soften the impact of change, however, for there can be no question that to open to the other side all communications received by a party from witnesses would have a profound effect on the way litigation is now conducted. Precisely how the process of litigation would be affected is difficult to predict, but what is clear is that the possible implications of change need to be considered carefully before the step is taken of subjecting witness communications to disclosure.

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[215] The federal proposals for re-defining the scope of privilege would protect specifically "work produced in contemplation of litigation" by the lawyer. See *supra,* footnote 1.

[216] The Ontario proposals on privilege draw this distinction. Witness communications other than those which contain the opinions or advice of an expert obtained in preparation for the litigation are subject to production. See *supra,* footnote 1.