Crown Privilege in Regard to Upper Echelon Government Documentation

HENRIK G. TONNING*

This article reviews the common law pertaining to the manner in which courts have entertained claims of privilege by Crown authorities when the latter are requested to produce documents or submit to discovery. In considering the issue it deals specifically with executive level documentation and by examining recent trends, attempts to isolate some of the matters that must be addressed when a party attempts to wrench such material from the government's grasp.

De quelle façon les tribunaux ont-ils disposé des revendications à un privilège de la part de la Couronne lorsqu'il lui est demandé de déposer des documents ou de se soumettre à un examen au préalable? Cet article tente d'y répondre en faisant une étude du "common law" à ce sujet. L'auteur discute plus précisément de la documentation au niveau exécutif. En procédant à l'analyse des tendances les plus récentes, il fait voir les différents aspects auxquels une partie doit toujours réfléchir lorsqu'elle veut soustraire de tels documents de l'étreinte du gouvernement fédéral.

Much to the delight of civil libertarians, there has been a marked change in the manner in which courts are dealing with attempts by various Crown authorities to restrict the production of upper echelon government documentation by claiming Crown privilege. As the number of legal actions increases, litigants at all stages of proceeding often find their requests for discovery or the production of documents denied whether the Crown is a party or not,[1] on the ground that the evidence disclosed by submitting to an examination or production would be injurious to the public interest.

In the past, the courts have often considered high level documentation containing government policy and Cabinet proceedings as having an element of public interest that warranted restricting its production regardless of the interests of litigants. Although the more

*B.A., 1977 (Dalhousie), LL.B., 1980 (U.N.B.). Barrister and Solicitor, Department of Justice, Province of New Brunswick, Fredericton.

[1] 13 *Halsbury's Laws of England* (4th ed.), at 68-70.

appropriate phrase is "public interest immunity",[2] this paper will continue to refer to this substantive rule of law as "Crown privilege". In reviewing the relevant case law an attempt will be made to formulate a pragmatic approach to the hurdle that a claim of Crown privilege poses for a litigant engaging a Crown authority or attempting to make its case relying on various forms of upper level government documentation.

Initially, at common law, the Crown was immune from discovery though on occasion it did allow itself to be discovered when public policy dictated. The House of Lords in *Duncan* v. *Cammell, Laird and Company, Limited*[3] held that documents otherwise relevant and liable to production need not be produced if the public interest required that they should be withheld. An objection, duly taken by the head of a government department, usually by affidavit, was to be treated as conclusive.

This obviously harsh stance, though tempered by the Court of Appeal on three occasions,[4] stood for twenty-six years until the issue was readdressed by the House of Lords in *Conway* v. *Rimmer.*[5] Prior to this however, the Court of Appeal in *Merricks* v. *Nott-Bower*[6] held that the nature of the class of document, and the reasons for its being withheld should be sufficiently described by the Crown to clearly justify why it was objecting to discovery. Later that same year in *Re Grosvenor Hotel, London (No. 2),*[7] the Court of Appeal suggested that reasons should be forthcoming to allow a proper balancing of the public interest served by non-disclosure, and the interests of justice as between the parties. Similar considerations were reiterated in *Wednesbury Corporation* v. *the Minister of Housing and Local Government.*[8]

The most enduring and well known of these cases is *Conway* v. *Rimmer.*[9] In recanting from the strong position taken in *Cammell, Laird*[10] the House of Lords set forth a test which has received almost universal application with subtle refinements and is still most pertinent today. The following comment of Lord Reid is generally considered to be the best expression of this test.

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[2]*Ibid,* Evans, J. M., "Comments", (1980) 57 *Can. Bar Rev.* 360.

[3][1942] A.C. 624 (H.L.).

[4]Bushnell, S.I., "Crown Privilege", (1973) 51 *Can. Bar Rev.* 551, at 560.

[5][1968] 1 All E. R. 874 (H.L.).

[6][1964] 1 All E. R. 717 (C.A.).

[7][1964] 3 All E. R. 354, at 362 (C.A.).

[8][1965] 1 All E. R. 186 (C.A.).

[9]*Supra,* footnote 5.

[10]*Supra,* footnote 3.

> . . . [C]ourts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice. That does not mean that a court will reject a Minister's view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh then the Minister's view must prevail; but experience has shown that reasons given for withholding whole classes of documents are often not of that character.[11]

Lord Morris reiterated Lord Reid's comments and noted that the courts, rather than Ministers of State, are independant bodies, and can most adequately weigh these competing aspects of public interest.[12]

Prior to *Conway* v. *Rimmer* the Canadian Courts adhered to a mechanical application of *Cammell, Laird.*[13] In 1954 however, the issue came before the Supreme Court of Canada in *R.* v. *Snider*[14] and the Court quickly rejected the absolute right of a Crown Minister to claim such privilege. The case involved a criminal prosecution in which a provincial Attorney General desired the production of various income tax returns filed with the Department of National Revenue, and the Minister responsible objected by way of affidavit to their production, stating that it would be contrary to the public interest. The Court noted that the privilege of denying disclosure required as its essential condition that there be a public interest recognized as overriding the general principle that in the court of justice every person and every fact must be available for the execution of its supreme function. Rand J. commented that

> Once the nature, general or specific as the case may be, of documents or the reasons against its disclosure, are shown, the question for the court is whether they might, on any rational view, either as to their contents or the fact of their existence, be such that the public interest requires that they should not be revealed; if they are capable of sustaining such an interest and a minister of the Crown avers to its existence, then the courts must accept his decision. On the other hand, if the facts, as in the example before us, show that, in the ordinary case, no such interest can exist, then a declaration of the minister must be taken to have been made under a misapprehension and be disregarded. To eliminate the courts in a function with which the tradition of the common law has invested them and to hold them subject to any opinion formed, rational or irrational, by a member of the executive to the prejudice, it might be, of the lives of private individuals, is not in harmony with the basic conceptions of our polity.[15]

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[11] *Supra*, footnote 5, at 888.

[12] *Ibid.*, at 891.

[13] *Murray* v. *Murray*, [1947] 3 D.L.R. 236 (B.C.S.C.); *Weber* v. *Pawlik*, [1952] 2 D.L.R. 750 (B.C.C.A.); *M.N.R.* v. *Die-Plast Company Ltd.*, [1952] 2 D.L.R. 808 (Que. Q.B., Appeal Side); *Clemens* v. *Crown Trust et al.*, [1953] 2 D.L.R. 290 (Ont. C.A.).

[14] [1954] S.C.R. 479.

[15] *Ibid.*, at 485.

As suggested by Kellock J., where the documents and facts claimed to be privileged emanate from the public itself, as was the case with the income tax returns in *R.* v. *Snider,* a plea for non-disclosure on the basis that it would be prejudicial to the public interest is highly questionable.[16]

The decisions in *Conway* v. *Rimmer, R.* v. *Snider* and the requirement embodied therein, that courts weigh general public policy against the interest of justice, have been consistently applied in Canada.[17] Admitting this to be the paramount consideration when any court finds itself confronted with a claim of Crown privilege, we will now examine this situation with specific application to upper level government documentation including that concerning the formation of policy at the executive level, communications between Ministers and high level officials, and Cabinet Memoranda.

Both *Conway* v. *Rimmer*[18] and *R.* v. *Snider*[19] imply that there exists a general class of document that the courts may be incompetent to weigh, and upon which a Minister's opinion should be accepted. Substantial authority will later be noted that suggests the executive level documentation with which we are concerned is of such a class and contains the requisite public interest to require its being withheld, and further, that the opinion of the appropriate Crown official should rarely be questioned when he attests that the evidence before the court is of this nature.[20]

The courts have often held such high level documents to be superior to any public interest requiring disclosure on the basis that the production of such documentation would hamper the operation of governmental departments and restrict the candour with which top government officials execute their duties. Though the courts are holding such considerations to be of less importance than they possibly once did,[21] the restriction of candour was a profound issue in a great many decisions[22] and even though no longer determinative it does have its

[16]*Ibid.*, at 488.

[17]*Reese et al.* v. *The Queen,* [1955] Ex C.R. 187; *Re Lew Fun Chaue* (1955), 112 C.C.C. 264 (Ont. S.C.); *Gagnon* v. *Quebec Securities Commission* (1965), 50 D.L.R. (2d) 329 (S.C.C.); *Re Board of Moosomin School Unit No. 9 and Gordon* (1972), 24 D.L.R. (3d) 505; *Huron Steel Fabricators London Ltd.* v. *M.N.R.* (1972), 31 D.L.R. (3d) 110 (F.C., T.D.), aff'd. [1973] F.C. 808 (F.C.A.); *R.* v. *Homestake Mining Company and Texas Gulf Potash Company,* [1977] 3 W.W.R. 629 (Sask. C.A.).

[18]*Supra,* footnote 12.

[19]*Supra,* footnote 16.

[20]*Re Board of Moosomin School Unit No. 9 and Gordon etal, supra,* footnote 17. See also: *Attorney General for Nova Scotia* v. *Murphy et al.* (1979), 10 C.P.C. 279 (N.S.C.A.).

[21]*Supra,* footnotes 5 and 15; *Burmah Oil Co. Ltd.* v. *Bank of England,* [1979] 3 All E.R. 700.

[22]*Re Lew Fun Chaue, supra,* footnote 17; *Gronlund et al* v. *Hanson* (1968), 64 W.W.R. 74 (B.C.C.A.); *M.N.R.* v. *Die-Plast Company Ltd. supra,* footnote 13, *R.* v. *Lewes Justices, ex parte The Gaming Board of Great Britain,* [1971] 2 All E.R. 1126 (Q.B.); *Rogers* v. *Secretary of State for the Home Department,* [1972] 2 All E.R. 1057 (H.L.); *D.* v. *N.S.P.C.C.,* [1978] A.C. 171 (H.L.).

application in special circumstances, such as the executive level documentation under consideration here. When advancing the argument that the disclosure of such material would hamper the candour and completeness of information contained therein, it is important to note that executive deponents are under no duty to supply the information. Indeed, where there is no obligation to come forward with the information contained in the documents, there is a possibility that they may be seen as privileged,[23] but where a public servant is under a statutory duty to provide the information contained in material under consideration the candour and completeness argument may fall on deaf ears. As the Federal Court of Appeal noted in *Re Blais and Andras* when dealing with a report prepared by the Superintendent in Bankruptcy,

> It may be important to protect such communications on questions of general policy for the purpose of ensuring candour and completeness of information and comment, but I find it difficult to conceive of the report of a Superintendent in Bankruptcy, made in the course of his statutory duties on the conduct by a trustee of the affairs of a bankrupt estate being less candid or complete by reason of his knowing that his report might be subject to disclosure.[24]

These comments on candour are noted not to derogate from this paper's general proposition that many courts have held high level communications of governmental affairs and policy to be unquestionably privileged, but rather, they are included to show that the courts are cognizant of this important component of upper echelon decision and policy making. The necessity for restricting production of such documentation in order to protect and preserve a high degree of candour in governmental affairs recently received favourable comment, albeit *dicta,* in the cases *Sankey* v. *Whitlam and others*[25] and *Attorney General* v. *Jonathan Cape Limited et al.*[26]

Returning to internal government memoranda and cabinet minutes, it is important to reiterate that such documentation is indeed different than that which has generally come before the courts and been subjected to a Crown authority's claim of privilege. We are not concerned with tax returns, police reports or any of countless other reports prepared pursuant to legislation; we are dealing with a class of documentation which has often been seen as privileged *per se,* and which on the basis of general comment in *Conway* v. *Rimmer* and *R.* v. *Snider* is entitled to restricted production merely because of its nature.

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[23]*Murray* v. *Murray, supra,* footnote 13; *R.* v. *Lewes Justices, ex parte The Gaming Board of Great Britain* and *D.* v. *N.S.P.C.C., supra,* footnote 22.

[24](1973), 30 D.L.R. (3d) 287, at 291 (F.C.A.).

[25](1978) 21 A.L.R. 505 (Aus. H.C.).

[26][1976] Q.B. 752.

Support for this contention has early roots in Canadian law. In *Dufresne Construction Company Limited* v. *The King*[27] certain memoranda prepared for the guidance of the Minister of Public Works were held to be privileged because of their nature. In *Weber* v. *Pawlik*,[28] though the Court refused to order the production of the documents in question, O'Halloran J.A. argued strongly for it. He noted that in the instance before him production of the documents should not be denied since they did not deal with official government secrets, matters of government policy, the defence of the state or inter-departmental communications. As well, in *Re Lew Fun Chaue*[29] Master Marriott of the Ontario Supreme Court held high level memoranda to the Minister of Citizenship and Immigration to be privileged since the public interest required that the documents in question not be produced and the Minister had averred to the existence of such an interest. A similar decision was reached in *Reese* v. *The Queen*[30] where, in applying *R.* v. *Snider* the Court held that it would not order production of inter-departmental communications between public officials when the head of a department had, in valid form, objected to their production on the ground that they belonged to a particular class of documents which is not in the public interest to disclose. Even if the prerogative of the Crown in Canada was not as absolute as it was in England prior to *Conway* v. *Rimmer*, "there is a public interest which requires that inter-departmental communications between public officials should not be produced."[31]

In *Gagnon* v. *Quebec Securities Commission*[32] the Supreme Court of Canada adopted the reasoning of the English Court of Appeal in *Re Grosvenor Hotel, London (No. 2)*[33] and suggested that although a court should satisfy itself that the interests of state served by non-production outweighed the interests of the litigants to the dispute, this was generally not necessary where the documents involved military secrets, diplomatic exchanges, cabinet papers or political decisions made in high places. The Federal Court of Appeal in *Re Blais and Andras*[34] conjectured that it would not have as readily ordered the production of documents had they dealt with questions of policy and administration of the *Bankruptcy Act* rather than being a simple report made pursuant to a particular provision of that Act. The special status afforded documents of this

[27][1933] Ex. C.R. 77.

[28]*Supra*, footnote 13.

[29]*Supra*, footnote 17.

[30]*Supra*, footnote 17.

[31]*Ibid.*, at 197.

[32]*Supra*, footnote 17.

[33]*Supra*, footnote 7.

[34]*Supra*, footnote 24, at 293.

nature was also confirmed in *Re Regina and Vanguard Hutterian Brethren Inc.*,[35] where the Court held that all conversations with and reports made to superior departmental officers by government employees, as well as reports to a Cabinet Committee and various interested Ministers were of a class that entitled the Crown to restrict their production by claiming privilege.

In addition to this Canadian line of authority, which admittedly contains decisions of varying weight, there is a similar trend in numerous English cases which suggests there may be some types of documents that are exempted from the classic balancing process elaborated by Lord Reid in *Conway* v. *Rimmer.*[36]

The existence of this trend was clearly confirmed in *Sankey* v. *Whitlam and others*[37] and *Burma Oil Company* v. *Bank of England,*[38] where the Courts began eroding the independent nature of this class of documents and clearly stated that even the previously paramount public interest served by restricting the production of such upper echelon government memoranda can at times be outweighed by the interests of the litigants to a dispute.

The matter came before the High Court of Australia in *Sankey* v. *Whitlam* in a criminal conspiracy charge against the former Prime Minister of Australia, where the Court had to contend with a claim of privilege over cabinet minutes, memos from senior departmental officials and other notations from top level files. It is interesting to note that the claim of privilege advanced by the Crown was not based on injury to either the proper functioning of the public service or to a public harm, but rather was based on the concept that the documents in question were of a general class that is in and of itself privileged. The Court noted that such a class does exist and that cabinet minutes and records of discussion between the heads of various government departments are generally privileged *per se*[39] but the Court, considering the test in *Conway* v. *Rimmer,* held that even the public interest served by non-disclosure must be weighed against a possible frustration of the administration of justice.

Gibbs A.C.J. noted that various papers brought into existence for preparing submissions to Cabinet as well as documents relating to the formation of high level government policy were generally considered privileged.[40] In doing so he referred to Lord Reid in *Conway* v. *Rimmer*

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[35](1980), 97 D.L.R. (3d) 86 (Sask. C.A.).

[36]*Supra,* footnote 5.

[37]*Supra,* footnote 25.

[38]*Supra,* footnote 21.

[39]*Supra,* footnote 25, at 526.

[40]*Ibid.*, at 527.

who concluded that such a privilege could extend to "all documents concerned with policy making within departments, including it may be, minutes and the like by quite junior officials and correspondence from outside bodies".[41] He held however, that despite the existence of this privileged class, the courts must weigh the issues with care, and if necessary inspect the documents themselves to ensure a proper determination. Where, on the facts of the case, the interest in the proper administration of justice outweighs any served by withholding the material, the Court must order the production of the documents despite their previous immunity. Since the issue in *Sankey* v. *Whitlam* concerned the proper execution of governmental duties by senior officials the Court felt it improper to withhold such documents since the policy proposals that the documents dealt with were never put into effect and they were the very crux of the plaintiff's conspiracy case.[42]

Similar considerations were voiced by Steven J. when he noted that the public interest varies from case to case, and though the law on the subject gives an unqualified recognition of the entitlement of such documents to privilege, such a claim of privilege based merely on the class of document carries a heavy onus to be dispelled. Where the documents are needed to ensure the administration of justice or relate to policies of purely historical significance, the Crown is not entitled to claim privilege and must produce the documents. It is important to remember that in *Sankey* v. *Whitlam* the issue before the Court was the proper execution of duties entrusted to senior government officials and the documents requested were an integral part of the plaintiff's case.

In *Burmah Oil Co. Ltd.* v. *Bank of England*[43] the House of Lords was faced with a similar problem. Burmah Oil was in serious financial difficulty and as it was deemed to be in the national interest to save the undertaking from liquidation, the Company, the Bank of England and various governmental departments entered into negotiations which resulted in Burmah's receiving financial assistance. The action also resulted however, in a suit by Burmah against the Bank to set aside a requisite sale of stock on the grounds that the sale was unconscionable, inequitable, in breach of the Bank's duty of fair dealing and at an undervalue. The documents subject to the claim of privilege disclosed the part played by the Crown, and consisted of communications to and from Ministers, memoranda from senior representatives of the various companies, and material dealing generally with the formation of governmental policy.

In their decision, the Law Lords gave practical effect to the principles expounded in *Sankey* v. *Whitlam,* and though they did not

[41] *Supra,* footnote 5, at 888.

[42] *Supra,* footnote 25, at 532.

[43] *Supra,* footnote 40.

order the production of the documents in question since they were not necessary to a fair disposition of the matter, they did define some of the considerations a court should be cognizant of when weighing the public interest served by non-production against a proper administration of justice between the parties. Lord Scarman briefly noted that the withholding of government documentation dealing with various policy decisions was undoubtedly in the public interest for it is important to ensure adequate candour in the advice tendered to ministers of the Crown and to avoid capricious, ill-formed criticism in regard to policy decisions.[44] Lord Wilberforce, in keeping with recent authority,[45] suggested that when dealing with documents concerning the formation of government policy it is important to consider the time frame involved. Since all is not "past history", restricted production is often necessary to ensure an effective implementation of policy, though where the documents in question are merely of an historical nature, they should not be withheld.[46] Lord Edmund-Davies, in an interesting judgment, suggested that there are three criteria a court should review when faced with restricting production on the basis of a claim of Crown privilege: the weight of the documents themselves, the importance of the litigation to the parties, and the possibility that the documents' being withheld would result in a denial of natural justice. Since the documents before the Court in *Burmah Oil* were not of such a nature as to result in the latter possibility, the court refused to order their production.

The decisions in *Sankey* v. *Whitlam* and *Burmah Oil* represent a substantial weapon for any litigant attempting to thwart a claim of Crown privilege. No longer is the production of executive level documentation to be restricted without question, for as a result of these recent cases, the benefit to be gleaned by the public from non-production must be weighed against the interests of the litigants themselves. It is submitted that this approach is indeed more rational than the 'carte blanche' immunity evidenced earlier, and although a Crown authority does not have the unlimited protection previously enjoyed, the documentation with which we are concerned can still be said to be of such a class as to deserve restricted production once a number of requisite conditions exist.

Various aspects noted in *Sankey* v. *Whitlam* and *Burmah Oil* must now be considered. The candour argument still contains substantial merit, the historical perspective of the evidence in question, and the effective implementation of the policies contained therein must be looked at, as well as the possible erosion of Cabinet solidarity on sensitive issues and the relevance or importance of the desired evidence to the case of those desiring production. Though on previous occasions these various

[44] *Ibid.*, at 733.

[45] *Supra*, footnote 26.

[46] *Supra*, footnote 40, at 707.

elements have often been seen as independently definitive, they must now be considered interdependent and weighed together against the interests of the litigants and the necessity of fairly disposing of the matter between them. This is not to suggest that the outcome of the claim of Crown privilege will in all cases change. It does suggest, as in *Burmah Oil,* that there is now a crack in the stone wall through which an enterprising litigant can argue. A rational consideration of the arguments for non-production, in view of the interests of the parties to a litigation, may necessitate the production of upper echelon government material that was previously immune.

Sankey v. *Whitlam* and *Burmah Oil* now bring the production and examination of executive level material in line with the treatment of other evidence in the possession of Crown authorities which can only be seen as a favourable development. While the final disposition in any particular case may not alter, it at least affords a party desiring production a chance to hear and meet those arguments compelling non-production.

In retrospect a quick comparison of *Cammell, Laird* and *Sankey* v. *Whitlam* is instructive. While in both, the appropriateness of the outcome cannot be questioned and would no doubt be the same today, the former was correctly viewed with skepticism while the trend evidenced in *Sankey* v. *Whitlam* and *Burmah Oil* represents a welcome progression in a time when the closeted dealings of government engender increasing suspicion.