THE LAW OF CROWN PRIVILEGE IN CANADA AND ELSEWHERE PART 2*

*Stephen G. Linstead***

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.

IV. The Law of Other Countries

A. *Other Common Law Countries*

1. *Australia*

The chief Australian contribution to the jurisprudence on Crown privilege is the case of *Robinson v. South Australia* [*No. 2*]. This was an action for negligence brought by a representative plaintiff on behalf of the farmers of South Australia against the state government for loss of crops stored in state warehouses under a statutory marketing scheme. The prerogative immunity of the state government from suit and discovery had been removed by statute and the Crown, as defendant in the action, accordingly made an affidavit of documents before trial in obedience to a court order. In its affidavit, however, the government objected on the ground of public policy to production of 1,892 numbered documents, which

---

* Part 1 of the article was published in Vol. 3, No. 1.

** Diploma in Public and Social Administration, 1965, M.A., 1967, University of Oxford; M.A., 1968, Carleton University.

it claimed were intra- and inter-departmental communications. When the Supreme Court of South Australia (in banco) refused to order production of the documents, the plaintiff appealed successfully to the Judicial Committee of the Privy Council. The Committee found the claim of Crown privilege to have been inadequately made and remitted the case to the Supreme Court of South Australia with instructions to examine the documents and to determine whether the claim of privilege should be allowed.

The two basic issues arising from the *Robinson* case are whether it can be distinguished from the later *Duncan* case and, if not, whether the Judicial Committee's decision is better law than that of the House of Lords. Only the first of these questions will be covered in this section. Mr. Justice Robertson suggested in *Weber v. Pawlik* that the Judicial Committee in the *Robinson* case had based their decision on the insufficiency of the ministerial affidavit and that they had never suggested that an objection made in valid form could be overruled. It is certainly true that in *Robinson* the Judicial Committee were dissatisfied with the form in which the objection to production was taken. It is also true that in dealing with the powers of the courts they quoted with approval a rather ambiguous passage from *Marconi's Wireless Telegraph Co. v. Commonwealth (No. 2).*[191] This passage, while affirming that the courts had power to inquire into the nature of documents for which Crown privilege was claimed and to demand a fuller explanation of the detriment to the public interest which production would entail, did not specifically state that the courts had the right to go further and overrule a ministerial objection when the additional information had been provided. On the other hand such a specific statement, although not quoted in *Robinson*, was made elsewhere in *Marconi.*

It is moreover unreasonable to suggest that the inadequacy of the ministerial objection was the only ground for the Committee's action or that the Committee did not infer an ultimate residual right of overruling a claim for Crown privilege, even when made in valid form. The dicta of Lord Blanesburgh on this point are implicit in the judgment rather than explicit, but after reading the report as a whole, it is difficult to conclude that he could ever have assented to Viscount Simon's doctrine concerning the finality of a ministerial objection when made in the correct form. In support of this contention it may be observed that Lord Blanesburgh claimed that it was the duty of the courts to prevent the extension of the admitted scope of Crown privilege. The courts could scarcely do this if they were unable to overrule a ministerial objection, however detailed an explanation accompanied it. The Committee also referred with approval to three other cases in which the right of the court to overrule a ministerial objection had been confirmed *viz.*, the Scottish case of *Henderson v. M'Gown,* [192] the English case of *In re Joseph Hargreaves* [193] and the Australian case of *Queensland*

[191] 16 Commw. L.R. 178 (Austl. 1913).
[192] [1916] Sess. Cas 821 (1st. Div.).
[193] *Supra* note 71.

Pine Co. v. Australia. [194] The Judicial Committee thus seems to have held that the courts had a right not only to call for a fuller explanation from a minister, but also in the last resort to overrule his objection.

The second ground on which *Robinson* had been distinguished is that put forth in the dissent of Mr. Justice Smith in *Regina v. Snider*: that in *Robinson* the South Australian courts were endowed with special statutory powers to order production of documents despite the objection of the Crown. The two relevant pieces of legislation discussed by the Judicial Committee were the Commonwealth Judiciary Act [195] and the Rules of the South Australian Supreme Court. The former, however, merely deprived the state governments of their prerogative immunity from discovery and did not deprive them of their right to object to production on the ground of public policy. The Rules of Court, which have their counter-part in many other common-law countries, permitted the courts to examine a document for which "privilege" had been claimed in order to determine whether the claim should be allowed. The Judicial Committee, citing *Ehrmann v. Ehrmann*, [196] considered that the relevant rule covered claims of Crown privilege. Viscount Simon was to disagree with the Committee on this point, but it is unnecessary at this stage to consider who was right, as the Committee clearly did not base their ratio decidendi merely on the South Australian Rules of Court. The Committee certainly stated that the abolition of Crown immunity from discovery in South Australia and the Rules of Court of that state were additional reasons for remitting the case to the Supreme Court, but it is clear that these were not the Judicial Committee's only reasons. As illustrated in the preceding paragraph, the Committee cited several cases from outside Australia in which the inherent right of the courts to overrule a ministerial objection had been affirmed. They also quoted with approval the practice of Mr. Justice Field (mentioned in *Hennessy v. Wright*) [197] of inspecting a document for which Crown privilege had been claimed to satisfy himself that the objection was justified.

It may thus be concluded that in *Robinson*, the Judicial Committee affirmed the inherent right of courts of justice to demand further information from the Crown concerning a claim of Crown privilege and, in the last resort, to override a ministerial objection, even when additional information had been supplied. This decision, although taken in an action to which the Crown was defendant, contains no implication that a ministerial objection is conclusive when the Crown is merely third party to an action and when the relevant documents are sought on a subpoena. Finally, the case stands for the principle that the courts may lay down the form in which a claim of Crown privilege is to be made.

Robinson was accepted as authority in Australia until the advent of

---

[194] [1920] Queensl. 121 (Sup. Ct.).
[195] [1903] Cons. of 1903-50, at p. 2387.
[196] [1896] 2 Ch. 826.
[197] *Supra* note 66.

the *Duncan* case, which led to the adoption of the rule that ministerial objection was conclusive. It was not until *Bruce v. Waldron*,[198] that the judgments of Australian courts began to swing the other way. In this case the Supreme Court of Victoria ruled that the *Robinson* and *Duncan* cases were in conflict and that the former should prevail, both on the grounds that in Australia, Judicial Committee decisions should be preferred to those of the House of Lords and that *Duncan* was bad law. It is still too early to say whether *Bruce v. Waldron* will be accepted as authoritative in Australia. However, in *Constable v. Constable*[199] the Supreme Court of South Australia overruled a claim of Crown privilege, apparently basing its judgment on *Bruce* v. *Waldron.* In *Kleimeyer v. Clay*,[200] moreover, the Queensland Supreme Court, while upholding a claim of Crown privilege, reserved the right of the courts to demand reasons from a minister before sustaining his objection. There would thus appear to have been a definite movement away from Viscount Simon's dictum in Australia in recent years.[201]

2. *New Zealand*

The problem of whether to follow *Robinson* or *Duncan* has perplexed the courts of New Zealand as much as those of Australia, for the Judicial Committee of the Privy Council is the Supreme Court of Appeal for both countries. The pattern of New Zealand jurisprudence appears largely to have followed that of the country's larger neighbour. In the years between *Robinson* and *Duncan*, New Zealand courts ruled that the judiciary could overrule a ministerial claim of Crown privilege (*e.g., Gisborne Fire Board v. Lunken*),[202] but after the House of Lords' judgment, the pendulum swung in the opposite direction (*e.g., Hiron Mariu v. Hutt Timber & Hardware Co.*,[203] *Carroll v. Osburn*,[204] *Hinton v. Campbell*[205]). A judicial reaction against *Duncan* set in, however, in *Corbett v. Social Security Commission.*[206] In this case, in which Crown privilege was claimed in respect of internal memoranda of the defendant commission, the New Zealand Court of Appeal considered the jurisprudence of the subject at very great length. It was ultimately held that *Robinson* should be preferred to *Duncan*: New Zealand courts, when confronted with a conflict between the Judicial Committee of the Privy Council and the House of Lords, should normally prefer the judgment of their own Supreme Court of Appeal, except where it was evident that on a reconsideration of the matter the Judicial Committee would reverse their earlier decisions.

---

[198] [1963] Vict. 3.
[199] [1963] N.S.W. 357 (Sup. Ct.).
[200] [1965] Queensl. 29 (Sup. Ct.).
[201] *See also Ex parte* Black, 83 W.N. (N.S.W.) 45 (Chambers 1965), and *Ex parte* Brown, 84 W.N. (N.S.W.) 13 (C.A. 1966).
[202] [1936] N.Z.L.R. 894 (C.A.).
[203] [1950] N.Z.L.R. 458, at 461 (Sup. Ct.).
[204] [1952] N.Z.L.R. 763, at 765 (Sup. Ct.).
[205] [1953] N.Z.L.R. 573, at 574 (Sup. Ct.).
[206] [1962] N.Z.L.R. 878 (C.A.).

3. *United States of America*

The federal or state executives in the United States (afterwards referred to collectively as "the state") have succeeded to many of the prerogative rights of the Crown of England. Thus at common law the state cannot be sued against its will, be held liable for tort or forced to make discovery. The state can also object to production of documents or the reception of oral evidence on the ground of public policy. In this last respect, however, the testimonial privileges of the executive have been given a very restrictive interpretation, as the courts have always retained in their own hands the task of deciding whether a claim of state secrecy is justified. *Duncan* is accordingly anathema to the jurisprudence in the United States.

Where the state is merely third party to an action and is summoned to deliver documents on subpoena, the courts have been most liberal in their treatment of claims of state secrecy. In such cases, the privilege had been held to extend to a whole host of communications relating to such matters as national security, international diplomacy, and the internal workings of the government machine (*e.g.*, *Boske v. Comingore*[207]). Where the state is party litigant, however, the courts have been far less liberal in their treatment of executive claims. In cases where the state is prosecutor or plaintiff, the courts have tended to act as if the executive had waived all its testimonial privileges (*e.g.*, *United States v. Andolschek*,[208] *Jencks v. United States*,[209] *Fleming v. Bernadi*,[210] *Bank Line Ltd. v. United States*[211]). Where the state is defendant the situation is slightly more complex. Without amending legislation the federal and state executives cannot be sued without their consent or required to make discovery, let alone to produce documents or give testimony. Where statutes have permitted actions against the state, however, the courts have been liberal in their interpretation of the consequential effects on proceedings. Thus it has been held that the Federal Tort Claims Act,[212] by putting the state on a par with the citizen in litigation, has severely modified the various testimonial privileges of the executive (*e.g.*, state immunity from discovery, state secrecy and so on). At the same time the American courts have not deprived the state as defendant of all its testimonial privileges. As was laid down in the important case of *United States v. Reynolds*[213] evidence connected with international diplomacy, peace and war should be protected by the courts from disclosure. In other cases where the state is defendant and where issues of security and diplomacy are not involved, the practice appears to be to order production.

In formulating their jurisprudence the American courts seem to have

---

[207] 177 U.S. 459 (1900).
[208] 142 F.2d 503 (2d Cir. 1944).
[209] 353 U.S. 657 (1957).
[210] 4 F.R.D. 270.
[211] 76 F. Supp. 801 (N.Y.D. Ct. 1948).
[212] 28 U.S.C.A. § 2672-80 (1946).
[213] 345 U.S. 1 (1953).

been influenced by the problem of enforcement. The general opinion appears to be that officers of the executive cannot be committed to prison for contempt of court orders. This view has been challenged,[214] but the preponderant tradition seems to have led courts to giving a very liberal interpretation to claims of state secrecy where the executive is third party (and where the courts have consequently no sanction to punish disobedience). Where the state is party litigant, the courts can (and do) throw out the executive's statement of claim or defence in the event of non-compliance with directions, and in such cases a correspondingly stricter view of the state secrecy privilege appears to have been taken. The American jurisprudence would thus appear to differ in many respects from that of Canada or England. It has never been suggested, however, that the right of American courts to order production of documents is entrenched in the constitution or that the respective legislatures may not give their executives a *carte blanche* to withhold information from the judiciary if they should ever wish to do so. The Evidence Act (Alberta) would thus not be a legal impossibility in the United States.

B. *Countries of Mixed Common-Law and Roman-Law Traditions*

1. *Scotland*

In preceding discussions, the Scottish Law of Crown privilege has been referred to several times in cases occurring outside the Scottish jurisdiction and therefore merits a brief examination in this survey. Scotland is a country of the Roman rather than the common law and retains a vigorous tradition of independence in the fields of civil, criminal and public law. These differences are quite marked in the area of Crown proceedings. The Crown in right of Scotland has, for example, never been immune from suit or discovery (recovery). These differences also extend to the field of Crown privilege.

It will be recalled that in *Duncan* Viscount Simon expressed the view that a ministerial objection to production of documents was conclusive on both sides of the border. This view was, however, rejected decisively in *Glasgow Corp. v. Central Land Board.*[215] In this case the House of Lords held that the two Scottish cases cited by Viscount Simon were unrepresentative of Scottish law. *Earl v. Vass* had been disregarded by the Scottish courts consistently as bad law and *Admiralty Commissioners v. Aberdeen Steam Trawling Co.*[216] had been specifically distinguished in *Henderson v. M'Gown*[217] which had reaffirmed the right of Scottish courts to overrule a claim of Crown privilege.

The House of Lords did not order production of the documents objected to in the *Glasgow* case, but the Court of Session refused quite pointedly to

---

[214] *See* Sawyer v. Dollar, 190 F.2d 623 (D.C. Cir. 1951).
[215] [1956] Sess. Cas. 64 (H.L.).
[216] [1909] Sess. Cas. 335 (Sess. Ct.).
[217] *Supra* note 192.

accept a claim of Crown privilege in the later Scottish case of *Whitehall v. Whitehall.*[218] The circumstances of this case were almost identical to those in the English case of *Broome v. Broome.*[219] The documents sought concerned the marriage guidance activities of the S.S.A.F.A. In the Scottish case, however, the documents were in the possession of the petitioner (pursuer) rather than the Crown. The Court of Sessions' refusal to comply with the Secretary of State's request for the documents to be forwarded to him so that he might see whether Crown privilege should be claimed was based on the following grounds: (i) the documents could be removed from the court's jurisdiction (*i.e.*, to England) only by exercise of the court's "nobile officium,"[220] (ii) that Crown privilege could not be claimed for documents which had not emanated from or were not in the possession of the executive,[221] (iii) that since the *Glasgow* case it had been definitely established that a ministerial objection to production was not conclusive in Scotland.

These two Scottish cases were substantial nails in the coffin of *Duncan* and were quoted in the later *Corbett, Bruce, Grosvenor Hotel* and *Conway v. Rimmer* cases. They exposed the flaws in the earlier judgment of the House of Lords and paved the way for a reconsideration of the law of Crown privilege throughout the common-law world.

2. *South Africa*

The contribution of the Roman-Dutch tradition of Southern Africa to the common-law jurisprudence on Crown privilege has so far been minimal. This is largely due to local legislation (mainly dating from colonial days), which prescribes that South African and Rhodesian courts are to follow the practice of the English court in determining questions of evidence excluded on the ground of public policy.

It is ironical that the first principal South African case on Crown privilege, *Barnicott v. Minister of Justice,*[222] is almost identical in background to the later English case of *Ellis v. Home Office.*[223] In the South African case, a prisoner had been attacked by a fellow inmate while awaiting trial. The claim of Crown privilege for the assailant's medical record by the provincial government, despite protests from the court, successfully frustrated the prisoner's action against the authorities for negligence.

The principal post-war case quoted by South African jurists is *Ex parte Zelter*[224] (a Rhodesian case), in which the *Duncan* doctrine was followed exclusively. The courts made a minor stand against the executive in *Rutland*

[218] [1957] Scots. L.T.R. 96 (1st. Div.).
[219] *Supra* note 95.
[220] A discretionary jurisdiction vested in the Court of Session in some way resembling English equity.
[221] *Supra* note 95.
[222] [1913] T.P.D. 691 (Prov. D.).
[223] *Supra* note 91.
[224] [1951] 2 S. Afr. L.R. 54 (South Rhodesia).

v. Engelbrecht,[225] in which it was held that an objection to production of documents must come from the minister of the Crown responsible and not from the Attorney-General. In *Van der Linde v. Calitz*,[226] moreover, the court, while accepting a ministerial objection to production, suggested that there might be cases where an objection was so obviously groundless that the court could override it. This is admittedly a small chink in the armour of *Duncan*. On the other hand, the *Duncan* doctrine appears to have aroused as much criticism in South Africa as in other countries and it is thus possible that *Conway v. Rimmer* may eventually lead to a reformulation of South African jurisprudence on this subject.

C. *Countries of Roman-Law Tradition*

1. *France*

Having completed our review of common-law countries and of Scotland and South Africa, it may be of some value to look very briefly at one of the countries of continental Europe to see whether the problem of state secrecy has arisen under a so completely different politico-legal system. France stands out as an ideal and representative[227] choice.

It is at first necessary to pinpoint some of the fundamental differences which distinguish French from English Law. The Roman-law system as applied in France in general gives a more active role of the court than under common law. In civil cases the judge may leave most of the argument to the respective parties, but in criminal and public cases, he assumes more the role of an inquisitor, charged with the duty of finding the truth behind the issues in the case. Another difference is that the French courts do not in general have powers to commit a witness to prison for refusal to testify or to produce documents. At most they can "draw inferences" from the witness's behaviour.

A right on the part of the state to withhold from the courts information the disclosure of which would be prejudicial to the safety of the state has long been recognized by the French courts, along with various private testimonial privileges. Such a right may, however, rebound on the state if exercised without justification or contrary to the court's wishes.[228] In France there is a dichotomy between the administrative and other branches of the judicial system. All actions brought against the state must be brought in one of the administrative courts and not in the civil judicature, *i.e.*, to a "tribunal administratif" or on appeal to the "Conseil d'Etat." The adminis-

---

[225] [1956] 2 S. Afr. L.R. 578 (Cape Prov. Dist.).

[226] [1966] 3 S. Afr. L.R. (n.s.) 797 (O.P.A.).

[227] The Italian administrative legal system is very similar.

[228] "Si d'autre part le pouvoir de demander communication des pièces à l'administration ne s'étend pas aux documents dont la divulgation est exclue par . . . défence nationale, le juge peut même dans cette hypothèse tenir compte après avoir demandé éventuellement des explications complémentaires du silence de la mauvaise volonté de l'administration." [1955] S. Jr. III 150 (1962).

trative courts do not depend entirely on the evidence brought to their notice by the petitioner. In the preliminary examination of the evidence (instruction) the court will usually call upon the government department concerned to produce for its inspection the administrative dossier relating to the case and any other documents which it considers relevant. If the department refuses to comply with the order the case may well go against it by default, as was the case in the famous *Barel (E.N.A.)* [229] case. The court is, however, under no obligation to show any of the evidence produced to it to any other party to the action. It is thus able to decide a case against the state without revealing confidential executive information to outside parties.

Outside the admittedly wide field of administrative litigation, the rights of the litigant are less well protected. In criminal cases the trial judge decides individually what witnesses may be called and what questions may be put to them. The court is thus theoretically free to draw inferences from the refusal of prosecution witnesses to answer questions or to produce documents. In practice, however, this procedure is not necessarily beneficial to the accused as it would appear that French courts do not always permit a very rigorous examination of prosecution witnesses, particularly of police officers. In ordinary civil cases in which the state is not party litigant, there would appear to be an even more noticeable lack of judicial power to compel the executive to produce evidence. By all accounts, however, French governments are in general less reluctant [230] to see their confidential information used in private litigation than in the common-law world. The problem in France has accordingly not reached the proportions of the Crown privilege issues in England or Canada.

V. Conclusion

The reader who has persevered to this point in the saga may feel some sympathy with the writer's image of Crown privilege as an eternal warfare of the Gods. In some distant Valhalla, the warriors fight out over the aeons an eternal struggle which had its origins and cause beyond the memory of man. The battle goes now one way, now another, with no sign of a general settlement, and, at each sundown, the day's fallen warriors are duly resurrected in time for another day's fighting. It is of course a much more serious matter than this in real life, but it is difficult to read a modern Crown privilege case without feeling that here too old warriors neither die nor fade away. Whether *Conway v. Rimmer* has now altered this pattern irrevocably remains to be seen. It is not surprising that judges should have held differing views on the nature and extent of the Crown's testimonial privileges, as the variety of circumstances in which the various cases have arisen is infinite and the legal and political issues involved are immense. The task of the judge

[229] [1954] S. Jur. III 409 (1962).

[230] This readiness may stem from different administrative traditions or alternatively from a greater willingness on the part of the French courts to use *in camera* proceedings.

has, however, been made doubly difficult by the behaviour of the two senior courts of the common-law world— *viz.*, the House of Lords and the Judicial Committee of the Privy Council. Between 1942 and 1968, these bodies were in direct conflict on the question of Crown privilege. Both tribunals, however, have reversed their own previous rulings, the Judicial Committee by ignoring *Stace v. Griffith*[231] in the *Robinson* case and the House of Lords by rejecting *Duncan* in *Conway v. Rimmer*. The House of Lords, moreover, seems to have been "overruled" on two occasions by its inferior tribunals. *Earl v. Vass* was with reason ignored by the Scottish courts, whereas the Court of Appeal in *Grosvenor Hotel*, by means of some rather complex reasoning, rejected the hitherto accepted view of the *Duncan* judgment as an incorrect statement of English jurisprudence—a view which was in effect accepted by the House of Lords in *Conway v. Rimmer*. Faced with such an impossibly confusing situation, it is not surprising that the courts of other Commonwealth countries including Canada, have felt free to formulate their own jurisprudence.

The judgment of the House of Lords in *Conway v. Rimmer* has now set the official seal of respectability on the view that Viscount Simon's ruling paved the way for a serious encroachment on the rights of litigants. However, apart from the policy considerations of whether the English highest court should have thus divested itself and its inferior tribunals of effective control over the exercise of Crown privilege, it is seriously to be doubted whether Viscount Simon's judgment represented a correct statement of the law. The judgment failed to take account of Chief Baron Pollock's admission in *Beatson v. Skene* that there might be cases where a ministerial objection could legitimately be overruled. It also completely misstated the Scottish tradition on the subject. Not only did it neglect to mention the fact that *Earl v. Vass* had been ignored by Scottish courts for over a century, but it also referred approvingly to the later *Admiralty Commissioners*[232] case without mentioning the equally important Scottish cases of *Sheridan v. Peel*[233] and *Henderson v. M'Gown* in which the inherent power of the courts to overrule a ministerial objection had been emphasized. Moreover, both of these later cases had been mentioned in the *Robinson* case.

It is of course quite possible that, given a clearer understanding of Scottish tradition, Viscount Simon and his brothers would still have come to the conclusion that the King's ministers rather than the King's justices were better judges of whether potentially sensitive information should be revealed in courts of law. This still leaves the objection, however, that the *Duncan* judgment dismissed the ruling of its sister court in the *Robinson* case in a singularly cavalier fashion. As has already been suggested, the ratio of this case does not hang solely on an interpretation of a rule of the South Australian Supreme Court, but also on what the Judicial Committee con-

[231] *Supra* note 62.
[232] *Supra* note 216.
[233] [1907] Sess. Cas. 577.

ceived to be the inherent powers of a common-law court. Even if this supposition is false, however, and if the Judicial Committee's ruling was consequently a mere matter of statutory interpretation, it is somewhat surprising that Viscount Simon should have put forward the proposition (without any supporting cases) that Crown privilege did not fall within the ambit of "privilege" as generally accepted in judicial parlance.

The defects of the *Duncan* judgment are well known and had it not come from seven members of the House of Lords, it would probably have died a much quicker death than in fact was the case. The *Robinson* case, on the other hand, is likewise by no means flawless in its structure. As indicated earlier the ratio of Lord Blanesburgh is ambiguous in several places and has been interpreted in various ways. It will, however, be assumed for the sake of argument that the writer's interpretation of the judgment's ratio is valid. The Committee were clearly anxious to prevent the scope of Crown privilege from being extended unnecessarily to documents which could be revealed in court without prejudice to the public interest. They accordingly favoured precedents which confined Crown privilege to various categories of evidence and which left it to the courts to decide whether a claim of privilege should be upheld. The English and Scottish cases quoted asserted a residual, if undefined, power on the part of the courts to overrule a ministerial objection. The three principal Australian cases quoted in this connection were *Marconi's Wireless Telegraph Co. v. Commonwealth, Queensland Pine Co. v. Commonwealth* and *Griffin v. South Australia.*[234] The last of these three cases had upheld the ministerial objection, but the first two had favoured the rights of the courts more forcefully than any previous English decision. There were, on the other hand, several early Australian cases which were not mentioned in *Robinson*, either by counsel or by the court (*e.g., Webb v. Federal Commissioner of Taxation*[235]), not all of which were as favourable to the rights of the courts as the *Queensland Pine Co.* case. On the whole it is probably safe to say that in 1931, the law on Crown privilege was as confused in Australia as it was at that time in England and that the Judicial Committee, as well as summarizing previous cases, was making a conscious policy decision as to what should in future be the accepted jurisprudence on the matter.

The Committee was not as uninformed about Scottish law as was the House of Lords. Lord Blanesburgh accepted that *Sheridan v. Peel*[236] and *Henderson v. M'Gown* were more representative of the Scottish tradition than *Admiralty Commissioners.* On the other hand the Committee failed either to note *Earl v. Vass* or to explain why they were overruling their own previous decision in *Stace v. Griffith.* Moreover, the Committee's claim that *Smith v. East India Co.* and *Wadeer v. East India Co.* supported their view that there were limits to the types of evidence for which Crown privilege

---

[234] 35 Commw. L.R. 200 (Austl. 1924).
[235] 30 Commw. L.R. 450 (Austl. 1922).
[236] *Supra* note 233.

could be claimed was rather ill-supported, given the fact that *Beatson v. Skene* had by implication overruled this view. In the last resort the *Robinson* judgment must attract the same criticism as the *Duncan* case, *i.e.*, that the judges imposed their own ideas on what was at the time a very confused jurisprudence, while giving the impression that the weight of jurisprudence favoured their own interpretation of the law. On the other hand, the *Robinson* judgment made fewer glaring errors or omissions than did the *Duncan* case and for that reason, if for none other, it is accordingly to be preferred as the better statement of the law for England, Australia and Canada.

Until the advent of the *Snider* case, Canada contributed little that was novel to the common-law jurisprudence on Crown immunity or Crown privilege. Canadian courts have accepted the nineteenth-century doctrine that the Crown is immune from discovery and have shown no more inclination to probe into the details of medieval Chancery practice than have their English or American counter-parts. They have also concluded that the Crown's immunity extends to oral as well as written evidence. In view of the relatively few cases in England dealing with the Crown's immunity from discovery of facts (as opposed to documents), this aspect of Canadian jurisprudence is important. However, as Crown immunity from discovery has now largely been regulated by statute in this country, this problem is likely to assume less prominence in the future.

With regard to Crown privilege, Canadian courts appear to have been set on a rather authoritarian trend by *Gugy v. Maguire*. This judgment, in refusing to admit that there were any cases where a ministerial objection might be overruled, probably went further than contemporary jurisprudence required (*e.g.*, than the dictum of Chief Baron Pollock). Perhaps in consequence there is no Canadian equivalent of *Queensland Pine Co. v. Commonwealth*. The *Gugy* case also raised the suggestion, which was to reappear several times in this country, that documents in the possession of the Crown were by their nature privileged from production, even upon subpoena. These notions were in any case fairly effectively overruled in the *Snider* case, but it is interesting to note that they do not appear to a similar extent in any of the other common-law countries studied, with the possible exception of the United States, where the constitutional position is in any case different. Another example of the extent to which Canadian courts have tended to favour the executive is that they have on occasion accepted a claim of Crown privilege without any written statement from the minister concerned. It is true that this problem was not ruled upon comprehensively until *Duncan*, but the Canadian practice does appear to run counter to English practice, which, from *Beatson v. Skene* onward, was to demand a certificate or affidavit from the minister.

One of the surprising aspects of Canadian jurisprudence on Crown privilege is the respect given by some judges to the House of Lords' rulings as against those of the Judicial Committee of the Privy Council, which was until recently the Supreme Court of Appeal from this country. Mr. Justice

Robertson, in *Weber v. Pawlik*, quoted, in support of the supremacy of the House of Lords, *Will v. Bank of Montreal*,[237] *Negro v. Pietro's Bread Co.*[238] and Mr. Justice Martin's dissenting judgment in *Attorney General for British Columbia v. Col.*[239] He did not, however, mention the contrary case of *Lobb v. Rockwood Credit Soc'y.*[240] Since *Weber v. Pawlik*, the Australian and New Zealand cases of *Bruce v. Waldron* and *Corbett v. Social Security Commissioners* have both, after prolonged consideration of previous cases, supported the general supremacy of the Judicial Committee. These cases, moreover, being only partially based on the fact that the Judicial Committee is the Supreme Court of Appeal for those countries, would tend to lend support to the *Lobb* case.

The Supreme Court of Canada studiously avoided any pronouncement on the matter in the *Snider* case. This it was able to do because *Snider* arose from a criminal trial concerning which Viscount Simon had admitted that the law might differ from that applicable to civil actions. It is, on the other hand, fair to point out that there had been several common-law cases where Crown privilege had successfully been claimed in a criminal trial and to this extent the Supreme Court was breaking new ground. Moreover, Mr. Justice Rand implied that the ratio of his judgment stemmed from the *Robinson* case.

If *Gagnon v. Quebec Security Commissioners* is anything to go by, the *Duncan* judgment may well be discarded lock, stock and barrel the next time the issue comes up to the Supreme Court. It is difficult to see, however, where this will lead Canadian jurisprudence, for given the current uncertain state of jurisprudence, the rejection of *Duncan* does not entail the automatic espousal of any simple alternative doctrine. Like the English courts, the courts of Canada now seem to be faced with a considerable period of uncertainty until a new jurisprudence has been evolved.

Such uncertainties could easily be avoided by means of legislation. It is difficult, however, to suggest what form such legislation should take, as any decision would be deeply influenced by political considerations. Legislation on the lines of the amendments to the Alberta Evidence Act would reflect a belief that only the executive could be trusted to determine what official information should be made available to litigants. Legislation such as the new Quebec Code of Civil Procedure which merely restated the right of the courts to decide the issue would reflect both a mistrust of the executive and a trust in the ability of the courts to exercise their discretion fairly and in the public interest. In between these extremes could come a variety of expedients laying down what categories of evidence could attract privilege and by whom the decision as to admissibility was to be taken. All these solutions, however, would imply that in the matter of Crown privilege the rights of the state and of the litigant were irreconcilable. There is indeed a con-

[237] *Supra* note 153.
[238] *Supra* note 154.
[239] *Supra* note 155.
[240] [1926] 2 D.L.R. 819 (Man.).

siderable conflict of interest in the matter. Even in the most democratic and liberal of societies the government is normally the ultimate arbiter of what official information shall be kept secret or made public. On the other hand, the fair administration of justice is also a matter of public concern and the existence of Crown privilege, particularly when defined in terms of the *Duncan* dictum, is quite inimical to the concept of judicial fairness. Carried to its extreme, the doctrine would allow a government complete control over all evidence admissible in courts of law and would thus permit the government, if it so desired, to interfere in virtually any judicial proceedings for its own ends. It is not suggested that this power has been so abused and the courts have in any case begun to reassert some control over its exercise. On the other hand, Crown privilege covers a wider scope of evidence than most other types of testimonial privilege and it is therefore suggested that the chances of its interfering with the normal processes of law are correspondingly greater.

The doctrine of Crown privilege together with the hardships which it entails for the litigant spring in no small measure from the system of "trial by combat" which is so characteristic of the common-law world. Subject to a few exceptions under the category of "judicial notice," the judge can only take account of information placed before him on oath by counsel for the parties. Such evidence, moreover, if it is shown to the judge, must also be shown to the jury, to counsel for the opposing party and, unless the proceedings are in camera, which is rarely the case, to the public at large and the press. On this basis, it is not surprising that governments are cautious about letting official information be used by litigants. A corollary of the system, however, is that evidence which cannot safely be shown to both parties cannot be used in evidence at all, for the judge cannot be expected to look at the evidence by himself and come to his own conclusions. As seen earlier, the problem of state secrecy does not arise nearly so acutely in France in cases where an inquisitorial procedure is adopted. Is there any means whereby we could gain the benefits of the French system without destroying one of the fundamental principles of the common law? Many suggestions for the reform of the law have already been made and the writer is diffident about adding any of his own. The following proposals are, however, put forward as a small contribution to the general debate.

It should be accepted as an absolute rule that in criminal cases and in civil cases where the Crown is plaintiff, the Crown's testimonial privileges should be no greater than those of the private citizen. This may seem an unduly harsh doctrine, but it is no more severe than that adopted by the American courts. The interests of the government would, however, be given some additional protection by allowing ministers to require that some or all of the action be heard in camera and by providing for trial without jury in civil cases. [241] Where the Crown is defendant, it is suggested that the follow-

[241] In so far as such cases were heard in the Exchequer Court of Canada, they would in any case be tried in the absence of a jury.

ing procedure should apply. First, the Crown should have the same automatic right to in camera proceedings as in cases of which it was the instigator. Second, the Crown should have the right to certify, possibly by means of a warrant from the Governor-General, that the evidence sought by its adversary was of so confidential a nature that it could not be disclosed to the public or to the other party without grave prejudice to national security. (It would be understood that "national security" covered matters of international diplomacy, espionage, war and peace and so forth.) This would preclude the desired evidence from being produced in ordinary courts. However, if the plaintiff or suppliant felt that the evidence withheld was vital for the prosecution of his case, he could apply to the courts for a certificate to this effect. The court hearing the application would be authorized to examine the relevant evidence (or to interrogate any witness) secretly and *ex parte*. In granting a certificate, moreover, it could succinctly record its view that national security was not involved, if it felt that the government was abusing the legislation.

Armed with the court certificate, the litigant could then refer his action to a Secret Causes Court. This tribunal would consist of up to ten judges (depending on the anticipated complexity of the points of law likely to be raised) and a number of lay assessors experienced in security matters, perhaps retired members of the Royal Canadian Mounted Police. The court would sit in camera as a court of inquisition. It would be able to demand evidence from both sides, on the understanding that evidence tendered to it in confidence would pass no further, not even to the opposite party. Refusal to testify would not be punishable by imprisonment for contempt of court, but the security court would be free to "draw inferences" from such refusal. The court's ruling would be final. In deference to Anglo-Canadian tradition, and on the analogy of reports to Parliament of the British Parliamentary Commissioner for Administration, the government would be allowed to excise any portion of the Secret Causes Court's judgment on grounds of national security. The court would, however, be allowed to register a formal public protest if it felt that the government was using the provision merely to save itself from political embarrassment. The censorship provision would, moreover, be inapplicable in ordinary proceedings where official information had been admitted and where a national security certificate had not been issued. The court would be obliged to hear in camera representations from counsel for the Crown before delivering its judgment, but the court's view in this case would be final.

Where the Crown was not a party to the action and was summoned on a subpoena to testify, a similar procedure would apply. The Crown could demand that all or part of the proceedings be heard in camera or else issue a national security certificate for the evidence in question. In the latter case, the party seeking the evidence could seek a court certificate that the evidence was vital to his case, and, if successful, could refer the whole matter to the Secret Causes Court. Disobedience to the original

subpoena or refusal to give evidence to the Secret Causes Court would involve the Crown in automatic damages to the injured party. It is suggested that only two categories of documents should be completely excluded from judicial inspection, namely minutes of the Dominion and provincial cabinets and communications between the Governor-General (or Lieutenant-Goveror) and his ministers. Existing legislation which prevented specific categories of evidence from being admitted in court would be unaffected by the suggested innovations.

It is not denied that the suggested reforms would be a radical innovation for any country of the common-law tradition. However, it must be stressed that the argument which rules out the possibility of an *ex parte*, inquisitorial procedure for actions involving state secrets and which implies that justice can only be done in public, bears the inevitable corollary that in such cases the rights of the Crown and subject are incompatible and that either one or the other must yield. As has been shown, this concept is not universally accepted, nor, it is suggested, should it be accepted in Canada.