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CROWN PRIVILEGE IN THE 1980's: A DECADE OF CHANGE

Memorandum by the Commonwealth Secretariat and a paper prepared by Dr. D. C. Pearce, Reader in Law of the Australian National University

The suppressing of evidence in the public interest gives rise to difficult and important questions, for the public interest also requires that justice be done, and the private litigant's right to the production of all relevant documents otherwise admissible has to be weighed against claims based on the concept of Crown privilege.

2. Dr. Pearce's paper reviews recent decisions in the Commonwealth which have attempted to resolve a conflict which can never be eliminated. Against the background of decided cases, he discusses general principles and the basis of the courts' approach to claims for Crown privilege; and gives an account of recent decisions which relate to particular types of evidence. Dr. Pearce also refers to legislation relating to the subject.

3. Ministers may wish to review these developments and exchange ideas and experience in an area of the law which has a potential for conflict between the executive and the judiciary regarding who should be the final arbiter in determining the issues involved.

CROWN PRIVILEGE IN THE 1970's: A DECADE OF CHANGE

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Introduction

Since the leading decision of the House of Lords in *Conway* v. *Rimmer* delivered in 1968, Crown privilege questions have come before the courts on many occasions. The purpose of this paper is to examine the attitude shown by the courts in recent years to the admission of government information in evidence in judicial proceedings.[1]

This area of the law is usually referred to as "Crown privilege" but it is doubtful whether this expression is accurate. The non-revelation of governmental information embraced in the notion of Crown privilege is not a privilege in the sense in which that expression is used in the law of evidence.[2] Where evidentiary privilege attaches to certain communications, such as those between husband and wife or between solicitor and client, evidence of the communications cannot be given in judicial proceedings. The privilege is, however, personal and may be waived by the party for whose benefit it exists. Crown privilege, on the other hand, contemplates a situation in which certain information is not made available in judicial proceedings because the public interest demands that it be kept secret. It is not a privilege that the Crown possesses, but one which is exercised by the Crown on behalf of the public at large. The Crown may intervene in litigation between third parties to prevent disclosure. If the point is not taken by the Crown (as might well be the situation if the issue arises in the course of litigation between private individuals), it is the duty of the court to rule that the information be not revealed. Secondary evidence of the information in question cannot be given. But while it may not technically be a "privilege", the term "Crown privilege" has assumed a usage which makes it convenient for the purposes of this discussion and the expression will be employed accordingly.

It is proposed to outline first the general principles adopted by the courts in determining Crown privilege questions and then to enumerate some of the factors to which the courts have had regard in determining Crown privilege claims. Finally, some recent decisions relating to the application of those principles to specific materials or fact situations will be considered.

It should be interpolated, at this point, that the matters here discussed have only limited application to those countries to which a provision equivalent to section 123 of the Indian Evidence Act applies. That section provides–

> "123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of state, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."[3]

Most of the comments hereunder relate to "unpublished official records" and hence the issue of their admissibility would not arise where this provision applies. However, the courts have moved away from "Crown" privilege and are now determining the admissibility both of government documents and documents that are only marginally related to affairs of state by an application of public interest criteria. To this extent this paper is applicable to the countries mentioned above as the matters with which it is concerned are pertinent to the admission in evidence of documents not related to affairs of state[4].

General principles

(1) *Body having power to determine whether privilege applies.* From the time when Crown privilege claims first made their appearance in the nineteenth century, most courts considered that they were bound by a certificate from a responsible authority stating that it was inappropriate for governmental documents to be revealed in the course of judicial proceedings. There were some notable exceptions[5] to this, but in the main it was the accepted dogma. The primary authority for the view in later years was *Duncan* v. *Cammell, Laird and Co. Ltd.*[6] The notion underlying this approach was that it was appropriate that the government determine the question of production because it was better placed

1 Reference is made to the principal decisions in the reports of jurisdictions available to the writer. The following cases are referred to frequently throughout and, where appropriate, will be abbreviated in the manner indicated:
Conway v. *Rimmer* [1968] A.C. 910: "*Conway*"
R. v. *Lewes Justices ex parte Secretary of State for Home Department* [1973] A.C. 388: "*Lewes*"
Alfred Crompton Amusement Machines Ltd. v. *Customs and Excise Commissioners* (No. 2) [1974] A.C. 405: "*Crompton*"
Norwich Pharmacal Co. v. *Customs and Excise Commissioners* [1974] A.C. 133: "*Norwich*"
Australian National Airlines Commission v. *The Commonwealth and Canadian Pacific Airlines Ltd.* [1975] 6 A.L.R. 433: "*A.N.A.*"
Hoffman La Roche A.G. v. *Department of Trade and Industry* [1975] The Times 19th April Ch.D: "*Hoffman La Roche*"
Konia v. *Morley* [1976] 1 N.Z.L.R. 455
D. v. *National Society for Prevention of Cruelty to Children* [1978] A.C. 171: "*D.* v. *N.S.P.C.C.*."
Sankey v. *Whitlam* [1978] 21 A.L.R. 505: "*Sankey*" *Burmah Oil Co.* v. *Governor and Company of Bank of England* [1979] 3 W.L.R. 722: "*Burmah Oil*"
Science Research Council v. *Nasse* [1979] 3 W.L.R. 762: "*Nasse*"

2 *Cf. Lewes* Lord Reid at 400; Lord Simon at 407

3 See further Field's *Law of Evidence*; Morris: *Evidence in East Africa*

4 This is of greater significance because of the attitude of the courts in "section 123 countries" to limit the scope of the expression "affairs of state": see, for example, *Raj Narain* v. *Indira Nehru Gandhi* A.I.R. 1974 All 324; *Appuhamy* v. *Ilangaratne* [1964] 66 C.L.W. 17

5 See, for example, *Robinson* v. *State of South Australia* (No. 2) [1931] A.C. 704; *Glasgow Corporation* v. *Central Land Board* [1956] S.C. (H.L.) 1

6 [1942] A.C. 624; for earlier references see *Beatson* v. *Skene* (1860) 5 H & N 838; 157 E.R. 1415; *H.M.S. Bellerophon* (1874) 44 LJ Adm. 5.

than the courts to make a decision as to where the public interest lay. However, the increasing assertion by the courts of the right to review administrative decisions coupled with abuse by governments of the right to prevent the production of evidence led to a reversal of this approach by the courts. It is now clear that, subject to legislation in force in some jurisdictions,[7] it is for the courts to declare whether or not governmental information should be produced in judicial proceedings. In coming to its conclusion, a court is to have regard to whether or not it is in the public interest that the particular evidence be revealed. This issue is to be determined by balancing what may be two competing interests, namely, on the one hand, the necessity for a court to determine a case having regard to the best available evidence and, on the other, the desire of the government that its proceedings be free from public scrutiny except to the extent that information is revealed by or with the approval of a Minister. To enable it to reach a conclusion, the court may inspect the documents in question.[8]

In *Burmah Oil* the House of Lords rejected an argument that a ministerial certificate should be regarded as conclusive because to hold otherwise would mean that judges occupying lower levels in the judicial hierarchy would be entitled to inspect and rule on the admissibility of governmental documents. However, Lord Keith and Lord Scarman considered that where a claim for privilege was overruled, the Crown should have a right of appeal before the document was produced.[9]

(2) *Scope of documents covered by Crown privilege.* The adoption of the concept that the court should determine whether governmental documents should be admitted in evidence by having regard to the public interest has resulted in this same touchstone being applied in the case of documents that were brought into existence other than by the central organs of government. *Hoffman La Roche*, for example, was concerned with documents of the Monopolies Commission, a body which is not a department of government. It was nonetheless hardly surprising that Templeman J rules that the same approach should be adopted in regard to these documents as with departmental documents. The issue arose in a more difficult form in *D.* v. *N.S.P.C.C.* There the House of Lords held that information revealed by an informer to the National Society for the Prevention of Cruelty to Children should not, in the public interest, be admitted in an action for negligence brought against the Society. Their Lordships considered that the abandonment of the notion of "Crown" privilege meant that the issue had to be determined quite independently of whether or not the evidence emanated from, or had been provided to, a governmental or semi-governmental department. It should be pointed out that the N.S.P.C.C. is the leading organisation in the United Kingdom concerned with the protection of children and is recognised in legislation relating to the care of children. Nonetheless, the decision did not turn merely on the status of the body. The issues of public interest were those which concerned the Court and it said that it was essential that information of the kind in question should continue to be revealed to the N.S.P.C.C. It considered that knowledge by an informer that the information that he provided could be revealed or indeed that his identity could be made known would lead to a drying up of the information.

This decision is of considerable significance in relation to the whole array of quasi-governmental or community organised welfare agencies that function largely as a result of the confidential relationship established between the parties, such as, marriage guidance organisations, adoption agencies, rape crisis centres, women's and children's refuges, etc. Information given to these organisations will frequently be defamatory and may lead to other forms of investigation with the possible consequence of an action subsequently being brought. Is it necessary in the public interest that these organisations be free from the likelihood of having to disclose information that may have been revealed to them? It was essential and probably inevitable that the concept of public interest should not be tied to "government" information. But the extension of the privilege from the aegis of government to other bodies will almost certainly result in the courts having to make some difficult decisions about where the public interest lies.[10]

The movement from Crown privilege to public interest has also resulted in this more general principle being adopted to determine whether referees and other confidential personnel reports should be made available to a litigant: *Nasse*. The House of Lords in its decision stressed that they were not creating a new category of privileged documents but were merely applying established principles to resolve the issue.

(3) *Confidentiality as a ground for declining admission of evidence.* The mere fact that a document has been entrusted in confidence to a person against whom an order is being sought for production is no ground in itself for denying the order.[11] Lord Denning in the Court of Appeal in *Crompton's* case[12] endeavoured to elevate confidential documents to a position whereby they

7 See below p 11

8 *Conway; Sankey; Nasse; R.* v. *Snider* [1954] 4 D.L.R. 483; *Gagnon* v. *Quebec Securities Commission* (1964) 50 D.L.R. (2d) 329 (Canadian Courts seemed a little slower to accept the general principle of judicial supremacy, but see now *Re Board of Moosomin School Unit No. 9 and Gordon* (1972) 24 D.L.R. (3d) 505; *Augustine* v. *City of Saint John* (1975) 12 N.B.R. (2d) 59; *Homestake Mining Co.* v. *Texasgulf Potash Co.* (1977) 76 D.L.R. (3d) 521); *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878; *Konia* v. *Morley; Public Service Association of Papua and New Guinea* v. *Administrator of the Territory* [1966] P. & N.G.L.R. 361

9 At pp 751, 761; see also Gibbs A-C.J in *Sankey* at 530

10 On the revelation of information given to adoption agencies, see *Pollock* v. *Pollock and Grey* [1970] N.Z.L.R. 771 and see further below p 6.

11 *Lewes*, Lord Salmon at 411; *Crompton*, Lord Cross at 429, 433; *Sankey*, Gibbs A-C.J at 529, Mason J at 574; *Minister of National Revenue* v. *Huron Steel Fabricators (London) Ltd.* (1973) 41 D.L.R. (3d) 407; *Nasse*.

12 [1972] 2 Q.B. 102.

could not be revealed. His Lordship said, "A party to litigation is not obliged to produce documents, or copies of documents, which do not belong to him, but which have been entrusted to his custody by a third party in confidence."[13] This view was expressly rejected by the House of Lords on appeal. However, the rejection was qualified by Lord Cross when he said, "Confidentiality is not a separate head of privilege, but may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest. What the court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other."[14] Similar views were expressed by Lord Salmon in *Lewes*.[15] In the Court of Appeal decision in *D.* v. *N.S.P.C.C.*, Lord Denning endeavoured to resurrect this argument that information supplied in confidence should not be revealed but the House of Lords again rejected the view.[16] It would seem therefore, that the fact that evidence is given in confidence is not enough; something more is necessary. Disclosure of the information must be likely to lead to the drying up of the source of information because of danger to or other adverse effects upon the communicator. The concept of confidentiality is thus closely linked with the approach adopted in regard to information provided by informers and by referees and it is suggested that it should be read in that context and not treated as a separate issue justifying refusal to produce information.[17]

(4) *Effect of prior publication of information for which privilege claimed.* It has long been accepted that the Crown cannot take objection to the production in court of information already made public—for obvious reasons. "...there can be no injury to the public interest which would preclude their publication when they have already been published."[18] Perhaps the fullest early discussions of the point is by the High Court of Australia in *Marconi's Wireless Telegraph Co. Ltd.* v. *The Commonwealth (No. 2)*[19] in relation to an assertion that information contained in a patent specification should not be disclosed. The matter was taken further in *Konia* v. *Morley*. There privilege was claimed in respect of evidence given at a police inquiry. The evidence had not been published nor had the inquiry been open to the public at large. But the person whose complaints had stimulated the inquiry (and who was the plaintiff seeking the production of the evidence) had been present (together with his grandmother) during the inquiry. This, in the view of the Court of Appeal, was sufficient to make the evidence public and the claim that it be not admitted was rejected.

These authorities did not, however, consider the position if the information has been revealed but without authority. This issue was alluded to in *Lewes* by Lord Reid who observed that the mere fact that there had been an unauthorised disclosure of the information was no ground for refusing to allow it to be revealed in court if it were in the public interest that it be not revealed.[20] Presumably his Lordship was contemplating a disclosure to a very limited number of people. Reference was also made to the documents concerned having been obtained by unlawful means. Minogue J in *Public Service Association of Papua and New Guinea* v. *Administrator of the Territory*[21] was not prepared to hold that a document had been published merely because one copy was, without authority, delivered to counsel for the applicant. Earlier, Kriewaldt J in the Northern Territory of Australia Supreme Court had ruled that privilege could not be claimed for a document that came into the possession of a party to the proceedings "by means not shown to be reprehensible".[22] The argument against allowing disclosure in such cases has probably been put most forcefully by Goswami J in *Sujit Kantha Neogi* v. *Union of India*[23]—

"It is a question of serious import whether a person should be allowed to take advantage of his illegitimate action in securing by any means whatsoever secret and confidential documents of the Government. It is not possible to show any leniency in a matter of this description and we cannot too strongly condemn this unlawful practice and would be loath to give the erring party any advantage of his wrong action."

The issue was more fully discussed in *Sankey* where a difference of opinion emerged between the judges. Two difficulties were seen to arise. One was how to establish that the document reproduced was the document for which privilege was claimed. The second problem was whether a court, by ordering production on the basis of prior unauthorised publication, was thereby countenancing the misdeed. On the identification issue, Stephen J[24] could see no objection to taking what he described as the "straightforward course" of the court comparing the relevant document to see if the published document was indeed a copy of the original. As far as the second issue was concerned, his Honour referred to the views expressed in *Lewes* that documents published after having been obtained by unlawful means should not be produced. But he distinguished

13 At 134.

14 At 433.

15 At 412.

16 See Lord Diplock at 220; Lord Hailsham at 230; Lord Simon at 237. The decision in *Nasse* now clearly puts the issue beyond peradventure.

17 See below pp 8 and 9

18 *Allen* v. *Byfield* (No. 2) (1964) 7 W.I.R. 69 at 71 per Phillips C.J.

19 (1913) 16 C.L.R. 178; and see also *Robinson* v. *State of South Australia (No. 2)* [1931] A.C. 704 at 718; *Sankey*. Publication of a document removes it from the protection of s. 123 of the Indian Evidence Act: *State of Pubjab* v. *Surjit Singh* A.I.R. 1975 P. & H. 11.

20 At 402.

21 [1966] P. & N.G.L.R. 361.

22 *Christie* v. *Ford* (1957) 2 F.L.R. 202.

23 A.I.R. 1970 A & N 131 at 135.

24 At 547.

these remarks on the basis that they were limited to a case where publication would reveal the identity of an informer. Those "quite special considerations" did not apply to this case. And seemingly would only apply in a limited number of instances.

Gibbs A – C. J and Mason J on the other hand considered that the two issues referred to above could not be divorced. While contemplating that a comparison might properly be made to determine the accuracy of the copy, both justices indicated that this might (in the words of Mason J) "confer the mantle of authenticity on a publication which was made unlawfully or in breach of confidence."[25] In some cases, they said, this might be a ground for upholding an objection to production. The matter did not have to be resolved finally as the Court ruled that the document concerned was not, in any case, entitled to privilege.

The question at issue is a difficult one as the differing views indicate. However, if resort is had to the basis for refusing production of a document, it is suggested that the view of Stephen J is to be preferred. Production is to be refused if it is necessary in the public interest for the document not to be disclosed. But it is the content of the document that should resolve this question, not the means by which the document came to public knowledge. If disclosure would interfere with the policy-making process of the government or would reveal the identity of an informer, production should be refused. But disclosure should not be denied as an indirect means of punishing a person for wrongly publishing the document. There are other laws to deal with such misconduct. Even in the case of a document that reveals the identity of an informer, once it has been published and the informer identified, the reason for refusing to allow publication of the document has disappeared.[26] It is suggested that the greater public interest in cases of this kind lies in ascertaining whether the alleged copy is authentic. The court should inspect the original and the published copy. If it finds the copy is accurate, it should order publication of the original on the basis of prior publication.

(5) *Production of documents associated with public document.* If one of a series of documents is made public and therefore can be produced in judicial proceedings, what is the position in regard to associated documents that have not been published? In *Sankey* both Gibbs A – C. J and Stephen J clearly saw the fact of publication of one or more of a series of documents as weighing strongly in favour of production of associated documents. The public interest that would deny production is curtailed once one or more of the documents relating to a topic become "public and subject to public speculation and discussion."[27] A similar approach was adopted in *Raj Narain* v. *Indira Nehru Gandhi*[28] where it was held that the document had ceased to be "unpublished" and had thereby lost the protection of section 123 of the Evidence Act.

(6) *Refusal by Crown to claim privilege. Conway* v. *Rimmer* made it clear that it is the duty of the court to prevent the production of a document harmful to the public interest even though no objection is raised by the Crown.[29] This circumstance would usually arise where the Crown had had no opportunity to object to production. But in *Sankey* the reverse situation applied. The Australian Government had been given an opportunity to object to production and had chosen not to do so. In the view of Gibbs A – C. J and Mason J this weighed strongly against privilege being accorded the documents. Gibbs A – C. J considered that in such circumstances "it would be most exceptional for the court to intervene."[30] Stephen J, on the other hand, viewed the issue in the context of whether it was possible for a person other than the Crown to raise privilege at all. He concluded this was possible in a case where the Crown had not considered the issue but he reserved this position where the Crown had elected not to claim privilege. He seemed to contemplate that it might be that a third party could not claim privilege unless the Crown's failure to act had been based upon some erroneous view of the law. It would seem, with respect, that the approach of Gibbs A – C. J and Mason J is to be preferred. The view of the Crown is a factor to be considered in determining the public interest, whether that view is opposed to, or is in favour of, disclosure. There could be circumstances in which the Crown was unfairly seeking to produce one document while denying access to others to disadvantage the other party. This could well be the case in an action with political overtones.[31] Once the notion of the privilege being *Crown* privilege is abandoned, the view of the government is but one of the factors to be considered. Nonetheless, it will probably only be in exceptional cases that a court will decline publication of documents that have been considered by the Crown and in respect of which no claim of privilege is made.[32]

(7) *Means of raising objection to admission of evidence.* While it may be that if the Crown fails to object to the production of information which can be said to be protected by Crown privilege the issue can be raised by a party or by the court, nonetheless the usual way in which the issue comes before the court is on an objection by the Crown. The form that this objection should take was fully discussed in *Robinson* v. *State of South Australia (No. 2),*[33] *Duncan's* case and *In Re Grosvenor Hotel, London.*[34] These cases all make it clear that the

25 At 575.

26 *Cf. Tipene* v. *Apperley* [1978] 1 N.Z.L.R. 761.

27 Stephen J. at 547 – 548.

28 A.I.R. 1974 All 324.

29 See, for example, Lord Reid at 950.

30 At 531.

31 As was *Sankey* where a private prosecution alleging conspiracy had been brought against a former Prime Minister and members of his Cabinet.

32 *Re McLeery and the Queen (No. 2)* (1974) 50 D.L.R. (3d) 387; *Raj Narain* v. *Indira Nehru Gandhi* A.I.R. 1974 All 324.

33 [1931] A.C. 704.

34 [1964] Ch 464.

objection has to be taken by the responsible Minister unless there is some special reason, such as his unavailability, in which case the permanent head of the appropriate department can lodge the objection. The cases suggest that, at the discovery stage, objection can be lodged by means of an affidavit. But at the trial, attendance of an official of the department is desirable. The form of the affidavit of objection must indicate that the Minister has himself examined the documents and formed the view that it would not be in the public interest to disclose them. If objection is being taken to production of documents because they fall within a class,[35] the affidavit is required to indicate to which class the document belongs and why that class of documents should not be disclosed. Surprisingly, in the light of these authorities, affidavits are still lodged by Ministers that do not satisfy the requirements as to form. In *Sankey*, the High Court commented adversely on the manner in which the objections to production had been made. There had been a failure by the Minister to indicate that he had personally perused the document for which privilege was claimed. Mason J indicated that the affidavits in support of the privilege claim "should state with precision the grounds on which it is contended that documents or information should not be disclosed so as to enable the court to evaluate the competing interests."[36]

(8) *Claims for privilege in respect of a class of documents. Duncan's* case not only contemplated that the certificate of a Minister stating that a document should not be produced in the course of judicial proceedings was final but also stated that there were classes of documents that could not be produced in a court. Defence and security matters were pertinent to the claim in *Duncan's* case and were clearly contemplated as an example of the kind of document that could not be produced under any circumstances. While *Conway* v. *Rimmer* denied the approach that a ministerial certificate was final, the judgments of their Lordships seemed to recognise that there were classes of documents that would always be regarded as inadmissible. Examples given were Cabinet papers, high-level policy documents, documents relating to defence and security, matters relating to the detection of crime, etc.

This approach has now been called in question in England by the decision in *Burmah Oil*. There, three of the five Law Lords, with varying degrees of enthusiasm, rejected the notion that if a claim for privilege were made for documents falling within a nominated class, the court was precluded from considering whether privilege should rightly be afforded to every document within the class. Lord Scarman expressed the most forthright view: "I do not therefore accept that there are any classes of documents which, however harmless their contents and however strong the requirement of justice, may never be disclosed until they are only of historical interest."[37]

35 See below

36 At 572. The affidavit of the minister was commended for its clarity in *Burmah Oil* and should be regarded as a model to follow.

37 At 759.

Lord Edmund Davies and Lord Keith expressed like views.[38] On the other hand, Lord Wilberforce and Lord Salmon endorsed the accepted opinion that there are classes of documents that are privileged, regardless of content.[39] The position in England cannot therefore be regarded as settled. The trend would seem to be against class claims being allowed but there is no certainty that this will be followed should a differently constituted court have to consider the issue in the future. It would be very easy for the remarks of the majority to be set aside as obiter dicta because, after inspection, none of the documents for which production was sought were considered of sufficient relevance to warrant their production in the face of the ministerial objection.

In New Zealand privilege claims for classes of documents are allowed.[40] Richardson J in *Elston* v. *State Services Commission* put this on the basis that the courts are not in a position to form judgments as to the prejudice to the public interest of revelation or otherwise of certain types of documents. In Canada, there seems to have been some reluctance to accept privilege claims for classes of document too readily;[41] but there has been no outright rejection of the notion that all documents falling within a particular class can be protected.[42]

In Australia, however, the High Court in *Sankey* swept away the notion that there are classes of documents which may never be produced. The nub of the decision is to be found in the statement of Stephen J[43]—

> "The judge-made law relating to Crown privilege is no code, it erects no immutable classes of documents to which a so-called absolute privilege is to be accorded. On the contrary, its essence is a recognition of the existence of the competing aspects of the public interest, their respective weights and hence, the resultant balance varying from case to case."

No government documents in Australia are therefore per se free from protection—not even Cabinet papers. Whether in practice production will be required will depend upon a balancing of the possibly competing interests referred to previously.

The rejection of privilege for classes of documents does, however, reinforce the wisdom of the course proposed by Lords Keith and Scarman in *Burmah Oil* that production of disputed documents should not occur until the Crown has had an opportunity to appeal against the order of a lower court.[44]

38 At 745 and 749.

39 At 730 and 737.

40 See *Konia* v. *Morley* at 461, 465; *Elston* v. *State Services Commission* [1979] 1 N.Z.L.R. 193.

41 *Re Blais and Andras* (1972) 30 D.L.R. (3d) 287; *R.* v. *Snider* [1954] 4 D.L.R. 483; *Augustine* v. *City of Saint John* (1975) 12 N.B.R. (2d) 59; *Manitoba Development Corporation* v. *Columbia Forest Products Ltd.* [1973] 3 W.W.R. 593.

42 See also the Hong Kong case of *Khan* v. *Attorney-General* [1974] H.K.L.R. 63.

43 At 546.

44 At 751 and 761.

Basis of courts' approach to claims for Crown privilege

What then are the factors that a court will take into account when determining whether to refuse the revelation of information? *Conway* v. *Rimmer* talked only in general terms of matters that, in the national interest or the public interest, should not be revealed. Due weight, it was said, must be given both to the administration of the executive and the administration of justice. The exercise becomes one for the court to weigh the competing public interests. But detailed assistance can be extracted from the subsequent cases and an attempt will now be made to identify a number of these factors.

(1) The need to preserve candour in communications is not a factor in itself that will persuade a court to order that information be not revealed. The notion that public servants will be constrained in what they write because they will be afraid that the information may be revealed to the public was scorned by the House of Lords in *Conway* v. *Rimmer*. The approach taken was that the number of instances of revelation of information in judicial proceedings is infinitesimal when compared with the number of occasions on which it is necessary for a public servant to express his views. In addition, it would be belittling public servants to suggest that their advice would vary accordingly to whether or not it was exposed to public scrutiny. In *Lewes*, Lord Salmon referred to this argument as "the old fallacy."[45] The same general attitude was followed by Moller J in *Pollock* v. *Pollock and Grey*.[46] His Honour was impressed by the claim advanced in that case that welfare workers concerned with questions of adoption should be able to discuss the private lives of prospective adoptive parents without fear that the discussion would be revealed subsequently. But he was not prepared to allow this factor to overweigh the need to achieve justice between the parties in divorce proceedings. A similar approach was followed in Canada in relation to a report of the Superintendent of Bankruptcy in *Re Blais and Andras*.[47] On the other hand, in *Konia* v. *Morley* the Court did pay considerable attention to the possibility of police investigations being inhibited if views expressed by officers were to be generally available. Perhaps investigations of alleged misconduct can be treated as a special category. Richmond J stated that no general rule could be laid down "...except that the courts should be slow to order production of such documents if the circumstances suggest that information has been supplied in circumstances where it might well not have been supplied at all had it been thought that it would later be made public."[48] His Honour mentioned as a factor that the court should bear in mind that, in the absence of confidentiality, there might be a fear of victimisation. This is most pertinent to inquiries into the conduct of public servants and is particularly applicable to reports from junior officials. This view was also stated by Gibbs A–C. J in *Sankey*. His Honour cited as an example the case of a Crown servant who is obliged to furnish a report on the suitability of one of his fellows for appointment to high office.[49] His Honour considered that he did not think it "altogether unreal" that in certain circumstances frankness in communication might be affected if disclosure were possible.

The question of whether or not referees' reports should be revealed to the persons who are the subject matter of the report raises this issue squarely and is discussed below.[50]

(2) If the information is such that it must be kept secret to enable the body claiming protection to perform its statutory function, revelation should not be ordered.[51] The circumstances in which this position is most likely to arise is where the information is obtained from sources that would dry up if the information were not kept secret. This approach is of long standing in regard to police informers.[52] It was extended in *Lewes* to include information obtained from retailers in the peculiar circumstances of that case where the information related to the criminal of quasi-criminal activities of gaming clubs and would almost certainly not have been made available if it were thought that the information could not be kept secret. It is interesting to note that in that case the Court conceded that the contents of the documents, if revealed, were not such as would be damaging to the public interest. It was the source of the documents that was being protected.[53] The same thinking underlies the decision of the House of Lords in *D.* v. *N.S.P.C.C.* where the Court considered that the need to ensure that the N.S.P.C.C. was provided with information relating to cruelty to children required anonymity to be afforded to persons communicating information to the Society. Here again, disclosure of the information was likely to lead to the drying up of the source of information through danger to the communicator.

But the courts have not allowed too much to be made of this concept of having to make the statute work. In *Norwich* it was argued that disclosure of the information (the names of importers of goods) would result in falsification of documents in the future. This argument was rejected as being irrelevant to the application. It was not in the public interest to preserve one ill (in this case non-disclosure of the names of illegal importers) for the purpose of avoiding another ill.[54] Nor was the Court in that case prepared to give great credence to the argument that the knowledge that the information could be disclosed would impair the good relations of the Commissioners of Customs with traders. The Court considered that only dishonest traders would be reluctant to provide information—honest traders

45 At 413.

46 [1970] N.Z.L.R. 771.

47 (1972) 30 D.L.R. (3d) 287

48 At 465; see also *Liddle* v. *Owen* [1978] 21 A.L.R. 286

49 At 527.

50 At p 9

51 *Lewes*, Lord Reid at 401; Lord Morris at 405.

52 See further below p 8

53 *Cf.* Lord Morris at 405; and *cf.* the discussion in *Konia* v. *Morley* referred to above.

54 Lord Cross at 199.

had nothing to hide so therefore would not cease to co-operate with the Commissioners.[55]

A similar approach was followed in Canada in relation to a claim that the revelation of information supplied in the tax returns of a defunct company would dissuade other tax payers from providing complete and accurate information in their returns.[56] The Federal Court of Appeal considered that the argument had "very little weight or validity by itself" and even less when considered in the light of the penal provisions in the Income Tax Act requiring the disclosure of information.

(3) The fact that the information has been disclosed under compulsion is not in itself sufficient to prevent its disclosure.[57] There seem to be two exceptions to this approach. One is where the information is given pursuant to a statute which provides that disclosure of the information is not to be permitted. Clearly, in these circumstances, the statutory requirement of non-revelation overrides any question of public interest in disclosure.[58] A second category contemplated by Viscount Dilhorne in *Norwich* is that of information being given to a government department where the information is of a personal character obtained in the exercise of statutory powers and is of such a character that the giver of it would not expect it to be used for any purpose other than that for which it was given and would not expect it to be disclosed to any person not concerned with that purpose.[59] But the fact that a government department treats information obtained under a statutory compulsion as confidential does not alter the basis of the court's approach and will not prevent a declaration that it be produced in court.[60]

(4) The greater the relevance of the information to the resolution of the issues before the court, the more likely it will be that the courts will order disclosure.[61] In *A.N.A.* the information was described as having a decisive influence on the outcome of the case. The same point was made by Lord Cross in *Crompton*.[62] Conversely where the information is not essential to the plaintiff's case or would have little bearing on its outcome, *Burmah Oil* indicates that an order for production should not be made in the face of a claim for privilege. The balancing act in such cases comes down on the government's side because the countervailing interest of a court having all available information in making its decision will not be affected by the absence of the evidence.

(5) If the information is such as would be available in a criminal case it should also be available in a civil action.[63]

(6) The fact that disclosure could result in industrial unrest is not relevant to the question of revelation where the information is otherwise of importance and should be revealed in the interests of justice.[64] Nor does the fact that the information pertains to the government's industrial relations policy mean that it should not be revealed.[65]

(7) There may perhaps be a leaning towards revelation where the information to be produced has not been brought into existence as part of the processes of executive government.[66] Added weight will be given to this point if the information is contained in documents of a commercial nature.[67] But the mere fact that the body producing the information is not a department is not conclusive: it is the information not its producer that is important.[68]

Privilege relating to particular types of evidence

The general principles outlined above are relevant to all claims that evidence on a particular matter should not be revealed in the public interest. There have, however, been some recent decisions relating to particular types of evidence that warrant further mention in the present context.

(1) *State papers.* As mentioned previously, in *Conway* v. *Rimmer* a number of categories of documents were said to be of a kind that should never be produced in court. These categories or classes of documents included Cabinet papers—qualified by Lord Reid to the extent that they could be revealed when only of historical interest;[69] letters or reports on appointments to offices of importance;[70] high-level inter-departmental minutes, foreign office despatches and correspondence pertaining to the general administration of the military forces.[71] Many of these categories of documents had been held to be privileged in earlier cases.[72] To these categories of information might be added reports from Colonial officials to

55 Lord Reid at 175; Lord Cross at 198.

56 *Minister of National Revenue* v. *Huron Steel Fabricators (London) Ltd.* (1973) 41 D.L.R. (3d) 407.

57 *Norwich*, Lord Cross at 198; Lord Kilbrandon at 206; *Crompton*, Lord Cross at 433; *Minister of National Revenue* v. *Huron Steel Fabricators (London) Ltd.* (1973) 41 D.L.R. (3d) 407.

58 *Norwich*, Viscount Dilhorne at 189; Lord Cross at 198; see also *Rowell* v. *Pratt* [1938] A.C. 101; *R.* v. *Saint Merat* [1958]N.Z.L.R. 1147; *Canadian Pacific Tobacco Co. Ltd.* v. *Stapleton* (1952) 86 C.L.R. 1.

59 At 189.

60 *Norwich*, Lord Cross at 198.

61 *A.N.A.* at 443.

62 At 434. See also *Tipene* v. *Apperley* [1978] 1 N.Z.L.R. 761 (the information was "pivotal" to the plaintiff's action).

63 *Norwich*, Lord Kilbrandon at 206.

64 *A.N.A.* at 442.

65 *Elston* v. *State Services Commission* [1979] 1 N.Z.L.R. 193

66 *A.N.A.* at 442; *Broome* v. *Broome* [1955] p 190

67 *Norwich*, Lord Reid at 175; *Robinson* v. *State of South Australia (No. 2)* [1931] A.C. 704 at 715; *Burmah Oil*

68 *Hoffman La Roche*; *D.* v. *N.S.P.C.C.*

69 At 952; and *cf.* the decision in *Attorney-General* v. *Jonathan Cape Ltd.* [1976] Q.B. 752

70 Lord Pearce at 987; Lord Upjohn at 993.

71 Lord Upjohn at 993.

72 See, for example, *Asiatic Petroleum Co. Ltd.* v. *Anglo-Persian Oil Co. Ltd.* [1916] 1 K.B. 822 (security and defence matters); *Wyatt* v. *Gore* (1816) 1 Holt N.P. 299; 171 E.R. 250 (communications between Governor and Attorney-General).

government[73] and reports and records of the armed services.[74]

Canadian[75] and New Zealand[76] courts seem generally to accept this approach, as did Papua-New Guinea in a pre- *Conway* v. *Rimmer* decision.[77] But this blanket exclusion of information from production was rejected by the High Court of Australia in *Sankey* and, after *Burmah Oil*, its acceptance in England must now be questioned. Gibbs A-C. J reflected the views of the High Court in *Sankey* when he said that this exclusion from disclosure fitted ill with the general principles expounded in *Conway* v. *Rimmer*. He continued–

> "The fundamental principle is that documents may be withheld from disclosure only if, and to the extent, that the public interest renders it necessary. That principle, in my opinion, must also apply to State papers. It is impossible to accept that the public interest requires that all State papers should be kept secret forever, or until they are only of historical interest. In some cases the legitimate need for secrecy will have ceased to exist after a short time has elapsed; this will be so...when new taxation proposals have passed into legislation. In other cases it may be necessary to maintain secrecy for many years. This may be so where the documents concern national security or diplomatic relations, to give two obvious examples. In other words, State papers do not form a homogeneous class, all the members of which must be treated alike. The subject matter with which the papers deal will be of great importance, but all the circumstances have to be considered in deciding whether the papers in question are entitled to be withheld from production, no matter what they individually contain."[78]

So in Australia (except in New South Wales)[79] there is to be no class of undisclosed documents, but presumably, the higher the document on the policy formulation scale or the more it is concerned with defence or security issues, the harder it will be to persuade a court to order production. This is probably also the position in England.

(2) *Informers*. The earliest reported case concerned with the question of exclusion of evidence in the public interest related to evidence given by a police informer. *Hardy's* case[80] was a treason trial and in the course of examination questions were put that were designed to elicit the avenues of information that had led the Crown to investigate the actions of the defendants and bring them to trial. The Court ruled that the questions were inadmissible. It said that revelation of the channels by means of which detection is made should not be unnecessarily disclosed. The correctness of this early decision was confirmed in *Marks* v. *Beyfus*[81] subject to the rider that revelation may be allowed if it is essential to the establishment of the defendant's innocence. One of the rare examples of the making of an order requiring the disclosure of an informant's identity is *R.* v. *Tovarula*.[82] There, Minogue C.J considered that it was essential to the establishment of the voluntariness of a statement by the accused that it be known on whose word the police had acted in arresting him.

In *Crompton* the House of Lords determined that the exemption from disclosure of information supplied by informers in the course of judicial proceedings, extended beyond information communicated directly to the police. It included also information supplied generally to investigatory officers in circumstances analogous to the supply of information by police informers. In that case the information was communicated to customs officers. *D.* v. *N.S.P.C.C.* made it clear that this category of protected information was based squarely on the public interest principle. It is not a case of saying that information supplied by particular persons is privileged but rather of applying the test whether it is necessary in the public interest that the information be not disclosed. In that case the information concerned was a statement to the Society which claimed that Mrs. D's small child had been maltreated. The information, on investigation, proved to be false and Mrs. D sued the Society alleging negligence. For the purposes of her case she sought the revelation of the name of the person who had supplied the information to the Society. The House of Lords held that the identity of the informant should not be disclosed as the Society needed to be able to offer anonymity to persons supplying it with information if it were to perform its duties satisfactorily. The significance of the case is that the Society was not an organ of government and could not be readily equated with the police force or other investigatory-type bodies.

The matter of protection for persons giving information has, however, also arisen in the context of inquiries by company inspectors. In England, the Divisional Court declined to require the production of the transcript of a witness's evidence given to a company inspector who had conducted a non-public inquiry into the affairs of a company.[83] The informer cases were cited as authority for this approach by counsel and Lord Widgery seemed to accept this argument. His Lordship said, "...the public interest in maintaining the sources of information of this kind of inquiry would outweigh the private

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73 *Anderson* v. *Hamilton* (1816) 129 E.R. 917 (the earliest Crown privilege case concerned with government documents); *Hennessy* v. *Wright* (1888) 21 Q.B.D. 509; *Wright & Co.* v. *Mills* [1890] 62 L.T. 558.

74 *Home* v. *Bentinck* (1820) 2 Brod. & B. 130; 129 E.R. 907 *Adams* v. *Ward* [1917] A.C. 309; *H.M.S. Bellerophon* (1874) 44 L.J. Adm. 5; *Duncan* v. *Cammell, Laird and Co. Ltd.* [1942] A.C. 624.

75 See, for example, *Reese* v. *The Queen* [1955] 3 D.L.R. 691; *Gronlund* v. *Hansen* (1968) 68 D.L.R. (2d) 223.

76 *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878. The general tenor of the judgments in *Konia* v. *Morley* indicated no great willingness to be bound by traditional thinking, but see now *Elston* v. *State Services Commission* [1979] 1 N.Z.L.R. 193 where the Cabinet and high level papers approach is clearly endorsed.

77 *Public Service Association of Papua and New Guinea* v. *Administrator of the Territory* [1966] P & N.G.L.R. 361

78 At 528.

79 See below p 11

80 (1794) 24 State Trials 199 at 808.

81 (1890) 25 Q.B.D. 494; affirmed in *D.* v. *N.S.P.C.C.*

82 [1972]P N.G.L.R. 140.

83 *R.* v. *Cheltenham Justices, ex parte Secretary of State for Trade* [1977] 1 W.L.R. 95

disadvantage (to the defendant)."[84] With this ruling should be contrasted the decision of the New South Wales Court of Appeal in *Barton* v. *Csidei*.[85] The Court there declined to hold that the evidence of a witness to a company inspector should not be revealed. While the relevant legislation is different in the respective countries, the Australian court expressly rejected the argument that the protection afforded to witnesses should be equated with that for informers. This view seems to be preferable, particularly when it is borne in mind that a company inspector in England can compel the attendance of a witness and it is an offence to refuse to co-operate and comply with his directions. The witness is thus afforded a reasonable answer to any accusations made against him by the company. In any case, the risk to the witness is not of the same order as that to a police informer whose identity and evidence is revealed.

It is submitted that the extension of inadmissible evidence to include that given to a company inspector is somewhat questionable. The reasoning of the Divisional Court would seem to be equally applicable to any inquiry that is not open to the public. This then takes the exclusionary rule into the area of evidence supplied in confidence: an approach to the question that has been rejected by the House of Lords[86] and also by the High Court of Australia.[87] If it is thought necessary to protect witnesses appearing before statutory inquiries, it would seem desirable for it to be so provided in the legislation relating to the conduct of the inquiry rather than leaving it to a court to make such a decision on the rather less certain ground of public interest.

A New Zealand case has sounded a cautionary warning about allowing the informer exception to become unconfined. In *Tipene* v. *Apperley*[88] the Court was concerned with a claim for privilege in respect of a statement made to the police by the defendant who later pleaded guilty to an offence. The statement contained allegations of complicity in the offence by the plaintiff. The plaintiff denied these allegations and no charges were brought against him. He sued the defendant for defamation and sought production of the defendant's statement from the police. The Court of Appeal, in overruling the privilege claim, said that where a member of the public makes a statement to the police in relation to a criminal investigation, the "informer" privilege should not be regarded as applicable to that statement. A person so acting can expect to be required to repeat his statement in court and have his identity revealed. He is not in the position of a police informer whose identity must be kept secret to protect him from reprisals.

Finally, informer evidence, like any other evidence regarded as inadmissible in the public interest, should not continue to be unavailable if the public interest against disclosure has been set to one side by other facts, such as the publication of the information. Once this has happened, the revelation of the evidence does not pose any greater risk to the informer than already exists and the reason for non-disclosure is therefore negated. This occurred in New Zealand and resulted in the Court of Appeal in *Tipene* v. *Apperley*[89] denying a claim that certain information provided to the police should not be disclosed.

(3) *Investigation of allegations against members of police force.* In *Conway* v. *Rimmer* Lord Reid noted, as information that was not protected by Crown privilege, routine governmental reports including personnel reports. That decision was itself concerned with a report prepared by a senior police officer relating to a probationary constable. The House of Lords held that the report could be disclosed in judicial proceedings. However, in two other cases decided after *Ridge* v. *Baldwin*, *Konia* v. *Morley* and *Liddle* v. *Owen*,[90] claims for privilege were upheld in respect of internal minutes relating to a police officer whose conduct had been the subject of a complaint by a member of the public. The documents included opinions expressed by senior officers relating to the respective police officers' actions and personalities. The court in each case considered that disclosure of the documents produced in the course of a police internal investigation could inhibit full investigation of complaints lodged by members of the public.[91] The decisions in these cases reflect a similar attitude to that evidenced in relation to the decisions mentioned under the next heading. But it is to be noted that Richmond J in *Konia* v. *Morley* drew a distinction between documents which contained recommendations and expressions of opinion by officers conducting the inquiry and those which related more directly and immediately to the facts of the incident giving rise to the investigation. Privilege claims would more readily be allowed in respect of the former than of the latter.

(4) *Reports of referees.* One of the areas in which, traditionally, confidentiality of documents has been expected—and provided—has been that of personal reports on applicants or employees provided by referees or superiors. For example, in *Bell* v. *University of Auckland*[92] Turner J declined to order the production of referees' reports. He based his decision in part on the fact that the plaintiff had nominated the referees himself and had impliedly indicated to them that their reports would be kept confidential. His Honour said that it was within his power to order disclosure but considered it inappropriate to do so. In *R.* v. *Teachers Tribunal*;

84 At 100.

85 *Barton* v. *Csidei*, 8 June 1979, unreported at time of writing, see also *Finnane* v. *Australian Consolidated Press Ltd.* [1978] 2 N.S.W.L.R. 435 where it was held that a witness in such an inquiry could publish his own evidence if he chose to do so.

86 *D.* v. *N.S.P.C.C: Burmah Oil*

87 *Sankey*

88 [1978] 1 N.Z.L.R. 761.

89 Ibid

90 [1978] 21 A.L.R. 286

91 *Cf. Augustine* v. *City of Saint John* (1975) 12 N.B.R. (2d) 59 where a claim for privilege in respect of police reports was rejected. It is not clear, however, whether the reports were of internal investigations.

92 [1969] N.Z.L.R. 1029.

ex parte Colvin[93] Lush J declined to hold that an applicant for promotion had been denied natural justice where, in accordance with a long established procedure, referees' reports had not been disclosed to him. In *Slavutych* v. *Baker*[94] the Canadian Supreme Court upheld an appeal against dismissal that was founded upon allegedly false and malicious statements made by the plaintiff in a confidential report relating to a colleague. The report had been made on the understanding that it would be seen only by a tenure committee and would be destroyed, after the committee had completed its inquiry. But *Sankey* and *D.* v. *N.S.P.C.C.* make it clear that the fact that a document has been prepared in circumstances in which its author thinks its contents will be kept secret is not, in itself, sufficient to preserve the document from production in an appropriate case.[95] It will be a factor that a court will take into account in determining whether or not production should be ordered, but it is not conclusive.

The circumstances in which the question of production of personal reports could arise are increasing. It is pertinent to such long established actions as wrongful dismissal or certiorari or other remedy to question a decision of a statutory tribunal concerned with employment matters. But the recent adoption in many countries of equal opportunity legislation intended to prevent applicants for jobs being discriminated against on grounds of race, sex, etc., of necessity brings with it the disclosure of referees' reports. This fact is clearly demonstrated by the recent decision of the House of Lords in *Science Research Council* v. *Nasse*.

The judgments dealt with two applications: one by N. against the Science Research Council alleging that she had been denied promotion because of her union activities and because she was a married woman. The second was a claim brought by V. against Leyland Motors asserting that he had been refused promotion because he was black. The applications came before an Employment Appeal Tribunal pursuant, in N's case, to the Employment Protection Act 1975 and to the Sex Discrimination Act 1975 and in V's case, to the Race Relations Act 1976. N. was given access to her own personal file, including reports relating to her prepared, in confidence, by her superior officers. But she also sought access to the personal files of the persons who had gained promotion when she had been refused. V. was given access to his personal work record, but was refused access to other applicants' work records and also to notes made by members of an interviewing panel on all applicants, including V. The Employment Appeal Tribunal ordered access to be given to all documents sought by the respective applicants. The employers appealed. The Court of Appeal,[96] in allowing the appeal, did not order that the documents sought be not disclosed but so circumscribed the basis on which disclosure should be granted as to have that effect.

Lord Denning M.R., stated the principle that should govern cases of this kind in the following terms[97]–

> "The industrial tribunals should not order or permit the disclosure of reports or references that have been given and received in confidence except in the very rare cases, where, after inspection of a particular document, the chairman decides that it is essential in the interests of justice that the confidence should be overriden: and then only subject to such conditions as to the divulging of it as he shall think fit to impose—both for the protection of the maker of the document and the subject of it. He might, for instance, limit the sight of it to counsel and solicitors on their undertaking that it should go no further."

Browne L.J expressed his entire agreement with this statement of principle and Lawton L.J agreed with the general effect of it. All judges emphasised the need for inspection by the Tribunal and for a decision being made that takes into account the circumstances of the particular case. But clearly, if the principle as formulated by Lord Denning were to be followed, it would place an extremely heavy onus on a person seeking the disclosure of a referee's report. Lord Denning indeed described the request to see the reports on other applicants for promotion as "the most presumptuous claim of all" and suggested that we might think "we were back in the days of the General Warrants."

The circumscribed access that would have flowed from the Denning formulation did not commend itself to the House of Lords. Their Lordships regarded it as too rigid and not allowing sufficient flexibility to deal with individual fact situations. But Lord Edmund Davies and Lord Fraser were prepared to endorse the test propounded by Lord Denning modified by the deletion of the words, "in the very rare cases."[98] The tenor of the other judgments of the House of Lords is to like effect. Thus, the position is reached that the confidence expected by the referee will be respected unless, after inspection, revelation is essential to the resolution of the dispute.

A person claiming discrimination against him is placed in a difficult position. He is asserting that he is better than another person and the best way to establish this fact is to see what referees have said about all parties concerned. But it must be recognised that persons concerned with the selection and promotion process, be it in government departments or industry or for admission to educational establishments, need to have frank and honest assessments of applicants. It is a weakness of human nature that if a referee knows the subject matter of his report will see that report, he is likely to be more guarded in what he writes. As far as the revelation of reports on other persons is concerned, there is also the question of the invasion of privacy—the point that Lord Denning was making as set out above. It is conceded that pres-

93 [1974] V.R. 905.

94 [1975] 4 W.W.R. 620.

95 Above p 2

96 [1978] 3 W.L.R. 754

97 At 768.

98 At 780 and 789.

ervation of secrecy is likely to protect the biased or unfair reference. But the right of a court or tribunal to inspect a confidential report, should, when it is viewed in the light of other evidence presented, enable this sort of unfairness to be mitigated. It is really up to the adjudicator to win the confidence of all parties so that they will accept his ruling on disclosure, after inspection, as being the correct course of action.

It is of interest to note that the Court of Appeal in *Nasse's* case observed that the various anti-discrimination Acts with which the Court was concerned were silent on the question of availability of referees' reports. This is a matter on which courts are entitled to expect some guidance from legislators. Proponents of such legislation should be prepared to grapple with the issue. It is suggested that Lord Denning's principle, as modified by the House of Lords, could well be given statutory form.

Legislation relating to Crown Privilege

Apart from section 123 of the Indian Evidence Act which has already been noted, some other provisions relating to claims for Crown privilege should be mentioned. Section 41 of the Canadian Federal Court Act provides–

"41. (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 in importance 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."

For the reason mentioned below, it is not proposed to discuss this provision here, except to note that subsection (2) goes far towards explaining the relatively small number of Crown privilege cases that have come before Canadian courts. Section 41 will be repealed when the Canadian Freedom of Information Act becomes law. In addition to repealing that section, the Freedom of Information Act (among many other things) amends the Canadian Evidence Act by inserting the following provisions:

"36.1 (1) A Minister of the Crown or other person interested 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.

(2) An objection to disclosure referred to in subsection (1) may be reviewed by a superior court, in which case, the court may examine or have the information in respect of which the objection was made and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest."

It can be seen that these sections restate the basic principles upon which the law of Crown privilege is founded. The sections do not attempt to set out the detailed law on the topic and it may be assumed that Canadian courts will turn to the principles enunciated in the cases cited in this paper in applying the sections.

It is somewhat ironic that when Canada should be amending its law on Crown privilege to give greater access to information, New South Wales should be legislating to restrict markedly the information that will be available in judicial proceedings. In what can only be described as an extraordinary over-reaction to the *Sankey* decision, the New South Wales State Government amended the Evidence Act of the State to provide–

"61 (1) When the Attorney-General certifies in writing that in his opinion—

(a) any communication described in the certificate, or any communication relating to a matter so described, is a government communication and is confidential; and

(b) the disclosure of the communication in any legal proceedings described in the certificate is not in the public interest,

the communication shall not be disclosed in or in relation to those legal proceedings or be admissible in evidence in those legal proceedings.

(2) A certificate under subsection (1) shall, without any court having examined, or heard a record of, the communication so certified or having inquired into the power of the Attorney-General to give the certificate, be accepted in the legal proceedings described in the certificate as conclusive that the communication is a government communication and is confidential and that the disclosure of the communication in those legal proceedings is not in the public interest.

(3) A certificate under subsection (1) may be revoked by the Attorney-General.

62 (1) A communication shall not be disclosed in or in relation to any legal proceedings or be admissible in evidence in any legal proceedings if—

(a) it appears to the person presiding in the court before which the legal proceedings are held or taken that the communication is a government communication; and

(b) the Attorney-General has not had an opportunity to give a certificate under section 61 in relation to the communication.

(2) Subsection (1) does not apply to a government communication the publication of which has previously been duly authorised.

(3) Subsection (1) does not prevent a communication from being disclosed in or in relation to any legal proceedings so far only as the disclosure is made to the person presiding in the court before which those legal proceedings are held or taken and is necessary to enable

the person to decide whether or not the communication is a government communication and, if the person decides that it is such a communication, whether or not it is a government communication referred to in subsection (2)."

It can be seen that these sections turn the clock back to the law as it was after *Duncan* v. *Cammell, Laird and Co. Ltd.*, without even the limited safeguards that that case provided. A ministerial certificate will be final and a court will not be able to question whether or not it is in the public interest for a document to be disclosed. Claims by the New South Wales Attorney-General that the Act merely restored the law to the position it was in prior to the *Sankey* case are not accurate, as it is quite clear that *Sankey* did no more than apply the principles espoused by the House of Lords in *Conway* v. *Rimmer*. The only exception to this was that the High Court did not accept that a court should bind itself by recognising a category of documents that would always be regarded as inadmissible in the court's discretion: a view endorsed by the majority of the House of Lords in *Burmah Oil*.

Conclusion

The period since 1960 has seen a steady assertion by the courts of the supremacy of the judiciary over the executive as final determiner of the rights of citizens. The requirement of compliance with the rules of natural justice laid down in the early 1960s; the assertion of the right to review ministerial decisions made soon thereafter; and the continuing refusal to allow the jurisdiction of the courts to be ousted have all been part of the working out of the respective roles of the institutions making up our system of government. Evidentiary privilege was one of the last bastions of ministerial superiority. The right of the Minister to have the final say was removed by *Conway* v. *Rimmer*. The High Court of Australia in *Sankey* and the House of Lords in *Burmah Oil* have taken this concept of judicial right to its logical conclusion by the rejection of the self-imposed fetter that certain classes of documents are never admissible. The courts have been left with the task of balancing the public interest—a task that will not be easy for them to carry out. The significant feature, however, underlying all the more recent decisions in this field is that it is the courts that will have to undertake this balancing task, not the executive.