

STATE SECRETS IN CANADA

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The right of a government to refuse production of information on the ground that it constitutes a state secret is almost invariably regarded as part of the law of evidence under the topic of Crown Privilege or Executive Immunity. In a federal system where the applicable law of evidence depends upon the nature of the proceedings, such a classification leads to absurd results. If, however, such a right is regarded as a matter of substantive law, while there may be problems in selecting the proper law to apply, the results are much more acceptable. Under such a solution, federal law would govern all matters of federal state secrets regardless of which law of evidence governed the proceedings. The applicable provincial law would govern provincial state secrets whether the proceedings are governed by federal evidentiary law or provincial evidentiary law, though there may be difficulties where the province governing the proceedings is different from the province controlling the secret. Assuming the applicable proper law has been chosen, the article then discusses the substantive rules that should govern the refusal to produce a state secret.

Le droit qu'a le gouvernement de refuser de fournir des renseignements en invoquant le secret d'état est presque toujours considéré comme partie intégrante du droit de la preuve, relevant soit du privilège de la couronne, soit de l'immunité du pouvoir exécutif. Dans le système fédéral où le droit applicable dépend de la nature de l'action intentée, ce genre de classification mène à des résultats absurdes. Mais si l'on admet que ce droit est un droit de substance et non de procédure, les résultats sont alors beaucoup plus acceptables, même s'il peut s'avérer difficile de choisir la loi applicable. Si l'on adoptait cette solution, le droit fédéral s'appliquerait à toutes les questions de secrets d'état fédéraux, quelle que soit la loi du droit de la preuve qui s'applique à l'affaire. Le droit provincial pertinent s'appliquerait à tous les secrets d'état provinciaux, qu'on applique à l'affaire le droit fédéral ou le droit provincial de la preuve, quoiqu'il puisse y avoir alors des difficultés dans le cas où la province où l'affaire se poursuit est différente de la province qui tient à préserver le secret. Une fois réglée la question du choix de la loi applicable, il s'agit pour l'auteur d'examiner les règles de fond à suivre au cas où l'état refuse de révéler les secrets d'état.

Introduction

What title one adopts to describe that area of the law concerned with the right of a state to withhold information during court proceedings, is largely a matter of individual choice. "Crown privilege" used to be the most commonly used, but it has, with justification, fallen rather out of favour. The word "crown" may seem unduly restrictive but, more im-

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portantly, the word "privilege" may completely disguise the issues involved and lead to considerable confusion and error, not least of which is that it assumes that we are dealing with an evidentiary problem. "State secrets", "public policy", "public interest immunity" or "executive non-disclosure" have all been used or suggested as more accurately describing what is involved. Whatever the name, what we are concerned with is the right—or perhaps the duty—of the "government" (whatever is meant by that) in the course of proceedings to refuse to disclose or to object to the disclosure of certain information that is in its possession or that is in the possession of some other person on the ground that its disclosure would be contrary to the public interest.

In a federal country such as Canada, the issue may be enormously more complex than in a unitary state such as England, which does not have the divided domestic jurisdictional problems that we have. Here, it may arise in a criminal prosecution, subject to the federal law as to substance, evidence and procedure and involve a secret of the federal government. That is the simplest and easiest fact situation. It may arise in a criminal prosecution, but involve a provincial secret—and that province may or may not be the province in which the prosecution is taking place. Equally well, however, it may arise in a purely civil action (which is governed by provincial law as to substance, evidence and procedure), and involve a secret of that provincial government. That is also an easy and simple case. But it may involve a secret of the federal government or of a province other than the one in which the action is being brought. In addition, and not infrequently, we may be dealing with a proceeding brought by or against a government itself and the issue may involve a secret of that government or some other government. Conceivably, we could be dealing with an action brought by one government against another government with the same variables.¹

In any of these situations, furthermore, we may be dealing with a case where the information—the "secret" involved—is in the possession of the government itself and one of the parties to an action is seeking an order for its production. This will entail a consideration of whether that "government" (in whatever guise it takes) is amenable to such an order before considering any further question. Or we may be dealing with the case where the information is already in the possession of someone else (who may be a party to the action or a third party) and it is the "government" that is objecting to its being introduced into evidence.

In a unitary state, most of these variables make no difference since the same law governs the substance and procedure anyway. Whether the action is civil or criminal, or brought by or against the government or not,

¹ This is quite apart from the international problem that might arise when, in an action brought in Canada, a foreign country objects to the disclosure of one of its secrets. Or *vice versa*. It is not proposed to complicate this article by considering international issues.

only one "government" has a secret to protect. It does not matter in the slightest whether the problem of non-disclosure of state secrets is characterized as part of the law of evidence, or of procedure or of substance. In fact, most English texts (if not all of them) assume that "crown privilege" (as it is there most commonly called) is part of the law of evidence but it makes little difference how one chooses to characterize it.

In Canada, the characterization may be crucial to determine the applicable law, and to assume that it is part of the law of evidence may lead to totally unnecessary blunders. Sections 36.1, 36.2 and 36.3 of the Canada Evidence Act² now contain the federal statutory provisions relating to state secrets. We shall discuss the actual content of these provisions later, but if they purport to contain the total substance of the federal law relating to state secrets there may be problems. It may be argued that section 2 of the Canada Evidence Act limits the application of that Act to criminal proceedings and such other proceedings as are within the federal jurisdiction—admiralty, bankruptcy and the like. Proceedings in the Federal Court would likewise be governed by the provisions of the Canada Evidence Act by virtue of the Federal Court Act.³ If this is the case (and this problem will be explored at a later stage), then if the proceedings in question are, for example, a breach of contract action between two private persons, then the Canada Evidence Act does not apply at all. Whatever law does apply to a federal secret in a civil action between two private persons, it could not, therefore, be sections 36.1, 36.2 and 36.3. It may be some other federal law—viz. federal common law—but not federal evidentiary law.

This may be compared with the former section 41 of the Federal Court Act which treated the issue of federal state secrets not as an evidentiary matter but as an issue of substantive law. Whatever its limits might have been,⁴ section 41 applied whenever the issue of a federal secret arose "in any court".

I. Which law applies?

The first question to be determined, therefore, is which law governs the issue of state secrets? If one assumes—wrongly, it is suggested—that state secrets are part of the law of evidence, then in a federal system one would have to conclude that if the issue of a federal secret arose in a case

² R.S.C. 1970, c.E-10. Sections 36.1, 36.2 and 36.3 were added by the Access to Information Act, S.C. 1980-81-82-83, c.111, s.4.

³ R.S.C. 1970, 2nd Supp., c.10.

⁴ Since it is now repealed, this is academic but in *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218, at p. 248, (1979), 90 D.L.R. (3d) 161, at p. 185, (1979), 43 C.C.C. (2d) 49 at p. 73, Pigeon J. for the majority, stated: "No question is raised as to the constitutional validity and applicability of s.41....". For the repeal of s.41, see Access to Information Act, *supra*, footnote 2, s.3.

governed by provincial evidence law, it would fall to be determined by what that provincial evidence law said about federal state secrets. Conversely, if the issue of a provincial state secret arose in a case governed by federal evidence law, then it would fall to be determined by what the federal evidence law said about provincial secrets. This is not necessarily absurd or impossible but it is rather difficult since the provincial evidence law says nothing expressly about federal secrets nor does the federal evidence law say anything expressly about provincial secrets.

If the characterization of the issue as part of the law of evidence is discarded, however, the solution seems much more acceptable. It seems clear that the basis for keeping information secret lies in some aspect of public policy—that it would be contrary to the best interests of the state that this information be disclosed in court, the “state” being Canada in the case of a federal secret, or the province in the case of a provincial secret. It seems equally clear that what is in the interest of the state of Canada falls to be determined by Canada, and, even if no other provision applies, is to be included in whatever is for the “peace, order and good government of Canada”. It is submitted, therefore, that the issue of a federal state secret is one of substantive law to be determined by the proper law governing that issue and that the proper law is whatever the applicable federal law is, no matter whether the proceedings themselves are determined by provincial adjectival law or not. That is to say, if the issue of a federal secret arises in *any* proceedings—whether criminal or civil—the law determining that issue is federal law. But, as we have seen, it could be argued that the only *statutory* federal law is contained in an act governing *only* criminal proceedings (or other proceedings within the federal competence). If, therefore, the proceedings are not governed by the Canada Evidence Act, the issue is determined not by reference to the Canada Evidence Act, but by reference to the federal common law. If, again, as I shall argue, the law contained in sections 36.1, 36.2 and 36.3 is not the same as the common law, one may end up with the peculiar situation that the rules relating to a federal secret that arises in criminal proceedings are not the same as the rules relating to a federal secret that arises in provincial civil proceedings.

But what of provincial “state” secrets? Again, basically, any province has jurisdiction over its own state secrets, but a province has limited territorial jurisdiction. There is this one crucial distinction between federal secrets and those of a province, which leads to many complications. Whereas the federal law—statutory or common law as the case may be—applies in whichever jurisdiction or province the issue arises, with provincial secrets which law applies may well depend upon where the secret “is”. Obviously, if, for example, one has a civil action in Ontario and the issue involves an Ontario state secret, there is not much difficulty in saying that Ontario law applies. But suppose there is a civil action in Ontario—say an action for breach of contract—and one of the parties

wishes to introduce evidence that is a Manitoba state secret—for example, a memorandum of a Cabinet meeting. If the secret “is” in Manitoba (that is to say, in the possession of someone in Manitoba, such as the Clerk to the Cabinet), then the issue is resolved quite simply on the basis of amenability to jurisdiction. Whether the Manitoba Clerk would come to Ontario with the secret or answer questions on commission in Manitoba, depends, of course, on what Manitoba law would have to say about it. The secret may, however, be in Ontario. It may, for example, be a report prepared for the Manitoba Cabinet which is in the possession of one of the parties or of a person present in Ontario and the Manitoba “government” (that is a Minister or Clerk) may intervene to prevent its disclosure in evidence. It is submitted that, in this case, the Ontario court must apply Ontario law since it can only be guided by what is contrary to the public policy of Ontario. If the objection is upheld, it should be on the ground that it is contrary to the public interest of Ontario to order the disclosure of a Manitoba state secret. This would not necessarily lead to the secret being ordered disclosed, as we shall see.

But what law governs if the issue of a provincial state secret arises in *criminal* proceedings. In these days of militant protests, consumer activism and ecological worries, it is not difficult to imagine this arising. A person is on trial in Toronto for, let us say, wilful damage and seeks access to an Ontario Cabinet minute or, what is even more complicated, to an Alberta Cabinet minute. One thing seems clear and that is that the problem cannot be finessed on jurisdictional grounds since a subpoena issued in a criminal case is valid throughout Canada, either by virtue of the jurisdiction of the trial court or, where the trial is before a provincial court judge, by the simple expedient of issuing the subpoena out of a superior court.

The criminal trial in Toronto is governed by the Canada Evidence Act, of course, and one would assume therefore that any assertion of state secrecy would have to be taken under the provisions of sections 36.1, 36.2 and 36.3. This is quite possible, but if so, there is something strange about the provisions. Section 36.1 refers to a Minister of the Crown in right of Canada *or other person* being able to make objection, so there is no reason why that could not include, for example, a provincial Attorney-General or Clerk to a Provincial Cabinet. The section requires the objection to be based on a specified public interest. Subsection (2) then permits the court (if a superior court) to examine the information and order its disclosure if it concludes that the public interest in disclosure outweighs in importance the specified public interest. If the trial court is not a superior court, then the objection has to be determined by the trial division of the superior court. Section 36.2 provides that if the specified grounds are that the disclosure of the information would be injurious to international relations, or national defence or security, the objection is to be determined only by the Chief Justice of the Federal Court (or his

designate), while section 36.3 makes conclusive any objection based on *federal* Privy Council confidences.

While these sections do not rule out an objection based on a *provincial* secret, they are clearly geared to *federal* secrets, and even if an objection by a *provincial* minister or officer could be taken (or *must* be taken) under those provisions, it would seem that what would have to be decided is whether it would be contrary to the public interest of *Canada* that a *provincial* secret should be disclosed. It seems beyond question that, quite simply, the problem of an objection to disclosure of *provincial* state secrets in the course of a criminal trial was never in the minds of the framers of the legislation.

If, however, we again stop regarding the question of state secrets as a matter of evidence and instead view it as a question of substantive law, we can arrive at a more sensible result. We simply apply the proper law of the substantive issue as to whether this particular provincial secret should be disclosed or not. In other words, it is not sections 36.1, 36.2 and 36.3 of the Canada Evidence Act that control the question of provincial state secrets in criminal cases, but whatever law governs that secret. Thus, if the criminal case takes place in Toronto and the issue is an Ontario state secret, the form, substance and effect of the objection should be governed by what Ontario says about it, not by what the Canada Evidence Act says about it. If the criminal case takes place in Toronto and the issue is an Alberta state secret that is present in Alberta, whether that should be disclosed or not depends upon what Alberta says about it. If the criminal case takes place in Toronto and the issue is an Alberta state secret but the secret is present in Ontario and an Alberta minister or official intervenes to prevent its disclosure in evidence in Ontario, then the form, substance and effect of the objection should be governed by Ontario law, and the decision should be based upon a consideration of whether disclosure in Ontario of an Alberta state secret present in Ontario would be injurious to the public policy of Ontario.

This seems to follow logically, but in cases where the secret is present in Ontario and it is a secret of some other province (in our example, Alberta), though it is all very well to say that the form, substance and effect of the objection should be governed by Ontario law, I am not sure that it makes all that much sense to say that the decisions in Ontario will have to be based on a consideration of whether it would be contrary to the public policy of *Ontario* that a secret of Alberta should be disclosed in Ontario. It is logical because this is the reasoning where *foreign* governments intervene to object. They are entitled to do so, but the decision is based upon whether it is contrary to *Canada's* interest that the secret of a foreign government should be disclosed. Sometimes, of course, it is, because it might affect Canada's international relations or national defence, but where the objection is upheld it is not to protect the

foreign secret, *per se*, but to protect *Canada's* interest in keeping the matter secret.

On principle, therefore, the same should apply to inter-provincial secrets. If an action is brought in one province and another province intervenes to prevent disclosure, the decision ought to be based on whether it would be contrary to the interests of the province of the forum that the secret of another province should be disclosed. But in a federal system, I am not sure that logic should be carried that far. Perhaps one could argue that some principle of reciprocity would dictate that it is in Ontario's interest to refuse disclosure of an Alberta state secret on the basis that it would be against Alberta's public policy to disclose it because, if it did not, the same principle would be applied if the situation were reversed. Or perhaps, in a federal system, some simple principle of comity should ensure that all provinces respect each other's public policy interests.

This seems to leave the following propositions:

- (1) Criminal Case⁵/Federal secret. The applicable law is to be found in sections 36.1, 36.2 and 36.3 of the Canada Evidence Act.
- (2) Civil Case⁶/Federal secret. The applicable law is the federal law, but perhaps not sections 36.1, 36.2 and 36.3 of the Canada Evidence Act because that Act is not applicable. It may, therefore, be the federal common law, which may or may not, as we shall see, be the same as that contained in the Canada Evidence Act.
- (3) Civil Case/Provincial Secret of same Province. The applicable law is whatever the Provincial law is. This may be statutory or common law.
- (4) Civil Case/Provincial secret of different Province. This would depend upon whether the secret is in the possession of someone within the jurisdiction of the province of the forum and the "foreign" province intervenes to object to its disclosure, or whether its locus is outside the province and one of the litigants seeks to have it produced in the forum. If the former, the form and effect of the objection is governed by the *lex fori*. Whether the court should uphold the objection should, in principle, depend upon whether it would be contrary to the public policy of the forum for a foreign provincial secret to be disclosed but reciprocity or comity may result in the forum applying the public policy of the foreign province. If the latter, the applicable law

⁵ Also included would be any other proceeding governed by the Canada Evidence Act.

⁶ Or any other proceeding, not governed by the Canada Evidence Act.

would be that of the foreign province. In any case, a subpoena issued by the forum would have no extra-provincial effect, and any evidence taken on commission would be subject to the law of the foreign province so, in practice, this is likely to be only a theoretical problem.

- (5) Criminal Case/Provincial Secret. Since the proceedings would be subject to the Canada Evidence Act, one could argue that sections 36.1, 36.2 and 36.3 are exhaustive of the topic of state secrets in general and any objection would have to conform to the requirements and limitations there set out. However, the spirit, if not the literal words of those sections seems to be directed only towards federal state secrets and it is doubtful whether the federal government has jurisdiction over purely provincial secrets. If it is held that they have no relevance to provincial secrets then there are problems. It may be there is an as yet undiscovered federal common law in respect of provincial state secrets or it may be that, even though these are criminal proceedings, the substantive law concerning a provincial secret is properly that of the province concerned. If, as I would argue, that is the case, then the "province concerned" is that where the secret is located. But in criminal cases, a subpoena issued by the superior court of one province *does* have extra territorial effect. The result is that while the superior court of Ontario *could* subpoena the Clerk of the Privy Council of Alberta in a criminal case, it will not, if, under Alberta law, the information he has is properly a state secret of Alberta.

II. *The Substance of the Doctrine*

A. *Federal law when it applies.*

There is, first of all, the Access to Information Act⁷ to consider. Section 4(1) provides that, notwithstanding any other act but subject to the provisions of the Access to Information Act itself, every person has a right of access to any record under the control of a government institution. The amendments that are now sections 36.1, 36.2 and 36.3 of the Canada Evidence Act were passed as section 4 of the Access to Information Act, section 3 of which repealed section 41 of the Federal Court Act. It might be therefore that the right given to free access is subject to sections 36.1, 36.2 and 36.3, or it might be that the Canada Evidence Act falls within the provision "notwithstanding any other Act" so that the limitation does not include the provisions of the three sections. In any case, it is rather a pointless problem since the limiting provisions of the Access to Information Act are so broad that it is inconceivable that

⁷ *Supra*, footnote 2.

anything in respect of which objection was made under the Canada Evidence Act would not also be within the exceptions listed in the Access to Information Act. These are contained in sections 13 to 23 and are much wider than those contained in the Evidence Act provisions. The result is that, in effect, the right of the government to keep information secret under the Evidence Act is not affected by the provisions of the Access to Information Act.

Let us at this stage, consider in more detail the effect of section 2 of the Canada Evidence Act. This provides that Part I (which includes sections 36.1, 36.2 and 36.3) applies to all criminal proceedings and to all civil proceedings "*and other matters whatever respecting which the Parliament of Canada has jurisdiction in this behalf*". It is clear that Parliament has jurisdiction over all criminal proceedings and over certain civil proceedings, and therefore the Canada Evidence Act applies to such proceedings. It is also clear that the Canada Evidence Act does not apply to an ordinary civil action between two private persons—say, for a tort or breach of contract. But what is meant by "*other matters whatever respecting which the Parliament of Canada has jurisdiction in this behalf*"? I have already argued that Parliament does have jurisdiction over the *substance* of federal secrets, even if it does not have jurisdiction over the *evidence* in civil actions. If we stop regarding the issue of a federal state secret as one of evidence, therefore, there is no reason why sections 36.1, 36.2 and 36.3 should not apply equally to civil proceedings (the evidence in which is governed by provincial law) as to criminal proceedings (the evidence in which is governed by federal law).

Unfortunately, of course, the provisions are contained in something called an Evidence Act, and the federal government has no jurisdiction to legislate over the evidence law of provincial proceedings. One could plausibly argue that the sections are only applicable in respect of proceedings that are governed by federal evidentiary law, and that if an issue of a federal state secret arises in a provincial proceeding, while federal law governs the substance of that issue, it cannot be the three sections of the Canada Evidence Act because that Act has no applicability.

I would submit that the phrase "*other matter whatever respecting which the Parliament of Canada has jurisdiction in this behalf*" is wide enough to include any matter of *substance* that fortuitously happens to be included in a Canada Evidence Act and would be applicable no matter which evidence law governs the proceedings. In this way, the only blunder would be the inelegance of including a matter of substance in an evidence Act.

If the contrary is held and it is decided that because the Act is entitled the Canada Evidence Act, it is only applicable to these proceedings over which the federal government has jurisdiction to legislate evidentiary matters, then we are left with the conclusion that none of the

provisions of Part I of the Canada Evidence Act (including sections 36.1, 36.2 and 36.3) are applicable to provincial civil proceedings and that it must be a common law federal law that would apply to federal secrets arising in such proceedings.

On the first hypothesis, the provisions of sections 36.1, 36.2 and 36.3 would apply *whenever* an issue of a federal secret arises in any case in Canada, no matter what the court and no matter what the nature of the proceedings. Under section 36.1(1) a Minister of the Crown in right of Canada or other person may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest. One would assume that in most cases it will be a Minister who may make the objection, but the section makes it clear that anyone may object. The objection must be by either oral or written certification and must state specifically the public interest that would be harmed by the disclosure. If the court, person or body before whom the objection is taken is not a superior court then application shall be made for the determination to be made by the provincial superior court trial division or by the Federal Court Trial Division if the person or body in question is not a court established under a law of a province. There are various provisions for appeals that need not concern us here.

Under section 36.1(2), the court may examine or hear the information which is being objected to (subject to any restrictions or conditions that are appropriate—such as, presumably, hearing the information in private), and if it concludes that the public interest in disclosure outweighs in importance the specified public interest it may order or permit its disclosure. This, however, is subject to sections 36.2 and 36.3 which we will consider in a moment. Basically, then, the Act adopts the principle, only reached at common law after some considerable soul-searching,⁸ that the objection is not conclusive; the court may examine the material for itself before making the decisions.

The court must balance two conflicting public interests—the public interest that will be served by concealment and the public interest that will be served by disclosure. The private interests of the litigants are not, as such, to be taken into consideration since, presumably, those private interests would always favour disclosure. But the *public* interest in disclosure is that the administration of justice should not be hampered by undue concealment. What is “undue” would, of course, depend upon all the circumstances—the relevance of the information, the importance of the secret, other available means of proof, and the importance of the litiga-

⁸ The cases will be discussed later since they are still relevant to determine the common law position in Canadian jurisdictions.

tion, including whether the proceedings are civil in nature, or whether they are criminal and the information important for the defence.

Sections 36.2 and 36.3 contain exceptions to these basic principles. Section 36.2 is not all that different but it enumerates three types of specified public interest, namely, international relations, national defence or security, in the case of which the determination shall be made only by the Chief Justice of the Federal Court (or his designate) *in camera* and, if required by the objector, in Ottawa. It is also possible for the objector, if he wishes, to make representations *ex parte*.

It is section 36.3 that contains the extraordinary provision. If a Minister, or the Clerk of the Privy Council for Canada, certifies in writing that the information constitutes a confidence of the Queen's Privy Council for Canada then the objection is conclusive and disclosure shall be refused without examination or hearing of the information by the court. A confidence of the Privy Council is not exhaustively defined but it includes a Council agenda, minutes of deliberations or decisions, a record reflecting communications between Ministers relating to the making of government decisions, draft legislation and the like. "Council" includes committees of the Privy Council and committees of cabinet. There are some exclusions that are not likely, in practice, to be of great significance.

Since section 36.1 only says that the court "may" examine the information, it seems clear that the court does not have to examine it and we are left with the problem of when *should* it examine the information in question. This was the subject of the decision of the Federal Court of Appeal in *Re Goguen and Albert and Gibson*⁹ but since this difficulty is at the core of the problem both under section 36.1 and at common law, it will be discussed at a later stage.

If, contrary to what I have suggested, sections 36.1, 36.2 and 36.3 are only applicable to *proceedings* governed by the Canada Evidence Act, then what is the position when the issue of a federal secret arises in a provincial civil case? Presumably the answer is that federal law which governs federal secrets that are not contained in the Canada Evidence Act. It is doubtful if this federal "common law" is, in fact, the same as that contained in sections 36.1, 36.2 and 36.3. Indeed, if it is the same as provincial common law, it is virtually certain that it is not the same, as will be seen in the discussion of provincial law.

There is one last point on the applicability of federal law that should be further examined, and that is the question of what law applies when a matter of a provincial secret arises in criminal proceedings. The proceedings themselves are, of course, governed by the Canada Evidence Act by virtue of section 2, including sections 36.1, 36.2 and 36.3, if those sections have anything at all to do with the substantive law of provincial

⁹ (1984), 7 D.L.R. (4th) 144 (F.C.A.).

state secrets. As I have stated, there is nothing in the sections that expressly excludes the possibility of a provincial state secret being within provisions of the Act since the objector may be "any person" and the ground "any specified public interest". Section 36.3 would never apply since it is limited to secrets of the Privy Council for Canada. But I do not think one can have it both ways. If the federal government has jurisdiction over any federal secret in no matter what court or what proceedings the issue arises because the law governing a federal secret should be federal law, then it is difficult to see how the federal government would have jurisdiction to legislate over a provincial state secret *qua* provincial secret. If the provincial secret has federal ramifications, then, of course, the federal government has an interest in keeping it concealed but that would be because it is contrary to the public interest of *Canada* that it should not be disclosed and sections 36.1 and 36.2 would apply. But if it is solely concerned with the *provincial* public interest, then I would suggest that sections 36.1 and 36.2 would be *ultra vires* insofar as they may be considered to affect provincial secrets, even if the issue arises in proceedings governed by the federal evidentiary law. Again, to reach that result, we would have to stop regarding the issue of state secrets as part of the law of evidence, and regard it, instead, as part of the proper law governing the substance of state secrets.

If this view is incorrect then one would have to say that in any proceedings governed by federal evidentiary law, an issue of *any* state secret—whether provincial or federal—falls to be determined under the provisions of sections 36.1, 36.2 and 36.3 of the Canada Evidence Act. But conversely, I think one would also have to say that in any proceedings governed by provincial evidentiary law, an issue of *any* state secret—whether provincial or federal—falls to be determined by the *provincial* law, not by these sections and that seems to me to be an untenable position.

Which view is correct when an issue of a provincial state secret arises in criminal cases would lead to differing important consequences. If section 36.1 applies, the issue could not be determined by an inferior court judge and would have to be referred to a Superior Court judge which does not seem, from any of the cases, to be the rule at common law. The form and content of the objection may, as we shall see, be different.

I would therefore suggest that if, in criminal proceedings, an issue of a provincial state secret arises, sections 36.1 and 36.2 have no applicability (unless the federal government objects on the ground that disclosure of the particular *provincial* information would be injurious to the public interest of *Canada* as a whole—*e.g.* that it would be injurious to international relations), and that the law that should be applied is whatever provincial law governs that secret. For the reasons I set forth earlier, that should be the law of the province where the secret "is"—the *lex fori*

if the secret is present in that province, or the *lex loci* if the secret is present in some other province.

B. *Provincial law.*

Most provinces do not have any statutory provisions except those governing the formality of *who* may make the objection—usually providing for a Deputy Minister or some such official being authorized to make the objection—but these do not affect the substance of the law. All provinces now provide for actions being brought by or against the Crown and in such actions any law relating to non-disclosure is preserved, but again this provision does not affect the substance of the law relating to provincial state secrets.

The Quebec Code of Civil Procedure¹⁰ has, in Article 308, a statutory provision of the simplest kind. It merely states that a witness in the circumstances under consideration is not compellable to answer, provided that the judge is of the opinion that disclosure would be contrary to public order. Alberta, too, has a statutory provision¹¹ respecting government employees but this is directed towards the protection of such employees rather than towards the substance of the law.

I do not propose to trace the history of the common law, which has been well documented elsewhere.¹² It is now beyond doubt that at common law there is no conclusive right of concealment on the part of the government even in the case of cabinet secrets. Certainly, in England,¹³ Australia¹⁴ and New Zealand¹⁵ the courts have insisted upon their ultimate right to inspect and make their own determination as to whether the material should be disclosed. The Canadian courts, too, have maintained this position.¹⁶ It seems clear that when the appropriate person—a Minis-

¹⁰ R.S.Q. 1977, c.C-25.

¹¹ R.S.A. 1980, c.A-21, s.35.

¹² The most recent writing is R.J. Rolls, *Privilege in Civil Litigation: The Winning Edge; Tactics for Success*, in the 1984 Annual Institute on Continuing Legal Education (C.B.A.). Other articles include S.I. Bushnell, *Crown Privilege* (1973), 51 Can. Bar Rev. 551; S.G. Linstead, *The Law of Crown Privilege in Canada and Elsewhere* (1969), 3 Ott. L. Rev. 79; I.G. Eagles, *Cabinet Secrets as Evidence*, [1980] Public Law 263.

¹³ Starting with *Conway v. Rimmer*, [1968] A.C. 910, [1968] 1 All E.R. 874 (H.L.) and leading up to *Burmah Oil Co. Ltd. v. Bank of England*, [1980] A.C. 1090, [1979] 3 All E.R. 700 (H.L.) and *Air Canada v. Sec. of State for Trade*, [1983] 2 A.C. 394, [1983] 1 All E.R. 910 (H.L.).

¹⁴ *Sankey v. Whitlam* (1978), 142 C.L.R. 1, 21 Aust. L.R. 505 (H.C. Aust.).

¹⁵ *Environmental Defence Society v. South Pacific Aluminium Ltd.*, [1981] 1 N.Z.L.R. 146, at p. 153 (C.A.).

¹⁶ *Mannix v. The Queen* (1981), 126 D.L.R. (3d) 155 (Alta. C.A.); *Re Gloucester Properties Ltd. and the Queen* (1981), 123 D.L.R. (3d) 33, [1981] 4 W.W.R. 179, 27 B.C.L.R. 10 (B.C.C.A.); *Re Carey and the Queen* (1983), 1 D.L.R. (4th) 498, 43 O.R. (2d) 161 (Ont. C.A.). See also *Pavey v. Furrrie* (1979), 106 D.L.R. (3d) 425, [1980] 1

ter or other official¹⁷—objects to disclosure, even, for example, of a cabinet memorandum, the court has the right to inspect the information for itself and to decide whether the public interest would be better served by disclosure or concealment.

It does not appear from the cases that the courts have, at common law, placed any limitations on *which* courts have jurisdiction to determine issues of state secrets, probably because the matter has never really arisen. It would seem, in any case, that a statutory provision would be required before any court, having jurisdiction over the proceedings, could be ousted from jurisdiction over a particular issue that arises in the course of those proceedings. In the absence of a statutory provision, any court, whether inferior or superior, could determine the issue.

The other difference between the common law provincial law and the provisions of the Canada Evidence Act may lie in the form and procedure of the objection. The Canada Evidence Act permits the objection to be made “orally or by certificate” “by the Minister or any other person” but requires the objection to state the specified public interest involved.¹⁸ At common law, it would appear that the objection must be made either by affidavit or by certificate (but not, *semble*, orally) and by a Minister (or, by virtue of various Evidence Acts, his Deputy).

C. When Should the Court Examine?

While the common law and section 36.1 (and section 36.2) permit a court to examine the information for itself, the great unanswered question is *when* should a court do so. Or rather, it is not that the question is unanswered, so much as that the answers that have been given are inconclusive and unhelpful.

When the House of Lords, in *Conway v. Rimmer*,¹⁹ first retreated from the position of upholding the conclusiveness of a ministerial objection it enunciated in *Duncan v. Cammell Laird*,²⁰ all members of the House of Lords agreed that the court should not look at the information needlessly and if it was clear on the material before it that disclosure should not be ordered, then it was unnecessary to inspect it. But this does not help with the problem when the situation is not clear cut and Lord Pearce²¹ set forth some fairly simple propositions. First of all, the court has to be satisfied that the information is not only relevant (which it has to

W.W.R. 441, 13 C.R. (3d) 79 (Alta. Q.B.) and *Smerchanski v. Lewis* (1981), 120 D.L.R. (3d) 745, 31 O.R. (2d) 705 (Ont. C.A.).

¹⁷ See *Pavey v. Furrie*, *ibid.*

¹⁸ *Supra*, footnote 2, as amended, s.36.1(1).

¹⁹ *Supra*, footnote 13.

²⁰ [1942] A.C. 624, [1942] 1 All E.R. 587 (H.L.).

²¹ *Conway v. Rimmer*, *supra*, footnote 13, at pp. 988 (A.C.), 911 (All E.R.).

be in any case) but also that it is important for the applicants' case so that, absent any other consideration, disclosure would be ordered. Second, it should, without looking at the information, give all due consideration to the public interest involved, and permit the Minister to explain why disclosure should not be ordered and allow him to elaborate on his reasons. Third, if the matter is still in doubt, the court should call for the information, and, under any conditions that may be necessary to preserve confidentiality and secrecy, examine it for itself and make its own decision whether to refuse disclosure, order disclosure, order partial disclosure or make any other order suitable in the circumstances.

This simple approach puts no onus on the applicant apart from showing not only relevance, but also the importance of the information to his case. Once that is done, the onus is on the Minister to show why the information should not be disclosed, without the court examining the information. If the court is undecided, or, up to that point is tending towards disclosure, it should examine the information before reaching a decision.

This basic approach appears to have been the one favoured by Canadian courts—at least until recently.²² But just as the English judges seem to be having second thoughts about whether Lord Pearce's simple approach was correct, so there are signs that the Canadian courts too are opting for more stringent requirements. Since *Conway v. Rimmer*, some disturbing phrases have been adopted by various English judges, that seem to favour casting some sort of onus on the applicant to persuade the court that it should look at the information—"only if it is really necessary",²³ "in rare instances where a strong positive case is made out",²⁴ "situations where grave doubt arises",²⁵ "only where the court has definite grounds for expecting to find material of real importance".²⁶

Something of this unease is to be observed in two recent Canadian cases.²⁷ Obviously the courts cannot countenance mere fishing expeditions, and, equally clearly, they would not wish to inspect secret information unnecessarily. On the other hand, why should it be the applicant who has the burden, even of persuading the court merely to inspect the information?

²² See the cases cited *supra*, footnote 16, except for *Re Carey and the Queen*.

²³ Lord Morris in *Conway v. Rimmer*, *supra*, footnote 13, at pp. 964 (A.C.), 896 (All E.R.).

²⁴ Lord Wilberforce in *Burmah Oil*, *ibid.*, at pp. 1117 (A.C.), 711 (All E.R.).

²⁵ Lord Keith in *Burmah Oil*, *ibid.*, at pp. 1135 (A.C.), 725 (All E.R.).

²⁶ Lord Fraser in *Air Canada v. Sec. of State for Trade*, *supra*, footnote 10, at pp. 436 (A.C.), 917 (All E.R.). I have taken these examples from Rolls, *loc. cit.*, footnote 12.

²⁷ *Re Goguen and Albert and Gibson*, *supra*, footnote 9; *Re Carey and the Queen*, *supra*, footnote 16.

In *Re Goguen and Albert and Gibson*²⁸ the Federal Court of Appeal had its first application under section 36.2 of the Canada Evidence Act. The information sought concerned certain Royal Canadian Mounted Police matters, disclosure being objected to on the grounds of national security and national defence. On the application, Thurlow C.J. had refused to order disclosure and refused to inspect the information, stating:²⁹

... the judge hearing the application will have to be persuaded on the material that is before him either that the case for disclosure, in the circumstances, outweighs the importance of the public interest in keeping the information immune from disclosure or, at the least, that the balance is equal and calls for examination of the information in order to determine which public interest is more important in the particular circumstances.

Counsel for the applicants in the Federal Court of Appeal suggested the following test:³⁰

...the court should examine the information if what the applicant has invoked in favour of disclosure is serious enough that it may in the circumstances outweigh the reasons invoked for protection against disclosure.

De Lain J. (Ryan J. concurring) was sympathetic to this submission but nevertheless held that Thurlow C.J. was correct in refusing to examine the information. In his view, the court should consider the opposing public interests involved and only inspect the information if it was likely to affect the balance of these interests. Marceau J. agreed with the result, but was even more specific in his view that, once the objection has been made, the onus of showing why the information should be examined is on the applicant.

In *Re Carey and the Queen*,³¹ the Ontario Court of Appeal had to consider a claim for secrecy of cabinet documents which it upheld without examination, even though the certificate of objection failed to specify the precise grounds of public interest involved, merely claiming non-disclosure on the basis of cabinet documents. Thorsen J.A. (speaking for the court) held that before such documents would be inspected the applicant would have to persuade the court that the likelihood of the documents yielding up evidence that will substantially assist his case is sufficiently great that the court ought thereupon to inspect.

This "first stage" (as it is becoming called since *Goguen* and *Carey*) of whether the court should even examine the information, is quite independent of the "second stage" of whether disclosure will be ordered after the examination. It seems clear that the courts have imposed some sort of onus on the applicant at the second stage. In *Carey*, the court specifically held that the burden is on the applicant to show that the information would substantially assist his case, that the issue is one of real substance and that what is sought to be established cannot be established by other

²⁸ *Ibid.*

²⁹ Referred to in the F.C.A. judgment, *ibid.*, at p. 148.

³⁰ *Ibid.*, at p. 151.

³¹ *Supra*, footnote 16.

evidence, before it will decide that the public interest in disclosure outweighs the public interest in concealment. But it does not follow from this that there should be any onus on the applicant at the first stage, beyond that of demonstrating relevance, even if it is correct to put the burden of persuasion on the applicant for disclosure at the second stage. The reluctance of the courts to overrule a Ministerial objection does not necessarily entail a reluctance to *see* what is being objected to.

Or is it that Cabinet secrets are in a different category from other secrets? This is manifestly the case under the Canada Evidence Act by virtue of section 36.3, but if *Carey* stands for a general principle applicable to *all* state secrets, then it seems regrettable. It is not the approach taken in Australia³² or New Zealand,³³ where the courts are not at all reluctant to see for themselves, even in the case of Cabinet secrets. But it is the approach that *Goguen* seems to adopt, even with secrets apart from Cabinet secrets. It seems undesirable, as a legal proposition, to make the question of the examination of a state secret depend upon the strength of mind of the individual judge. Rather than adopt the *Carey* or the *Goguen* approach, I would submit that it is preferable not to complicate the issue by questions of burdens of proof and who has the onus of proving what. Once the applicant has demonstrated relevance (which surely disposes of the "fishing-expedition" worry) and once the Minister has stated his objection and the ground for it, unless the matter can clearly be decided upon the material then before it, why should not the court (at least if it is a superior court) then examine, under whatever conditions of security may be appropriate, the material in question? This, after all, is only the first step, and by no means prejudges the final decision.

It is probably true that on the second stage, once the public interest in concealment has been shown, the onus is on the applicant to show that the public interest in disclosure outweighs the public interest in concealment. This may very well depend upon factors such as the materiality of the evidence, the importance of the secret and whether or not the same issue could be proved by other means, but it is difficult to see how, whenever there is any doubt, this could be resolved save by examining the contents of the secret.

D. Counsel's Right to Examine.

An interesting issue arose in the Australian case of *Alister v. The Queen*.³⁴ The case involved something of a *cause célèbre* in which members of a sect had been convicted of conspiracy to murder and attempted murder. They sought disclosure of a number of police files, and objection

³² *Sankey v. Whitlam*, *supra*, footnote 14.

³³ *Environmental Defence Society v. South Pacific Aluminium Ltd.*, *supra*, footnote 12.

³⁴ (1984), 58 A.L.J.R. 97 (H.C. Aust).

was made on the ground of prejudice to national security. The Security Intelligence Organization produced the files for inspection by the court, whereupon counsel for the applicant submitted that he, too, should be permitted to see their contents in order to advance his arguments as to their relevance and materiality. The court refused counsel's request, saying, *inter alia*.³⁵

...we do not discount the significance of the argument that the parties may be more able than the members of the Court to discern possible relevance of material in a trial of this kind, but we remain satisfied that the material would not assist the appellants.

This was in spite of the fact that the Federal Attorney-General had, as he stated, no objection to counsel for the parties inspecting the material for themselves under conditions in which security could be maintained. What counsel wished to do was to support his argument that the public interest in disclosure outweighed the public interest in concealment. To do this he had, among other things, to demonstrate its importance and materiality to the litigation and to show that the facts could not be proved by any other available evidence. It was difficult for him to do this if he was not permitted to see the files for himself in order to advance his argument. In the result, the court denied itself the assistance of counsel in reaching its conclusion. If the case is followed in Canada, it will mean that counsel for the applicant is not entitled to see the information and must present his arguments *in vacuo*, even though he swears to preserve the secrecy of the information he is privy to.

E. The Charter.

Lastly, we must consider whether the Charter of Rights and Freedoms³⁶ could affect any of this. It is difficult to imagine that the position in the case of civil actions is affected at all since none of the provisions of either the Charter or the Bill of Rights seem to be applicable, but an argument could be made that in criminal proceedings, where a person has been "charged with an offence" there may be different considerations. Section 11(d) of the Charter guarantees the right to be presumed innocent until proven guilty according to law in a fair and public hearing, subject, of course, to the limitation in section 1. Section 2(c) of the Bill of Rights states that no law shall be applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice.

I am disturbed by section 36.3 of the Canada Evidence Act, and I am disturbed by the developments in *Carey* and *Goguen* discussed above. Is it demonstrably justified in a free and democratic society to make Ministerial objections to the disclosure of Cabinet secrets conclusive? It is

³⁵ *Ibid.*, at p. 124.

³⁶ Part 1, Constitution Act 1982, Schedule B to the Canada Act 1982, c.11 (U.K.).

difficult to answer that in the affirmative when many other jurisdictions as free and democratic as Canada seem to manage quite well without such a rule. If not, do such conclusive objections violate the right to a fair trial or undercut the right to be presumed innocent?

Is it fair to require the applicant accused to shoulder a burden of demonstrating why the court should even inspect documents for which secrecy is claimed? Perhaps it *is* justifiable to require him to show why the public interest in disclosure outweighs the public interest in secrecy, since most jurisdictions seem to have reached that conclusion, but none seems to have considered it necessary to go to the lengths of *Carey* and *Goguen* at the first stage of the enquiry.

Is it fair that an accused should be denied the right to have his counsel inspect documents which the court has inspected—a proposition which does seem contrary to our notions that a court should not be able to use evidence that only it (and possibly the prosecution counsel) has seen?

Conclusion

I cannot help thinking that the whole law in Canada is in a shocking state of confusion, yet the instances when this problem is likely to arise are increasing rather than decreasing. From one case every few years, we now seem to be seeing them two or three times a year. Perhaps only legislation—on both levels of government—can now resolve the difficulties. I advance the following propositions either because I think they now represent the law or because they may form some basis for coherent legislation.

- (1) State secrecy, public immunity, crown privilege or whatever one chooses to call it is not a question of the law of evidence but of substantive law.
- (2) That law is the law that properly governs the secret involved and that depends upon what public interest is being protected.
- (3) If a Canadian, federal interest is invoked, then federal law applies, no matter what the nature of the proceedings.
- (4) If a provincial government's interest is invoked then the law of that province applies, save that a province is territorially limited and its law cannot, except on some principle of reciprocity or comity, have extra-provincial effect.
- (5) Apart from section 36.3 of the Canada Evidence Act (which should be repealed), no objection to *any* secret is absolutely conclusive.
- (6) An applicant for disclosure must demonstrate the relevance of the information and, if this is shown, the Minister or other official must object and specify the interest involved.

- (7) The court may uphold the objection without examining the information where it is apparent that the public interest in concealment is paramount on the material before it.
- (8) The court should never order disclosure after an objection without first examining the information.
- (9) If the paramountcy of the public interest in concealment is not apparent on the material then before it, the court should examine the information.
- (10) If the court examines the information, then both or all counsel should have the right also to examine it, subject to whatever safeguards are called for, in order better to be able to present their arguments.
- (11) The ultimate decision whether to order disclosure or not depends upon the applicant for disclosure persuading the court that the public interest in disclosure outweighs the public interest in concealment.
- (12) The factors going to the ultimate decision are, on the one hand, not only the relevance but the high degree of relevance of the information, the importance of the issue in the particular case, the nature of the proceedings themselves and the availability of other methods of proof, against, on the other hand, the type of public interest involved, and the prejudice that might ensue from disclosure of this particular information or of this type of information.
- (13) It is preferable to have these matters decided by superior court judges in spite of the inconvenience, and the approach taken in section 36.1(2) of the Canada Evidence Act should be more widely adopted.