

THE LAW OF CROWN PRIVILEGE IN CANADA AND ELSEWHERE PART I *

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This article examines, with particular reference to Canada, that aspect of the law which permits ministers of the Crown to withhold evidence from the courts. The subject falls under two headings, that of Crown immunity from discovery and Crown privilege proper. Although the doctrine on Crown immunity was finalized at a fairly early stage in the nineteenth century, the law of Crown privilege has undergone major fluctuations over the last 150 years. Despite these fluctuations, which at one stage resulted in a conflict of views between the House of Lords and the Judicial Committee, Canadian courts have, with some exceptions, tended to follow the current English jurisprudence. A recent judgment of the House of Lords seems likely to reinforce the determination of Canadian courts to place some limits on the exercise of Crown privilege by the executive. After consideration of practice in some other common-law countries and in France, the author suggests a scheme which might satisfy both the need of the executive for administrative secrecy and the need of the litigant to secure evidence vital for his case.

I. PROBLEMS AND METHODS OF SECURING EVIDENCE AT COMMON LAW AND EQUITY

A. *Definition of Terms*

Of the many problems of administrative law which have occupied judges and lawyers alike throughout the common-law world this century, that of Crown privilege has been among the most controversial. The judge-made law on this subject has now been a matter of dispute for over a hundred years, and the dispute shows no signs of being settled. It is a problem, moreover, which has appeared under different guises in many countries, from Scotland to South Africa and from Australia to the United States. It is thus not surprising that Canada, a monarchy and a country of the common law in the public-law sector, should have experienced these legal problems to no small degree and that she should have contributed to the evolution of what is now a world-wide jurisprudence.

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The object of this work is not to advocate changes in the law, although some suggestions for possible future legislation are included in the concluding section. The object is rather to investigate the ways in which the law of Crown privilege has evolved in this country, through the judgments of Dominion and provincial courts, and to determine in what ways Canadian practice differs from that of other common-law countries. In pursuing this object it will be necessary to give very close consideration to English jurisprudence, which, in this as in many other aspects of public law, has had a profound influence upon Canadian judgments.

It is desirable at this stage to define some of the terminology to be used in ensuing discussion. Broadly speaking it is proposed to cover the general judge-made law whereby ministers of the Crown (or state) are entitled to withhold documentary and oral evidence from courts of law. This field of law falls under two headings. The first is Crown immunity from discovery. This right, which is in the nature of a prerogative, arose at equity, and is a rather specialized subject. The second is the more general right of the Crown to prevent evidence from being produced in court on the ground of detriment to the public interest. This right, which is more circumscribed by precedent than Crown immunity from discovery, arose mainly at common law and is frequently referred to as "Crown Privilege."

Some writers have declined to use the term "Crown Privilege" to refer to this field of law on the ground that the Crown's special testimonial rights cannot be placed in the same category as the testimonial privileges of the subject. Such writers prefer to place "Crown Privilege," together with the right of the prosecution to withhold the name of an informant and the testimonial privilege surrounding the deliberations of jurors and judges, within the category of "evidence excluded on grounds of public policy." In support of this proposition, it is argued that whereas a private privilege is vested in the person of a witness and can be invoked or waived by him alone, the Crown can intervene on grounds of public policy to prevent a willing witness from testifying in cases where the witness is in no sense an agent or servant of the Crown. It is also pointed out that whereas the courts will only enforce a private privilege at the instance of the party claiming it, a judge can intervene on grounds of public policy, without any motion from counsel, to prevent evidence from being admitted even where the witness is willing to testify. Finally, it is observed that secondary evidence can be used to prove the content of documents for which (private) privilege has successfully been claimed, but that where a document has been excluded on grounds of public policy, the courts will not allow secondary evidence of its content to be admitted.¹

¹ See remarks of Viscount Simon in *Duncan v. Camell Laird & Co.*, [1942] A.C. 624, at 643, also R. CROSS, EVIDENCE (3d ed. 1967).

It is conceded that there is considerable force in these arguments and that in resisting them the writer may well be going against the general trend of legal opinion. There are, however, dangers in segregating public policy from privilege too severely. There is an element of public policy in the recognition of the most "private" of privileges. In English and Canadian jurisprudence, moreover, the ability of ministers of the Crown to intervene in the judicial process by withholding written and oral testimony has often in the past seemed to depend more on their public-law status than on any objective consideration of the nature of the evidence in question. The element of arbitrariness in the system which such jurisprudence entails suggests that there are grounds for defining the rights of the Crown in this area in terms of privilege.

To pursue this matter a little further, although the right to claim private privilege is normally vested in a witness and can only be claimed or waived by him personally, there are cases in which a witness has been prevented from testifying by a successful claim of private privilege, raised by another person. Thus in the English case of *Mole v. Mole*,² one of the parties to a divorce action, by claiming privilege, prevented a probation officer from giving details in court of "without prejudice" (pre-trial) communications between the petitioner and respondent in which he had acted as intermediary. To the second proposition, namely, that where public policy is involved a judge can intervene without motion from counsel, the following answer can be made. It is admitted that judges have occasionally³ prevented the disclosure of the name of an informant without any prior objection from the prosecution. Outside this narrow field, however, it is virtually unknown for a judge to intervene to prevent evidence being admitted without a prior objection from counsel. In fact with most categories of evidence which have at one time or another been the subject of claims of Crown privilege, the general rule appears to be that such evidence is to be admitted unless the responsible minister of the Crown specifically objects to its admission. There are a few contrary cases,⁴ but these occur mainly in the early nineteenth century when the jurisprudence on the subject was only partially formulated.

It must be conceded that there is no satisfactory answer to the argument concerning the admission of secondary evidence. It has been shown, however, that the differences between the testimonial privileges peculiar to the Crown and the ordinary privileges of the subject are not as great as sometimes made out. For this reason the writer feels justified in using the term "Crown Privilege" rather than "evidence excluded on grounds of public policy" to refer to the general extra-statutory testimonial rights of the

² [1951] P. 21, [1950] 2 All E.R. 328.

³ *E.g.*, *Rex v. Cobbett*, [1831] 2 St. Tr. (n.s.) 789 (K.B.).

⁴ *E.g.*, *Wyatt v. Gore*, [1816] Holt N.P. 299.

Crown. On the final analysis this choice of terminology is primarily a matter of personal preference. In support of the position adopted in this work it is, however, possible to direct the reader's attention to Wigmore's monumental work on *Evidence*⁵ on which state secrecy (the United States version of Crown privilege) is treated as one of many public and private testimonial privileges. It may also be observed that in the celebrated case of *Robinson v. South Australia* [No. 2],⁶ which has been so influential on jurisprudence, it was considered that the term "privilege" in a rule of court covered the right of the Crown to object to production of evidence on grounds of public policy.

The second terminological point concerns the use of the word "discovery." This term has been used somewhat imprecisely in the past to cover a variety of procedures. In this work, however, the term will be used to refer exclusively to the following pre-trial remedies: (a) an affidavit⁷ from one's adversary in litigation setting out a list of documents in his possession which are relevant to the case, (b) the right to inspect documents listed in such an affidavit, to take copies of them and to produce the originals or the copies in court, (c) securing answers to questions relevant to the action from one's adversary whether by means of written interrogatories or by oral examination for discovery, (d) securing inspection and examination of things other than documents in the possession of one's opponent.

B. *Trial by Combat*

Although trial by combat fell into desuetude at a fairly early stage in the evolution of the common law, the method of procedure for the conduct of trials in common-law countries still bears many of the marks of a conflict between two or more parties. The judge, sometimes assisted by a jury, presides over the contest impartially, occasionally regulating the behaviour of the contestants, but otherwise playing no overt part in the proceedings until their conclusion, when he awards a decision "on points" to one of the parties, or else charges the jury. Given this relatively passive role played by the court, which is in striking contrast with, for example, a French criminal trial, the parties to an action must come to court armed with all the necessary evidence on which to base their case. The judge will not ask a witness questions except to clear up the ambiguities in his testimony, nor will he normally order the attendance of witnesses or the production of documents save at the motion of one of the parties.

⁵ 8 J. WIGMORE, *EVIDENCE* §§ 2367-79 (3d ed. 1940).

⁶ [1931] A.C. 704 (P.C.).

⁷ A written statement on oath made before a commissioner for oaths or other appointed officer.

Over the years, however, the common law, reinforced by statute, has evolved various methods of assisting the litigant (including in this context, the prosecutor or defendant in a criminal case), to secure the necessary evidence even when this evidence may be in the hands of his opponent.

C. *The Subpoena*

It is not often realized that in England a person wishing to give evidence at a trial on behalf of one of the litigants was, until the sixteenth century at least, regarded with grave suspicion. Before this period the jury was required to find out for itself all the evidence necessary for deciding a case before it came to trial. This rule permitted the jury to question witnesses, but tended to censure someone who volunteered information either before or during the trial. The supposition was that in all probability an eager witness was in the pay or "maintenance" of one of the parties. The threat of punishment for maintenance accordingly acted as a disincentive to the witness to testify.

The need for a process of court which would absolve a witness from the threat of prosecution for maintenance and at the same time penalize him if he did not attend was felt for many years before such a remedy was evolved. As was the case with several other remedies, it was the Court of Chancery which first met the recognized need of litigants. In the fourteenth century a penalty of £100 for non-compliance was added to summonses to witnesses to attend the court—this being the first example of a process compelling the attendance of third parties. The "Writ of Subpoena" as it became known was extended to common-law courts as of right by statute⁸ in 1562-1563.

The subpoena at first only compelled a witness to attend court and did not require him to testify. However, jurisprudence gradually filled this lacuna in the course of the seventeenth century. The general right of a defendant in a criminal trial to compel attendance of witnesses was also introduced in the seventeenth century, at first as an act of special grace on the part of the courts, but eventually as of right by statute.⁹ The subpoena was extended to cover both oral testimony and documentary evidence, the former being known as a *subpoena ad testificandum*, the latter as a *subpoena duces tecum*, (literally, "under threat of penalty, bring with you").

⁸ An Act for the Punishment of Suche Persons as Shall Procure or Comit any Wylful Perjurye, 5 Eliz. 1, c. 9 (1562-63).

⁹ An Act for Regulateing of Tryals in Cases of Treason and Misprison of Treason, 7 & 8 Will. 3, c. 3 (1665).

D. *Discovery*

The remedy of discovery, like many other equitable remedies, arose out of the deficiencies of the common-law courts. Although endowed by statute in the sixteenth century with the equitable remedy of the subpoena, the common-law courts (*i.e.*, Common Pleas, the Exchequer, King's Bench) proceeded to restrict its scope by ruling that the parties to an action could not be required to produce documents in their possession. This immunity, however, was never recognized in the Court of Chancery and in time a remedy known as the "Bill of Discovery" was evolved by that court to fill the common-law lacuna. Under this procedure the party against whom the bill was granted was obliged to make an affidavit declaring all the documents in his possession which related to his opponent's case. All such listed documents, save those for which privilege could be claimed, had to be made available to the opposite party on demand, who could inspect them, take copies of them and use the copies or the originals in evidence at trial.

The advantage of the bill of discovery was that it could be used not only to facilitate proceedings in Chancery, but also as an auxiliary process to supplement the deficiencies of the common law. Thus the information obtained on discovery could be used in an action for recovery of land in the Court of Common Pleas. The procedure involved shuttling back and forth between two courts, but it was better than no remedy at all. Discovery was always subject to the limitation that it could only be granted against someone who was party to an action and not against third parties, whose testimony could only be secured at trial on a subpoena. Further limitations of discovery were that it was not available to either prosecutor or defence in a criminal trial and, most important of all for the purposes of this work, that it was not available against the Crown.

Discovery of facts, as opposed to discovery of documents, evolved as a separate process in the Court of Chancery under the name of "Interrogatories." This procedure enabled a litigant to obtain a court order requiring his adversary to answer on oath before the trial certain questions relevant to the case. The admissibility of the questions, which had to be submitted and answered in writing, was determined by the court. Like the affidavit for discovery of documents, answers to interrogatories could be used in subsequent equitable or common-law proceedings, but could not be extracted from third parties or from the Crown.

E. *Privilege*

The general rule at common law and equity concerning testimony is that the public is entitled to every man's evidence. Thus any objection to answering a question or to being required to produce a document will only be sustained in exceptional circumstances, governed by authority.

Such grounds as have been accepted for upholding objections to testimony are known collectively as "privileges."¹⁰ They include, to name only the most important, the solicitor-client privilege, the privilege against self-incrimination, the privilege covering matrimonial communications and that of state secrecy (henceforth termed "Crown Privilege"). In all cases it is for the court to decide whether a claim of privilege should be upheld. In the case of Crown privilege, however, the courts have at times given such a degree of discretion to the executive that they have virtually abandoned any control over the exercise of the right.

Discovery and the subpoena both originated in the Court of Chancery. Together with the law of privilege, however, they have been considerably modified by statute. In England, the most important reform¹¹ was in the mid-nineteenth century when the common-law courts were allowed to grant discovery along with other equitable remedies, previously the exclusive province of the Court of Chancery (and more recently of the Court of the Exchequer on its Equity Side). The effect of these reforms was to turn discovery from an extraordinary remedy available only at equity into an ordinary adjunct of litigation, which could be obtained as a matter of course by either party, whenever an action had been commenced in any of the central courts. Later on the distinction between the various courts was made even less real by the Judicature Act¹² which created a single Supreme Court of Judicature composed of several divisions.

In Canada, most provinces have followed the English practice of granting their superior courts all the powers of the former courts of common law and equity. This means that, as in England, discovery has in practice become an adjunct to litigation, a matter of procedure, rather than a special remedy. In two important respects, however, Canadian practice differs from that in England. In England, the equitable tradition that interrogatories must be made by means of a special court order and in the form of written questions remains unchanged.

In Canada, on the other hand, most provinces have replaced interrogatories by a procedure known as "Examination for Discovery"—an oral examination of one's adversary before a court official, the transcript of which examination can be used in evidence at trial. Canadian legislation has also tended to modify the English tradition of restricting pre-trial discovery to parties to the action. As in the United States, several courts in Canada can order pre-trial discovery against third parties (*e.g.*, the Exchequer Court of Canada).

¹⁰ For a comprehensive review of common-law and statutory privileges, see J. WIGMORE, *supra* note 5.

¹¹ Common Law Procedure Act, 17 & 18 Vict., c. 125, § 50 (1854).

¹² 36 & 37 Vict., c. 66 (1873).

The following discussion will cover two aspects of Canadian administrative law, the prerogative right of the Crown to refuse discovery, whether of facts or documents (Crown immunity), and the right of the Crown to object to production of facts or documents on the grounds of detriment to the public interest (Crown privilege). As will be seen at a later stage, these two aspects of the law are closely interrelated, with the result that some judges have failed¹³ to distinguish them sufficiently. In such cases the inevitable result is confusion for the advocate and judge alike, not to mention the general public.

II. ENGLISH LAW

A. *Crown Immunity from Discovery*

The feudal principle that a lord could not be sued in his own court made it very difficult to bring the Crown under any legal constraint in mediaeval England. The most that a subject could hope for was that the King would consent to a dispute between himself and the subject being referred to the courts as a matter of grace. This extraordinary procedure, known as a "Petition of Right," which only came into common use from the seventeenth century onwards, differed in many ways from an ordinary court action. A royal fiat was necessary before the petition could be referred to the courts and when the case came up for hearing the Crown and the subject were on an unequal footing. No execution could be made against the Crown; the subject, even if successful, had to rely on the King's good will if he were to obtain the satisfaction to which the courts had held him entitled. The courts, moreover, while holding the Crown liable for breaches of contract, refused to hold it liable in tort, this doctrine being based on the assumption that "the King can do no wrong." The Crown on the other hand could sue the subject at will merely by laying an information before the courts and, if successful, could use all the methods of compulsion against its adversary which were open to a private litigant.

As was observed above, discovery was originally an equitable remedy. In view of the fact that the Crown and subject were always on a slightly more equal footing at equity than at common law, it might be thought that discovery would have been held to be available against the Crown. It has in fact been suggested¹⁴ that ministers of the Crown were occasionally interrogated on discovery in the mediaeval Court of Chancery. In the nineteenth century, however, the courts firmly rejected the idea that the Crown could be required to make discovery, in any form whatsoever.

¹³ See *Reese v. The Queen*, [1955] Can. Exch. 187, [1955] 3 D.L.R. 691.

¹⁴ See *Anthony v. Attorney-General for Alberta*, [1942] 1 W.W.R. 544, [1942] 4 D.L.R. 681 (Alta. High Ct.).

The first major English case on Crown immunity from discovery arose before the Common Law Procedure Act had made discovery a universal remedy and before the establishment of a single Supreme Court of Judicature. This was *Deare v. Attorney-General*.¹⁵ The case arose out of an action against a former government agent brought by the Attorney-General to recover a debt. Having failed to satisfy the courts that he had settled accounts with the War Office, Deare filed a cross-bill for discovery against the Attorney-General in the Court of Exchequer (upon its Equity Side), seeking production of certain accounts in the possession of the War Office, which he claimed would enable him to prove his case. The Attorney-General demurred to the bill on the grounds that he was being sued in his official capacity as an officer of the Crown, which he claimed was improper; besides, he claimed that a bill of discovery would not lie against the Crown. The court overruled the Attorney-General's demurrer on technical grounds, but expressed severe doubts as to whether the Crown could be compelled to make discovery through the medium of its chief law officer. It should be noted that the judgment in this case was hedged about with many reservations and standing by itself it would probably not amount to conclusive proof that discovery will not lie against the Crown.

The later cases, however, which all came after discovery had been made a universal adjunct to litigation, were far more definite. In *Thomas v. The Queen*,¹⁶ in which the suppliants claimed breach of contract by the Crown in connection with the invention of new types of artillery and heavy ordnance, the Queen's Bench held that the right to refuse discovery was a prerogative of the Crown. The Petitions of Right Act¹⁷ (which had greatly simplified the antiquated and cumbersome procedures for bringing actions against the Crown and had in general extended to petitions of right the procedure for suits between subjects) had not specifically mentioned discovery. Therefore, (following *Tobin v. The Queen*),¹⁸ as the prerogatives of the Crown could only be taken away by statute and in specific words, the right of the Crown to refuse discovery remained intact.

The court expressed doubts in *Thomas v. The Queen*¹⁹ as to whether the Crown could obtain discovery against a subject on a petition of right. This *quaere* was, however, disposed of a few years later in *Tomline v. The Queen*.²⁰ In this case, the Exchequer Division of the High Court held that the rights of the Crown as litigant under the Petitions of Right Act did not depend on any reciprocity between Crown and subject in the matter of procedure and remedies. This view, that the Crown was entitled

¹⁵ 1 Y. & C. Ex. 197 (1835).

¹⁶ L.R. 10 Q.B. 44 (1874).

¹⁷ 23 & 24 Vict., c. 34, § 7 (1860).

¹⁸ 14 C.B. (n.s.) 503 (1863).

¹⁹ *Supra* note 16.

²⁰ Ex. D. 252 (1879).

to discovery against the subject, while the subject was not so entitled against the Crown, was reaffirmed by the Court of Appeal, *en passant*, in *Attorney-General v. Newcastle-upon-Tyne*,²¹ and more specifically by the King's Bench Division of the High Court in the arbitration case of *In re la Société les Affréteurs Réunis of France*.²² Finally in *Duncan v. Camell Laird & Co.*,²³ the House of Lords made it quite clear that in actions involving the Crown no compulsory discovery could be obtained by the subject whatsoever.

The doctrine so applied was not without contrary cases. Apart from the alleged practice of the medieval Court of Chancery already referred to, there were some nineteenth century examples where the courts appeared reluctant to deny the subject reciprocity with the Crown in matters of discovery. In *Attorney-General v. Brooksbank*,²⁴ the court stayed an information for discovery against the defendant until the Secretary of State for War had produced certain vouchers and accounts which the defendant desired for the purpose of amending his plea. It is also noteworthy that in *Tomline v. the Queen*,²⁵ the inability of the subject to obtain discovery from the Crown seems to have been regarded as arising more from technical difficulties than from the prerogative. In *Kain v. Farrer*,²⁶ an action against the Secretary of the Board of Trade under the Merchant Shipping Act,²⁷ the Common Pleas Division of the High Court ordered the secretary to make an affidavit of documents. This decision, however, seems to have been based on a technicality. The secretary had not objected that the prerogatives of the Crown were involved, when an order for discovery had originally been made against him. The court also made it clear that the secretary's right to object to production of individual documents on the grounds of public policy, *i.e.*, Crown privilege, had not been vitiated by his failure to claim Crown immunity from discovery.

The judge-made law on Crown immunity was considerably altered by the Crown Proceedings Act.²⁸ This act allowed the subject to sue the Crown as of right through officially designated government departments and, subject to certain exceptions, placed the Crown in the same position as a private citizen as regards liability for tort. The act also allowed the courts to require the Crown to make discovery of documents or to answer interrogatories. This general provision was, however, made subject to the important provisos that the Crown could still object to the production of documents for inspection on the grounds of detriment to the public

²¹ [1897] 2 Q.B. 384 (C.A.).

²² [1921] 2 K.B. 1 (C.A.).

²³ [1942] A.C. 624.

²⁴ 1 Y. & J. 439, 148 Eng. Rep. 743 (Ex. 1827).

²⁵ *Supra* note 20.

²⁶ 37 L.T.R. (n.s.) 469 (C.P. 1877).

²⁷ 38 & 39 Vict., c. 88, § 8 (1875).

²⁸ 10 & 11 Geo. 6, c. 44 (1947).

interest and that no rule of court should prevent a minister from concealing the existence of a document if, in his opinion, disclosure of its existence would be injurious to the public interest. What the right hand gave, therefore, the left hand apparently took away. It is significant, however, that in *Conway v. Rimmer*,²⁹ the House of Lords denied that the provision gave the executive any additional powers to withhold documents from production.

B. *Crown Privilege*

1. *From the Earliest Cases Through Beatson v. Skene*

As earlier discussed, the English doctrine on Crown immunity from discovery has been clarified fairly definitely in the last hundred and fifty years. The law of Crown privilege, however, was never defined so concisely. Perhaps this was because the very concept of privilege is more difficult to comprehend than that of the prerogative. In any event, after one and a half centuries of jurisprudence, there is still a wide area of disagreement on some fairly basic questions.

The first case which can indubitably be described as one involving Crown privilege was that of *Anderson v. Hamilton*.³⁰ This was an action for false imprisonment against the Governor of Heligoland. In the course of the trial, the plaintiff summoned one of the Under Secretaries of State (a junior minister) at the Colonial Office, on a subpoena, requiring him to produce in court a letter sent to the Secretary of State by the plaintiff concerning the defendant's conduct, and correspondence and copies of correspondence between the Secretary of State and the defendant concerning the plaintiff's letter of complaint. The Attorney-General objected to the production of all these letters in court: to the first category, on the ground that the letter had never been shown to the defendant, and, to the second, on the ground that the letters were communications of a confidential nature which in the interests of the state ought not to be disclosed. To this latter objection, the plaintiff's counsel replied that only part of a letter from the Secretary of State to the defendant was required.

Lord Ellenborough, in ruling on these objections, appeared to be somewhat embarrassed. He plainly did not wish to allow the correspondence between the Secretary of State and the governor to be produced in public, yet at the same time he probably did not wish to close the door forever to the admission of official documents on a subpoena. He therefore based his refusal to allow the documents to be produced on two grounds: (a) that "secrets of state" should not be taken out of the hands of public servants, and (b) that the letter from the Secretary of State might have been

²⁹ [1968] 2 W.L.R. 998, [1968] 1 All E.R. 874 (H.L.).

³⁰ 2 Br. & B. 156, 129 Eng. Rep. 917 (C.P. 1816).

a collateral condemnation of the defendant. However, his Lordship was not to be allowed to leave his ratio decidendi so ill-defined. He had stated that if the letter were to be used merely to prove a fact, it might be admitted. To this counsel quickly asserted that the purpose of seeking the letter was solely to prove a fact—that a complaint had been made to the Secretary of State by the plaintiff. Lord Ellenborough replied that if a fact could be established only by giving in evidence part of what was embodied in an official letter, it could not be got at at all.

This judgment, which tended to be the point of departure for judges and counsel alike in future consideration of the problem of Crown privilege, was by all standards most unsatisfactory. Lord Ellenborough claimed to base his decision on one of the state trials, whose date and title he did not specify, in which he claimed that Lord Greville's objection to producing some communication intercepted in the post had been sustained on the ground that "State Secrets ought not to be taken out of the hands of public servants." Besides failing to identify this case, Lord Ellenborough also admitted that his memory might not be completely accurate as to all the details. This was scarcely a propitious foundation for a problem which was to beset the common-law world for many years to come.

The case to which Lord Ellenborough referred was not known to contemporary authors, nor has the present writer succeeded in tracking it down. It has been suggested that he may have had in mind one of the state trials of 1794-1796 (e.g., *Rex v. Hardy*,³¹ *Rex v. Tooke*,³² *Rex v. Stone*³³). All these cases, however, dealt with the right of the prosecution to withhold information concerning the identity of an informant and the means by which the informant communicated with the authorities. This represents a quite separate branch of the law of testimonial privilege, although some early nineteenth-century writers and judges obviously thought that Crown privilege and the informer privilege came from a common source.³⁴

In the so-called *Bishop Atterbury's Trial*,³⁵ the House of Lords had refused to allow clerks of the post office to be asked how they opened or resealed letters or to allow a government decipherer to be required to reveal the secrets of his art. It should be observed, however, that these proceedings scarcely constituted a trial, being the passage of a bill of pains and penalties (a virtual act of attainder). The issues in the case appear

³¹ 24 How. St. Tr. 199 (K.B. 1794).

³² 25 How. St. Tr. 1 (K.B. 1794).

³³ 25 How. St. Tr. 1155 (K.B. 1796).

³⁴ E.g., 1 PHILLIPS & ARNOLD, TREATISE ON THE LAW OF EVIDENCE § 2 (10th ed. 1852) and dictum of Lord Eldon in *Earl v. Vass*, 1 Sh. App. 299 (Scot. 1822).

³⁵ 16 How. St. Tr. 323 (Parl. 1723).

to have been decided on political lines and the whole affair earned its perpetrators a mention in *Gulliver's Travels*.³⁶ It may also be observed that decipherers appear to have been examined on at least one previous occasion.³⁷

In *Atherford v. Beard*,³⁸ reference was made to two previous cases in which it was stated that the court had declined to order production of revenue books. As these cases were not specified, however, it is difficult to assess their importance. There were, however, one or two cases prior to *Anderson v. Hamilton*³⁹ in which the courts had insisted on examining witnesses despite government protests. The two most notable of these were the *Trial of Lord Strafford*⁴⁰ and the *Trial of the Seven Bishops*.⁴¹

It will thus be seen that although there were some precedents for refusing to require official documents to be produced in court, there were also some contrary precedents. To state as an absolute rule, therefore, that "State Secrets ought not to be taken out of the hands of public servants" was an over simplification of what in 1816 was a very ill-defined jurisprudence.

Whatever the deficiencies of *Anderson v. Hamilton*,⁴² it was treated with respect in succeeding cases. A few months later, in *Wyatt v. Gore*,⁴³ a libel case against the Governor of Upper Canada, the Common Pleas at *nisi prius* on the objection of the defence, ordered the Attorney-General of the province, who had been subpoenaed to give evidence, to refrain from answering a question on the ground that it related to a communication between public officers which was privileged from production. In *Cooke v. Maxwell*,⁴⁴ the following year, the King's Bench ruled, on the basis of *Anderson v. Hamilton*, that a witness who had arrested the plaintiff and destroyed his property could not be required to produce his written orders in view of an objection to production of these documents by the Attorney-General. The court did, however, permit the officer to be asked whether he had done anything to the plaintiff or his property not warranted by his orders.

Anderson v. Hamilton was quoted the same year in *Rex v. Watson*,⁴⁵ a trial for high treason. During the cross-examination a Clerk of the Works was asked by the Crown whether certain sketches found in the

³⁶ Chapter 6.

³⁷ *Coleman's Case*, 7 How. St. Tr. 1 (K.B. 1678).

³⁸ 2 T.R. 610, 100 Eng. Rep. 328 (K.B. 1788).

³⁹ *Supra* note 30.

⁴⁰ 3 How. St. Tr. 1381 (Parl. 1640).

⁴¹ 12 How. St. Tr. 183 (K.B. 1688).

⁴² *Supra* note 30.

⁴³ *Supra* note 4.

⁴⁴ 2 Stark. 183, 171 Eng. Rep. 614 (*Nisi Prius* 1817).

⁴⁵ 2 Stark. 116, 171 Eng. Rep. 591 (*Nisi Prius* 1817).

defendant's house were accurate plans of the Tower of London. The defence thereupon sought to ask the clerk whether accurate plans of the Tower of London could not also be bought openly in London shops. The court (which included Lord Ellenborough), however, refused to allow the question to be put on the grounds that an answer might entail public mischief. In 1820, in *Home v. Bentinck*,⁴⁶ a former lieutenant-colonel in the army sued a major-general for libel arising from a Military Court of Inquiry. Chief Justice Abbott refused to require Sir Henry Torrens, Military Secretary to the Commander-in-Chief of the Army, to produce the original records of the Court of Inquiry, despite the fact that a copy of the report had been given to the plaintiff. The defence objected to the production of the original on grounds of public policy. On a writ of error to the Exchequer Chamber, Chief Justice Dallas stressed the confidential nature of the report. The question, he claimed, was not whether the court could have required Sir Henry Torrens to produce the report against his will, but whether, if he had been willing to produce it, the court should not have prevented him from so doing. The answer was by implication that the court would have so restrained Sir Henry had he not objected to production.

In 1841, in the case of *Smith v. East India Co.*,⁴⁷ a claim for debt, the plaintiff sought discovery against the East India Company. The defendants in their affidavit of documents claimed privilege for certain documents on the ground of public policy. These were, it was alleged, confidential communications between the company and the Imperial Government made in compliance with statute. The Lord Chancellor allowed the claim for privilege. He made it clear, however, that privilege could not be claimed merely because documents were "official." There must be special circumstances to warrant their non-disclosure. In this case the legislature had required the company to report all their transactions to the government-appointed Board of Control in London and it was to be assumed that the legislature had intended such communications to be made in an atmosphere of confidentiality. Another case involving the East India Company arose in 1856. In *Wadeer v. East India Co.*,⁴⁸ the Court of Appeal in Chancery quashed an order of the Master of the Rolls requiring the company to produce documents for which privilege had been claimed on the ground of public interest. These documents were, it was alleged, (a) documents which could not be released except by order of the Board of Control, (b) communications between the company's several governments in India relating to the company's political activities. The court held that the documents of both categories were of a class which could not be produced on the ground of public policy, but suggested that if they had belonged

⁴⁶ 8 Price 225, 146 Eng. Rep. 1185 (Ex. 1820).

⁴⁷ 1 Ph. 50, 16 Sim. 76, 41 Eng. Rep. 550 (Ch. 1841).

⁴⁸ 8 De G.M. & G. 181, 44 Eng. Rep. 380 (Ch. 1856).

to a different category the judgment might have gone differently. This line of argument, which has a striking similarity to the argument in *Smith v. East India Co.*,⁴⁹ found favour with the Judicial Committee of the Privy Council in *Robinson v. South Australia* [No. 2].⁵⁰

It is fair to observe that in suggesting that there were categories of official communications which could not be protected from disclosure, the equity courts may have been dissenting from the rather broad doctrine of *Anderson v. Hamilton*.⁵¹ It should also be noted, however, that the East India Company, although agents of the Imperial Government, were not immune from discovery as such. The company were regarded in a sense as a sovereign power and could claim some of the prerogatives of the Crown, e.g., they could not be sued for their political acts. However, they were not immune from all suit and were certainly as answerable as an ordinary private company for their normal commercial activities.⁵² This special status of the company must be borne in mind in consideration of the several cases of Crown privilege in which they were involved.

It will thus be seen that by the mid-nineteenth century there was already a considerable jurisprudence in England on the subject of Crown privilege. The courts had recognized that privilege attached to certain official communications on the ground that disclosure would be contrary to the public interest. They had recognized that the privilege extended to oral as well as to written testimony and that prior publication to one of the parties did not necessarily constitute a waiver of the privilege. It had not been decided, however, whether the privilege was confined to certain categories of official documents or whether it covered all documents in the possession of the Crown; nor was it decided in what form an objection should be made, by whom it could be taken or whether the courts had any residual right to override it. The time was ripe for a judgment which would clear up these outstanding issues.

In *Beatson v. Skene*,⁵³ the court certainly attempted to define the principles on which the law of Crown privilege was based, but it is doubtful whether the objective was realized. This was yet another libel action involving army officers. Beatson was a former major-general in the Crimean War. In the course of an official investigation into Beatson's conduct, Skene had allegedly volunteered a defamatory statement about Beatson to the officer in charge of the investigations. At trial in the Court of Exchequer, Baron Bramwell refused to order the Secretary

⁴⁹ *Supra* note 47.

⁵⁰ *Supra* note 6.

⁵¹ *Supra* note 30.

⁵² See *Moodaly v. Moreton*, 2 Dick 643, 21 Eng. Rep. 425 (Ch. 1785).

⁵³ 5 H. & N. 838, 157 Eng. Rep. 1415 (Ex. 1860).

of State for War to produce minutes of a Court of Inquiry (which in March, 1857 had investigated charges against the investigating officer preferred by Beatson), and letters written to the War Office by the plaintiff in 1855.

On a motion for a new trial (Beatson had lost his action), the Court of Exchequer stated that the documents which the plaintiff sought were in any case irrelevant to his action. The court made it clear, however, that it agreed with Bramwell in refusing production on the ground of public policy. Chief Baron Pollock, delivering the judgment of the court, said that there must obviously be limits to the power of the courts to compel production of documents where matters of the state were concerned. If the production of an official paper would be injurious to the public service, the general public interest in its non-disclosure must be paramount to the individual interest of a litigant in securing evidence. In the opinion of the court, it was for the minister of the Crown having custody of the documents and not the court to decide whether production would be detrimental to the public interest. "The administration of justice is only a part of the general conduct of the affairs of any State or Nation, and we think is . . . subordinate to the general welfare of the community."⁵⁴

This important judgment was subject to two reservations. The court had ruled that judges "ought not" to compel the production of a document where the head of a department had attended and stated that in his opinion such action would be contrary to the public interest. Reservations were, however, expressed as to whether a judge might not exercise his discretion where the minister did not object or merely sent an official with instructions to object. The second reservation concerned the dissent of Baron Martin, who asserted that whenever a judge was satisfied that the document might be made public without prejudice to the public interest, he might compel production despite a ministerial objection. In reporting his brother's dissent, Chief Baron Pollock conceded that there might be some rare cases where such action would be called for. This, however, was to be considered as a rather extreme case, and extreme cases threw very little light on the practical rules of life.

Several observations upon this case arise immediately. First, it was made clear that it was generally for the minister and not the judge to decide whether a document should be produced. The suggestion in *Smith v. East India Co.*⁵⁵ and *Wadeer v. East India Co.*⁵⁶ that there might be classes of official documents to which privilege did not attach was thus by implication overruled.⁵⁷ It should be noted, however, that

⁵⁴ *Id.* at 853-54, 157 Eng. Rep. at 1422.

⁵⁵ *Supra* note 47.

⁵⁶ *Supra* note 48.

⁵⁷ But the Judicial Committee was to have other ideas in the *Robinson* case, *supra* note 6.

the principal reason given for this decision was the supposition that if the judge were to examine the document to determine whether production would be contrary to the public interest, such an examination would have to take place in public. Even if this was a correct statement of the law in 1869, it is certainly not the law today in England or in Canada, and it is therefore arguable that the ratio of the judgment has been undermined. Second, the duty of the judge to refuse production was limited to cases where a minister objected in person. There had been a few previous cases⁵⁸ where the objection had been sustained when taken either by the Attorney-General or by the defence. On the other hand, there were ample precedents⁵⁹ for ordering production when the minister having custody of the document did not object. The doctrine of *Beatson*⁶⁰ was thus something of an antidote to *Home v. Bentinck*,⁶¹ in which the duty of the judge to do the executive's work for it had been stressed. Henceforth, although judges were rarely to demand a minister's personal attendance (accepting in lieu an affidavit or certificate), they were to pay increasing attention to the manner in which privilege was claimed, before sustaining an objection to production. In particular, they began to demand evidence that the minister had personally considered the facts of the case.

It should be noted that the case applied only to documentary evidence. It failed to deal with the question of oral secondary evidence where a document had been ruled privileged on the ground of public policy. This problem remained to perplex judges and lawyers in ensuing years. It should also be observed that even those points which were the subject of rulings in *Beatson v. Skene* were not necessarily clarified thereby.

In *Stace v. Griffith*,⁶² the Judicial Committee of the Privy Council appeared to re-affirm the doctrine implied in *Home v. Bentinck*⁶³ that the court should order a document to be withheld even when the department had not objected to production. This was an appeal from the Supreme Court of St. Helena in which libel was alleged by a local teacher against a colonial officer. The original copy of the alleged libel was, however, contained in a communication from the defendant to the Colonial Secretary, who refused to allow the document to be produced in court on the ground of public policy. The Chief Justice of St. Helena allowed secondary evidence of the libel to be produced and in the event the jury found for the plaintiff. The Judicial Committee held (on the basis of

⁵⁸ E.g., *Anderson v. Hamilton*, *supra* note 30.

⁵⁹ See *Dickson v. Earl of Wilton*, 1 F. & F. 419, 175 Eng. Rep. 790 (Nisi Prius 1859).

⁶⁰ *Supra* note 53.

⁶¹ *Supra* note 46.

⁶² 6 Moo. P.C. (n.s.) 18, 16 Eng. Rep. 633 (1869).

⁶³ *Supra* note 46.

Anderson v. Hamilton)⁶⁴ that the Chief Justice should have refused to allow secondary evidence of the communication to the Colonial Secretary to be produced once privilege had been claimed for the original. The Court also held, however, that the trial judge should have refused to allow production even if there had been no ministerial objection.

In the case of *H.M.S. Bellerophon*⁶⁵ the High Court of Admiralty, in upholding the objection of the Secretary of the Lords of Admiralty to production of official reports concerning a collision at sea, held that it was sufficient for the secretary to object in the form of an affidavit. His personal attendance was not required. In this case it was also ruled that if part of a document was sufficiently sensitive for a minister to object to its production, then the whole document must be withheld. This in fact affirmed part of Lord Ellenborough's judgment in *Anderson v. Hamilton*.

A slightly different approach to the problem appeared in *Hennessey v. Wright*.⁶⁶ In this case, an action for libel brought by the Governor of Mauritius against a resident of the colony, the plaintiff objected to the production of various reports made by himself to the Colonial Secretary, claiming that the secretary had ordered him to object in the public interest. The Colonial Secretary neither attended in person nor sent an affidavit of objection to the court. The court was unanimous in holding that an objection to production of documents made in such a form was not binding on the court. It held, however, that the objection ought nevertheless to be respected on the ground that confidential communications between ministers and officials should not be revealed. Mr. Justice Field averred that, where a minister did object in person at the trial, the judge should nevertheless have the right to examine the document to satisfy himself that public policy was the minister's real motive in objecting. This opinion was in fact an endorsement of Baron Martin's dissenting judgment in *Beatson v. Skene*.⁶⁷ Field was, however, careful to state that his opinion was meant to apply only to cases where objection was made at trial and not, as in the case before him, where objection was made on discovery.

Several cases followed in which ministerial objections to production of documents were sustained by the courts. In *Wright & Co. v. Mills*,⁶⁸ the Chancery refused to order production of documents in the custody of the defendant which were the legal property of the Cape of Good Hope Government, to which production the government had objected. In *Hughes*

⁶⁴ *Supra* note 30.

⁶⁵ 11 Asp. M.C. 449 (Adm. 1874).

⁶⁶ 21 Q.B. 509 (1888).

⁶⁷ *Supra* note 53.

⁶⁸ 62 L.T.R. (n.s.) 558 (Ch. 1890).

v. *Vargas*,⁶⁹ the Queen's Bench, in refusing to overrule the personal objections of the Secretary and Chairman of the Board of Inland Revenue to production on a subpoena of a confidential report made on the plaintiff, held that the court "could not" inquire into the grounds on which the Crown had objected. In *Chatterton v. Secretary of State*,⁷⁰ the Court of Appeal upheld the High Court's summary dismissal of an action for libel against the India Secretary, on the grounds that the communication complained of (a minute from the Secretary of State to his junior minister) was absolutely privileged and that such a document could never be produced.

Henceforth the jurisprudence became even more confused, the courts normally accepting the objection of a minister, but giving differing opinions as to the ultimate right of the court to order production. In the case of *In re Hargreaves*,⁷¹ the Court of Appeal implied that a residual power to order production of documents remained despite a ministerial objection. However, in *Attorney-General v. Nottingham Corp.*,⁷² Mr. Justice Farwell, although strongly objecting to the action of the Local Government Board in withholding a report on a smallpox hospital, expressed himself powerless to order production. In *Williams v. Star Newspaper Co.*,⁷³ Mr. Justice Darling stated that a judge "ought not" to override a ministerial objection. In *West v. West*⁷⁴ the Court of Appeal upheld an appeal in a libel and slander action. At trial, the judge had sustained an objection by the Lord Chamberlain to being examined concerning a confidential oral communication made to him by the defendant. The court implied that once the trial judge had accepted the Lord Chamberlain's objection to revealing the text of the communication, he should not have allowed further questions to be put concerning the communication.

In *Asiatic Petroleum Co. v. Anglo-Persian Oil Co.*⁷⁵ the Court of Appeal upheld the decision of the High Court in refusing to order production of documents, some of which had never been in the possession of the Crown, but which related to the military situation in the Persian Gulf. The judgment makes it clear, however, that the trial judge had exercised his discretion (in the manner suggested by Field in *Hennessy v. Wright*)⁷⁶ by examining the documents privately, in order to determine whether the ministerial objection was made in good faith. The court did not disapprove of the trial judge's action.

⁶⁹ 9 T.L.R. 471, 551 (Q.B. 1893).

⁷⁰ [1895] 2 Q.B. 189 (C.A.).

⁷¹ [1900] 1 Ch. 347 (C.A.).

⁷² [1904] 1 Ch. 673, at 674, 20 T.L.R. 257, at 258.

⁷³ 72 J.P. 65, 24 T.L.R. 297 (1908).

⁷⁴ 27 T.L.R. 476 (C.A. 1911).

⁷⁵ [1916] 1 K.B. 822 (C.A.).

⁷⁶ *Supra* note 66.

In *Anthony v. Anthony*,⁷⁷ the Probate, Divorce and Admiralty Division held that it "had no option" but to refuse to order production of the respondent's army records in view of the objection of the War Secretary. The court did, however, strongly disapprove of the Crown's objection, which was made despite the fact that the respondent was willing for his record to be revealed, and awarded costs against him, even though the petition was dismissed. In *Ankin v. London & North Eastern Ry.*,⁷⁸ the Court of Appeal stated that it was the practice of the courts to accept a statement from a minister of the Crown that production of a document would be contrary to the public interest. However, in *Spigelman v. Hocken*,⁷⁹ the King's Bench, while accepting that an objection to production on grounds of a document's contents must be accepted, refused to allow an objection based on the ground that the document belonged to a class of documents the production of which would be contrary to the public interest. The document in question was a police report on a road accident. Mr. Justice MacNaughten ordered the document to be produced in court for his examination and, having satisfied himself that its disclosure would not prejudice the public interest, ordered the witness to read it out in open court. It should be observed that there was at least one previous case in which an objection based on a document's class (rather than its contents) had been sustained, namely *H.M.S. Bellerophon*.⁸⁰

At the time when *Duncan v. Camell Laird & Co.*,⁸¹ the second great milestone in the English law of Crown privilege, was decided, there were still several basic issues unresolved. It was not clear whether the courts were automatically obliged by law to respect a minister's objection to production of documents. Nor was it clear what constituted a valid objection. Must the minister appear in person or would an affidavit suffice? On what grounds could a minister object (*i.e.*, was "class" a sufficient ground)? To what extent did the rule cover oral evidence? Did it cover all oral evidence to which objection was taken or was Crown privilege in such cases confined to secondary evidence or privileged documents? In 1941, the case law had become further complicated by the Australian case of *Robinson v. South Australia* [No. 2],⁸² in which the Judicial Committee of the Privy Council had reasserted the right of the courts to order production over the objection of a minister.

The judgment in *Duncan* was clearly intended to settle all these outstanding issues. The fact that it did not is a testimony to the continual

⁷⁷ 35 T.L.R. 559 (P.D. & A. 1919).

⁷⁸ [1930] 1 K.B. 527 (C.A.).

⁷⁹ 150 L.T.R. (n.s.) 256 (K.B. 1934).

⁸⁰ *Supra* note 65.

⁸¹ *Supra* note 23.

⁸² *Supra* note 6.

conflict of opinion on the merits of Crown privilege and to the ingenuity of judges and lawyers in distinguishing one case from another. *Duncan* occurred in the middle of World War II, a time when the fortunes of war had not yet begun to swing toward the Allied's cause, and it has been suggested that this factor to some extent influenced the judgment. Be that as it may, the case arose out of the loss of the submarine *Thetis* while undergoing trials in 1939 in Liverpool Bay, with the loss of ninety-nine men. Several of the dependants of the victims sued the constructors of the submarine—Camell Laird & Co.—for negligence. At discovery, the defendants objected to production of certain important papers relating to the case, including the contract between themselves and the Admiralty for the hull and machinery and salvage reports made after the accident. The objection was supported by an affidavit from the First Lord of the Admiralty to the effect that disclosure of the documents in question would be contrary to the public interest.

The plaintiffs fought the case up to the House of Lords and lost. The judgment of the whole Court, which consisted of seven members, (an unusually large number for this tribunal), was given by the Lord Chancellor, Viscount Simon; it dealt with many of the problems which had arisen in connection with Crown privilege in the past. The first problem covered was the position of Crown as third party. Was the Crown able to prevent a litigant from disclosing a document even when not a party to the action? The Court decided that the Crown did have such a right. The second problem was whether the Crown could be compelled to make discovery. The Court held that in cases to which the Crown was a party it could not be forced to make even an affidavit of documents, much less to produce documents for inspection. This ruling was based on *Deare v. Attorney-General*,⁶³ *Thomas v. The Queen*⁶⁴ and *Attorney-General v. Newcastle-upon-Tyne*.⁶⁵ The Court admitted, however, that the Crown might possibly be obliged to produce documents to the defence in criminal cases.

It was further stated that for an objection to be valid it must be evident that the ministerial head of the appropriate department or else the permanent head had personally examined the documents in question. If the objection were to be made at discovery, *i.e.*, before trial, it should be made by affidavit, but if it were to be made at trial the minister might merely send an unsworn statement (a certificate). The court should, however, have the right to demand the minister's personal attendance before giving effect to an objection. An objection could be made on the ground of a document's contents or on the ground that it belonged to a

⁶³ *Supra* note 15.

⁶⁴ *Supra* note 16.

⁶⁵ *Supra* note 21.

class of documents, production of which would be contrary to the public interest (this disposed of *Spigelman v. Hocken*).⁸⁶ It could also cover oral evidence. The objection must, however, be made solely on the ground of injury to the public interest and if made on other grounds, such as inconvenience to officials, fear that production might weaken the Crown's case and so on, it might invalidate the claim.

The Court dealt finally with the question of whether the minister's objection was conclusive. Without in fact stating that the courts had no legal power to override a ministerial objection, their Lordships indicated that the courts should never go behind an objection when made in the correct form. Nor should they examine a document to see whether public policy was the minister's real motive in objection. In ruling on this last point, their Lordships disapproved of the action of the Judicial Committee in *Robinson*, in remitting documents for examination to the Supreme Court of South Australia. It was asserted that in *Robinson* the Judicial Committee had to a large extent based their judgment on the existence of a South Australian Rule of Court which allowed courts to examine documents for which privilege was claimed. Viscount Simon said that objection to production of documents on the ground of public policy did not come within the scope of the law of privilege as normally defined and that the South Australian Rules of Court did not therefore confer any powers on the courts of that state to override a claim of Crown privilege. He expressly disapproved of the practice of some judges (as in *Hennessy v. Wright*,⁸⁷ *Asiatic Petroleum Co. v. Anglo-Persian Oil Co.*⁸⁸ and *Spigelman v. Hocken*)⁸⁹ of examining documents for which Crown privilege was claimed.

2. *From Duncan v. Camell Laird & Co. to Date*

The *Duncan* case has been sharply criticized in many countries.⁹⁰ It has been claimed that in this case the courts abdicated their powers and responsibilities by giving the executive a *carte blanche* to spread a cloak of secrecy over all its activities and to remove them from the purview of the judiciary. Whatever the merits of these arguments, which are as much political as legal, the *Duncan* case was accepted for several years, in England and elsewhere, as standing for the principle that the courts had no right to override a ministerial objection when taken in valid form. Not all judges were happy about the case, however, and this dissatisfaction appears to have increased through the years. One case

⁸⁶ *Supra* note 79.

⁸⁷ *Supra* note 66.

⁸⁸ *Supra* note 75.

⁸⁹ *Supra* note 79.

⁹⁰ See dictum of O'Halloran, J.A., in *In re Regina v. Snider*, 8 W.W.R. (n.s.) 1, at 13-14, [1953] 2 D.L.R. 9, at 20-21 (B.C.).

which produced particularly strong judicial reaction was that of *Ellis v. Home Office*.⁹¹ In this case a prisoner awaiting trial in the hospital wing of a prison was attacked and severely injured by a fellow prisoner, who was under observation as a suspected mental defective. The injured man sued the Home Office for negligence under the Crown Proceedings Act. At discovery the Home Office objected to the production of various documents on the ground of public policy. These included police reports made after the attack and medical reports on the behaviour of the suspected mental defective before the incident. Mr. Justice Devlin, though conceding that the courts had no power to require the documents to be produced, objected vigorously to the action of the Home Office and intimated that Crown privilege was being claimed for documents which could be made public without the least harm to the public interest. As a result of the Home Office's action, the plaintiff lost his case. However, the comments of the trial judge and the Court of Appeal at least had the effect of securing an administrative concession⁹² from the government whereby the exercise of Crown privilege was in future somewhat restricted as a matter of grace.

A number of succeeding cases confirmed the absolute nature of a ministerial objection (*e.g.*, *Auten v. Rayner*,⁹³ and *Gain v. Gain*).⁹⁴ In *Broome v. Broome*,⁹⁵ however, it is possible to note a hardening of the judicial attitude towards the executive. This was a divorce case in which the Secretary of State for War objected to the production in court of certain documents in his possession concerning the attempts of the S.S.A.F.A.⁹⁶ to bring about a reconciliation between the parties prior to the action. The secretary also objected to Mrs. Allsop, an officer of the S.S.A.F.A., being required to give oral testimony concerning her mediation attempts. In his judgment, Mr. Justice Sachs ruled that the claim of privilege must be accepted in respect of the documents, although he entered a *quaere* as to whether privilege applied where documents had been sent to the Crown merely to avoid their production in court: the documents must either be in the possession of the Crown or else have "emanated" therefrom if privilege was to be claimed. The court refused, however, to set aside the *subpoena ad testificandum* served on Mrs. Allsop, on the ground that objection must be made to specific questions and not in blanket form to a subpoena as such. In the event, the War Secretary did not follow up his objection to the *subpoena ad testificandum*, and Mrs. Allsop was allowed to give her evidence without interruption. Sachs had, moreover, made it clear that if the Crown had objected to individual questions being

⁹¹ [1953] 2 Q.B. 135 (C.A.).

⁹² PARL. DEB., H.L. (5th ses.) 741 (1956).

⁹³ [1958] 3 All E.R. 566 (C.A.).

⁹⁴ [1962] 1 All E.R. 63 (P.D. & A. 1961).

⁹⁵ [1955] P. 190, [1955] 1 All E.R. 201.

⁹⁶ A service welfare organization.

put to Mrs. Allsop, he would probably have required argument as to why the question was contrary to the public interest.

Broome v. Broome was therefore a straw in the wind. The courts were acquiring a determination to ensure that the *Duncan* judgment was applied no further than the ratio of the case would allow. In *In re Grosvenor Hotel (No. 2)*,⁹⁷ however, the Court of Appeal went much further. In effect the court declared Viscount Simon's remarks in the *Duncan* case on the finality of a ministerial objection to be both obiter and bad law, and accordingly the court refused to follow them. Such a judgment could only introduce a high element of uncertainty into the English law on Crown privilege as it amounted to an overruling of a decision of the House of Lords by an inferior tribunal. A definitive pronouncement from the highest court of the United Kingdom was therefore essential. Such a decision appears to have come at last in *Conway v. Rimmer*.⁹⁸ Conway, a probationer police officer, had been prosecuted for the alleged theft of a torch. The prosecution failed, but Conway's employment with the Cheshire constabulary was terminated shortly afterwards. Conway thereupon brought an action for malicious prosecution against Rimmer, an officer who had been instrumental in bringing the charge of larceny against him. At discovery, the plaintiff sought production of a number of documents which he claimed were relevant to his case, in particular three probationary reports on himself, a report by a district police training centre and a report by Rimmer, which had been delivered to the Chief Constable. The Home Secretary intervened, objecting to the production of the documents on the ground that they belonged to a class, disclosure of which would be detrimental to the public interest. The Court of Appeal, differently constituted from the tribunal which had sat in *In re Grosvenor Hotel (No. 2)*, upheld the Home Secretary's objection on the ground that they were obliged by *stare decisis* to follow the ruling of the superior court in *Duncan*. Lord Denning, however, delivered a characteristically vigorous dissenting judgment.

On further appeal the case was considered at length by the House of Lords. At judgment, speeches were delivered by all five members of the Court, but there was no basic divergence of views and the judgment as a whole is adequately summarized in the speech of Lord Reid. He said that the documents sought might clearly be of the utmost relevance to the plaintiff's case. However, if the normal interpretation of Viscount Simon's speech in *Duncan* were to be followed, there would be no option but to accept the Home Secretary's objection. Normally, he would be unwilling to reverse a definitive ruling of the House of Lords only twenty-five years old. However, there were several exceptional features in the *Duncan* ruling. Viscount Simon had assumed that the law of Crown privi-

⁹⁷ [1965] Ch. 1210, [1964] 3 All E.R. 354 (C.A.).

lege was the same both in England and Scotland. However, the House of Lords had expressly dissented from this opinion in *Glasgow Corp.*⁹⁸ Furthermore, the *Duncan* judgment had been received with almost universal judicial hostility and the executive had itself declined to make the maximum use of the powers which the ruling permitted.

After reviewing a large number of cases from England and Scotland, together with the *Robinson*¹⁰⁰ judgment and *Reynolds v. United States*,¹⁰¹ Lord Reid concluded that the *Duncan* ruling had attempted to lay down correct judicial practice rather than to define the lawful rights of the courts. Nothing in *Duncan*, he concluded, had abrogated the right of the courts to overrule a ministerial objection to production of documents. Moreover, he dissented from Viscount Simon's ruling as to what constituted correct judicial practice. He did not doubt that in *Duncan*, the House of Lords had been right to uphold the ministerial objection. The documents sought had contained military secrets and, at the time of the hearing, the state had been engaged in a desperate military struggle with a foreign power. However, he doubted whether the courts should automatically give effect to a ministerial objection as was required by the *Duncan* ruling. The courts would rarely wish to order production where privilege was claimed on grounds of the document's contents. Similarly there were documents to which privilege should attach by virtue of the class to which they belonged. This category included Cabinet minutes, and must also include communications inside government departments and between departments and outside bodies, where these concerned the formulation of policy. On the other hand, routine reports such as those sought in this case could probably be produced without any detriment to the public interest. The proper test was to ask whether the withholding of a document because it belonged to a particular class was really "necessary for the proper functioning of the public service." If the minister's reasons were such that a judge could properly weigh them, he must also consider the probable importance in the case before him of the documents or other evidence sought to be withheld. If he decided that on balance they probably should be produced, it would generally be best that he should see them before ordering production and if he thought the minister's reasons were not clearly expressed he would have to see them before ordering production. The House of Lords, after examining the documents sought in the case, concluded that their production would not be detrimental to the public service and accordingly ordered them to be shown to the plaintiff.

⁹⁸ [1968] 2 W.L.R. 998, [1968] 1 All E.R. 874 (H.L.).

⁹⁹ [1956] Sess. Cas. 1 (H.L.).

¹⁰⁰ *Supra* note 6.

¹⁰¹ 345 U.S. 1 (1953).

It is obviously too soon to assess the full importance of this case. The authority of *Duncan*, with its emphasis on the finality of a ministerial objection, has been emphatically discarded and this is a development of the utmost significance. However, there will doubtless be ample scope for argument in the years to come over the categories of document which may still be withheld on grounds of detriment to the public interest. The following additional features of the case are worthy of attention. First, the amount of attention given by the House of Lords to non-English cases must inevitably act as a unifying factor in jurisprudence on the subject throughout the common-law world. Second, the House of Lords in *Conway* has clearly stated the right of the courts not only to overrule a ministerial objection, but also to inspect the documents *ex parte* to see whether the public interest would truly be injured by their production. This right was stressed in *Robinson*, but was explicitly denied in *Duncan*. Finally—and perhaps most important for English law as a whole—*Conway* is the first case in which the House of Lords has used its newly regained ability¹⁰² to reverse a previous decision. Lord Reid's speech makes it quite clear that his judgment is intended to establish a code of practice different from that laid down by Viscount Simon in *Duncan*. There can be few aspects of English law in respect of which the right to dispense with *stare decisis* was more desirable.

III. CANADIAN LAW

A. *Crown Immunity from Discovery*

Although there have been few cases relating to Crown immunity from discovery in Canada, the general doctrine on the subject in this country closely resembles that of England. This means that the Crown, in right of Canada or the provinces, cannot be compelled against its will to make discovery of either facts or documents in the absence of specific legislation to this effect. As earlier mentioned, written interrogatories as a means of establishing facts before trial have in Canada largely been replaced by an oral examination before a court official, this procedure being known as "Examination for Discovery." The Canadian courts have, however, tended to treat the position of the Crown with regard to examination for discovery in the same manner as with regard to written interrogatories.

The first notable Canadian case concerning Crown immunity from discovery was that of *Attorney-General for Ontario v. Toronto Junction Recreation Club*.¹⁰³ (This was similar to *Attorney-General v. Newcastle-upon-Tyne*¹⁰⁴ in that the rights of the Crown with regard to discovery

¹⁰² See Note, [1966] 1 W.L.R. 1234, [1966] 3 All E.R. 77.

¹⁰³ 8 Ont. L.R. 440 (Weekly Ct. 1904).

¹⁰⁴ *Supra* note 21.

were only touched on in passing.) In this case, the Attorney-General was seeking a declaration from the court that the club should be deprived of its charter of incorporation on the ground that it had been carrying on an illegal betting business. The club sought an injunction to restrain the government from recommending to the Lieutenant-Governor that their charter be annulled before the court action had been concluded. The court refused the injunction on the ground that such activities on the part of a court against the Crown would be unprecedented and contrary to law. In dealing with the prerogatives of the Crown as litigant, however, the court mentioned that no compulsory discovery was available against the Crown, quoting with approval *Attorney-General v. Newcastle-upon-Tyne*. This part of the judgment was to some extent obiter, but it was nevertheless quoted in later Canadian cases.

Probably the most important Canadian case on Crown immunity from discovery was that of *Crombie v. The King (No. 2)*.¹⁰⁵ This case arose on an appeal by the Ontario government from a ruling of Mr. Justice Logie granting an order for examination for discovery against the Crown on petition of right proceedings. Logie ruled that the Crown had the right to object to answering individual questions on examination, but held that it must attend for examination and make an affidavit of documents, if required. Logie's ruling was based on an earlier ruling which had held that the Ontario Crown's right to resist discovery had been abolished by the Rules of Court of 1913 and by the Ontario Judicature Act¹⁰⁶ of 1914. On appeal, however, the Appeal Division ruled that the Rules of Court of 1913 and the statute of 1914 had not made any specific reference to discovery in dealing with the procedure to be followed in actions between the Crown and subject, and that the Ontario Crown's immunity from discovery must therefore remain intact.

A further case concerning Crown immunity arose in 1927 in *The King v. Smith*.¹⁰⁷ In this Alberta case the Crown in right of the province had brought a civil action against the defendant who in the course of the proceedings had sought to examine a minister for discovery. The Crown objected to this procedure, not on the grounds that ministers were immune from discovery, but on the more technical grounds that the minister was not an "officer of a corporation" examinable under rule 360 of the Alberta Supreme Court Rules. The Supreme Court of Alberta (Appeal Division) ruled that the minister was not in fact such an "officer of a corporation" and expressed doubts as to whether any Crown servant was examinable under the Supreme Court Rules. The defendant did in fact eventually

¹⁰⁵ 22 Ont. W.N. 370, 500, [1923] 2 D.L.R. 542 (1922).

¹⁰⁶ ONT. REV. STAT. c. 56 (1914).

¹⁰⁷ 22 Alta. 544, [1927] 2 D.L.R. 69.

manage to obtain examination of the Crown through the person of a former Attorney-General, this procedure being allowed under the Supreme Court Rules. It will be recalled that in *Tomline v. The Queen*,¹⁰⁸ the English courts had suggested on similar lines that the inability of the subject to obtain compulsory discovery against the Crown arose from the fact that the British Petitions of Right Act¹⁰⁹ had not specified which officer of the Crown was to answer on discovery. The lesson from both cases is, therefore, that regardless of the Crown's prerogative, its peculiar status in law—neither a private person nor an ordinary commercial corporation—makes it difficult for the subject to obtain discovery from the government unless the specific method in which this is to be done is specified by court rule or by statute.

The question of what constitutes the Crown for the purposes of litigation has been raised in many common-law countries and forms a distinct branch of administrative law. The position is especially delicate where the legislature, in setting up a statutory corporation, has not stated whether it is to be regarded as an agency of the Crown. All that can safely be assumed is that the courts will have to come to a decision in each case taking into account the peculiar circumstances of the country and the relevant legislation. Where, however, the court decides that an organization is not an agency of the Crown, no privilege or prerogative of the Crown can be claimed. This is illustrated in the case of *Radych v. Manitoba Power Commission*.¹¹⁰ There the Manitoba Court of Appeal held that the Commission was not an agency of the Crown and must therefore produce an officer to be examined for discovery. This case is comparable with *Blackpool Corp. v. Locker*¹¹¹ in which the English courts refused to allow a local authority to raise an objection on ground of public interest to the production of their inter-departmental minutes. In *Radych*, however, the provincial government subsequently took legislative action to place beyond doubt the commission's status as an agency of the Crown.

A slightly irregular case occurred in *Anthony v. Attorney-General for Alberta*.¹¹² In this case, the plaintiffs sought to examine for discovery the Provincial Minister of Lands and Mines. When the defendants claimed Crown immunity, the plaintiff pleaded that the medieval Court of Chancery had required ministers to submit to discovery and that an imperial statute¹¹³ of James I had placed the Crown on the same footing as the subject as regards discovery. The court had no difficulty in disposing of

¹⁰⁸ *Supra* note 20.

¹⁰⁹ *Supra* note 17.

¹¹⁰ 50 Man. 54, [1942] 2 D.L.R. 776.

¹¹¹ [1948] 1 K.B. 349 (C.A.).

¹¹² *Supra* note 14.

¹¹³ 21 Jac. 1, c. 14 (1623-24).

these arguments. Whatever may have been the practice of the medieval courts of equity, nineteenth-century jurisprudence was too well established to admit of any compulsory discovery against the Crown. The statute of James I had not dealt with discovery but with the rights of Crown and subject at common law. The court went on to state, however, that, although the Crown could not be forced to attend for examination, it could not limit its consent by requiring the deputy minister to refuse to answer certain questions, once it had consented to submit him for discovery. It is not certain to what extent this case represents good law. Examination for discovery is a peculiarly Canadian procedure, and it is impossible to apply to it analogously the English jurisprudence on interrogatories, which is in any case extremely limited with regard to the rights of the Crown. However, if the right to refuse discovery of documents and facts is a matter of prerogative, then it is hard to see how submitting to partial discovery can constitute a waiving of the prerogative. The case should be compared with the later judgment of *Reese v. The Queen*.¹¹⁴

Discovery against the Crown came up again in the Exchequer Court of Canada in *Yarmolinsky v. The King*.¹¹⁵ In this case the suppliant on a petition of right sought to examine for discovery the driver of an army truck. The Crown had not resisted discovery, but had objected to being represented at examination. The Exchequer Court Act¹¹⁶ had specifically allowed the Exchequer Court to make rules concerning discovery in cases to which the Crown was party. In consequence the General Rules and Orders¹¹⁷ of the Exchequer Court had provided that any departmental or other officer of the Crown might by court order be examined for discovery at the instance of the party adverse to the Crown. President Thorson, after a study of provincial practice, held that the Dominion Crown was entitled to be represented at examination for discovery by someone more senior than the army driver. It will be noted that in this case the court did not deal, save in passing, with the question of whether the Crown could be compelled to make discovery in the Exchequer Court. Thorson did say, however, that discovery "could be ordered" against the Dominion Crown.

The problem was considered more thoroughly in the later case of *Reese v. The Queen*. In this action, various soldier-settlers (and their personal representatives) sought a declaration on a petition of right that they were possessed of mineral rights on the land in Alberta which they had formerly acquired from the Dominion Crown. Before the trial the suppliants examined for discovery an officer of the Crown under rule 460

¹¹⁴ *Supra* note 13.

¹¹⁵ [1944] Can. Exch. 85, [1944] 4 D.L.R. 216.

¹¹⁶ CAN. REV. STAT. c. 34 (1927).

¹¹⁷ As issued in 1931.

of the General Rules and Orders of the Exchequer Court. During this examination, the suppliants called on the witness to produce, as they were entitled to do under the rules, certain documents in the possession of the Crown. These were the original contract between the Soldier Settlement Board and the Solicitor-General of the Department of Indian Affairs, all correspondence relating thereto, the authority for the execution of the contract and the entire files of the Soldier Settlement Board relating to the suppliants' case.

The Crown objected to production of the files, claiming that it could not be compelled to make discovery, and that the files consisted of confidential interdepartmental memoranda which ought not to be produced on the ground of detriment to the public interest. The respondents were thus claiming both Crown immunity and Crown privilege. In his judgment Mr. Justice Cameron dealt with both claims, but only the first need be dealt with at this stage. He held that the Crown in right of the Dominion was as immune from discovery as in England and that neither the Exchequer Court Act nor the General Rules and Orders had affected this right. *Reese v. The Queen* went to the Supreme Court, but the question of discovery was not raised.

The following observations may be made on this case. Cameron did not mention *Yarmolinsky v. The King*, although in that case Thorson had probably implied that discovery was available against the Dominion Crown in the Exchequer Court. The Exchequer Court Act did not specifically allow the Exchequer Court to take away the Crown's immunity from discovery and it is arguable, on the principle that delegated legislation cannot alter the royal prerogative unless specific authority is given in the enabling statute, that the Exchequer Court had no right to provide for discovery to be ordered against the Crown. On the other hand the act did allow the court to make rules for discovery in Crown proceedings. The General Rules and Orders, moreover, seemed to place the Crown and subject on an equal footing as regards discovery in so far as no specific exception for the Crown's rights was made. The rights of the Crown as regards discovery in the Exchequer Court are thus still moot. Another point made in *Reese v. The Queen* was that although the Crown had agreed to produce some of the documents demanded by the suppliants, this did not constitute a waiving of the Crown's right to withhold the remainder. This part of the judgment seems to be in contrast to *Anthony v. Attorney-General for Alberta*.¹¹⁸ It should be observed, however, that by the time Cameron had reached this stage of his judgment, he had mixed up inextricably the questions of Crown immunity from discovery and Crown privilege, and it is hard to determine whether his observations on waiving through partial

¹¹⁸ *Supra* note 14.

disclosure referred to the former or the latter ground for objecting to production of documents.

A recent case on Crown immunity from discovery was *Croft v. Munnings*.¹¹⁹ In this case, in which the plaintiffs had sued Munnings on the ground of trespass and assault, the Federal Director of the Veterans Land Act had intervened as co-defendant to the action, claiming on behalf of the Crown an interest in the disputed land. Upon a motion for a further and better affidavit of documents, the director entered an objection to the application on the grounds of Crown immunity from discovery and Crown privilege. In connection with the latter objection the director asked for an adjournment so that a letter of objection from his minister could be obtained. When the master held that the first ground for objection was adequate by itself the plaintiffs appealed to the High Court. In his judgment, Mr. Justice Spence ruled that the functions of the director, which were set out in the Veterans Land Act,¹²⁰ indicated clearly that the director was an agent of the Dominion Crown. In these circumstances, and as he was being sued in his official capacity, it was clear that he had the right to refuse discovery.

B. *Crown Privilege*

1. *From Gogy v. Maguire to Regina v. Snider*

Although the Canadian law of Crown privilege, like that of Crown immunity, has, with one important exception, diverged but little from the mainstream of English jurisprudence, there has been no lack of legal controversy on the matter in this country. The early nineteenth-century case of *Wyatt v. Gore*,¹²¹ which arose out of events in Upper Canada, was settled in the English courts. In 1863, however, some four years before Confederation, the Court of Queen's Bench of Lower Canada was faced with the issue in the celebrated case of *Gogy v. Maguire*.¹²²

The case, like so many others involving Crown privilege, arose on a libel action. The plaintiff had sent the provincial government a complaint against the defendant, whom he alleged had committed "delinquencies" while conducting an inquiry as Superintendent of Police in Quebec. The provincial government (which at that time covered both Lower and Upper Canada) showed the plaintiff's letter to the superintendent. A copy of defendant's reply to his complaint was forwarded to the plaintiff who, considering the document to be highly libellous, commenced proceedings against the superintendent. At trial, the plaintiff summoned the

¹¹⁹ [1957] Ont. 211 (High Ct.).

¹²⁰ CAN. REV. STAT. c. 280, § 5 (1952).

¹²¹ *Supra* note 4.

¹²² 13 L.C.R. 33 (Q.B. 1863).

provincial secretary on a *subpoena duces tecum* requiring him to produce the original copy of the superintendent's letter. The minister refused to do this on the ground that it would be injurious to the public service. Upon losing his case and being refused a new trial, the plaintiff moved in error to the Court of Queen's Bench.

The result of this appeal was that the contemporary English doctrine of Crown privilege was applied to Lower Canada; the court refused to overrule the provincial secretary's objection and the appeal failed. In his dissent, Mr. Justice Mondelet maintained that the English law of Crown privilege was not applicable to Quebec. The Quebec Act¹²³ of 1774 had stipulated that in all matters of controversy relating to property and civil rights, resort should be had to the laws of Canada until they should be altered or varied, *i.e.*, the law of France should be observed until varied by imperial or colonial legislation. He claimed that the law of France did not recognize any such privilege as that claimed by the provincial secretary. If such a privilege were to be granted, it should at least be conferred by statute (as when Napoleon had made the Government of France immune from acts done in obedience to the Council of State) and not by an abdication of power on the part of the courts. He expressed grave apprehensions as to the abuses which might occur if the government could use Crown privilege to protect its servants from process in this manner. Having said this, however, he somewhat spoiled his case by a series of attacks upon the English and American cases which had been cited in support of the respondents. The American cases were, he claimed, worthless, because in the United States the judges were notoriously corrupt. His attack on the reasoning of Mr. Justice Dallas in *Home v. Bentinck*¹²⁴ was so scathing that Mr. Justice Meredith in his later judgment felt himself obliged to rebuke his brother for the hostility of his language.

The two other judgments in the case expressed support for the English law on Crown privilege. Mr. Justice Aylwin averred, citing Chief Baron Pollock's judgment in *Beatson v. Skene*,¹²⁵ that the detriment to the public interest which production of official documents might entail could only be determined by a minister of the Crown and not by the courts. Baron Martin's dissenting judgment in *Beatson v. Skene* was, he claimed, highly improper. No papers could be taken from the provincial secretary's office without the permission of the Governor-General, on whose instructions the secretary must be presumed to have acted in refusing to produce the documents. Aylwin thus implied that the courts would be bringing themselves into direct conflict with the Queen's personal representative if they ordered production of papers in the possession of the government.

¹²³ 14 Geo. 3, c. 83 (1774).

¹²⁴ *Supra* note 46.

¹²⁵ *Supra* note 53. He also cited various American cases in his judgment: *Marbury v.*

Mr. Justice Meredith's opinion was slightly less hostile to that of Mondelet's, but in essence he agreed with the English doctrine on Crown privilege. It was established, he claimed, that a public official could not be compelled at the instance of a private suitor to produce official documents in his custody when production would on grounds of public interest be inexpedient. The general principles of law as well as past decisions in England and the United States indicated that the executive and not the judiciary must decide whether production was inexpedient. The statute of 1774 did not apply to a matter of this nature, which must be governed, not by the Custom of Paris or the ordinances of the Kings of France, but by the law of England. In any case the appellant could gain little advantage by an application of French law to the case before the court.

Meredith cited in support of his opinion the English cases of *Anderson v. Hamilton*, *Wyatt v. Gore*, *Home v. Bentinck* and *Beatson v. Skene*, and the Pennsylvania cases of *Gray v. Pentland* and *Yoter v. Sanno* to the effect that "the President of the United States of America and the Governors of the several states are not bound to produce papers or disclose information communicated to them when in their own judgment the disclosure would on the ground of public interest be inexpedient."¹²⁶ Citing *Home v. Bentinck*, he disposed of the argument that the appellant was entitled to receive the original copy of the documents because he had already acquired a copy of the document. He suggested that although in such cases prior production to the opposite party might appear to contradict the argument that the document's content was particularly sensitive, it might also be argued that production in court would interrupt the candour of official communications.

Meredith rejected the suggestion that any of the English cases cited by the respondent were in any way inapplicable to the case before the court. It had, for example, been suggested that in *Home v. Bentinck* the defendant had been acting in the course of his official duties, whereas in this case the defendant's actions were so flagrant as to deprive him of any legal protection, an argument surprisingly redolent of present-day French administrative law. However, the general principle that the head of a department must have unfettered discretion to decide whether a document should be produced overrode any consideration of this kind. The minister would no doubt take into consideration the conduct of the official complained of in deciding whether to claim privilege. If the appellant was aggrieved by the provincial secretary's decision he would always appeal to the Governor-General in Council or to Parliament. However, the

Madison, 1 Cranch 137 (U.S. 1803); *Burn's Trial*, 6 Watts 186 (Pa.); *Gray v. Pentland*, 2 Serj. & R. 23 (Pa. 1815); *Yoter v. Sanno*, 6 Watts 164 (Pa. 1837); and *Cooper's Case*, Whart. St. Tr. 662.

¹²⁶ *Supra* note 122 at 64.

courts could not review the sufficiency of the reasons adduced for non-production of the document.

Gugy v. Maguire was the foundation of Quebec jurisprudence on Crown privilege. It has also deeply influenced practice in other Canadian provinces. Once the court had ruled that the imperial law on Crown privilege was applicable to Lower Canada, it probably had little option but to refuse production of documents given the fact that a minister of the Crown had objected. It should be noted, however, that, like Viscount Simon in *Duncan*, the *Gugy* judgment did not take note of Pollock's concession that there might be exceptional cases where production should nevertheless be ordered. Aylwin's judgment was thus more favourable to the rights of the Crown than contemporary English jurisprudence demanded. In suggesting that official papers could not be removed from the provincial secretary's office without the Governor-General's permission, he was, moreover, turning Crown privilege on a subpoena into a prerogative as sweeping as that of Crown immunity from discovery. These two branches of the law, are however, quite separate.

It may also be questioned whether the American cases cited in *Gugy* represented at that time, all or even the preponderant jurisprudence in that country on the subject. The early case of *United States v. Burr*,¹²⁷ in which Chief Justice Marshall had defended the right of the courts to order production of documents from members of the executive, was not mentioned in the case. *Marbury v. Madison*,¹²⁸ cited by Aylwin, moreover could be used against the proposition he was supporting. In this case the United States Supreme Court required several officers of the federal executive to be sworn against their will. The Court recognized that a former Attorney-General was not obliged to reveal confidential information, but it retained in its own hands the power to decide which communications were covered by state privilege and in the event the only questions the witness was excused from answering were ones held to be irrelevant to the action. The opinion cited in *Gray v. Pentland*,¹²⁹ moreover, has since been superseded in the United States by a jurisprudence far less favourable to the claims of the executive.¹³⁰

It is interesting to speculate what decision the court might have reached in *Gugy v. Maguire* if it had reached the preliminary conclusion that production of official papers was governed by French law. Mondelet was quite sure that no privilege of the kind claimed by the provincial secretary existed under the Custom of Paris and seemed to imply that the "Parle-

¹²⁷ [1807] C.C.C. Va., 1 Robertson 121.

¹²⁸ 1 Cranch 137 (U.S. 1803).

¹²⁹ 2 Serj. & R. 23 (Pa. 1815).

¹³⁰ See Part 2 in Vol. 3, No. 2.

ments" under the *Ancien Régime* would have resisted the claim. On the other hand, he admitted that the French Kings had paid scant regard to the protests of the Parlements in such matters.

There was no further case of significance on Crown privilege in Canada until the Ontario case of *Bradley v. McIntosh*.¹³¹ This was an appeal from a judgment for the plaintiff in a libel and slander action at Coburg Assizes. At trial the plaintiff, who alleged that the defendant had accused him of keeping a brothel in letters to the chairman of the Board of Licence Commissioners and the Government of Ontario, had summoned an official from the office of the provincial Attorney-General on a *subpoena duces tecum* requiring him to produce an anonymous letter (allegedly from the defendant) which the department had received. The official, on instructions of the Attorney-General, objected to production of the letter on the ground of public interest. A letter from the defendant to the Board of Licence Commissioners was produced by another official on subpoena, but in this case there had been no ministerial objection. The judge ordered the official to produce the anonymous letter on the ground that its disclosure could not possibly be prejudicial to the public interest, but warned that the case would go for nothing if he were overruled on appeal.

On losing the case, the defendant moved for a new trial in the High Court. In granting his application, the High Court approved the dictum of Pollock in *Beatson v. Skene* that if production of a state paper would be injurious to the public service, the public interest must be considered paramount to the individual interest of a private suitor. The production of an official document rested in the discretion of the head of the department concerned and not with the courts, who were in no position to judge whether the public interest would be prejudiced.

Several points may be made on this case. The judgment again referred to the conclusiveness of a ministerial claim for privilege without reference to Pollock's proviso about "extreme cases." The court, on the authority of *H.M.S. Bellerophon*,¹³² also ruled that a minister need not make an objection to the court in person. There is, however, no record that the Attorney-General sent anything to the court in writing as had been done in the cited admiralty case, although the witness did claim that his instructions were in writing.

Crown privilege was raised again in Quebec in *Alain v. Belleau*.¹³³ This was a libel action in which the Maître des Postes at Lorrette, Québec, alleged that one Belleau had made accusations of dishonesty against him

¹³¹ 5 Ont. 227 (C.P. 1884).

¹³² *Supra* note 65.

¹³³ 1 Qué. R. Prat. 98 (C.A. 1897).

to the postal authorities. At "enquête," Alain's counsel summoned Bolduc, the Inspecteur des Postes, and asked him the name of the individual who had laid complaints against the plaintiff and whether Belleau had ever spoken to him of a certain registered packet, which he maintained had been opened by Alain. After an adjournment, in which the inspector had consulted the Postmaster-General, Bolduc said that the minister had refused to let him divulge the information requested. Mr. Justice Andrews ruled on the basis of *Guy v. Maguire* that Bolduc could not be forced to reveal anything which he had learned in his official capacity concerning communications from Belleau to the postal authorities. Bolduc was, however, required to say whether he had had any conversations with Belleau as an ordinary citizen and to give details thereof.

It would appear from the report that the minister's instructions to Bolduc had been confined to the publication of knowledge acquired officially, and that the question of whether Crown privilege could extend to production of documents and oral testimony outside this sphere did not arise. The editorial note to this case suggests, however, that the courts will compel the production of evidence concerning communications made to officials outside their official duties. Such a proposition is somewhat dubious if stated as an absolute rule.

A rather obscure case arose in 1902 in *McDougall v. Dominion Iron & Steel Co.*¹³⁴ In this Nova Scotia case, Serois had been served with a subpoena to bring to court copies of telegrams which had been sent through the railway office of which he was agent. This office was under the control of the federal government. Serois did not bring the telegrams to court, pleading that he had not received permission to do so from the controller, who was the government agent on the railway. Upon a renewed application for the documents, Serois produced a letter from the controller addressed to himself, ordering him not to produce the telegrams. Both Serois and the controller were held in contempt, the judgment being affirmed on appeal. The report of this case is very defective in that it does not make it clear whether a minister of the Crown had objected to production of the telegrams. The judge did make it clear, however, that in his opinion the case was not one which would justify a ministerial claim of Crown privilege—the telegrams did not relate to railway affairs at all, but were private documents in the course of transmission. Neither the Dominion government nor any department, he claimed, could arbitrarily make rules which affected procedure in the courts. If a minister did object in this case, then the judgment is contrary to the contemporary doctrine that an objection must normally be accepted. In view of the inadequacy of the report, however, this case must be treated with some reserve.

¹³⁴ 40 N.S. 333 (1902).

The first case where the question of Crown privilege was raised on a criminal trial arose once more in Quebec in *Hebert v. Latour*.¹³⁵ The prosecutor had laid an information against Latour, claiming that while a bankrupt he had illegally concealed his wealth to defraud his creditors. It needed to be proved by the prosecution that Latour had formally ceded his assets to his creditors on June 8, 1911 and that his wife had obtained a "séparation de biens" against him on July 12, 1911. One of the prosecution witnesses, an assistant superintendent of the Canadian Post Office Savings Bank, was asked whether he had with him the entries in the book kept by his department concerning the amount of the deposits made in the bank by the defendant's wife. The witness stated that his minister had declined to claim privilege for these documents, but had told him to draw the court's attention to section 13 of the Savings Banks Act¹³⁶ which forbade directors and officials of the Post Office to reveal the names of depositors or the sums deposited, except to the minister or to officials nominated by him.

The magistrate, who had been asked to rule whether the witness was obliged to obey the subpoena, held that the Criminal Code of Canada gave no guidance in the matter. Section 35 of the code confined testimonial privilege to self-incrimination and communications between husband and wife. In accordance with the provisions of the same code, therefore, recourse must be had to the law of evidence of the province in which the trial was being held. The Quebec Code of Civil Procedure,¹³⁷ article 332, permitted a claim of privilege on grounds of public order to be made by a head of department and not by a junior official or private citizen. The Savings Banks Act did not prevent the names of depositors or sums deposited at the savings bank from being revealed to the courts. The witness was thus required to obey the subpoena. This case is in accordance with English tradition that where a minister fails to object to the production of a document the court will normally require its production, even if it contains confidential or official information. The case is also the first one in which article 332 of the Quebec Code of Civil Procedure was specifically mentioned in connection with Crown privilege. The article read: "[A] witness cannot be compelled to declare what has been revealed to him confidentially in his professional character as a religious or legal adviser or as an officer of state where public policy is concerned."

It is significant that in this case the magistrate held that this article went no further than declaring the existing jurisprudence on Crown privilege and that it did not add to ministerial powers of objection. This

¹³⁵ 15 Qué. R. Prat. 5 (B.R. 1913).

¹³⁶ CAN. REV. STAT. c. 30, § 13 (1906).

¹³⁷ QUE. CIV. PROC. CODE 1897.

interpretation of article 332 of the Quebec Code received later confirmation in *Gagnon v. Québec Security Commissioners*.¹³⁸

Yet another Quebec case, *Rheault v. Landry*,¹³⁹ arose during the conscription crisis of World War I. A Quebec farmer, who had been called up against his will, sought a writ of habeas corpus, alleging that his conscription was illegal. His case hinged on whether the act authorizing Canadian conscription could permit more than 100,000 men to be called up, and whether this number had been exceeded by the time the petitioner received his summons to the army. Rheault summoned as a witness the director of the Military Service Board, and asked him how many men had, to date, been conscripted under the act. The director replied that he was authorized to state only that, according to the latest returns, the number of reinforcements provided under the act was 42,593 and that the number of men on active service could not on any calculation be more than 100,000. The petitioner, however, asked the witness many detailed questions, trying to show that his original statement about the number of men conscripted was inaccurate. These the witness refused to answer, quoting the reasoned objections set out in his written instructions from the Minister of Justice.

Mr. Justice Drouin refused the petitioner's application for the director to be held in contempt. The executive and not the judiciary, he claimed, was the arbiter of whether official information should be revealed in court. The minister was not obliged to make the objection in person. It could be made by an official acting on his behalf as had been done in *Alain v. Belleau*. Nor need the minister support his objection with reasons as had been done in this case. The fact that information sought had previously been made public (as to which there was in any case some doubt) did not prevent the Crown from withholding it from the court.

Having applied *Guy v. Maguire*, Drouin then expressed some reservations as to whether the Crown could withhold evidence in cases to which it was party and where a public law was in question. He did not make any definite pronouncement on this matter, but the problem so disturbed him that he felt obliged to point out that the petitioner would have lost his case, even with the additional evidence he was seeking, as he had not stated in his habeas corpus application the date on which he had been conscripted. The ratio of the judgment is, therefore, a little difficult to determine. Drouin did, however, appear to clear up his doubts toward the end of the judgment: "Que l'autorité soit maîtresse des secrets qu'elle déclare d'Etat et de l'intérêt national, et après constatation du refus et de l'énonciation de la raison d'intérêt national, le tribunal perd toute discrétion."¹⁴⁰

¹³⁸ [1965] Sup. Ct. 73, 50 D.L.R.2d 329.

¹³⁹ 55 Qué. C.S. 1 (1918).

¹⁴⁰ *Id.* at 7.

Rheault v. Landry is evidence of the tendency for provincial courts to look for precedents within their own jurisdiction. Similarly, in *Green v. Livermore*,¹⁴¹ the Ontario Supreme Court cited *Bradley v. McIntosh*¹⁴² in the same manner as the Quebec courts had cited *Gugy v. Maguire*. In the *Livermore* case, an action for malicious prosecution, the superintendent of a government mental hospital refused to produce for discovery certain documents relating to the treatment of the plaintiff. He claimed in his affidavit that the Provincial Minister of Public Health had directed him in writing that the documents should not be produced on the ground of public policy. The master accepted the superintendent's objection, citing *Bradley v. McIntosh*. It should be noted that the minister appears to have sent no affidavit to the court in this case.

Two cases in the mid-forties are sometimes quoted in discussions of Crown privilege. In *The King v. Clark*,¹⁴³ an inhabitant of Ontario tried to show that an act to prolong the life of the legislative assembly was ultra vires. His subpoena to the clerk of the legislative assembly to produce copies of notes and proceedings of the assembly was struck down by the High Court on the ground that officials of the legislature could not be subpoenaed to give evidence concerning proceedings in Parliament or to produce documents in their custody, without the leave of the House concerned. Another ground given for the decision was that the documents sought were the property of the Crown. It is uncertain in this instance whether the objection to production of Crown property on a subpoena was based on a belief that such procedure was inherently objectionable or merely on the ground that the clerk of the assembly was not the right person to summon. If the former ground was adopted by the court, this would seem inconsistent with the general consensus of doctrine in England that official documents should be produced except where a minister objects on the ground of public policy.

The second case was that of *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*¹⁴⁴ In this case, the Judicial Committee of the Privy Council expressed a doubt as to whether section 63 (1) of the Income War Tax Act¹⁴⁵ was sufficiently specific to take away the minister's right to claim Crown privilege. The relevant section required the minister to file in the Exchequer Court "all . . . documents and papers relative to the assessment under appeal." This case is an example of Crown privilege being treated as a matter of substantive law which can only be altered by express words in a statute.

¹⁴¹ [1940] Ont. 381, [1939] 3 D.L.R. 788 (High Ct. 1939).

¹⁴² *Supra* note 131.

¹⁴³ [1943] 2 D.L.R. 554 (Ont. High Ct.).

¹⁴⁴ [1947] 1 D.L.R. 721 (P.C. 1946).

¹⁴⁵ CAN. REV. STAT. c. 97, § 63(1)(g) (1927).

*Boyer v. Boyer*¹⁴⁶ is another example of the rather authoritarian twist to Crown privilege given by the Quebec courts. In this matrimonial action, a doctor was summoned to the court on a subpoena requiring him to produce certain dossiers relating to the case which he held in his personal custody as superintendent of a hospital. The doctor's objection to production on the ground of professional privilege under article 332 of the Code of Civil Procedure was sustained, but the court saw fit to add that the documents sought were state property whose production it could not permit without the authority of the appropriate minister. The court also stated that the subpoena was wrongly directed as the witness was not the "propriétaire, possesseur ou détenteur" of the dossiers. The only persons who fitted this description were the Attorney-General of the province and the Minister of Health and Public Welfare. This problem of whether an official could be required to produce Crown property on a subpoena served on him was to be raised specifically in the reference case of *Regina v. Snider*.¹⁴⁷ It is significant that only Quebec cases were quoted in *Boyer v. Boyer*. Neither the *Robinson* nor the *Duncan* cases received a mention.

British Columbia is an important source of case law on Crown privilege in Canada. The first significant case was that of *Murray v. Murray*.¹⁴⁸ The wife sought to prove in a divorce petition her husband's adultery by showing that he had contracted syphilis as a result of intercourse with another woman. She accordingly summoned the officer in charge of records kept under the provincial Venereal Diseases Suppression Act,¹⁴⁹ requiring him to produce the documents relating to her husband's treatment for venereal disease. Although the respondent consented in writing to the production of these records, the officer appearing on the subpoena objected to their production in court, relying on an affidavit from his minister. The affidavit specified the category to which the documents belonged (viz., case histories of persons treated for venereal disease) and claimed that production of such documents would be contrary to the public interest in that it would impede the free flow of information to his department from patients suffering from venereal disease.

On this occasion both the *Robinson* and *Duncan* cases had been brought to the attention of the court. Mr. Justice Wilson was clearly perturbed at the prospect of having to rule between decisions of the House of Lords and the Judicial Committee of the Privy Council. He indicated that *Robinson* could probably be distinguished from *Duncan*. He held, moreover, that the affidavit satisfied the guidelines laid down in both the *Duncan* and *Robinson* cases. However, he preferred to rest

¹⁴⁶ [1946] Qué. R. Prat. 174 (C.S.).

¹⁴⁷ [1954] Sup. Ct. 479, [1954] 4 D.L.R. 483.

¹⁴⁸ [1947] 3 D.L.R. 236 (B.C. Sup. Ct.).

¹⁴⁹ B.C. REV. STAT. c. 398 (1960).

his judgment, not on his inability to overrule the minister's objection, but on the ground that the reasons set forth in the minister's affidavit were sufficient in themselves to warrant withholding the documents from production. Finally, for the reasons given by Viscount Simon, he refused to allow oral evidence to be admitted concerning the records for which privilege had been claimed. His view that the *Robinson* and *Duncan* cases are distinguishable has been rejected in several modern cases. More generally, however, this case seems to afford a good example of the reluctance of some judges when dealing with Crown privilege to disclose their true ratio decidendi.

The New Brunswick Supreme Court, King's Bench Division, had far less hesitation in deciding between the merits of *Robinson* and *Duncan* in *Re Geldart's Dairies, Ltd.*¹⁵⁰ A claim of Crown privilege arose in this case on an examination in bankruptcy under section 134 of the Dominion Bankruptcy Act.¹⁵¹ The trustee in bankruptcy was seeking a court order requiring an officer of the federal Department of National Revenue to attend and answer questions and to provide in evidence the income tax returns and other papers in his custody which had been filed by the examinee. The Minister of National Revenue, however, objected to the officer's being required to produce the returns or to answer questions relating thereto. The objection was made on the general ground of public policy and on the ground that production would contravene section 121 of the Dominion Income Tax Act and section 81(1) of the Dominion Income War Tax Act. The court held that the statutes cited did not remove the right of the trustee to secure the information he required, but that the minister's objection was unimpeachable. *Duncan* had settled the matter once for all and he did not feel disposed to go into consideration of previous English and Canadian cases. This judgment was short and to the point; it is nonetheless surprising that the court did not even take the trouble to distinguish or reject the *Robinson* case, save by implication.

A similar adoption of the *Duncan* case in preference to *Robinson* was made by the British Columbia Court of Appeal in *Weber v. Pawlik*.¹⁵² In this instance, moreover, the reasons for following Viscount Simon's judgment were set out at length. The case involved former partners in a butcher's shop, and the dispute was over the size of the enterprise's profits in 1948. The plaintiff summoned a locally based federal tax official on a subpoena, requiring him to produce in court the income tax returns for the shop for the period in question. The Minister of National Revenue objected to production of the returns and to associated oral testimony on the ground of detriment to the national interest.

¹⁵⁰ [1950] 3 D.L.R. 141 (N.B. Sup. Ct. 1949).

¹⁵² CAN. REV. STAT. c. 11 (1927).

¹⁵³ 5 W.W.R. (n.s.) 49, [1952] 2 D.L.R. 750 (B.C. 1951).

The opinion of the majority of the court is best summarized in the judgment of Mr. Justice Robertson. He had no hesitation in holding that the principles of the *Duncan* case were to be applied in the case before the court. The precedents quoted by Viscount Simon had shown that Crown privilege could be claimed in times of peace where national security was not at stake. Moreover, the affidavit containing the objection was adequate, the Crown being under no obligation to give such detailed reasons for its objection as it had done in *Murray v. Murray*. The fact that the tax return whose production was sought had been filed on the plaintiff's behalf by the defendant did not entitle either party to see the document. In reply to the suggestion that the court was bound by a ruling of the Judicial Committee rather than by the House of Lords decision, Robertson quoted statements against this proposition in *Will v. Bank of Montreal*,¹⁵³ *Negro v. Pietro's Bread Co.*¹⁵⁴ and Mr. Justice Martin's dissenting judgment in *Attorney-General for British Columbia v. Col.*¹⁵⁵ He stated, moreover, that the two major cases in question were not in conflict. In the *Robinson* case, the Judicial Committee had remitted the claim for privilege to the South Australia Supreme Court because of a defect in the form of the objection. It had never suggested that a ministerial objection made in valid form could be overruled. Alternatively, the House of Lords had overridden the Judicial Committee's judgment. Mr. Justice Sidney Smith's judgment followed that of Robertson. He did, however, suggest an additional reason for following the House of Lord's decision, namely that two of the judges who had sat on *Robinson* had also sat on *Duncan*. He also claimed that income tax returns could not be obtained on a subpoena addressed to officials as the returns were not in their possession but were the property of the Crown.

Weber v. Pawlik seems for the time to have created the impression in Canada that *Duncan* was conclusive and that *Robinson* was either dead and buried or else not in conflict with the later House of Lords decision. This view seems to have been taken in two Canadian cases, both involving the production of income tax returns: *Minister of National Revenue v. Die Plast Co.*¹⁵⁶ and *Clemens v. Crown Trust Co.*¹⁵⁷ *Weber v. Pawlik* thus seems to represent a point in Canadian jurisprudence in which the testimonial privileges of the Crown reached a high water mark. The ebb tide, however, was imminent.

The case of *Regina v. Snider*¹⁵⁸ is the most important contribution so far made by Canadian courts to the common-law jurisprudence on Crown

¹⁵³ [1931] 3 D.L.R. 526, at 536 (Alta. Sup. Ct.).

¹⁵⁴ [1933] Ont. 112, [1933] 1 D.L.R. 490.

¹⁵⁵ 48 B.C. 171, [1934] 3 D.L.R. 488, at 491.

¹⁵⁶ [1952] Qué. B.R. 342, [1952] 2 D.L.R. 808.

¹⁵⁷ [1953] Ont. 87, [1952] 3 D.L.R. 508.

¹⁵⁸ *Supra* note 147.

privilege. It is, therefore, fitting that it should be examined at some length, both at trial, in the Court of Appeal of British Columbia and on appeal to the Supreme Court of Canada.

In a trial¹⁵⁹ of various people charged with unlawfully conspiring to keep a common betting house, the prosecution served a subpoena on the federal Director of Taxation to appear and give evidence and to produce the income tax returns filed by the accused for the years 1944-1950. The director duly appeared, but counsel for the Minister of National Revenue objected to the production of the returns in question and to the director's oral testimony on information obtained by him in the course of his official duties. Mr. Justice Whitaker overruled these objections, and the returns were admitted in evidence. The provincial government, realizing that a matter of some importance had arisen, thereupon referred various matters connected with the case to the Court of Appeal of British Columbia under the Constitutional Questions Determination Act.¹⁶⁰ The questions asked of the court were as follows:

1. On the trial of a person charged with an indictable offence, where a *subpoena duces tecum* has been served on the appropriate income tax official to produce before the court on such trial returns, reports, papers and documents filed pursuant to the provisions of the Income Tax Act, and to give evidence relating thereto, and where the Minister of National Revenue has stated on oath that in his opinion such evidence and production of such returns, reports, papers and documents would be prejudicial to the public interest, ought such a court to order the production of such returns, reports, papers and documents and the giving of oral evidence relating thereto,

(a) When such subpoena is served at the instance or on behalf of the attorney-general of the province,

(b) When such subpoena is served at the instance of the accused?

2. Are the documents herein before mentioned in question 1 for the purposes of a *subpoena duces tecum* directed to an income tax official of the Income Tax Department, in the possession of the said official to the extent that the court may order them produced in court pursuant to the said subpoena or are the said documents in the possession of the Crown?

3. Do sections 81 and 121 of the Income War Tax Act and the Income Tax Act, 1948, respectively affect the right of the Minister of National Revenue to object on the grounds of pre-

¹⁵⁹ 14 Can. Crim. 255 (B.C. Sup. Ct. 1952).

¹⁶⁰ B.C. REV. STAT. c. 66 (1948).

judice to the public interest to production of the documents herein mentioned in question 1 and to the giving of oral evidence by an income tax official relating to returns made under the said Acts?

The majority of the court answered the questions as follows:

1. (a) Yes. To enable the court to determine whether the facts discoverable by the production of the documents would be admissible, relevant or prejudicial or detrimental to the public welfare in any justifiable sense.

1. (b) Yes. As answered in question 1 (a).

2. The documents described in question 1 are in the possession of authorized Crown Officials empowered by Parliament to receive and retain income tax returns and as such are produceable in court for the purposes stated in the answer to question 1, but subject to the answers in questions 1 and 3.

3. No. But the effect of the quoted relevant sections of the described enactments render the minister's objections to production in criminal proceedings subject to the discretionary jurisdiction and consequent order of the trial judge, as set forth in the answer to question 1.

The majority opinion is best summarized in the judgment of Chief Justice Sloan. Keeping strictly to the terms of reference, he stated that, as admitted by Viscount Simon in the *Duncan* case, a ministerial claim of Crown privilege was not necessarily so absolute in criminal as in civil cases. In this case, moreover, the federal and provincial Crowns were in conflict. When two public interests conflicted, *i.e.*, the secrecy of tax returns and the fair administration of the criminal law, the court had to determine which interest was paramount. In this case the administration of criminal justice was clearly the most important consideration and must prevail over secrecy of tax returns. If the defence had moved for a production of the returns, the same conflict would have arisen as in the case before the court and the defendants would have had a right to enforce their subpoena against the federal government. The Income Tax Act and the Income War Tax Act neither added to nor detracted from the minister's right to object to production. If the Dominion Parliament had wished to give the Crown absolute power to withhold evidence from the courts it would have conferred the power in express words. This opinion was shared by Mr. Justice Birch. Mr. Justice Robertson concurred with the Chief Justice's answers, but stated specifically that in criminal cases the courts could examine a document to which objection had been taken to determine whether the public interest would be prejudiced by its production.

The only opinion favourable to the federal government was in the dissent of Mr. Justice Sidney Smith. He held that the rule in the *Duncan* case about the conclusiveness of a ministerial objection was undoubtedly the law for civil cases and that there was no authority to suggest that the rule was inapplicable to criminal cases. The government's pledge of confidentiality to the taxpayer was at least as important as the administration of criminal justice. The authority concerning the conclusiveness of a ministerial objection was too strong to be varied; jurisprudence in England and Canada was the same on the subject. The *Robinson* case was not in conflict with the later English decision because in the Australian case a special statute had given the subject the same rights of discovery against the Crown as against a fellow subject. A ministerial objection was just as conclusive for oral as for documentary evidence. Sidney Smith's answers were therefore as follows:

Quest. 1 (a): No.

Quest. 1 (b): No.

Quest. 2: The documents in question are in the possession of the Crown.

Quest. 3: No.

The comprehensive if somewhat verbose judgment of Mr. Justice O'Halloran (dissenting in part) was as hostile to the claims of the federal Crown as Sidney Smith's was favourable. This judgment repeated in many aspects a similar dissenting opinion which he had given in *Weber v. Pawlik*. O'Halloran's judgment in the *Snider* case may be summarized as follows. First, he claimed that there was no real reason why the law with regard to Crown privilege should differ in civil and criminal cases. In some criminal cases the safety of the state must override private interests. The *Duncan* case was, however, thoroughly bad law and should be discarded. Viscount Simon had omitted to mention some Scottish and Australian cases which prejudiced his ratio decidendi. His ratio was also in direct conflict with the Judicial Committee of the Privy Council's judgment in the *Robinson* case. The latter could not be distinguished from *Duncan*. The action of the Judicial Committee in remitting the claim for privilege to the Supreme Court of South Australia was founded upon the inherent rights of the courts and not merely upon an inadequate claim of privilege by the South Australian Government. The existence of a rule of court permitting the South Australian courts to examine a document for which privilege was claimed was only an additional reason for the Board's decision.

O'Halloran went on to claim that Viscount Simon had spoken of Crown privilege as being a matter of the highest constitutional importance, but that throughout his judgment he had referred to the problem as one of practice rather than dealing specifically with the rights of the courts

and of the Crown. If the decision in *Duncan* was in fact based on practice, then the Canadian courts were entitled to adopt their own procedure for dealing with the matter. Canadian courts were, in any case, not bound to follow the House of Lords since the Statute of Westminster, 1931,¹⁶¹ had confirmed the international sovereignty of the Dominion. O'Halloran concluded that the Canadian courts were entitled to overrule the objection of a minister to production of documents in civil as well as in criminal cases. Concerning the way in which this power should be exercised, he held that any testimonial privilege accorded to the Crown by the courts should be allowed only when the evidence in question was not vital to the determination of the case (on the analogy of the procedure for other types of privilege). The Crown's privilege should only be treated as absolute where the court recognized that an act of state (as defined in *Eshugbayi (Eleko) v. Nigeria Government (Officer Administering)*¹⁶² was involved. In such cases, however, O'Halloran considered that it was the moral duty of the Crown to issue a *nolle prosequi* (criminal cases) or to give compensation (civil actions). His answers followed those of Sloan, Robertson and Bird with the exception that his answer to question 3 was "Yes."

The federal government, dissatisfied with the majority opinion of the British Columbia Court of Appeal, appealed to the Supreme Court of Canada.¹⁶³ Opinions were delivered by Justices Rand, Kellock, Estey and Cartwright. There was indeed a "highest common factor" in all these judgments, but it is desirable to examine all the opinions delivered as there was some divergence in emphasis.

Rand made it clear that his opinion was confined to criminal cases. His opinion was not, however, based merely on the fact that Viscount Simon had not extended his ruling in *Duncan* beyond civil actions. He claimed that the basis of Crown privilege sprang not from the fact that documents in the possession of the Crown were by their nature privileged from production, but from a public interest in permitting the secrecy surrounding a confidential communication to be maintained. The same basic reasoning was the "Grundnorm" of other privileges such as the informer privilege and the solicitor-client privilege. In a case of this nature the task for the court to decide (once the nature of the documents and the reasons for objection had been shown) was whether the documents might on any rational view, either as to their contents or the fact of their existence, be such that the public interest required that they should not be revealed; if they were capable of sustaining such an interest and the minister of the Crown concerned averred its existence, then the courts must accept his decision. On the other hand, if the facts, as in the case

¹⁶¹ 22 Geo. 5, c. 4.

¹⁶² 100 L.J.P.C. 152, at 157 (1931).

¹⁶³ *Supra* note 147.

on appeal, showed that ordinarily no such interest could exist, then such a decision of the minister must be taken to have been made under a misapprehension and should be disregarded. These considerations, he claimed, were necessary to preserve the courts from undue encroachments by the executive and stemmed from the ratio of the *Robinson* case. Rand held further that the Income Tax Act, 1948, had not increased the Crown's testimonial privileges. He also rejected any idea that a subpoena could not be directed to income tax officials for the production of income tax returns. Rand's answers were therefore:

1. (a) and (b). Yes, unless special factors or circumstances appearing on the minister's affidavit made it clear to the court that there might be prejudice to the public interest in their disclosure, but only to the extent of the documents within the special facts or circumstances.
2. The documents are in the custody of officials to the extent that the court may order them produced in court pursuant to a subpoena.
3. The minister has no right to object to the production of documents.

Chief Justice Rinfret concurred with Rand. Kellock answered along similar lines as Rand, but in his written opinion he seemed to base his judgment more on the fact that the *Duncan* case had only been applied to civil actions. On the other hand, he disapproved of the action of the British Columbia Court of Appeal in *Weber v. Pawlik* in not ordering production of income tax returns in a civil case.

Estey concurred with Rand and Kellock. He made it clear that his opinion was restricted to the trial of an indictable offence where a *subpoena duces tecum* had been served on the appropriate income tax official to produce income tax returns and associated documents. He held that the courts had a right to overrule the ministerial objection in the *Snider* case, because it was not clear from the minister's affidavit why the disclosure of income tax returns would be contrary to the public interest. Such papers had often been produced in court and if there were special reasons for them to be kept secret in the case of appeal, the minister should have stated them in his objection. To this extent he seems to have preferred the dictum in the *Robinson* case to that in *Duncan*. Moreover, although he confined the scope of his opinion to criminal cases, he did not base his case merely on the ground that *Duncan* had contained a reservation concerning criminal trials. Estey felt, however, that *Duncan* had overruled *Robinson* in one respect, namely, that the judge must not examine a document to determine whether a claim of Crown privilege was justified. That ruling applied to the case before the court.

Fauteux, Kerwin and Taschereau concurred with Kellock. Cartwright's answers were almost identical to those of Kellock. However, he saw fit to distinguish *Duncan* from *Snider* on the grounds that the facts in the later case differed from those before Viscount Simon, also because *Duncan* had applied only to civil proceedings. He went out of his way, moreover, to stress that his answer to question 1 applied only to income tax returns.

The majority of the Supreme Court adopted a perhaps slightly more restrictive view of the rights of the judiciary than had the provincial tribunal. The British Columbia majority opinion seemed to suggest that in all cases of the *Snider* category it was for the judge to decide whether production of a document would be contrary to the public interest. The opinion is, moreover, open to the interpretation that the courts may look at a document to decide for themselves whether a ministerial objection is justified. The answers of the Supreme Court on the other hand were given in terms of a straight choice. The courts could order production of income tax returns in criminal cases except where special facts appearing on the affidavit made it clear to the court that there might be prejudice to the public interest arising from disclosure. The judgment of Estey made it clear, moreover, that in his opinion the court had no right to examine a document for which Crown privilege had been claimed. Similarly, the procedure laid down by Rand seemed to preclude examination by the judge. Given the extremely restrictive terms of reference and the equally restrictive answers of the Supreme Court, it is probably safe to draw only the following conclusions from the *Snider* case:

(i) That in criminal cases, income tax returns should normally be produced in court despite a ministerial objection,

(ii) That the Income Tax Act and the Income War Tax Act affected the right of a minister to withhold returns from a court of law neither one way nor the other,

(iii) That income tax returns might be produced on a *subpoena duces tecum* addressed to appropriate officials, despite the fact that the documents were Crown property. (Because of Sidney Smith's views on this matter in *Weber v. Pawlik* and similar views expressed by other judges in earlier cases, this aspect of the *Snider* judgment, in particular Rand's comments, are highly important).

(b) *From Regina v. Snider to Date*

Despite the extremely restrictive scope of the Supreme Court's ruling in the *Snider* case, the fact that a breach had been opened in the seemingly impregnable fortress of *Duncan* caused considerable confusion in succeeding years in Canadian courts. This confusion seems to have been due in no small measure to the judgment of Mr. Justice Cameron of the Exchequer Court, in *Reese v. The Queen*.

As mentioned earlier, the suppliants in this case were seeking, on examination for discovery, certain documents relating to the alleged grant of mineral rights to them by the Dominion Crown. The objection of the Crown to production of these documents was based on Crown immunity from discovery and on the ground of detriment to the public interest. This latter claim was supported by an affidavit from the Minister of Veterans Affairs. On appeal from the master to the court, Cameron held that neither the Exchequer Court Act nor the General Rules and Orders of the Exchequer Court¹⁶⁴ had taken away the Crown's immunity from discovery. However, he went on to deal with the question of Crown privilege, which counsel claimed had been affected by the *Snider* case. It should be observed that once Crown immunity had been recognized, there was no need for the court to consider the question of Crown privilege. If Cameron had made it clear that Crown immunity and Crown privilege were alternative reasons for his decision then his judgment might have been more comprehensible. Unfortunately he seemed to imply that the Crown's prerogative of immunity from discovery had indeed been affected to some degree by *Snider*. Such a view will not bear examination. The Supreme Court had not been dealing with this problem in *Regina v. Snider*.

What was worse, Cameron attempted to apply the ruling of Mr. Justice Rand in *Snider* to the action before him which was a purely civil proceeding, having no connection whatsoever with income tax returns. This did not bring any gain to the suppliants, for, after considering whether on any rational view production of the documents would be contrary to the public interest, he ruled that as they were inter-departmental memoranda and correspondence their disclosure might prejudice the candour of communication between public servants. The ministerial objection was accordingly sustained.

The influence of *Reese v. The Queen* may be clearly seen in another Ontario case of the same year, *Re Lew Fun Chau*.¹⁶⁵ In this case an immigrant had been seeking admission into Canada for his alleged son. The federal Department of Citizenship and Immigration had refused him admission on the ground that they were not satisfied that the prospective immigrant was in fact his son. The father thereupon applied to the Ontario Supreme Court for a mandamus writ requiring the District Superintendent of Immigration at Toronto to consider the application properly. In the course of proceedings a subpoena was served on the superintendent requiring him to produce extracts from the departmental file covering the application. The superintendent produced an affidavit from his minister specifying which documents on the file might be produced and objecting

¹⁶⁴ *Supra* text accompanying note 117.

¹⁶⁵ [1955] Ont. W.N. 821, [1955] 5 D.L.R. 513 (High Ct.).

to production of the remainder. This last batch was not categorized, but it emerged during argument in court that the documents objected to were inter-departmental communications and communications received by the department from outside sources other than the applicants or other departments.

The senior master stated that it had been ruled in *Reese v. The Queen* that intra- and inter-departmental communications were privileged from production. As regards the second category of documents he was less sure. It was clearly for the court to decide whether a ministerial objection was sufficient and in coming to a decision the judge would have to consider which public interest should prevail, that of the Crown or the litigant. In this specific case, however, there was insufficient information in the ministerial affidavit (concerning the anticipated prejudice to the national interest which production would entail) for the master to be able to decide between the claims of the litigant and the Crown. He therefore adjourned the case to allow the minister to make a further affidavit. This the minister eventually did, claiming that production of the second category of documents (applications for immigration, visas and transcripts of examinations of prospective immigrants) would prejudice the candour of the information which would be furnished in such documents or such examinations. The master accepted this affidavit, holding that the grounds for objection to the second category of documents were adequate.

The objections to the ratio of Cameron in *Reese v. The Queen* apply with equal force to this ruling. The master was here applying Rand's dictum in the *Snider* case as had Cameron before him. The Supreme Court had, however, made it clear that their judgment applied only to criminal cases and to income tax returns. If the judge and the master sought to apply Rand's dictum to civil cases they should have stated on what basis they were breaking with the *Duncan* tradition, in view of the several previous Canadian cases which had followed it. These last two cases also closed as many doors as they opened, for they collectively conferred a judge-made privilege of secrecy on all intra- and inter-departmental communications and on a small but significant category of communications from the public to government departments.

Reese v. The Queen seems to have had some influence on *Croft v. Munning*.¹⁰⁶ The court based its refusal to order production of documents in this case mainly on Crown immunity from discovery. The judge did add, however, that Crown privilege was also a reason for his decision and quoted Viscount Simon for the proposition that if there were rational grounds for believing that it would be contrary to the public interest for documents to be produced in court, then the court should not

¹⁰⁶ [1957] Ont. 211 (High Ct.).

override a ministerial objection. As there obviously was a rational ground for believing that production of the documents (intra-departmental memoranda) in the case before him would be contrary to the public interest, he accordingly upheld the objection. It is quite clear that *Duncan* stands for no such principle as that enunciated above. Viscount Simon had held that once a minister had made an objection to production in valid form, and on the ground of public interest, then the courts should refuse to order production. Clearly, (unless the text of the report is corrupt) Mr. Justice Spence had mistaken the *Duncan* case for *Regina v. Snider* or *Reese v. The Queen*. Whatever the truth of the matter, however, it seems clear that *Reese v. The Queen* had influenced the judge in this case.

The "Cameron doctrine" was, however, brought to an abrupt halt by *Miles v. Miles*¹⁶⁷ which, however conservative in approach, appears to be based on sounder principles than the last three cases quoted. In this case the plaintiff had subpoenaed the Director of Income Tax requiring him to produce income tax returns filed by the late A. W. Miles Jr. and his father for certain specified periods. The director produced an affidavit from his minister objecting to production of the returns or to the hearing of oral evidence connected therewith. Judge Smily referred to Spence's ruling in *Croft v. Munnings*. However, he preferred to base his judgment upholding the ministerial objection on Mr. Justice Judson's opinion in the earlier Ontario case of *Clemens v. Crown Trust Co.*¹⁶⁸ He also referred to the unreported British Columbia case of *Zorzi v. Barker* in which Mr. Justice MacFarlane had stated that the dictum of *Regina v. Snider* was confined to criminal cases and had not overruled the early British Columbia case of *Weber v. Pawlik*. Smily said that he was in the same position with regard to *Clemens v. Crown Trust Co.* in Ontario as had been MacFarlane to *Weber v. Pawlik* in British Columbia. Until the Supreme Court of Canada directed otherwise, he felt obliged to recognize the finality of a ministerial objection in civil cases. It is quite clear that this was an eminently sensible line to take. The dictum of *Reese v. The Queen* had already confused the Ontario judiciary sufficiently to warrant a halt to the extension of the *Snider* ruling beyond the sphere of criminal trials.

So far the Supreme Court has not extended its *Snider* ruling on Crown privilege to civil cases. Some indication of its general attitude was, however, given (albeit obiter) in the recent case of *Gagnon v. Québec Security Commissioners*.¹⁶⁹ In this case a trustee in bankruptcy was trying on examination to extract from the secretary of the Provincial Securities Commission information concerning a letter to the commission from the president of the bankrupt company. The secretary eventually produced a

¹⁶⁷ [1960] Ont. W.N. 23, 24 D.L.R.2d 228 (High Ct. 1959).

¹⁶⁸ *Supra* note 157.

¹⁶⁹ [1965] Sup. Ct. 73, 50 D.L.R.2d 329.

letter from the provincial Attorney-General stating that it was in the public interest for the facts and documents assembled during the course of the commission's inquiries to be protected from disclosure and authorizing the president of the commission to avail himself of article 332 of the Code of Civil Procedure, as amended.¹⁷⁰

The Quebec Court of Queen's Bench, overruling the trial judge, held that it was for the minister of the Crown and not the courts to decide whether official information should be withheld from the courts. The Supreme Court of Canada held, however, that the ministerial objection had been taken in an invalid form and ordered the documents to be produced. According to Mr. Justice Fauteux, who delivered the majority opinion, article 332 of the Code of Civil Procedure merely stated the English and Canadian law of Crown privilege and neither added to nor detracted from the powers of the minister to object to production of documents. These powers, moreover, had never been unimpeachable. The right of Crown privilege and its means of invocation as well as the validity of its exercise, remained subject to limitations laid down by jurisprudence. The amendment to the code had merely permitted Crown privilege to be claimed by certain provincial boards such as the securities commission, when given written authority by the provincial Attorney-General. In the case before the Court, the written certificate, contrary to the provisions of article 332 of the code, as amended, did not specify the information to whose disclosure objection was taken, nor did it indicate that public order was involved in the questions which the secretary of the commission had refused to answer. Fauteux's judgment was, therefore, based primarily on the fact that the conditions of the amended article 332 had not been complied with. He also mentioned, however, the recent English case of *Re Grosvenor Hotel, London. (No. 2)* as undermining the conclusiveness of a ministerial objection on the ground of public policy. The question of whether the Attorney-General's certificate did comply with statutory and judge-made requirements is rather finely balanced. What is significant, however, is that, with the exception of Mr. Justice Abbot, none of the Supreme Court justices saw fit to quarrel with Fauteux's approval of the *Grosvenor Hotel* case. This suggests that in the future the dictum of *Regina v. Snider* may possibly be extended from criminal to civil cases without qualification. The recent judgment of the House of Lords in *Conway v. Rimmer* in which the *Gagnon* case was cited, makes such a development even more likely.

¹⁷⁰ Qué. Stat. 1957-58 c. 43, § 2.