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CROWN PRIVILEGE

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Introduction

It is well recognized that in a legal action the uncovering of facts must give way to other values, even at a trial, and these other values usually take the form of privileges. There is one privilege which is so broad that at times it not only covers specific situations, as for example, would result from a solicitor-client relationship, but in effect makes a party immune from any discovery at all. This party is the Crown, and whether involved in the prosecution of a criminal case, or as a party in a civil case the legal opponent of the government may find thrust in his path toward the disclosure of facts what is known as Crown privilege.¹ The raising of Crown privilege can also occur when the Crown has an interest in the subject matter of the information which is being sought by a party in a civil action, but is not a party itself.

It can hardly be contended that the government open its doors and allow the citizen to choose at will. There is information which would be damaging to the public interest if released. It has been held that the public interest requires the secrecy of documents held by the state, or by an individual, in cases where disclosure would be injurious to national defence, injurious to good diplomatic relations, or injurious to the proper functioning of the public service.²

There is little controversy concerning the withholding of docu-

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¹ It should be made clear at the outset that it is the evidentiary privilege that is being considered and not any substantive privilege of the Crown from liability, or otherwise.

² *Duncan v. Cammell, Laird & Co. Ltd.*, [1942] A.C. 624, [1942] 1 All E.R. 587 (H.L.).

ments from the public gaze if national defence or diplomatic relations would be injured. Citizens of a state, it must be assumed, are desirous that the state in which they live should continue to exist and not be threatened by outside forces. When the outside forces threaten, as in time of war, the citizen is prepared to forego many of his peacetime freedoms in order for the state to survive. In time of peace, as well, the outside forces are still present, although not overtly so as in a period of war. It is with these thoughts in mind that one can say that there is a real public interest in the non-disclosure of facts injurious to the national defence or diplomatic relations. But difficulty is encountered when consideration is paid to the ground of exclusion based on injury to the proper functioning of the public service. When dealing with national defence and diplomatic relations there was one overwhelming public interest involved, that of survival of the state, while in the case of the proper functioning of the public service we are dealing with an internal problem in which other interests are involved. The survival of the state is only indirectly involved. The administration of a state may be made difficult but the state exists. When dealing with an internal problem then other public interests within the state should be invoked and balanced alongside the interest of the proper functioning of the public service.

The documents held by a government are not all of the same importance, and the information received by the government has not the same degree of secrecy. Also, the documents held and the information collected by a government are not of the same kind. There are cabinet minutes, policy-making documents, correspondence between heads of departments, reports required from officials, reports required from individual citizens, and routine "house-keeping" records. Cabinet minutes and policy-making documents are political in character and contain opinion in greater proportion than facts. At the other end of the scale are routine "housekeeping" records which, in the main, contain bare facts. The more the factual content and the less the opinion content the greater should be the tendency to disclose. It is therefore important that governmental documents be distinguished as to type and degree of secrecy involved.

The vast information gathering facility of the state was reviewed by the *McRuer Report*³ and the Commissioners were of the opinion the information obtained by the state through its fact gathering apparatus "should be confined to the purpose for which it was obtained and that purpose only".⁴ The information obtained under a

³ Ontario, Royal Commission Inquiry into Civil Rights (1968), pp. 385-481.

⁴ *Ibid.*, p. 458.

statute is to be used by the state to aid in the administration of that statute, and there should be "adequate safeguards to insure that the information obtained by the exercise of the investigative power is not used for any other purpose".⁵ Much of the information required to be submitted to the government by statute provides statistical bases upon which the government can plan corrective or preventive programmes, and these reports relate to items such as public health, accidents, and consumer protection. The purposes in requiring these reports can be quite unrelated to the search for truth in legal proceedings. Lack of disclosure is upheld on the premise that disclosure would have the effect of drying up the sources, or cause a distortion in the information submitted. While the *McRuer Report* was of the opinion that disclosure should be greatly inhibited, it should be noted that an exception was made as far as disclosure in the courts was concerned.⁶

There are prohibitions against disclosure expressed in many statutes and these are stated in very wide terms, and consequently it can happen that the person who has been the subject of the investigation can be prevented from using the information himself.⁷ Certain statutes contain sections prohibiting disclosure in general. For example:

Section 24 of the Securities Act:⁸

No person, without the consent of the Commission, shall disclose, except to his counsel, any information or evidence obtained or the name of any witnesses examined or sought to be examined under Section 21 or 23.

Section 98(1) of the Workmen's Compensation Act:⁹

No officer of the Board and no person authorized to make an inquiry under this part shall divulge or allow to be divulged, except in the performance of his duties or under the authority of the Board, any information obtained by him or that has come to his knowledge in making or in connection with an inspection or inquiry under this part.

Provisions in statutes, such as these, prohibit the releasing of information and are examples of situations in which the state has an interest in the subject matter of the information sought to be disclosed, although it has no direct interest in the litigation itself. The information gathered under these statutes, and others, such as The Venereal Diseases Prevention Act,¹⁰ is for use by the state in the planning of programmes through which the public, or segments of

⁵ *Ibid.*

⁶ *Ibid.*, p. 461.

⁷ *Ibid.*, p. 459.

⁸ R.S.O., 1970, c. 426. A similar provision appears in The Used Car Dealers Act, R.S.O., 1970, c. 475, s. 25(8); The Real Estate and Business Brokers Act, R.S.O., 1970, c. 401, s. 27(8). Reference is made solely to Ontario statutes, but provisions similar to those used can be found in provincial statutes across Canada.

⁹ R.S.O., 1970, c. 505.

¹⁰ R.S.O., 1970, c. 479, s. 14.

the public, will be benefited. The state is not fulfilling the function of a fact-gathering and storage body in order that future litigants can have a ready source of information.¹¹

There are other statutory provisions which are aimed specifically at disclosure in a court. For example The Labour Relations Act states that "no member of the Board and no field officer is a competent or compellable witness in proceedings before a court or other tribunal respecting any . . . information, material or report".¹² Other examples are:

Section 6(1) of The Ontario Energy Board Act:¹³

No member of the Board or its secretary or any of its staff shall be required to give testimony in any proceeding with regard to information obtained by him in the discharge of his official duties.

Section 3(6) of The Energy Act:¹⁴

No inspector shall be required to give testimony in any civil suit with regard to information obtained by him in the discharge of his official duty, except with the written permission of the Minister.

In a recent amendment to the Workmen's Compensation Act of Ontario¹⁵ reports made by physicians are privileged and "not admissible as evidence or subject to production in any court in an action or proceedings against such person".

Section 17(2) of The Mining Act¹⁶ is framed in different terms and appears to be more satisfactory:

The Deputy Minister, the Commissioner or any officer or agent of the Department is not bound to disclose any information obtained by him in his official capacity that a member of the Executive Council certifies ought not in the public interest to be divulged or cannot *without prejudice to the interests of persons not concerned in the litigation* be divulged, and all such information is privileged.

This section clearly indicates a consideration which the court should weigh when ruling on a claim of Crown privilege. If the interests of persons not concerned in the litigation, in which disclo-

¹¹ This can be compared with the result which occurred in the case of *Re Love Estate* (1968), 64 W.W.R. 190 (Alta Dist. Ct). The case concerned a question of pedigree and an order was sought to compel the director of vital statistics to disclose certain records. The order was granted. The court held that under The Vital Statistics Act, S.A., 1959, c. 94, the chief purpose of registration of births, marriages and deaths was for the benefit and protection of the individual; and it was said by the court: "Where any individual has any *bona fide* reason for inquiring into the status or pedigree of any person I think there can be no question but that he has a right to such information as is available in the vital statistics records."

¹² R.S.O., 1970, c. 232, s. 100(6).

¹³ R.S.O., 1970, c. 312.

¹⁴ R.S.O., 1970, c. 148.

¹⁵ R.S.O., 1970, c. 505, s. 99. Added to the Act in 1968-69, c. 140, s. 2.

¹⁶ R.S.O., 1970, c. 274, emphasis added.

sure is requested, would be adversely affected then this fact should be balanced against the interest in the due administration of justice. But if the interests of persons not concerned in the litigation are unaffected by disclosure then there would seem to be no reason to refuse disclosure of the facts sought.

As the state engages more and more in protecting individual members of society from other individual members there is a requirement that the state be supplied with satisfactory information upon which it can base its course of action. It is reasonable that a person supplying information which is of a personal nature should not want that information spread on the four winds, but there would seem to be abuses which could develop from a too rigid application of the non-disclosure policy. It is foreseeable that there could be compelling reasons that some of the information within the control of the government should be released. It should at least be possible for a party who has supplied information to retrieve what he himself has supplied.

There is a real public interest that the public service should function properly so that daily life, which is becoming more and more regulated, should be lived as smoothly as possible. But there is another public interest, that of the due administration of justice, which is also necessary for the living of our daily life. The number of people involved in legal disputes is small and so there is a tendency in the minds of many people to raise the interest in the proper functioning of the public service to an uncalled-for level above that of the due administration of justice; but the working of a state in which individual freedom is cherished requires the presence of a legal system constantly ready to aid the individual and to settle the disputes in which he is involved.

I. *Canada: Prior to Duncan v. Cammell, Laird and Co. Ltd.*

Prior to 1962 in Ontario the Crown had a prerogative right against discovery.¹⁷ This was abolished by the Proceedings Against the Crown Act¹⁸ and discovery became available with the exception that "the Crown may refuse to produce or to answer a question on the ground that the production or answer would be injurious to the public interest".¹⁹

¹⁷ *Crombie v. The King* (1922), 52 O.L.R. 72.

¹⁸ R.S.O., 1970, c. 365, enacted as S.O., 1962-63, c. 109, s. 10, as am., 1965, c. 104, s. 2.

¹⁹ S. 12(a). This provision also exists in five other provinces. See S.A., 1959, c. 63, s. 11; R.S.M., 1970, c. C-207, s. 12; R.S.N.B., 1952, c. 176, s. 10; R.S.N.S., 1967, c. 239, s. 10; R.S.S., 1965, c. 87, s. 13. The prerogative against discovery still exists in British Columbia, Prince Edward Island and Newfoundland and also in regard to the Crown in right of the federal government, but probably because of the political unpalatability involved in invoking the prerogative it is rarely alluded to, and need not be further discussed; but its existence should not be forgotten.

Until recently the decided cases in Canada and England have virtually unanimously taken the position with regard to Crown privilege as that held by *Bradley v. McIntosh* in 1884.²⁰ The court in that case stated: "If the officer at the head of one of the High Government departments declines to produce it [letter] because it will not in his opinion be conducive to the public interest to do so, his judgment is conclusive."²¹ This case was cited and followed in 1939 in *Green v. Livermore*.²²

Four years before *Green v. Livermore* the Exchequer Court of Canada decided the case of *Defresne Construction Co. Ltd. v. His Majesty the King*.²³ The facts were that the plaintiff-company had contracted with the Crown to construct a pier and quay. Due to ice pressure certain sections of the piles were broken and rendered unserviceable. The Crown's engineer instructed the plaintiff to remove the damaged piles, and ordered the work to stop. The claim was for the cost of removing and replacing the broken piles. This work was not provided for in the contract. Under the contract the engineer's certificate was required for the payment of works specified in the contract and also of additional work not covered by the contract but ordered by the engineer. The plaintiff sought to have produced various memoranda prepared by the Crown's chief engineer or local engineer.

The Crown raised an objection against production of the documents on the ground that they were privileged, because it was against public interest that they should be filed, and because they constituted memoranda or reports prepared for the guidance of the Minister with respect to the plaintiff's claim. The privilege was upheld on the basis of the second reason, which constituted a client-solicitor privilege but Angers J. rejected the first reason. Since they only dealt with the relation of the Crown to the plaintiff their production could not be prejudicial to the public interest. "The privilege of exclusion of documents as evidence at the request of the Crown must not be extended beyond the requirements of public safety or convenience."²⁴ Angers J. quoted and approved Lord Blanesburgh's judgment for the Privy Council in *Robinson v. State of South Australia*.²⁵ Lord Blanesburgh had been of the opinion that if production of the documents would prejudice one side or assist the other this would itself be "a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security".²⁶ The interest in the due administration of

²⁰ (1884), 5 O.R. 227.

²¹ *Ibid.*, at p. 232.

²² [1939] O.W.N. 429.

²³ [1935] Ex. C. R. 77.

²⁴ *Ibid.*, at p. 87.

²⁵ [1931] A.C. 704.

²⁶ *Supra*, footnote 23, at p. 89 citing *ibid.*, at p. 715.

justice could only be overcome by the interest of the state in secrecy when the state's interest was of the gravest nature involving security or high political decisions ("state policy"). The *Dufresne* case has never been cited by a Canadian court.

In *Robinson v. State of South Australia (No.2)* the plaintiff had brought an action against the state of South Australia claiming damages for alleged negligence and it had been held that the action could be maintained.²⁷ An order was made for discovery by the plaintiff of documents in the possession of the state, but an affidavit was made with the minutes signed by the Minister in which objection to the production or disclosure of certain documents was made on the ground that they were state documents consisting of communications between officers administering a department of state in the course of their official duties, and that their disclosure would be contrary to the interest of the state and the public. The government of South Australia had established a marketing scheme whereby wheat growers were to deliver wheat to the government which assumed the duty of accepting and marketing it and distributing the net proceeds among the owners. It had been established that the government at the suit of wheat growers who delivered wheat under the scheme could be held liable for proved negligence in the performance of the duties assumed by the board. In this litigation, the appellant was attempting to quantify his loss and to establish that such loss was due to negligence for which the respondent-state was responsible. The facts were mainly in the possession of the state and without the assistance of complete discovery the establishment of the necessary facts was not practicable. The documents were primarily of a commercial nature.²⁸

The question involved in the appeal was whether the privilege claimed by the state and upheld in a previous action was really justifiable. The court stated that the privilege was a narrow one, "most sparingly to be exercised",²⁹ and pointed out, quoting Rigby L.J. in *Attorney-General v. Newcastle-upon-Tyne Corp.*,³⁰ that the Crown had in the past taken the utmost care to give a defendant discovery of documents, unless there was some plain overruling principle of public interest involved. The Board was concerned only with the case where the state was party litigant and bound to give discovery. In such a case it seemed to their Lordships clearly that this particular privilege should normally, like any other, be claimed under the sanction of an oath, the oath being that of a responsible minister of state whose mind has been directed to the question. The case was remitted to the Supreme Court of South

²⁷ See [1929] A.C. 469 (P.C.).

²⁸ *Supra*, footnote 25, at p. 722.

²⁹ *Ibid.*, at p. 714.

³⁰ [1897] 2 Q.B. 384.

Australia with the direction that it was a proper case for the exercise by that court of its power of itself inspecting the documents for which privilege was set up in order to see whether the claim was justified. Like the *Dufresne* case this case was ignored by Canadian courts.

II. *Duncan v. Cammel, Laird and Co. Ltd.*

The most famous case in the area of Crown privilege is that of *Duncan v. Cammel, Laird and Co. Ltd.*³¹ decided by the House of Lords in 1942. The facts of *Duncan* were that on June 1st, 1939 the Royal Navy submarine, H.M.S. *Thetis*, which had been built by the defendants, sank with the loss of ninety-nine lives while undergoing submergence tests in Liverpool Bay. Many representatives or dependents of the deceased sailors brought actions against the defendants claiming damages for negligence. The appeal brought before the House of Lords involved two test actions, the others being stayed. The plaintiffs sought the production of documents held by the defendants. The Crown, through the First Lord of the Admiralty, claimed privilege for certain of these documents on the ground that it would be injurious to the public interest that they be disclosed to any person. The documents covered by the claim of privilege were the contract of the hull and machinery of the *Thetis*, a letter written before the disaster relating to the vessel's trim, reports as to the condition of the *Thetis* when raised, a large number of plans and speculations relating to various parts of the vessel, and a notebook of a foreman painter employed by the defendant company. The claim of Crown privilege raised a question of considerable constitutional importance involving the power of the executive to restrict the information which would be available to the courts in any case.³²

The argument of counsel for the appellants was that "clearly injustice would be done if there were a universal rule that the opinion of an officer of State was final",³³ and that the court should determine the point by seeing the documents. Although there was a public interest that the state should not be endangered, yet, counsel argued, the administration of justice was part of the public welfare as well. The court reviewed the decided cases, rejected the argument above, and arrived at the conclusion that a rule of law had been firmly established:³⁴

The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found

³¹ *Supra*, footnote 2.

³² *Ibid.*, at p. 629 (A.C.).

³³ *Ibid.*, at pp. 627-628.

³⁴ *Ibid.*, at p. 633.

to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.³⁵

The court went on to say that: "The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents."³⁶ Then the court affirmed that the judge was in control of the trial, and not the executive, (which appears to be in answer to the constitutional issue of some importance which had been recognized by the court) but the proper ruling for the judge to make was to deny production of documents when there is a valid objection taken by the executive. When so taken the objection is conclusive.³⁷

It should be noted that Viscount Simon pointed out that although the rule was as stated above, yet for reasons of fairness and in the interests of justice the Crown usually granted disclosure in practice unless there was some plain overruling principle of public interest concerned which could not be disregarded.³⁸ He was also of the opinion that the result which followed in *Duncan* was exceptional; it was one of those rare cases in which the interest of the individual must give way to the interests of the state, because in the long run he would suffer if the interests of the state were not given priority.³⁹ No one has ever argued that the decision in *Duncan* was wrong. The facts and the year in which the case was decided clearly indicate that this was an "exceptional case", and one in which there was an overriding public interest which could not be disregarded. Also it can be fairly said that *Duncan* clearly stated the law as it then stood.

There had been a trend of the House of Lords to a "mechanical" approach in the late nineteenth century and it has continued until the present day.⁴⁰ The approach was a withdrawal by the House of Lords from the law-making scene in favour of the representative Parliament. It is natural, therefore, that the court should be extremely reluctant to interfere in any way with the Parliament itself or the executive rulers. The government and the executive were

³⁵ *Ibid.*, at p. 636.

³⁶ *Ibid.*, at p. 638.

³⁷ *Ibid.*, at p. 642.

³⁸ *Ibid.*, at p. 633, in speaking of the prerogative of the Crown, and at p. 636.

³⁹ *Ibid.*, at p. 643.

⁴⁰ See, Stevens, *The Role of a Final Appeal Court in a Democracy: The House of Lords Today* (1965), 28 *Mod. L. Rev.* 509.

to be allowed to function as they themselves saw fit.⁴¹ During the war years this policy on the part of the court to allow the executive a free hand was increased,⁴² and such was the result in *Duncan v. Cammell, Laird and Co. Ltd.* The dicta of the court clearly enunciated the policy that the executives were in charge of their own affairs, and were to be allowed to function in the degree of secrecy thought by them to be necessary. In order to be fair to a litigant, and in order that justice might be done, it was necessary that disclosure should normally be made, but this was up to the executive, and since the Crown usually granted disclosure it was therefore thought that there was no serious problem.

Before proceeding to consider the law in Canada after *Duncan* it is interesting to see the Court of Appeal's approach in England to the same question before 1968, when the House of Lords first exercised their power to depart from precedent and overruled *Duncan*.⁴³

III. *The Valiant Attempts*.⁴⁴

The story in the Court of Appeal begins in 1958 with the case of *Auten v. Rayner and Others*.⁴⁵ The court under the leadership of Lord Evershed M.R. applied the rule in *Duncan* to a case involving official police records. The records in question were reports made by one of the defendants as a detective constable in the Criminal Investigation Department to superior officers, and communications passing between the Metropolitan Police Force and other police forces. The action charged the defendants with conspiracy to injure and defraud the plaintiff as well as false imprisonment and malicious prosecution. Although Lord Evershed M.R. stated that "the court is bound to look with somewhat jealous care on any exercise of executive powers which have the effect of overriding or ousting the jurisdiction of the courts in matters which are *prima facie* peculiarly within their province",⁴⁶ he went on to hold that the correct view

⁴¹ See for example *Local Government Board v. Arlidge*, [1915] A.C. 120 (H.L., 1914).

⁴² See for example *Liversidge v. Anderson*, [1941] 3 All E.R. 338, [1942] A.C. 206.

⁴³ *Conway v. Rimmer*, [1968] 1 All E.R. 874. In 1966 Lord Gardiner announced that the Lords were free to depart from their previous decisions in certain circumstances: [1966] 3 All E.R. 77.

⁴⁴ Russell L.J., at p. 1273 in the Court of Appeal decision of *Conway v. Rimmer*, [1967] 2 All E.R. 1260: "In spite of the three valiant attempts made in recent cases in this court (by Athos M.R., Porthos and Aramis L.JJ.) to assert that *Duncan's* case is no authority for a 'class case', I cannot but recognise it as such and must leave it to the House of Lords to reconsider the whole basis of the case, if it wishes to do so." The three decisions referred to by Lord Justice Russell were decided in 1964 by Lord Denning M.R., Salmon and Harman L.JJ., *infra*, footnote 48.

⁴⁵ [1958] 3 All E.R. 566.

⁴⁶ *Ibid.*, at p. 567.

of the law was that: "The decision and the responsibility for determining the question of disclosure must be taken by the ministerial head of the department, save in exceptional circumstances."⁴⁷ The rule of law in *Duncan* was being mechanically applied to the factual situation before the court. The "exceptional" use of the privilege had become the "exceptional" overruling of the privilege.

Lord Denning's presence was felt in 1964 in three cases which came before the Court of Appeal,⁴⁸ and in each case the court consisted of Lord Denning M.R., Salmon and Harman L.J.J. For various reasons the documents in each case were not admitted in evidence,⁴⁹ but the court by the use of dicta purported to alter the rule in *Duncan* to a position similar to that subsequently held by the House of Lords in *Conway v. Rimmer*.

In *Merricks v. Nott-Bower* the Court of Appeal held that the rule in *Duncan* was *obiter*⁵⁰ and Salmon L.J. pointed out the significance of the facts of *Duncan*: "That case was decided in the darkest days of the war, early in 1942 before the Battle of Alamein, and, if the documents concerned there had been made public, it seems quite obvious that their publication could have been of the greatest assistance to the enemy."⁵¹ In the *Merricks* case the plaintiffs were police officers. A report which had been made by an Assistant Commissioner of Police to the Commissioner of Police recommending that, as a result of the plaintiff's failing to deal with activities of "street" bookmakers in their subdivision, they be transferred, was requested to be produced. The Secretary of State claimed privilege on the grounds of public interest as the report was said to belong to a class of documents which it was necessary in the public interest for the proper functioning of the public service to withhold from production. This claim was held by the court not to be sufficient. Lord Denning M.R., stated that the *nature* of the class should itself be described with sufficient particularity. The judge should be able to say: "I can well see that the Crown cannot be expected to produce these documents."⁵²

⁴⁷ *Ibid.*, at p. 570.

⁴⁸ *Merricks and Another v. Nott-Bower and Another*, [1964] 1 All E.R. 717; *Re Grosvenor Hotel, London (No. 2)*, [1964] 3 All E.R. 354; *Wednesbury Corporation and Others v. Ministry of Housing and Local Government*, [1965] 1 All E.R. 186.

⁴⁹ In *Merricks and Another v. Nott-Bower and Another* the claim of privilege was premature and no question of production arose at the time. In *Re Grosvenor Hotel, London (No. 2)* the documents were held to concern policy decisions at a high level. In the *Wednesbury Corporation* case the interests of justice did not require the disclosure of the documents. "It seems to me that the issues in this action can well be decided without reference to them at all." Per Lord Denning M.R., at p. 191.

⁵⁰ *Supra*, footnote 48, per Lord Denning M.R., at p. 722, Salmon L.J., at p. 726.

⁵¹ *Ibid.*

⁵² *Ibid.*, at p. 722.

In *Re Grosvenor Hotel, London (No. 2)*, the second case, Lord Denning M.R., held that *Duncan* could be restricted to its facts and that it rested on an insecure foundation since the court had been in error when it held that the law of Scotland was the same as the law of England on the point in issue. He considered the law in other parts of the Commonwealth and concluded that it was the same as Scottish law. He went on to say: "It is the judges who are the guardians of justice in this land; and if they are to fulfil their trust, they must be able to call on the Minister to put forward his reasons so as to see if they outweigh the interests of justice", and, "I think that we should weigh in the balance the two competing interests; on the one side, the public interest, averred by the Minister, in the proper functioning of the public service; on the other side the interests of justice as between [the parties]."⁵³ Harmon L.J. said that he seemed "to detect a desire in the official mind to push ever forward the frontiers of secrecy".⁵⁴ This was a process which he regarded with distaste. Salmon L.J. also held that *Duncan* should be restricted to its facts as it was "a view with which it would perhaps be difficult for anyone to agree who was not, in the words of Lord Atkin,⁵⁵ even 'more executive-minded than the executive'". In the opinion of Salmon L.J., the court "ought to have power to override the executive".⁵⁶ The power of the courts to override the objection of the Minister "is a useful and indeed necessary power and should not be abdicated if the courts are to preserve their function of protecting the vital interest of the public in seeing that justice is done". He added that: "It would be sad if it were only in England, the source of the common law, that contrary to its whole spirit, the judges had abdicated their power to control the intervention of the executive in the administration of justice."⁵⁷

In *Re Grosvenor Hotel, London (No. 2)* the documents sought were official letters by the secretary of the Railway Board to the Minister of Transport, and the replies. Also sought was correspondence and memoranda between the Board and the Department of Transport.

Lord Denning M.R. stated:⁵⁸

The objection of a Minister, even though taken in proper form, should not be conclusive. If the court should be of opinion that the objection is not taken in *good faith*, or that there are *no reasonable grounds* for thinking that the production of the documents should be injurious to the public interest, the court can override the objection and order production. It can, if it thinks fit, call for the documents and inspect

⁵³ *Supra*, footnote 48, at p. 362.

⁵⁴ *Ibid.*, at p. 363.

⁵⁵ *Liversidge v. Anderson*, *supra*, footnote 42, at p. 361 (All E.R.).

⁵⁶ *Supra*, footnote 48, at p. 370.

⁵⁷ *Ibid.*, at p. 372.

⁵⁸ *Ibid.*, at pp. 361-362, emphasis added.

them itself so as to see whether there are reasonable grounds for withholding them, ensuring, of course, that they are not disclosed to anyone else.

These documents were held to concern policy decisions at a high level, and related to decisions taken by the Minister in the national interest, and not to the *day-to-day affairs* of the Railway Board.

In the third and last case, the *Wednesbury Corporation* case, the court reaffirmed its stand, and the question for the court had become: "Do the interests of justice demand that these documents should be produced?"⁵⁹ The initial question in the case had been the sufficiency of the Minister's certificate claiming the privilege. What was sought to be disclosed was the governmental brief for the guidance of inspectors, and correspondence between officials of the Ministry of Housing and Local Government and the inspectors. The Minister had appointed three inspectors to hold a local inquiry under the Local Government Act, 1958 in regard to reorganization of an area. The plaintiff opposed the plan. A report was made and the Minister informed the plaintiff that he was going to proceed with reorganization. It was held that the inquiry was for the information of the Minister, and was administrative and not judicial in function. Although the claim of privilege was insufficient, the interests of justice did not require the Minister to disclose the departmental briefs and instructions to which he referred in his affidavit. The issues in the action could well have been decided without reference to the documents at all.⁶⁰

The story in the Court of Appeal ends in the case of *Conway v. Rimmer*.⁶¹ In that case the trilogy of cases was satirically dismissed and the court returned to the position of *Auten v. Rayner*.

IV. *Conway v. Rimmer*.

(i) *Facts*.

The plaintiff was an ex-police officer who was suing the defendant for malicious prosecution. The defendant was the superintendent of the police area in which the plaintiff had been a probationer police constable. The plaintiff had been charged with stealing and acquitted, but later he was dismissed from the force. The defendant had written two probationary reports on the plaintiff and following an investigation of the theft involving the plaintiff wrote a "Report to the Chief Constable", which went to the Director of Public Prosecutions who then had brought the charges against the plaintiff. Following this there had been a third probationary re-

⁵⁹ *Supra*, footnote 48, at p. 193, per Salmon L.J.

⁶⁰ *Ibid.*, at p. 191, per Lord Denning M.R.

⁶¹ [1967] 2 All E.R. 1260.

port rendered on the plaintiff. There was in addition to these reports a report by a District Police Training Centre. The plaintiff requested discovery of the above-mentioned documents, but the Home Secretary claimed Crown privilege: the documents belonged to a "class of documents comprising confidential reports by police officers to chief officers of police relating to the conduct, efficiency, and fitness for employment of individual police officers under their command" and the report of the investigation was "within a class of documents comprising reports by police officers to the superiors concerning investigations into the commission of crime". The documents were therefore said by the Home Secretary to be of such a class that disclosure would be injurious to the public interest.

(ii) *Conway v. Rimmer in the Court of Appeal.*

Lord Denning was once again on the Bench, but now he supplied a dissenting opinion. He stressed the importance of the documents, sought to be produced, in a proper determination of the action. "They [were] necessary to do justice between the parties."⁶²

He also laid stress on the fact that apparently the English law differed from that of other commonwealth nations,⁶³ and he was of the opinion that Lord Gardiner's statement had altered the doctrine of precedent in regard to the Court of Appeal. This latter point was disagreed with by the House of Lords.⁶⁴ Both Davies L.J. and Russell L.J., who comprised the majority of the court, and won the day, began their written reasons with basically the same comment. To quote Davies L.J.: "Lord Denning M.R., has, most understandably, discussed in some little detail the merits of this case. For my part, I propose to confine my observations to what I believe to be the law."⁶⁵ Davies and Russell L.JJ. were of the same opinion—the law was as decided in *Duncan v. Cammell, Laird*, namely, that in all cases, class and content alike, "a Crown objection to the production of documents is, if properly taken, conclusive".⁶⁶ Although Davies L.J. expressed doubt as to the merits of the rule in *Duncan*, stated above, yet as far as he was concerned the Court of Appeal was bound by that decision. Only the House of Lords with their new found power could alter the rule in *Duncan's* case.⁶⁷

The story in the Court of Appeal is now complete, and looking back we see two very different approaches to judicial lawmaking.

⁶² *Ibid.*, at p. 1262; see also at p. 1266.

⁶³ *Ibid.*, at pp. 1262-1263.

⁶⁴ *Supra*, footnote 43. Lord Morris of Borth-y-Gest, at p. 892, expressly and impliedly by the other Law Lords, in that if correct the trilogy could have been approved and dicta adopted by the House of Lords. Instead no reference was made to these cases.

⁶⁵ *Supra*, footnote 61, at p. 1266. See Russell L.J., at p. 1272.

⁶⁶ *Ibid.*, at p. 1270.

⁶⁷ *Ibid.*, at p. 1272.

First there was the approach of Lord Denning, and Salmon and Harman L.JJ.; they balanced the various interests involved in the case before them, and then by distinguishing *Duncan*, or calling the rule *obiter*, they were able to decide the case on its merits. The second approach was seen in *Auten v. Rayner* and in the majority decision in *Conway v. Rimmer*, the rule was applied to the case and until altered by competent authority it would continue to be applied to cases involving Crown privilege. A change occurred in only so far as now the court did not appeal to the legislature for change, but rather to the House of Lords with their new found freedom and power.

(iii) *The House of Lords.*

There was little doubt in the minds of the Law Lords when *Conway v. Rimmer*⁶⁸ appeared before them. In a show of solidarity reminiscent of *Duncan* they overruled that decision and framed a new rule.⁶⁹ The new rule, in the words of Lord Reid, is that the judge is to look at the reasons given by the Minister for claiming the privilege, and

. . . if the Minister's reasons are such that a judge can properly weigh them, he must on the other hand consider what is the probable importance in the case before him of the documents or other evidence sought to be withheld. If he decides that on the balance the documents probably ought to be produced, I think that it would generally be best that he should see them before ordering production and, if he thinks that the Minister's reasons are not clearly expressed, he will have to see the documents before ordering production.⁷⁰

The reasons for the particular decision reached by Lord Reid were that the documents sought by the plaintiff were of considerable importance to the adjudication of the action between the parties.⁷¹

Lord Reid referred⁷² to the case of *Gain v. Gain*,⁷³ a case in which the Admiralty claimed successfully Crown privilege for a medical report made by a surgeon commander in the Royal Navy on the condition of a husband involved in a divorce action, he stated: "The only result of the attitude taken up by the Admiralty was to deprive the court of the most reliable account of those facts with no profit to anyone. *There must be something wrong with a*

⁶⁸ *Supra*, footnote 43.

⁶⁹ The decision of the House of Lords in *Duncan* was unusual in that only one judgment was rendered, that by Viscount Simon L.C., and the other six Law Lords who heard the appeal concurred without rendering reasons. There was consequently a strong appearance of solidarity by the members of the court.

⁷⁰ *Ibid.*, at p. 888.

⁷¹ See *ibid.*, at pp. 878 and 879; and he ended his judgment by saying: "These documents may prove to be of vital importance in this litigation." At p. 889.

⁷² *Ibid.*, at p. 887.

⁷³ [1962] 1 All E.R. 63.

rule which permits Crown privilege to be asserted in this way.”⁷⁴ For Lord Reid it would have been wrong to apply the rule in *Duncan v. Cammell, Laird* in a case such as he was considering. To apply the rule would lead to an unsatisfactory condition. There must be a weighing of interests—withholding *versus* production.⁷⁵

Lord Gardiner's 1966 announcement now freed the Lords to reconsider the rule; but it should be noted that Lord Reid distinctly said that the re-examination would be done with the “authorities” as they existed. The House “would be very slow to question the authority of a unanimous decision of [the] House only twenty-five years old which was carefully considered and obviously intended to lay down a general rule”.⁷⁶ Several factors allowed him to reconsider the *Duncan* case, and these were: one, the “decision had several abnormal features”, namely that it was wrong when it held that Scot's law was the same as English law on the point, and in questions involving the proper relation between the powers of the executive and the powers of the courts a difference between the two countries could not be justified; two, “much dissatisfaction has been expressed” and there has not been “one expression of whole-hearted approval” of the rule. Also “a statement made by Viscount Kilmuir L.C., in 1956 on behalf of the government . . . [made] it clear that that government did not regard it as consonant with public policy to maintain the rule to the full extent which existing authorities had held to be justifiable”.⁷⁷ The statement referred to above by Viscount Kilmuir L.C., had set out the grounds on which Crown Privilege was to be claimed.⁷⁸ Lord Reid then proceeded to review previous cases and was able to discover a line of authority for the rule which he propounded. Omitted from the authorities in support of the new rule were the three decisions of the Court of Appeal decided in the mid-sixties by Lord Denning M.R., Harmon and Salmon L.J.J. which stated the new rule. Lord Reid concluded his judgment with a reference to the law of the United States, in particular the case of *United States v. Reynolds*,⁷⁹ in which it was stated: “Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”

Lord Morris of Borth-Y-Gest began straight-away by saying that there could be “a system under which, if a Minister of the Crown gave a certificate that a document should not be produced, the courts would be obliged to give full effect to such certificate and, in every case and without exception, to treat it as binding, final and

⁷⁴ *Supra*, footnote 43, at p. 887, emphasis added.

⁷⁵ *Ibid.*, at p. 882.

⁷⁶ *Ibid.*, at p. 879.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, at p. 881.

⁷⁹ (1953), U.S. 1, 73 S. Ct 528; quoted at p. 887, *ibid.*

conclusive. Such a system (though it could be laid down by some specific statutory enactment) would, in my view, be *out of harmony with the spirit which in this country has guided the ordering of our affairs and in particular the administration of justice*".⁸⁰

In his opinion, "it was one of the main functions of the courts to weigh up competing evidence and considerations". "The Court, . . . will be in a position of independence and will as a result often be better placed than a department to assess the weight of competing aspects of the public interest including those with which a particular department is not immediately concerned."⁸¹ Referring to Lord Gardiner's statement and finding *Duncan* unsatisfactory for the same reasons as Lord Reid he conducted a review of authorities and arrived at the new rule.

For Lord Hodson the rule of *Duncan* needed to be reconsidered "in view of the increasing extension of State activities into the spheres of trading, business, and commerce, and the claim of privilege in relation to liabilities firmly put forward, Turner L.J.'s observations stand on record to remind the courts that, while they must duly safeguard genuine public interests, they must see to it that the scope of the admitted privilege is not, in such litigation, extended".⁸² The observations of Turner L.J., referred to by Lord Hodson were made in 1856 in *Wadeer v. East India Co.*⁸³ and were to the effect that documents relating to the trading, commercial and contractual activities of a state can rarely be protected under the head of privilege.

Lord Pearce also noted the increasing extension of state activities into the life of the individual. Times had changed and today's "mass of documentation" bore little similarity to the "State Papers" of old, yet the same privilege was being claimed by the executive. An acceptance of the rule of *Duncan* produced a "malaise" and injustice. He reached the new rule based on these considerations and by the same route as the other Law Lords discussed above.

Lord Upjohn differed from his colleagues in that he was of the opinion that abandonment of the principle of *stare decisis* should be "exercised rarely and sparingly". In his opinion *Duncan* could be distinguished on two points, namely that *Duncan* was concerned with "contents" while this case was concerned with "class" documents; also *Duncan* did not consider "routine" reports as were being sought by the plaintiff in *Conway v. Rimmer*. But he also voiced opinions very similar to the other judges, such as: "The relation between Crown and subject becomes closer every day with the increasing interferences . . . of the Crown with the private life of the

⁸⁰ *Supra*, footnote 43, at p. 890, emphasis added.

⁸¹ *Ibid.*, at p. 891.

⁸² *Ibid.*

⁸³ 8 De G.M. & G. 182, 44 E.R. 360.

subject, so that communications within and between government departments relating to the individual subject are of much greater frequency than before",⁸⁴ and "it is clear, in my opinion, that the judiciary must regain its control over the whole of this field of the law".⁸⁵

V. *Canada: After Duncan v. Cammell, Laird and Co. Ltd.*

The cases decided in Canada after 1942 continued to state the law as enunciated in *Bradley v. McIntosh*,⁸⁶ but now they had the power of a House of Lords decision to cite and apply with approval. The Exchequer Court decision of *Dufresne Construction Co. Ltd.*,⁸⁷ was ignored and never cited. The unfortunate thing about the cases which followed *Duncan* in Canada was that they did not concern national defence or diplomatic relations, but rather they involved situations in which governmental involvement in daily human affairs was increasing and the government was becoming a vast depository of facts collected from the people.

In *Murray v. Murray*⁸⁸ decided by Wilson J. in the Supreme Court of British Columbia a minister's objection on the ground of Crown privilege to the production of records of the provincial Department of Health in relation to venereal disease reporting was upheld. This was a divorce case in which the petitioner-wife sought to prove the respondent's adultery by evidence showing that he contracted a venereal disease during coverture from some person other than herself. The husband had agreed to the production of the documents in writing. The Minister had stated merely that "it would be contrary to public interest to permit the production". Wilson J. stated that "it may be, and probably is, the law that he [the Minister] does not have to furnish any reasons". *Duncan v. Cammell, Laird* was followed and Wilson J. quoted from *The Zamora*:⁸⁹ "Those who are responsible for the national security must be the sole judges of what the national security requires."

Information held by the Revenue Department was sought in several Canadian cases. In *Weber v. Pawlik*⁹⁰ there was litigation between two partners. The plaintiff sought an accounting; he alleged that he had been taxed on profits never received. In order to prove this the plaintiff issued a subpoena to the local income tax official to produce income tax returns and assessment of the partnership. The defendant-partner had made out the returns on behalf of the

⁸⁴ *Supra*, footnote 43, at p. 913.

⁸⁵ *Ibid.*, at p. 915.

⁸⁶ *Supra*, footnote 20.

⁸⁷ *Ibid.*

⁸⁸ [1947] 3 D.L.R. 236.

⁸⁹ [1916] 2 A.C. 77, at p. 107, quoted *ibid.*, at p. 238.

⁹⁰ [1952] 2 D.L.R. 750.

partnership. The production of the returns was prevented by the claim of Crown privilege which was upheld. It was held that the returns were of such a confidential nature that their production would be prejudicial to the public interest. Since the returns are compulsory, candour and completeness of the information supplied is expected by the government, and disclosure might prejudice the government's expectation.⁹¹

With *Weber v. Pawlik* came the first dissent, aside from the *Dufresne* case. O'Halloran J.A. dissenting said:⁹² "How the production of the partnership income tax statements and returns in this case, at the behest of one partner in his action against the other partner can in any way be prejudicial to the public interest is completely beyond my understanding." He maintained that *Robinson v. South Australia*, which had held that the court had the power to inspect the documents for which privilege was claimed to determine whether their production would be prejudicial to the public welfare was "more considerably uniform with the historical English legal tradition and more in accord with Canada's own constitutional development". He went on to say: "In Canada at least it is the accepted and traditional constitutional view that decisions relating to life, liberties, rights and property are determined by the constituted courts of the land, whose jurisdiction in that respect cannot be hindered or stayed by the Executive as such, let alone by the political head of a department of government."⁹³

In *M.N.R. v. Die-Plast Co. Ltd.*⁹⁴ the taxpayer again asked for information concerning his own affairs. The case rested upon the existence of a lease which had disappeared. The information from the Department of National Revenue which was sought concerned whatever information regarding the lease the department had acquired in its official capacities. The objection of the Crown was upheld. The Minister had stated that the information sought was of "such confidential nature that their production would be prejudicial to the public interest". Although Casey J. thought that a Minister was the only person who could decide whether disclosure would be against the public interest,⁹⁵ yet he saw the danger that such a view makes possible situations in which an individual could suffer.⁹⁶ The only remedy seen by Casey J. was that to be supplied by "competent authority", or by an appeal to the Governor in Council, with a right of a further appeal to Parliament.⁹⁷

⁹¹ *Ibid.*, at p. 765.

⁹² *Ibid.*, at p. 757.

⁹³ *Ibid.*

⁹⁴ [1952] 2 D.L.R. 808 (Que. Q.B.).

⁹⁵ *Ibid.*, at p. 815.

⁹⁶ *Ibid.*, at p. 816.

⁹⁷ *Ibid.*

In *Weber v. Pawlik* the taxpayer was also requesting information which the government possessed regarding his own business. Like *M.N.R. v. Die-Plast* the person whose candour was threatened was the person requesting the information. The request was refused on the ground that if they gave the applicant a copy his honesty and completeness of future returns would be threatened.

In the third case on this line, that of *Clemens v. Crown Trust Co. et al*⁹⁸ Judson J. of the Ontario High Court upheld the Crown Privilege which was stated by the Minister:⁹⁹ “. . . all reports, papers and documents filed with his department in connection with the administration of the Income War Tax Act . . . are of such a confidential nature that their production would be prejudicial to public interest.” *Duncan* was followed and the objection held to be conclusive. It was also conclusive as to oral evidence about the contents of the documents.

*Re R. v. Snider*¹⁰⁰ was the first case to reach the Supreme Court of Canada involving the issue of Crown privilege. It was a criminal case and the Crown in the right of the province had subpoenaed the Director of Taxation of the District of Vancouver requiring him to give evidence and to produce the income tax returns of the accused. When a claim of privilege was raised by the Minister of National Revenue, a reference under the Constitutional Questions Determination Act¹⁰¹ was made as to whether a Minister of the Crown may refuse to permit production of income tax returns and documents on a criminal trial. *Duncan v. Cammell, Laird & Co. Ltd.* could be distinguished on the basis that it was limited to civil actions;¹⁰² there was therefore no conflict between *Snider* and *Duncan*, each could stand alone. But the Supreme Court took the opportunity to state its view on Crown privilege in general. Each judge was careful in stating that he was considering criminal cases, but the words of the judgments were in wide terms.

Rand J. stated:¹⁰³ “It [Crown privilege] requires as its essential condition that there be a public interest recognized as overriding the general principles that in a court of justice every person and every fact must be available to the execution of its supreme functions” And, “It springs, then from a confidential communication coupled with a paramount public interest in permitting secrecy

⁹⁸ [1952] 3 D.L.R. 508, [1952] O.W.N. 434 (Ont. H.C.).

⁹⁹ *Ibid.*, at p. 509 (D.L.R.).

¹⁰⁰ [1954] S.C.R. 479, [1954] 4 D.L.R. 483.

¹⁰¹ R.S.B.C., 1948, c. 66.

¹⁰² Viscount Simon L.C. in *Duncan v. Cammell, Laird & Co. Ltd.*, *supra*, footnote 2, had stated at p. 633: “The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same.”

¹⁰³ *Supra*, footnote 100, at p. 482 (S.C.R.).

surrounding the communication or its contents to be maintained". And also,¹⁰⁴ "Once the nature, general or specific as the case may be, of documents or the reasons against its disclosure, are shown, the question for the court is whether they might, on any rational view, either as to their contents or the fact of their existence, be such that the public interest requires that they should not be revealed; if they are capable of sustaining such an interest, and a Minister of the Crown avers its existence. then the courts must accept his decision. On the other hand, if the facts, as in the example before us, show that in the ordinary case no such interest can exist, then such a declaration of the Minister must be taken to have been made under a misapprehension and be disregarded. To eliminate the courts in a function with which the tradition of the Common Law has invested them, and to hold them subject to any opinion formed, rational or irrational, by a member of the Executive to the prejudice, it might be, of the lives of private individuals, is not in harmony with the basic conceptions of our policy." Estey J. stated:¹⁰⁵ "As a class these documents, in the ordinary course, do not involve questions of safety or security and as such their production would not be prevented upon the basis of public interest." And "The objection must be made by the Minister presiding over the department, commission, board, or other body in whose custody the documents, the production of which is requested, are held. Before making the objection the Minister should acquaint himself with the facts, and as a responsible Minister of the Crown, decide whether the production of these documents, or evidence in relation thereto, would or would not be detrimental to the public interest. If he comes to the conclusion that their disclosure would be detrimental, it would appear that the more convenient procedure would be that he embody in an affidavit sufficient of the facts to indicate the nature of his objection and that he, as a responsible Minister of the Crown, has concluded that their production or information thereto, in a court of law, would be detrimental to the public interest." And, "*The presiding judge, who, upon the affidavit, is satisfied that the production of these does, and information in relation thereto might be detrimental to the public interest, would give effect to the Minister's objection.*"¹⁰⁶

Kellock J. was of the opinion that strict secrecy was at the basis of the privilege, and documents which have emanated from the public lack this characteristic. Upon the above reasoning he was forced to expressly disapprove of the case of *Weber v. Pawlik*. This case, it will be remembered, was not a criminal case. The wide terms in which the judgments were stated would have appeared to

¹⁰⁴ *Ibid.*, at p. 485.

¹⁰⁵ *Ibid.*, at p. 493.

¹⁰⁶ *Ibid.*, at p. 494, emphasis added.

a reader in 1954 as indicating a disapproval of the holding of *Duncan* in regard to both civil and criminal cases. Professor Willis in the *Canadian Bar Review*¹⁰⁷ at the time stated: "The reasons given by most of the members of the court suggest that the principles laid down by the House of Lords in *Duncan* . . . can no longer be relied on in Canada.

In *Reese et al v. The Queen*¹⁰⁸ Cameron J., held *Duncan* to be of binding authority and denied the discovery of inter-departmental memoranda or correspondence. The case involved a claim against the government for breach of contract. The plaintiff was a veteran who had entered into an agreement with the Soldier Settlement Board for the purchase of certain lands. He alleged that there had been an offer made by the Board, and a contract entered into between the Crown and himself in regard to the mineral rights in the lands. It was necessary to prove that the minerals in the lands had passed from the Superintendent of Indian Affairs to the Soldier Settlement Board and that the local official of the Board who had offered to sell him the mineral rights had the necessary authority to do so. There were six letters between the Commissioner of the Soldier Settlement Board and the Deputy Superintendent General of Indian Affairs regarding the written instructions given by the Board to the official and by the Deputy Minister of Veterans' Affairs to the Board, as well as a letter from the Secretary of the Cabinet to the Department of Veterans' Affairs. Cameron J. held that there are particular classes of communications which the public interest requires should be protected from the production, such as inter-departmental correspondence, although the documents in question would not affect the safety of the state to any degree, yet,

. . . public policy requires that such official communications between officers of the state should be completely unreserved. If they were made with the knowledge that they might later be subject to disclosure in the courts, they would in many cases be shorn of that candour, completeness, and freedom of expression which is desirable in such matters. They would tend to become more cautious and reserved and expressions of opinion would be affected by the possibility of subsequent public disclosure. The officials of the state would be hampered in the performance of their proper functions.¹⁰⁹

In *Re Lew Fun Chaue, re Low Sui Jim and Low Sui Sing*¹¹⁰ the applicant applied to the Department of Citizenship and Immigration for the admission to Canada of his alleged son. The application was refused on the ground that the Department was not satisfied with the identity of the person seeking admission. *Mandamus*

¹⁰⁷ (1955), 33 Can. Bar Rev. 352, at p. 353.

¹⁰⁸ [1955] 3 D.L.R. 691, [1955] Ex. C.R. 187.

¹⁰⁹ *Ibid.*, at p. 701 (D.L.R.).

¹¹⁰ (1955), 112 C.C.C. 264.

was applied for which would direct the District Superintendent of Immigration at Toronto to properly consider the application for admission to Canada of the alleged son on the ground that sufficient proof of identity had been given to the Minister. The documents sought were contained in the file covering the application. The Minister refused to produce inter-departmental and intra-departmental communications, and communications received by the department from outside sources other than the applicants or other government sources. The inter-departmental and intra-departmental documents were held privileged on the basis of *Reese*. In regard to other documents the court stated: "The nature of the proceeding in which production is sought and the nature of the public interest which the Minister seeks to protect are to be considered and their relative importance is to be determined. The court is then in a position to decide which interest is paramount."¹¹¹ And ". . . it is a question for the court to decide whether the objection is sufficient in any particular case."¹¹² The objection of the Crown stating that "production . . . should be contrary to the public interest" was held not to be sufficient.¹¹³ Marriott, Senior Master, felt that he could not disregard the decision in *Reese* in regard to the inter-departmental communications, but he was not prepared to extend the holding. He applied *R. v. Snider* to the other documents and held that the Minister should state in an affidavit sufficient facts to indicate the nature of the objection. He made no reference to the inspection of the documents by himself in order to test the sufficiency of the objection, as by a reading of *R. v. Snider* might be allowed. Upon the filing of a second affidavit by the Minister which stated that "the candour and completeness of the information that would be furnished . . . would . . . be prejudiced",¹¹⁴ the objection was sustained. And so there was developed a form of words sufficiently capable to sustain the claim of Crown privilege.

Reese v. The Queen was followed in *Croft and Croft v. Munings and the Director, the Veterans' Land Act*.¹¹⁵ Spence J. stated that: "Only when, on further investigation and perhaps a more careful scrutiny of the matter that the court is of the opinion that there is no rational ground upon which it could be feared that the public interest would be ill served by production and that the court should order a production over the objection of the Minister."¹¹⁶ The Crown's ground of non-disclosure, namely, that the candour and completeness of such communications might be prejudiced if they

¹¹¹ *Ibid.*, at p. 267.

¹¹² *Ibid.*, at p. 268.

¹¹³ *Ibid.*, at p. 266.

¹¹⁴ *Ibid.*, quoted at p. 270.

¹¹⁵ [1957] O.R. 211.

¹¹⁶ *Ibid.*, at p. 216.

were ever liable to be disclosed, was held to be a rational ground for believing that the production of the documents was not in the public interest.

*Miles v. Miles*¹¹⁷ in the Ontario High Court was basically the same case as *Clemens*. The reason that the plaintiff had not accepted *Clemens* as decisive was that *R. v. Snider* had intervened, and they contended that the dicta in *Snider* should be applied to this civil case. Smiley J. did not accept this argument, and he followed *Clemens*. He stated that in *Snider* "the various Judges in their reasons for judgment appear to confine their judgment to the fact that it is a criminal case".¹¹⁸

In *Re R. v. Snider* the Supreme Court of Canada did not approve *Duncan v. Cammell, Laird, and Co. Ltd.* In 1964 the Supreme Court again faced the question involving Crown privilege, and again *Duncan* was not approved. The 1964 case was *Gagnon v. Quebec Securities Commission*,¹¹⁹ a non-criminal case. In fact, not only was *Duncan* not approved, but the court in a four to one decision declined to follow it, and approved *Re Grosvenor Hotel, London (No. 2)*.¹²⁰ The facts in *Gagnon* were that during the course of an examination of the secretary of the Quebec Securities Commission before the Superior Court sitting in bankruptcy, the appellant, as liquidator of a company, sought the production of a letter alleged to have been written to the Commission by the president of the company at a time when the affairs of the company were being investigated by the commission. Privilege was claimed under article 332 of the Code of Civil Procedure by the Attorney General. The Code provision read:

He [the witness] cannot be compelled to declare what has been revealed to him confidentially . . . as an officer of state where public policy is concerned.

The same shall apply to any member, officer, or employee of a commission, board or other body the members of which are appointed by the Lieutenant-Governor in Council, whenever the Attorney General or Solicitor of the Province certifies by a writing in the possession of the witness, who must produce the same, that public order is involved in the facts concerning which it is desired to examine him.¹²¹

The letter of the Attorney General had stated: "It is in the public interest that the facts and documents assembled during the

¹¹⁷ (1960), 24 D.L.R. (2d) 228 (Ont. H.C.).

¹¹⁸ *Ibid.*, at p. 230.

¹¹⁹ (1965), 50 D.L.R. (2d) 329.

¹²⁰ *Supra*, footnote 48.

¹²¹ This provision has been held to be of the same effect as that of the common law rule: "This rule is common with the law of England." Per Hyde J. in *Commission de Relations Ouvrières de la Province de Québec and Others v. Canadian Ingersoll-Rand Company Limited and United Steelworkers of America*, [1957] B.R. 673, at p. 677 (Que. C.A.).

course of the inquiries conducted by the Quebec Securities Commission not be divulged." The court held by a majority decision that the reasons for claiming the privilege were not specific enough. The reasons must in each case be in relation to "the facts concerning which it is desired to examine him".

Fauteux J., who spoke for the majority of the court, stated that the claiming of Crown privilege was an exception to the general rule that all witnesses must answer or produce documents or other things in their possession.¹²² The exception recognized the supremacy of the interest of the state over that of the litigant. But, Fauteux J. further stated that the privilege was not absolute, but subject to "limitations delineated by the jurisprudence". Citing *Re Grosvenor Hotel, London (No. 2)* with approval he said: ". . . The Master of the Rolls [Lord Denning M.R.], with the concurrence of his colleagues, recalled that it is the Judges who are the guardians of justice", and, he added, "if the confidence placed in them is to have meaning they must be able reasonably to satisfy themselves that the interest of the State goes beyond that of the litigant, or at least that the departmental objection is not unreasonable as in the case, obviously where, for example, documents involving military secrets, diplomatic exchanges, 'cabinet papers' or political decisions made in high places are concerned. There is no doubt that judges will use great caution and will hesitate before exercising this residuary power of review".¹²³ The dissenting judge, Abbott J. held that the letter was sufficient, but he ended his judgment by saying: "This view of the effect of the art. 332 C.C.P., certainly gives to the Minister of the Crown far-reaching power. It may well be that this is out of line with modern day conditions, as to which, of course, I express no opinion. If that be so, I think the remedy must be sought elsewhere than in the courts."¹²⁴

*Gronlund et al v. Hansen*¹²⁵ in the British Columbia Court of Appeal was decided at about the same time as *Conway v. Rimmer*. The plaintiffs were a widow and her children who were suing for damages for the death of the husband and father. There had been a collision at sea between the ship on which the deceased was a seaman and another vessel. While making towards land the vessel with the deceased on board overturned and sank. The deceased was drowned. The defendant was the master of the vessel on which the deceased worked. The Minister of Transport had convened a ministerial inquiry under the Canada Shipping Act¹²⁶ and the plaintiff sought to compel production of the report given after the inquiry

¹²² Art. 330 C.C.P. Now see arts 307, 308, and 313 C.C.P.

¹²³ *Supra*, footnote 119, at p. 333.

¹²⁴ *Ibid.*, at p. 338.

¹²⁵ (1968), 64 W.W.R. 74.

¹²⁶ R.S.C., 1952, c. 29, s. 555, now R.S.C., 1970, c. S-9, as am.

and the notes upon which it was based. The Minister objected to the disclosure of these documents, and stated in his affidavit:¹²⁷

The evidence of the defendant . . . reported therein was given solely for the Minister's information in the course of a preliminary inquiry respecting a shipping casualty and I have formed the opinion that the production thereof would prejudice the candour and completeness of the information that would be furnished in the course of preliminary enquiries respecting shipping casualties and that it is essential to the proper conduct of such enquiries that such documents not be produced and that it would be contrary to the public interest to produce them. . . .

The documents were held to be privileged.

Branca J.A. stated:¹²⁸

When an objection is made to the production of documents entitled to protection on the basis of public policy and the responsible Minister deposes by way of affidavit, as he did here, that he has seen and considered the material in his affidavit embodies sufficient facts to indicate clearly the nature of his objection and then adds that as the responsible minister for the Crown he has concluded that the production of such documents or the giving of information in relation thereto in court **would be detrimental to the public interest, it is incumbent upon the presiding judge to satisfy himself, from the affidavit or otherwise, whether such production might be so detrimental. If satisfied that it might, effect should be given to the Minister's objection.**

What "or otherwise" in the above statement means is not clear. The question to consider, as seen by Branca J.A., was whether the Minister's affidavit satisfied the court that there might be prejudice to the public interest as claimed in the affidavit. The affidavit in this case was again based on candour and completeness of the information. Thus if the Minister states the magic words the question is settled; it would seem that only if the ground of loss of candour and completeness could be refuted would there be any hope of discovery of the documents.

This case is similar to *H.M.S. Bellerophon* in 1874.¹²⁹ There had been a collision between the navy ship and the plaintiff's ship; and it was the duty of the commanding officer to report the collision to the Admiralty. The plaintiff sought discovery of the report. It was objected that disclosure would be prejudicial to the public service and the objection was upheld. Lord Reid in *Conway v. Rimmer* commented on this case by saying: "We do not know whether the report contained any such 'remarks'. If it did, it may well have been right to withhold it; but if it was a purely factual report, I find it difficult to see how the candour of naval officers in reporting facts could be inhibited by any fear that this report might be published."¹³⁰

¹²⁷ *Supra*, footnote 125, quoted at p. 79.

¹²⁸ *Ibid.*, at p. 80.

¹²⁹ (1874), 44 L.J. Adm. 5, 31 L.T. 756.

¹³⁰ [1968] 1 All E.R. 874, at p. 884C.

The report rendered in *Gronlund v. Hansen* was to contain a full statement of the case, and the opinion of the investigator.¹³¹ There would seem to be no reason why the two could not be divorced and the factual content made available to the plaintiffs. The minister could have instituted a formal investigation¹³² which would have been open,¹³³ and there might have been no need for a preliminary inquiry.¹³⁴

After this review of Canadian cases it seems that except for a brief doubt cast in the mid-fifties (*R. v. Snider* and O'Halloran J.A. in *Weber v. Pawlik*) the position in regard to Crown privilege is the same as it was in 1884 in *Bradley v. McIntosh*. The reasons have changed—the Minister's word is no longer in theory final and he must show grounds—but the results are the same by using the "candour and completeness" formula. There is, however, one very important fact to be noted, and that is that at the very least it can be said that the question has not been settled by the Supreme Court of Canada. One could even suggest that the *Gagnon* case is very persuasive authority against the line being taken by the common law provincial courts. This is so for the reason that Civil Procedure Code provisions have been held to be the same as the common law¹³⁵ and also to quote Lord Reid in *Conway v. Rimmer* when speaking of English and Scottish Law: "Here we are dealing purely in public policy—in the proper relation between the powers of the executive and the powers of the courts—and I can see no rational justification for the law on this matter being different in the two countries."

There are also decisions in Canada in which the judge did not accept the claim of Crown Privilege without question. Two cases might bear noting, and although both were decisions of judges of first instance, and the activities of the appeal courts may have severely shaken their authority, yet when one reads the line of cases upon which the House of Lords in *Conway v. Rimmer* supported their decision, then there may still be some power left in these decisions.¹³⁶

¹³¹ *Supra*, footnote 125, s. 557.

¹³² *Ibid.*, s. 558.

¹³³ *Ibid.*, s. 565.

¹³⁴ *Ibid.*, s. 561.

¹³⁵ *Supra*, footnote 117.

¹³⁶ The "line" in *Conway v. Rimmer* consisted of a case in which there had been a statement in the majority opinion that one of the judges had a contrary opinion on the point (*Beatson v. Skene* (1860), 5 H. & N. 838, [1943-60] All E.R. Rep. 882, per Pollock C.B., in reference to Martin B.); there were observations of a single judge (Field J. in *Hennessy v. Wright* (1888), 21 Q.B.D. 509); one judge had looked at certain documents (*Scut-ton J. in Asiatic Petroleum Co. Ltd. v. Anglo-Persian Oil Co. Ltd.*, [1916] 1 K.B. 822), though in a later case the same judge had expressly stated that he could not do so (*Ankin v. London & North Eastern Ry. Co.*, [1930] 1 K.B. 527, at p. 533); a Privy Council case from Australia (*Robinson v.*

In *Lengyel v. Swanson and Calgary Power Company Limited*,¹³⁷ the plaintiff's son, of fifteen years of age, was employed as a farm hand by the defendant, Swanson, and he was electrocuted when the spout of a grain loader came into contact with a high voltage power line erected and maintained by the defendant company on Swanson's farm. The plaintiff pleaded negligence on the part of both defendants. A Royal Canadian Mounted Police officer had investigated the circumstances of the accident and had made a report; also a report as a result of an inspection had been made by an electrical inspector employed by the provincial government. The Attorney General allowed both inspectors to be interviewed by the plaintiff but the official reports were not to be produced. At the trial the claim of Crown privilege was raised when the police officer was asked to disclose statements which had been made to him during his investigation. The claim was overruled since there were *no state secrets involved*.

In a later case *Pocock v. Pocock et al.*,¹³⁸ Chevrier J. in the Ontario High Court held that the provision in The Corporations Tax Act of Ontario¹³⁹ prohibiting disclosure of information in returns under the Act "to any person not legally entitled thereto" did not mean a court and the documents sought could be produced. He stated: "It is a practice which, in latter years has increased in rapid strides, and is one in which, in my opinion, not only should not be encouraged, but which should be vigorously discouraged and allowed to be used only on appropriate occasions, which, indeed, could only be in extraordinary circumstances. It tends to create an arbitrary authority, and whatever may be its real motive it nevertheless constitutes an important and unwarranted obstacle to the proper and unfettered administration of justice."¹⁴⁰

It is extremely interesting to note that although *Conway v. Rimmer* had little effect on the British Columbia Court of Appeal in *Gronlund v. Hansen* the case has apparently had an effect on the Dominion Government because when the new Federal Court was created under the Federal Court Act¹⁴¹ provision was made for Crown privilege by section 41; subsection (1) is the holding in *Conway v. Rimmer*. Section 41 reads:

State of South Australia (No. 2), [1931] A.C. 704); and a case in which the objection had not been taken in due manner, and the documents were looked at by the judge (*Spigelmann v. Hocker* (1932), 50 T.L.R. 87).

¹³⁷ [1947] 2 W.W.R. 648 (Alta).

¹³⁸ [1950] O.R. 734.

¹³⁹ Then S.O., 1939, c. 10, s. 43, now R.S.O., 1970, c. 91, s. 93. The provision in question is common in taxing statutes. The Dominion Income Tax Act, was amended in 1966 and now forbids communication of information "to any person", R.S.C., 1970, c. I-5, s. 196.

¹⁴⁰ *Supra*, footnote 135, at p. 744.

¹⁴¹ R.S.C., 1970, c. 10 (2nd. Supp.).

(1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs the public interest specified in the affidavit.

(2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

The move toward the rule in *Conway v. Rimmer* may have already begun if *Re Board of Moosomin School Unit No. 9 and Gordon et al.*¹⁴² decided by Sirois J. of the Saskatchewan Court of Queen's Bench, is any indication. Sirois J. referred to *Conway v. Rimmer*, *Re Grosvenor Hotel*, and the *Snider* case, and said:¹⁴³

The main principle to be derived from these cases is that the final responsibility for the production of any document lies on the High Court itself with its inherent power to decide what evidence it shall demand in the fulfillment of its public duty to administer justice. It is the Judges who are the guardians of justice and no one else. In arriving at its decision as to whether documents should be produced or not the Court has to weigh in the balance two conflicting interests, on the one side the public interest averred by the Minister in the proper functioning of the public service, on the other side the interests of justice as between the applicant and the respondents. The objection of the Minister to the production of a class of documents is not conclusive and if the Court is of the opinion that it was not taken in good faith or that there are no reasonable grounds for the claim of privilege, it would override the objection and order production; however, that residual power of the Court would only be exercised in exceptional and rare cases. It is rare for the Court to override the Minister's objection although it has the ultimate power in the interests of justice to do so.

The documents in the case were not ordered to be produced since the application for a writ of certiorari was dismissed, therefore the above comment was dictum; like the one robin—it does not necessarily mean that spring is here but it could be the beginning.

Conclusion

In England a reaction by the judiciary against the blank acceptance of the Minister's objection set in and finally resulted in the overruling of *Duncan*. It was first seen in words such as those stated by

¹⁴² (1972), 24 D.L.R. (3d) 505.

¹⁴³ *Ibid.*, at p. 510.

Devlin J. in *Ellis v. Home Office*:¹⁴⁴ "It is a rule, of course, which is particularly unfortunate when the person who is responsible for deciding whether they [documents] should be disclosed or not happens also to be the defendant in the action in which he is being sued. It means that every litigant against a government department—and such litigation is becoming more and more frequent as the sphere of government activities is extended—is denied, as a matter of course, the elementary right of checking the evidence of government witnesses against the contemporary documents." This statement and also those made by the Court of Appeal in the same case led to the Lord Chancellor making a statement in the House of Lords¹⁴⁵ in which he set out the grounds on which Crown privilege should be claimed. In the three cases decided in 1964-65 in the Court of Appeal in England it was stated that the court has a residual power to override the claim of privilege taken by the Crown, and to order the production of the documents sought to be discovered. The interest in the proper functioning of the public service is weighed against the interest in due administration of justice and if the interest in the due administration of justice prevails the documents must be produced.

As one scans the cases which involve the apparent battle between the courts and the administrative tribunals which are populating the scene, one receives the impression that the courts are ever ready to harken to the side of the citizen in his conflict with bureaucracy. Natural justice is raised to a pinnacle from which it strikes terror into the heart of the executive if they dare entangle poor John Citizen. Privative clauses in statutes are rent assunder by courts and administrative decisions questioned and re-decided using "judicial wisdom and mercy" rather than "administrative coldness". How does this picture obtained from administrative law cases stand up when considering Crown privilege? The state sets up agencies by which disputes may be settled quickly by experts in various fields, and the courts interfere to help the suppliant who feels badly done by. Yet when the state denies to the suppliant the possible means of providing his case in court, or, as in *Reese*, appears to protect itself from liability, the courts uphold the state.

The cases have been legion in which a reader would conclude that the principle of natural justice is beyond the grasp of government and the courts. Natural justice has many aspects, but the main branch is the rule *audi alteram partem*—a person has the right to be heard. Might it not be argued that by denying a citizen the means by which to say anything then although he has the opportunity to be heard this opportunity is stripped of any value? In

¹⁴⁴ [1953] 2 Q.B. 135 (C.A.), quoted at p. 136.

¹⁴⁵ See *Conway v. Rimmer*, *supra*, footnote 43, per Lord Reid, at p. 886A.

Reese v. The Queen the plaintiff was given the right to be heard but was not allowed to have anything to say.

It is important to realize that what is being sought from the government is *facts*. A litigant requires facts in order to proceed at trial. Facts are the heart of the legal system and without them a trial would be a mockery. The reason advanced for the denial to make facts available is that candour and completeness of the facts supplied to the government would be prejudiced. A ministerial inquiry is set up and someone is sent to investigate, collect the facts and then report these to the Minister. The purpose of the inquiry is to inform the Minister, and from that information he is to decide as to the disciplinary steps. A witness at the inquiry knows that the information will be used, perhaps even in a public hearing. Will the witness, or even the person whose action is being investigated, be less candid because a court of law might be informed of the facts given? *Gronlund v. Hansen* and the Minister of Transport in that case held that the answer is yes. An inspector visits a factory to inspect the conditions there with respect to safety and health. Will he cover up facts because a court might see the report of the facts as found by him? A citizen makes a report to the government as required by statute. There is the stipulation that a fine will be levied for incompleteness or falsity. Will he say to himself that the taking of the fine is worth the keeping of the information from the courts? If he contested the fine then the facts would be robbed of their secrecy. The government wants the facts, and therefore it will ensure that the reports are truthful. If the report is such that the truthfulness is unverified then how badly does the government want the facts, and would the disclosure be a matter of concern? Perhaps the words of Rand J. in *Snider* bear repeating: "The ban against departmental disclosure is merely a concession to the inbred tendency to keep one's private affairs to oneself."¹⁴⁶

The English courts have, in their opinion, discovered an abuse to the proper functioning of the administration of justice. A remedy was supplied. One might wonder how the remedy will be applied in future cases, and whether one has a tendency to cynicism or not is irrelevant, when one can state that it is better to recognize an illness than not to apparently see it at all.

In considering a claim of Crown privilege it is vital that the interests of all those concerned should be balanced. There is the person seeking discovery, and his need can be very great or very slight. As was said in *United States v. Reynolds*:¹⁴⁷ "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for involving the

¹⁴⁶ *Supra*, footnote 100, at p. 484 (S.C.R.).

¹⁴⁷ *Supra*, footnote 79, at p. 533 (S. Ct.).

privilege is appropriate." In some cases persons not concerned in the litigation might be affected in that the information sought could affect them. Their interest in non-disclosure should be considered.¹⁴⁸ And then there is the state itself in the form of the government official claiming the privilege. The degree of secrecy and the nature of the document sought must be considered. Also the activity in which the state is engaged at the time the document is created must be taken into consideration. In a case such as *Robinson v. South Australia* the state was engaged in a mercantile venture and non-disclosure was far less vital than when it might be engaged in military operations, such as in *Duncan v. Cammell, Laird*. If the need of the litigant is reasonable and national security is not involved, the tendency should be toward disclosure. The administration of justice needs facts.

¹⁴⁸ See The Mining Act, *supra*, footnote 16, s. 17(2). Of course if the decision of the member of the Executive Council is conclusive then the result is the same as under the "candour and completeness" formula.