# Recent developments in the law of public interest immunity: Cabinet papers

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*Public interest immunity has been a difficult and volatile area of the law for the judicial and executive branches of government. This is particularly so in cases concerning Cabinet papers. This article compares recent common law developments in England, New Zealand, Australia and Canada which have substituted 'qualified' immunity for 'absolute' immunity. The author also considers what onus, if any, an applicant for production should be required to discharge, and concludes with a discussion of some of the more important criteria which might usefully guide the exercise of judicial discretion in ordering the inspection and production of Cabinet papers.*

> "One cannot delegate to a judge the decision whether or not Crown privilege should be given without involving him in matters of public policy which are outside his ambit and in which it is most undesirable to involve him."
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> (Statement made by Sir L. Ungoed-Thomas to the House of Commons: H.C., Vol. 558, cc. 962-963, 26 October 1956.)

## I. INTRODUCTION

It is a general rule of law founded on constitutional principle and public policy and recognised by Parliament[1] that any document otherwise relevant and admissible in litigation may be withheld on the ground that its disclosure would be injurious to the public interest. In public interest immunity litigation today, the basic challenge for the courts is to balance two countervailing facets of the public interest; on the one hand, the public interest that harm should not be done to the nation or the public service by the disclosure of certain documents and, on the other hand, the public interest that the administration of justice should not be frustrated by the withholding of documents which must be produced if justice is to be done.[2]

The law of public interest immunity is largely drawn from the common law and has undergone considerable judicial reshaping since World War II. Indeed, it is still evolving as it seeks to accommodate the ever-increasing litigation in which the Crown is involved.[3] Even the former epithet "Crown privilege" has been discarded in

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1 See the Crown Proceedings Act 1947 (U.K.), s. 28(1) proviso; the Crown Proceedings Act 1950 (N.Z.), s. 27(1) proviso.

2 *Conway v. Rimmer* [1968] A.C. 910, 940, per Lord Reid.

3 *Re Carey and the Queen* (1983) 1 D.L.R. (4th) 498, 502, per Thorson J.A.

recognition that this rule of law is not so much a privilege of the Crown as an exclusionary rule of evidence.[4] The delicate and sensitive issue of whether Cabinet papers can or should be amenable to production represents a microcosm of such reshaping and evolution. Until as recently as two decades ago, numerous dicta of high authority suggested the existence of a firm rule that the production of Cabinet papers would not be ordered in judicial proceedings. These dicta have now been exploded by the ratio of high Commonwealth case authorities which have effectively replaced absolute protection with a qualified protection, and thus subjected Cabinet papers to the judicial "balancing" exercise. Lord Wilberforce recently remarked extra-judicially that:[5]

> It seems to have been a common experience that, after the executive-minded approach of the 1940s, the pendulum has swung . . . in favour of judicial control of the executive . . . to a point, possibly reached now and certainly coming to be visible in the United Kingdom, where a swing in the direction of restraint is due.

His Lordship might well have had this particular area of the law in mind.[6] Despite this note of caution and the scepticism inherent in the lead quotation, it is submitted that the recently asserted judicial control over Ministerial certificates claiming immunity for Cabinet papers is a healthy development in the law. Part II of this paper contains a discussion and analysis of the development of the case-law in the United Kingdom, Australia, New Zealand and Canada; Part III considers the vexed question of the onus, if any, to be imposed on an applicant for production, and Part IV canvasses various criteria which may influence the exercise of judicial discretion in the balancing exercise.

Although the definition has varied considerably in the cases, in this article "Cabinet papers" will be used compendiously to refer to Cabinet minutes and accompanying explanatory memoranda, Cabinet committee minutes and papers, and documents prepared by Ministers or their departmental advisers for the assistance of Cabinet in formulating policies and reaching decisions.

## II. THE CASE-LAW

It is proposed for convenience to trace the common law (and, where appropriate, statutory) developments relating to the withholding of Cabinet papers from production in each of the four jurisdictions separately, and to make necessary cross-references where developments in one jurisdiction have influenced the others.

### *A. The United Kingdom*

Most English texts begin their chapter on public interest immunity with a discussion of *Duncan* v. *Cammell, Laird & Co.*[7] This unanimous House of Lords decision has come

4 See *R. v. Lewes Justices, ex p. Home Secretary* [1973] A.C. 388, where "Crown privilege" was variously described as "wrong", "misleading", "not accurate" and a "misnomer".

5 M. Taggart (ed.) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) p.ix of Foreword by Lord Wilberforce.

6 See the dissenting judgment of Lord Wilberforce in *Burmah Oil Co. Ltd. v. Bank of England* [1980] A.C. 1090, discussed infra.

7 [1942] A.C. 624.

to represent the high-water mark of undue judicial indulgence to executive discretion in this field. The case arose in war-time and few would question the wisdom of the Law Lords in holding that the Crown's claim to non-disclosure of certain defence secrets could not be forensically questioned in the particular circumstances. Unfortunately, apart from departing from earlier high authority,[8] the House of Lords laid down the law in terms far wider than required in so far as it held that a court could not question a public interest immunity claim made in proper form by the Crown, regardless of the nature or the class of document. By virtue of his *ipse dixit,* the Minister became the sole arbiter of the public interest such that a court was not entitled to inspect (let alone order the production of) the document in order to determine whether there were any reasonable and bona fide grounds for excluding relevant and otherwise admissible evidence. Predictably, executive abuse followed upon the heels of *Duncan*'s case leading ultimately to judicial backlash. In *Glasgow Corporation* v. *Central Land Board,*[9] Lord Radcliffe recognised that the "interests of government . . . do not exhaust the public interest"[10] in affirming the inherent power of the Scottish courts to override a Ministerial objection to disclosure. The groundwork was thus laid for the landmark decision of the House of Lords in *Conway* v. *Rimmer*[11] which brought back an unfettered executive power into legal custody. The House unanimously reversed what it had unanimously stated in *Duncan*'s case in asserting a judicial power to hold the balance between the two competing public interests, and ordering the production of several confidential police reports about a probationary constable over the Home Secretary's objection.

For the purposes of this article, however, it is significant to note that a number of dicta concerning Cabinet papers in *Conway*'s case seemed to place that class of document above the judicial balancing exercise. A Ministerial claim to non-disclosure of Cabinet papers would remain judicially unreviewable despite the contents of the documents sought and their importance to the party seeking production. As Lord Reid stated:[12]

> I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest.

Lord Hodson[13] considered that Cabinet minutes as a class of document required "absolute protection" from disclosure "from their very character", citing in support the then recent Court of Appeal decision in *In re Grosvenor Hotel, London (No. 2).*[14] There, unequivocal dicta fell from the lips of Lord Denning M.R. and Harman and Salmon

8 See *Robinson v. South Australia (No. 2)* [1931] A.C. 704, where the Judicial Committee of the Privy Council held that the court had jurisdiction to satisfy itself that a Ministerial claim to non-disclosure was justified, and accordingly remitted the case to Australia with directions to examine the documents.

9 1956 S.C. (H.L.) 1.

10 Ibid. 18.

11 [1968] A.C. 910.

12 Ibid. 952.

13 Ibid. 973.

14 [1965] 1 Ch. 1210.

L.JJ.[15] to the effect that a court would never order production of Cabinet papers as the Executive were better judges as to whether such papers should be disclosed. Lord Pearce confidently asserted that "Obviously production would never be ordered of fairly wide classes of documents at a high level . . . such as Cabinet correspondence..."[16] Nevertheless, as Gibbs A.C.J. remarked in the High Court of Australia decision in *Sankey* v. *Whitlam,*[17] such dicta "accord[ed] ill with the principles affirmed in [*Conway's*] case."[18]

These early dicta suggesting that Cabinet papers, as a class, were absolutely immune from production soon crystallised into a firm rule of Cabinet immunity from production. In *R.* v. *Lewes Justices, ex parte Secretary of State for Home Department,*[19] Lord Salmon cited Cabinet minutes as falling within "classes of documents . . . which for years have been recognised by the law as entitled in the public interest to be immune from disclosure" concerning which a Ministerial certificate "is hardly necessary."[20] In a slightly different context in *Attorney-General* v. *Jonathan Cape Ltd.,*[21] Lord Widgery C.J. had occasion to state by way of obiter that:[22]

> It has always been assumed by lawyers and, I suspect, by politicians, and the Civil Service, that Cabinet proceedings and Cabinet papers are secret, and cannot be publicly disclosed until they have passed into history. It is quite clear that no court will compel the production of Cabinet papers in the course of discovery in an action . . . .

There, the Attorney-General sought an injunction to restrain the publication of a series of volumes entitled "The Diaries of a Cabinet Minister" following the death of their author, Mr Richard Crossman. The diaries contained details of discussions in Cabinet of events which had transpired ten years previously. Although a court had the power to restrain publication of Cabinet material where such publication might be a breach of confidence or contrary to the public interest, the injunction was refused on the basis of the substantial effluxion of time and consequent minimisation of such risks.

The foundations of this firm rule of Cabinet immunity from production began to shift dangerously in 1979 when a 4-1 majority of the House of Lords applied the "balancing" principles laid down in *Conway's* case to high level governmental policy formulation in *Burmah Oil Co. Ltd.* v. *Bank of England.*[23] Burmah Oil sought a declaration that a sale by it to the Bank of England of certain oil company stocks was unconscionable and in breach of the Bank's duty of fair dealing. Prior to trial, Burmah sought an order for discovery of all relevant documents held by the Bank which thereupon resisted, on the Government's instruction, production of certain documents under its control. Burmah had hoped that these documents would disclose the part played by the Government in the episode and support Burmah's "unconscionability" argument. The Chief Secretary

15 Ibid. at 1246, 1250 and 1258-59 respectively.
16 *Conway v. Rimmer* [1968] A.C. 910, 987. See also the judgment of Lord Upjohn at 993.
17 (1978) 142 C.L.R. 1.
18 Ibid. 41.
19 [1973] A.C. 388.
20 Ibid. 412.
21 [1976] 1 Q.B. 752.
22 Ibid. 764.
23 [1980] A.C. 1090.

to the Treasury objected to production of, *inter alia,* communications between, to and from Ministers, and minutes and briefs for Ministers and memoranda of meetings attended by Ministers, on the basis that they formed a class of documents relating to the formulation of high level governmental policy and that their non-disclosure was necessary for the proper functioning of the public service. The House of Lords held that it was necessary to go behind the Chief Secretary's certificate and to order the production of the documents for judicial inspection.

Although none of the documents dealt with "Cabinet papers", the decision does contain a number of dicta concerning whether the latter documents are absolutely immune from disclosure or otherwise. Apart from Lord Salmon,[24] their Lordships did not regard the earlier dicta suggesting absolute immunity as decisive. In referring, *inter alia,* to Cabinet minutes, Lord Keith of Kinkel opined that "it would be going too far to lay down that no document in any particular one of the categories mentioned should never in any circumstances be ordered to be produced."[25] Basing his views on the "imperative demands of justice", Lord Scarman was equally vigorous in refusing to "accept that there are any classes of document which, however harmless their contents and however strong the requirement of justice, may never be disclosed until they are only of historical interest."[26] Lord Wilberforce[27] left open the issue of absolute immunity for Cabinet papers, contenting himself with the fact that counsel for the Attorney-General did not contend for an absolute immunity in all circumstances. Lord Edmund-Davies[28] implicitly leaned in favour of qualified immunity for Cabinet papers. It would seem, then, that a majority of their Lordships accepted, albeit with varying degrees of enthusiasm, that no classes of documents, not even Cabinet papers and those concerning high level government policy formulation, are excluded entirely from the balancing exercise. Although the *Burmah Oil* dicta cannot be seen as finally resolving the issue, they do provide support for the proposition that the trend in the United Kingdom is moving away from absolute immunity for Cabinet papers[29] and high level communications between Ministers and senior departmental policy advisers.[30]

24 Ibid. 1121.

25 Ibid. 1134.

26 Ibid. 1144.

27 Ibid. 1113.

28 Ibid. 1127.

29 See the decision of the House of Lords in *Air Canada v. Secretary of State for Trade* [1983] 2 A.C. 394, which involved a claim for non-disclosure of, *inter alia,* communications between, to and from Ministers, minutes and briefs for Ministers, and memoranda of meetings attended by Ministers. Acknowledging (at 432) that such documents "do not quite enjoy the status of Cabinet minutes, but [that] they approach that level in that they may disclose the reasons for Cabinet decisions and the process by which the decisions were reached," Lord Fraser of Tullybelton asserted that "while Cabinet documents do not have complete immunity, they are entitled to a *high degree of protection* against disclosure." Emphasis added. His Lordship instanced serious misconduct by a Cabinet Minister as justifying the substitution of a qualified immunity for Cabinet papers.

30 See, for example, *Williams v. Home Office* [1981] 1 All E.R. 1151 (Q.B.D.) where McNeill J. inspected and ordered for production a departmental submission to the Minister and notes of meetings held by the Secretary of State for the Home Department with officials in order to review prison policy, despite a "class" objection similar to that taken in *Burmah Oil.*

*B. Australia*

Although the High Court of Australia decided early on in *Marconi's Wireless Telegraph Company Limited* v. *The Commonwealth (No. 2)*[31] that a court had power to examine documents to determine whether an Executive claim to immunity was justified, it was not until the 1960s that the State courts were able to shake off the stultifying effects of *Duncan*'s case.[32] Nonetheless, Cabinet papers as a class continued to be considered automatically exempt from production by State and Commonwealth courts alike.[33] It was not until 1974 that a small crack appeared in the wall of absolute immunity for such papers. In *Lanyon Pty. Limited* v. *The Commonwealth,*[34] the plaintiff sought production of certain relevant minutes of Cabinet and its committees and sub-committees. The Commonwealth Government claimed an absolute immunity for such documents on the basis of the various dicta in *Conway*'s case. Menzies J., sitting alone, upheld the immunity claim without inspection, reasoning that:[35]

> [T]he governmental process directed to obtaining a cabinet decision upon a matter of policy ... should not, in the public interest, be disclosed by the production of cabinet papers including what I would describe as papers which have been brought into existence within the governmental organization for the purpose of preparing a submission to cabinet. Such papers belong to a class of documents that, in my opinion, are of a nature that ought not to be examined by the Court, *except, it may be, in very special circumstances.*

The "very special circumstances" exception alluded to by Menzies J. set the stage for the High Court's milestone decision in *Sankey* v. *Whitlam.*[36] The case involved a private prosecution brought against the former Prime Minister Whitlam and several members of his Government alleging a conspiracy arising out of the attempt by the Government to raise substantial loans outside the Loans Council approved borrowing guidelines. The informant sought the production of documents relating to the proposed borrowing including an explanatory memorandum and schedule relating to the minutes of a certain Executive Council meeting, and communications between Ministers and senior departmental officials concerning the formulation of government policy. The Commonwealth Government objected to the production of most of the documents on the ground that they belonged to a class of documents which the public interest required should not be disclosed in the interests of the proper functioning of the government and the public service. Four out of the five High Court Justices held that Cabinet papers and documents concerned with high level policy decisions are not entitled to absolute

31 (1913) 16 C.L.R. 178.

32 *Bruce v. Waldron* [1963] V.R. 3; *Ex parte Brown; Re Tunstall* (1966) 67 S.R. (N.S.W.) 1.

33 *R. v. Turnbull* [1958] Tas.S.R. 80; *Ex parte Brown; Re Tunstall* (1966) 67 S.R. (N.S.W.) 1, 12; *Australian National Airlines Commission v. The Commonwealth* (1975) 132 C.L.R. 582, 591 (H.C.A.) per Mason J. (sitting alone) by way of obiter.

34 (1974) 129 C.L.R. 650 (H.C.A.).

35 Ibid. 653. Emphasis added. That Menzies J. is prepared to exempt from disclosure any document which was created within a government department or agency "for the purpose of preparing a submission to cabinet" seems unduly wide in scope. As Eagles comments in "Cabinet Secrets as Evidence" [1980] Public Law 263, 271, the mere fact that Cabinet looks at a document should not be sufficient to confer protection on it, since a possibility otherwise arises of "privilege by annexure whereby all sorts of innocuous information could be concealed by including it as factual background in cabinet submissions."

36 (1978) 142 C.L.R. 1.

protection; rather, a court has the power to inspect such documents with a view to balancing the two competing public interests involved. As Gibbs A.C.J. stated:[37]

> The fundamental principle is that documents may be withheld from disclosure only if, and to the extent, that the public interest renders it necessary. That principle in my opinion must also apply to state papers. It is impossible to accept that the public interest requires that all state papers should be kept secret for ever, or until they are only of historical significance.

Stephen J.[38] dismissed earlier case-law suggesting absolute immunity as not having required any decision upon Cabinet papers per se and as having lacked the special features of the instant case. In His Honour's view, "The judge-made law relating to Crown privilege is no code, it erects no immutable classes of documents to which a so-called absolute privilege is to be accorded."[39] The High Court was clearly influenced in its decision to inspect the documents by the fact that the effluxion of time since the events in question had substantially reduced the need to preserve the secrecy of the documents, and that disclosure was essential to a prosecution for misfeasance in public office.[40] Thus, the High Court in *Sankey's* case extended the principles laid down by the Law Lords in *Conway's* case to one of the last bastions of executive supremacy in asserting judicial control over a claim to immunity concerning Cabinet papers.

After this flourish of judicial activity in the mid-1970s, the Australian courts have been left with the task of resolving whether *Sankey's* case intended to substitute a *Lanyon*-style "strong presumption" in favour of protection of Cabinet papers for the shattered "absolute protection" notion. In *Prineas* v. *Forestry Commission of New South Wales,*[41] Hutley J.A., after referring to remarks concerning Cabinet papers made by Gibbs A.C.J. in *Sankey's* case, said that "though he did not regard the privilege as absolute, it would be only in very special circumstances (cf *Lanyon Pty. Ltd.* v. *Commonwealth* . . .) that this should be departed from."[42] However, it is submitted that the more faithful interpretation of the *Sankey* judgments on this point is that adhered to by Pincus J. in the recent case *Harbours Corporation of Queensland* v. *Vessey Chemicals Pty. Ltd.*[43] There, His Honour did not read the High Court as having reached a precise conclusion on the question whether Cabinet papers have the benefit of a strong presumption in favour of immunity, and, accordingly, ordered Cabinet minutes and submissions to Cabinet to be produced for inspection.[44]

37 Ibid. 41-42.

38 Ibid. 63.

39 Idem.

40 Echoing respectively considerations raised in *Attorney-General v. Jonathan Cape Ltd.* [1976] 1 Q.B. 752, 767, 771, and the "very special circumstances" exception carved out by Menzies J. in *Lanyon Pty. Ltd. v. The Commonwealth* (1974) 129 C.L.R. 650, 653.

41 (1984) 53 L.G.R.A. 160.

42 Ibid. 165.

43 (1986) 67 A.L.R. 100 (Fed.Ct.).

44 In the non-litigious field, s.34(1) of the Freedom of Information Act 1982 (Cth. of Aust.) provides, *inter alia,* that a document is an exempt document, and therefore not subject to disclosure, if it is a document submitted to Cabinet for its consideration (having been brought into existence for such submission), an official record of Cabinet, or a document incorporating Cabinet deliberations.

*C. New Zealand*

Prior to *Conway's* case, New Zealand courts were persuaded that *Duncan's* case imposed an unhealthy restraint on the judicial function, and, accordingly, reasserted an inherent power to override an immunity claim if the balance of public interest so required.[45] Nevertheless, they continued to recognise the existence of classes of documents concerning which the Ministerial certificate would be treated as decisive.[46] In 1977, the issue of whether Cabinet papers and minutes constituted a class in respect of which absolute protection would be accorded, arose squarely for decision before Richardson J. in *Elston* v. *State Services Commission.*[47] Finding support in various respectable dicta,[48] His Honour held that "absolute protection from discovery must apply not only to Cabinet minutes and correspondence between Ministers, but also to papers prepared for Cabinet committees and officials' file notes summarising Cabinet and Cabinet Committee decisions."[49] To this list, Richardson J. was prepared to add "correspondence between Cabinet Ministers and their official advisers."[50] One year later, in the Court of Appeal decision in *Tipene* v. *Apperley,*[51] Richardson J., in delivering the Court's judgment, stated obiter that a Ministerial certificate claiming immunity from production of Cabinet papers as a class should be treated as decisive.[52] His Honour reasoned that their production would not be compelled "by reason of their very nature as actually or potentially involving highest level policy considerations affecting the public interest and because they are made in a setting which is peculiarly within the province of the executive."[53]

It was not until 1981 that the Court of Appeal squarely faced for the first time in *Environmental Defence Society Inc.* v. *South Pacific Aluminium Ltd. (No. 2)*[54] the issue whether or not Cabinet papers were absolutely immune from production. Clearly, the *Sankey* and *Burmah Oil*[55] decisions in the intervening period were influential in the Court's unanimous holding that it had jurisdiction, despite a Ministerial objection, to inspect and order production of documents relating to discussions in, and a decision by, Cabinet, and advice tendered to the Governor-General by the Executive Council,

45 *Corbett v. Social Security Commission* [1962] N.Z.L.R. 878.

46 See *Konia v. Morley* [1976] 1 N.Z.L.R. 455, 461, where McCarthy P. instanced the endangering of the safety of the state or diplomatic relations by disclosure.

47 [1979] 1 N.Z.L.R. 193 (Sup. Ct.).

48 *Conway v. Rimmer* [1968] A.C. 910, 952, per Lord Reid; *R. v. Lewes Justices, ex parte Secretary of State for Home Department* [1973] A.C. 388, 412, per Lord Salmon; *Attorney-General v. Jonathan Cape Ltd.* [1976] 1 Q.B. 752, 764, per Lord Widgery C.J.

49 *Elston v. State Services Commission* [1979] 1 N.Z.L.R. 193, 201.

50 Idem. His Honour opined that the courts are not in the best position to assess the prejudice to the public interest through disclosure concerning this class of document. In such cases, the Ministerial certificate would be accepted by the court as decisive.

51 [1978] 1 N.Z.L.R. 761.

52 Ibid. 764, drawing support from the same dicta as are listed in n. 48 supra.

53 Ibid. 765.

54 [1981] 1 N.Z.L.R. 153.

55 The judgments of Lord Keith of Kinkel and Lord Scarman were particularly noted in the judgments of Richardson and McMullin JJ.

concerning the promulgation of an Order in Council under the National Development Act 1979. Richardson J. stated that "while the Court will pay due deference to the views expressed by the Minister certifying that disclosure of particular Cabinet papers would be injurious to the public interest, the Court is not bound by that certificate."[56] After adverting to the *Sankey* and *Burmah Oil* decisions, McMullin J. concluded:[57]

> As a result of these judgments it can now be said that Cabinet papers and the like should not be entitled in this country to absolute protection from production although their importance as part of the deliberations of the highest executive body and the need to preserve their confidentiality in many cases will be an important factor in deciding what is now recognised as a wider issue of public interest.

Cooke J. noted the discretionary nature of this undoubted jurisdiction to order judicial inspection of Cabinet papers, and that such inspection "should . . . never be ordered without good reason applying to the particular case and certainly not lightly or as a matter of routine."[58] Although the Court of Appeal did not order production of the inspected documents, that was the result in its decision in *Fletcher Timber Ltd.* v. *Attorney-General.*[59] There, the Court applied its own decision in *Environmental Defence Society Inc.* in inspecting and ordering the production of "communications either between senior officials and Ministers of the Crown and Cabinet, or between Ministers and the Prime Minister, between Ministers and Cabinet, between Ministers and third parties and memoranda of Cabinet Committees." In calling for inspection, the members of the Court were particularly concerned that the "class" claim to protection was unsupported by any specific explanation that might assist the Court in arriving at an informed assessment of detriment to the public interest in non-disclosure.[60] Woodhouse P. stated:[61]

> A certificate claiming public interest immunity, particularly when referable to Cabinet and other high level documents, will certainly be given the sensitive attention it deserves. But in this area the influence of comity must not permit the Minister's conclusion to become the substitute for informed judicial decision.

And, in the context of a statement by Gibbs A.C.J. in *Sankey's* case[62] to the effect that there is no document for which immunity will automatically be given, McMullin J. indicated that "although protection for . . . [Cabinet] papers is more likely to be given than to papers at a lower level of Government, such papers do not fall into a class for which special protection is given by law."[63] Thus, the general tenor of these judicial statements is that though New Zealand courts no longer regard Cabinet papers as a class enjoying absolute immunity from production, they will bring to bear a healthy

56 *Environmental Defence Society Inc. v. South Pacific Aluminium Ltd. (No. 2)* [1981] 1 N.Z.L.R. 153, 162.

57 Ibid. 167.

58 Ibid. 156.

59 [1984] 1 N.Z.L.R. 290.

60 The Ministerial certificate merely contained a general assertion of the importance of the communications and deliberations in respect of which protection was sought, being made with frankness and freedom, which exposure to public scrutiny might inhibit.

61 [1984] 1 N.Z.L.R. 290, 296.

62 (1978) 142 C.L.R. 1, 42.

63 *Fletcher Timber Ltd. v. Attorney-General* [1984] 1 N.Z.L.R. 290, 307. See also the Court of Appeal's decision in *Brightwell v. Accident Compensation Corporation* [1985] 1 N.Z.L.R. 132, where McMullin J. (at 157) reiterated these statements by way of obiter.

circumspection on the issue of whether they should be inspected and ordered to be produced.

*D. Canada*

Cabinet papers have been accorded absolute immunity from disclosure by statute at the federal governmental level. Formerly, a federal Minister could swear an affidavit pursuant to section 41(2) of the Federal Court Act, R.S.C. 1970, c.10 (2nd Supp.) whose effect would bar judicial examination and disclosure of information pertaining to, *inter alia,* a confidence of the Queen's Privy Council for Canada.[64] Although this provision has been repealed by the Act to enact the Access to Information Act, S.C. 1980-81-82-83, c.111, it has been replaced by a new provision which effectively continues the absolute immunity of Cabinet papers. Section 36.3[65] of the Canada Evidence Act, R.S.C. 1970, c. E-10 provides that if a federal Minister or the Clerk of the Queen's Privy Council for Canada[66] objects in any proceedings to production of information by certifying in writing that such information constitutes a confidence of the Privy Council, then the objection is conclusive and disclosure "shall be refused without examination . . . by the Court. . . ." As one commentator[67] points out, it is ironic that at the federal level, the Access to Information Act, S.C. 1980-81-82-83, c.111 constitutes a retreat from a trend towards disclosure of Cabinet documents discernible elsewhere in the common law world, despite its apparent attempt at liberalising access to government information.[68]

The position under federal statute law is in sharp contrast to that obtaining under Canadian provincial common law. Although Canadian courts had early on expressed doubts as to the unduly wide ratio in *Duncan's* case and, accordingly, reaffirmed their residual power to override a Crown immunity claim,[69] Fauteux J., delivering the judgment of the majority of the Supreme Court of Canada, had suggested obiter in 1965 in *Gagnon* v. *Quebec Securities Commission*[70] that although a court should satisfy itself that the public interest in non-disclosure outweighed the interests of the party seeking

64 The Act itself does not define "a confidence of the Queen's Privy Council for Canada". However, s. 36.3(2) of the Canada Evidence Act, R.S.C. 1970, c. E-10 (as inserted by the Act to enact the Access to Information Act, S.C. 1980-81-82-83, c. 111, s. 4, Schedule III) defines this phrase to include information contained in, *inter alia,* a record recording deliberations or decisions of the Council, a record reflecting communications between Ministers relating to the making of government decisions, and draft legislation.

65 As inserted by the Act to enact the Access to Information Act, S.C. 1980-81-82-83, c. 111, s. 4, Schedule III.

66 "Council" is defined by s. 36.3(3) to mean the Queen's Privy Council for Canada, the Cabinet, committees of the Privy Council and Cabinet committees. The Privy Council for Canada is similar in function to the New Zealand Executive Council.

67 T. Rankin "The New Access to Information and Privacy Act: A Critical Annotation" (1983) 15 Ottawa L.R. 1, 36.

68 On the non-litigious side, s. 69 of the Act excludes from its scope confidences of the Queen's Privy Council for Canada (see n. 64 supra).

69 *R. v. Snider* [1954] S.C.R. 479; *Gagnon v. Quebec Securities Commission* (1964) 50 D.L.R. (2d) 329 (S.C.C.).

70 (1964) 50 D.L.R. (2d) 329, 333.

production, this was generally not necessary where the documents involved, *inter alia,* Cabinet papers. Even as late as 1979, the Saskatchewan Court of Appeal had ventured the dictum that Cabinet papers are not to be disclosed.[71] As a result of more recent decisions, however, it can be safely ventured that there are no longer any sacrosanct categories of information concerning which absolute immunity attaches. Provincial courts of appeal have decided that Canadian courts may inspect Cabinet papers in certain circumstances. In *Mannix* v. *The Queen in Right of Alberta*[72] the Alberta Court of Appeal upheld the decision of the Chambers Judge to inspect relevant Cabinet papers on the ground that certain deficiencies in the description of the documents in the Ministerial certificate otherwise would have rendered it difficult to assess the immunity claim.[73] The British Columbia Court of Appeal has held that Cabinet papers do not attract absolute immunity in the context of whether a condition precedent to the exercise of a statutory power vested in the Lieutenant-Governor in Council to make an Order in Council had been duly fulfilled.[74]

The most recent case of high authority is that of *Re Carey and The Queen.*[75] The plaintiff instituted proceedings against the Crown in right of the Province of Ontario seeking, *inter alia,* damages for breach of an alleged agreement concerning the operation of a resort lodge. The Crown applied to quash a *subpoena duces tecum* served on the Secretary of the Ontario Cabinet requiring him to attend at trial and bring with him all relevant Cabinet papers spanning a six-year period, and filed in support an affidavit sworn by the Secretary in which he claimed absolute immunity from production on a "class" basis of "notes taken at meetings of Cabinet, formal minutes of meetings of Cabinet and of committees of Cabinet, and reports and recommendations to Cabinet from committees of Cabinet and from various Ministries." The Divisional Court[76] rejected the Crown's submission that Cabinet papers are absolutely immune from disclosure but accepted its alternative submission that a court may require their production only in exceptional circumstances. Since no such circumstances had been proven to exist, the Divisional Court upheld the decision of Catzman J. to quash the *subpoena* without inspection. In arriving at this conclusion, the Divisional Court regarded the Australian High Court's 1974 decision in *Lanyon's* case that Cabinet papers as a class are presumptively immune in the absence of special circumstances, as accurately reflecting the common law of Ontario.

Before the Ontario Court of Appeal, the Crown abandoned its "absolute immunity" submission but maintained its "class" claim for the Cabinet papers which, it claimed, were "deserving of the highest respect" as such. After an exhaustive discussion of the

71 *R. v. Vanguard Hutterian Brethren Inc.* (1979) 97 D.L.R. (3d) 86, 91.

72 (1981) 126 D.L.R. (3d) 155.

73 This problem was confronted by the New Zealand Court of Appeal in *Fletcher Timber Ltd. v. Attorney-General* [1984] 1 N.Z.L.R. 290. See n.60 supra and the related text.

74 *Gloucester Properties Ltd. v. The Queen in right of British Columbia* (1981) 129 D.L.R. (3d) 275.

75 (1983) 1 D.L.R. (4th) 498 (Ont. C.A.); Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No. 18060, sub. nom *Carey v. The Queen in right of Ontario.*

76 *Carey v. The Queen in right of Ontario* (1982) 39 O.R. (2d) 273.

post-*Duncan* Commonwealth case-law, Thorson J.A., delivering judgment for the Court, concluded:[77]

> The weight of the authorities . . . is now heavily on the side of the view that the right which the Crown has to claim protection from disclosure of documents in its possession (whether they are "Cabinet documents" or of some other description) is not an absolute right.

His Honour did concede, however, that a court would undoubtedly have regard to the "high respect" due to "Cabinet documents concerned with the formulation of government policy" in balancing the competing public interests.[78] While upholding the Divisional Court's disposition, the Court of Appeal expressly disassociated itself from the *Lanyon* test of "very special circumstances", and regarded as possibly too constricting, the Divisional Court's examples thereof concerning allegations of criminal activity, misfeasance, irregularity or other improprieties involving Ministers or officials.[79]

On appeal to the Supreme Court of Canada, La Forest J., delivering the unanimous judgment of the Court, agreed that although Canadian provincial common law did not confer an absolute immunity upon Cabinet papers, courts must nevertheless proceed with caution in having them produced.[80] This was only one factor to be considered however. In ordering judicial inspection, the Supreme Court considered that this factor was outweighed by the nature of the litigation which involved an isolated twelve-year-old transaction of limited ongoing policy and public interest.

## III. INSPECTION: ONUS REQUIREMENTS

Recent English, New Zealand and Canadian decisions of high authority have been preoccupied with the issue of whether an applicant for production of Cabinet papers and other high level policy documents for which immunity is claimed, must prove something beyond their mere relevance to the proceedings before a court will inspect and place them on the balancing scales. These decisions have exhibited a variety of approaches. The issue of a possible onus requirement is an important one since its imposition can be used by the courts as a control mechanism over this area of the law.

In *Burmah Oil,* some of the Law Lords were concerned with the prospect of "fishing expeditions". Lord Wilberforce asserted that:[81]

> As to principle, I cannot think that it is desirable that the courts should assume the task of inspection except in rare instances where a *strong positive case* is made out, certainly not upon a bare unsupported assertion by the party seeking production that something to help him may be found, or upon some unsupported — viz., speculative — hunch of its own.

In Lord Edmund-Davies' view,[82] a judicial peep would be justified where the documents are "likely" to contain material "substantially useful" to the party seeking

77 *Re Carey and the Queen* (1983) 1 D.L.R. (4th) 498, 533.
78 Ibid. 540.
79 Ibid. 542.
80 *Carey v. The Queen in right of Ontario,* Unreported judgment of the Supreme Court of Canada rendered 18 December 1986; File No. 18060, 1, 46.
81 [1980] A.C. 1090, 1117. Emphasis added.
82 Ibid. 1129.

discovery. Lord Keith of Kinkel[83] spoke in terms of a "reasonable probability" existing of the documents containing material lending "substantial support" to the contentions of the party seeking their production.

The issue of an onus requirement was squarely addressed by all five Law Lords in *Air Canada* v. *Secretary of State for Trade.*[84] That case concerned the attempt by the plaintiffs to impute an unlawful dominant purpose to the Secretary of State for Trade. The plaintiffs sought the production of high level Ministerial papers relating to the formulation of relevant government policy in order to support such allegation. In upholding the Secretary of State's immunity claim without inspection, the House of Lords considered it improbable that the documents contained any material additional to that already available to the plaintiffs concerning the issue of unlawful purpose. Lord Fraser of Tullybelton preferred the "strict" test formulated by Lord Edmund-Davies in *Burmah Oil* that:[85]

> . . . [I]n order to persuade the court even to inspect documents for which . . . immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are *very likely* to contain material which would give *substantial support* to his contention on an issue which arises in the case, and that without them he might be "deprived of the means of . . . proper presentation" of his case . . . .

Lord Edmund-Davies[86] adhered to the test[87] he had propounded in *Burmah Oil,* while Lord Wilberforce[88] considered that there must exist some concrete ground for belief that the documents will support the case of the party seeking discovery. Basing their views on R.S.C., Ord. 24, r. 13(1),[89] Lords Scarman[90] and Templeman[91] considered that a court should not inspect the documents unless satisfied that they contained material which would assist "any" of the parties and which would likely be necessary for disposing fairly of the cause or saving costs. Whether the majority's stricter test or the minority's more liberal approach is applied, the onus resides in the applicant for production.

For those who advocate that the law should be as simply stated as possible but no simpler, the articulation of two tests by the Law Lords concerning when a court should inspect Cabinet and other high level papers prior to the balancing exercise, is a distressing development. Although on the facts of the *Air Canada* case the Law Lords were able to reach a unanimous conclusion on the inspection issue, the two tests are by no means similar concerning the "degree" of onus imposed on the applicant for

83 Ibid. 1135-36.
84 [1983] 2 A.C. 394.
85 Ibid. 435-436. Emphasis added.
86 Ibid. 444.
87 See the text relating to n. 82.
88 *Air Canada v. Secretary of State for Trade* [1983] 2 A.C. 394, 439.
89 The text of which provides: "No order for the production of any documents for inspection or to the court shall be made unless the court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."
90 *Air Canada v. Secretary of State for Trade* [1983] 2 A.C. 394, 445.
91 Ibid. 449.

production.[92] That "any" onus should be imposed at all may come as a mild shock to New Zealand, Australian and Canadian lawyers accustomed since at least the early 1980s to the movement towards "open government" and freedom of information legislation. Although the onus question was not addressed in the *Environmental Defence Society Inc.* case, it was squarely raised for the decision of the New Zealand Court of Appeal in *Fletcher Timber Ltd.* There the Court upheld the appellant's contention that once it is established that the documents are relevant[93] to the issues between the parties, the applicant is entitled "as of right" to their production subject only to a successful immunity claim. There is no onus on the applicant to establish that the documents are likely to assist its own case; rather, the onus lies on the party seeking to "avoid" production. In short, then, as stated by Richardson J., "the only onus on the applicant is to establish that the documents in respect of which . . . immunity is raised relate to a matter in question in the action: if he does so, then the Court should move immediately to the balancing exercise."[94] This holding was dictated largely by the particular rule of civil procedure[95] which, the Court took pains to point out, differed in its wording and effect from its English counterpart[96] considered in *Air Canada.*[97]

The Court of Appeal also sought to distinguish *Air Canada* on the basis of the enactment in New Zealand of the Official Information Act 1982 — a statute "to make official information more freely available". Speaking of this Act, McMullin J. reasoned:[98]

> If then Parliament intended to make available information in the hitherto closed books of State to New Zealand citizens at large, without recourse to legal proceedings, and made the public interest the touchstone in determining whether or not it should be supplied, it would be strange if that same information were to be protected from inspection by citizens who had become involved in an adversarial situation with the Crown where the information was admitted to be relevant.

McMullin J.[99] also noted that the reasons given by the Minister for withholding the documents from the appellant in the instant case did not fall within those sections of the Act which provided for "conclusive" reasons for withholding official information;

92 Lord Fraser of Tullybelton stated (at 433) that he was willing to assume that the documents were necessary for disposing fairly of the cause; an assumption which Lords Scarman and Templeman were not prepared to make.

93 Such relevance will usually be established through the listing of the documents by the Crown in its affidavit of production.

94 *Fletcher Timber Ltd. v. Attorney-General* [1984] 1 N.Z.L.R. 290, 301.

95 Rule 163 of the New Zealand Code of Civil Procedure read: "The Court or a Judge may at any time order either party to the action to produce, for the inspection of the opposite party, such of the documents in his possession or power *relating to any matter in question in the action* as the Court or a Judge thinks right, and the Court may deal with such documents when produced in such manner as appears just." Emphasis added. See now Rule 293(1) of the New Zealand High Court Rules which appears to be to the same effect.

96 See n. 89.

97 It is respectfully submitted that the attempt by the New Zealand Court of Appeal to distinguish *Air Canada* on the onus question on such basis is flawed since the majority of the Law Lords did not directly rely on R.S.C., Ord. 24, r. 13(1) in formulating their "inspection" test.

98 *Fletcher Timber Ltd. v. Attorney-General* [1984] 1 N.Z.L.R. 290, 306. See also the judgments of Richardson J. (at 302) and Woodhouse P. (at 296).

99 Ibid. 305.

rather, they fell at best within several of the "qualified"[100] reasons for withholding such information. Yet the analogy sought to be drawn by the Court between public interest immunity litigation and the Official Information Act 1982 lacks perfection since it is the Executive, rather than the Judiciary, which retains the ultimate say under the Act as to whether official information other than personal information will be disclosed. Moreover, the courts exercise an "appellate" jurisdiction, as it were, concerning the weighing of the competing public interests in the litigation context whereas they are confined to the more limited judicial review role under the Act.

It can thus be seen that English applicants for inspection must go far beyond what is required of New Zealand applicants who merely have to prove the relevance of the documents to the issues between the parties as a prerequisite to the balancing exercise. Curiously, despite the movement towards open government in Canada as evidenced, *inter alia,* by the recently enacted federal freedom of information legislation,[101] the Ontario Court of Appeal recently expressed its preference for the more stringent approach to judicial inspection enunciated by the majority[102] of the Law Lords in *Air Canada.* In *Re Carey and the Queen*[103] counsel for the appellant adopted a *Fletcher Timber*-style submission to the effect that once the relevance of the documents has been demonstrated to the court's satisfaction, the presumption should be in favour of their production, with the onus on the Crown to provide a sufficient reason why they should not be produced.[104] The Court of Appeal rejected that submission and proceeded to frame an elaborate and demanding onus requirement incumbent on the applicant for production to discharge at the first or "inspection" stage of the decisional process. Although not prepared to place any burden of persuasion on the applicant at the second or "balancing" stage, the Court insisted that the applicant must persuade it at the inspection stage that:[105]

> (a) there are cogent and concrete grounds to believe that the documents are likely to provide evidence . . . which, if the documents are produced, will *substantially* assist the . . . party seeking their production;
>
> (b) the issue to which the documents are relevant is one of real substance in the litigation . . . *and*
>
> (c) without the production of the documents, there is reason to believe that the existence of the facts . . . sought to be established is unlikely to be capable of being provided by other means.

100 "Qualified" in the sense that even information within those reasons — such as the protection of information supplied in confidence to the Crown and the maintenance of the effective conduct of public affairs through the free and frank expression of opinions between Ministers and officials — is not to be withheld if outweighed by other considerations which render it desirable, in the public interest, to make that information available.

101 An Act to enact the Access to Information Act, S.C. 1980-81-82-83, c.111.

102 Lords Wilberforce, Edmund-Davies and Fraser of Tullybelton.

103 (1983) 1 D.L.R. (4th) 498. (Ont. C.A.).

104 In the court below, the Divisional Court rejected this submission and adopted instead the *Lanyon* approach to the effect that prior to the inspection of the documents, the applicant for production must discharge the onus resting upon it of rebutting the presumption that Cabinet documents are immune by making out a case of "very special circumstances". See *Carey v. The Queen in right of Ontario* (1982) 39 O.R. (2d) 273, 280-81.

105 *Re Carey and The Queen* (1983) 1 D.L.R. (4th) 498, 539. Emphasis added.

Since the applicant, Carey, had not satisfied the Court that his claim that the admittedly relevant documents might assist him, amounted to more than an unsupported assertion, judicial inspection was refused.

With respect, this writer entertains real doubts over this trinity of tribulation which the Ontario Court of Appeal has visited upon applicants for production. Fortunately, the Supreme Court of Canada[106] overruled the Court of Appeal on this point, preferring instead the approach adopted by the New Zealand Court of Appeal in *Fletcher Timber Ltd.* which merely requires the applicant to establish the relevance of the documents prior to judicial inspection. Since applicants will not normally have seen the documents for which immunity is claimed, they cannot be expected to know precisely what it is that the documents can be expected to show if produced. What little knowledge they already possess of the documents likely will only go to their relevance and, without more, it is unrealistic to expect applicants to make such a comprehensive case for their inspection. As La Forest J. aptly states:[107]

> What troubles me about [the Ontario Court of Appeal's] approach is that it puts on a plaintiff the burden of proving how the documents, which are admittedly relevant, can be of assistance. How can he do that? He has never seen them; they are confidential and so unavailable. To some extent, then, what the documents contain must be a matter of speculation. But they deal with precisely the subject matter of the action . . . .

One might also ask whether it is necessary to place any onus on the applicant at the inspection stage when the court is merely being requested to inspect the documents under appropriate security arrangements.[108] Australian[109] and New Zealand[110] courts have not required such an onus even in the case of Cabinet papers. Once the applicant has satisfied the court that the documents sought are relevant, the court should proceed to examine them in the context of the balancing process if it is in doubt or is leaning towards disclosure on the material then before it. It is not necessary to complicate further this area of the law through the elaboration of sophisticated and stringent onus requirements.

## IV. BALANCING CRITERIA

That this field is a difficult one for both the Executive and the Judiciary cannot be denied.[111] The public policy issues involved are prodigious and complex. Although one learned commentator has castigated the House of Lords for having "substituted absolute judicial discretion for absolute executive discretion"[112] in *Conway*'s case,

106 *Carey v. The Queen in right of Ontario,* Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No. 18060, 1, 61-63.

107 Ibid. 57.

108 A step which will not prejudge the ultimate decision.

109 *Sankey v. Whitlam* (1978) 142 C.L.R. 1.

110 *Fletcher Timber Ltd. v. Attorney-General* [1984] 1 N.Z.L.R. 290.

111 *Brightwell v. Accident Compensation Corporation* [1985] 1 N.Z.L.R. 132, 139, per Cooke J.

112 S. A. de Smith *Constitutional and Administrative Law* (5 ed., Penguin Books, Middlesex, 1985) 639.

judges have attempted to formulate policy factors and criteria to guide the exercise of their discretion in this field. This section is devoted to a consideration of some of the more important of those criteria especially in the context of Cabinet papers. Although some of these factors formerly were considered independently decisive,[113] they must now be considered interdependent and be weighed against each other in reaching a final decision on disclosure.[114] We shall begin by considering those policy factors which arguably may be considered by a court as tilting the scales towards protection, and conclude with a discussion of those which favour disclosure.

*A. The Convention of Collective Responsibility*

Protection of Cabinet papers has been sought on the basis of the convention of collective responsibility whereby all Cabinet ministers are expected to support publicly Cabinet decisions regardless of their own personal views.[115] Production of documents indicating the views of individual Ministers, it is said, will tend to undermine the convention. They will not feel free to surrender their personal and departmental preferences to the achievement of a common view, nor can they be expected to abide by a common decision, if they know that the stance they have assumed and their compromise thereof might become public knowledge.[116] The convention is not as compelling as it once was in this context for at least two reasons. First, Cabinet minutes seldom now include contributions by individual Ministers, as Cabinet government moves increasingly towards "consensus" decision-making. Secondly, the convention seems to be unravelling. Lord Widgery C.J. has recently acknowledged this[117] and, as one learned commentator[118] fairly asks, why should litigants be bound by a rule which Ministers themselves do not consistently support.

*B. The Oath of Secrecy*

That members of the Executive or Privy Council are obliged to keep secret all matters revealed to them as such has recently been debunked as a legitimate ground for the non-disclosure of Cabinet papers.[119] The oath of secrecy would appear to be founded upon morals or conscience rather than law.[120]

*C. Possible Prejudice by Disclosure*

1. *Ill-informed public criticism*

A more substantial ground for protection and policy factor to be placed on the scales

113 For example, the 'candour' argument against disclosure, discussed infra.

114 No attempt is made here to assess their relative weight since this must vary with the facts and circumstances of each case.

115 See, for example, *Environmental Defence Society Inc. v. South Pacific Aluminium Ltd. (No. 2)* [1981] 1 N.Z.L.R. 153, 155.

116 *Attorney-General v. Jonathan Cape Ltd.* [1976] 1 Q.B. 752, 761.

117 Ibid. 770.

118 I. G. Eagles "Cabinet Secrets as Evidence" [1980] Public Law 263, 267.

119 *Sankey v. Whitlam* (1978) 142 C.L.R. 1, 42, per Gibbs A.C.J.

120 *Attorney-General v. Jonathan Cape Ltd.* [1976] 1 Q.B. 752, 767.

is to be found in the following passage from Lord Reid's judgment in *Conway*'s case:[121]

> [S]uch disclosure [of Cabinet minutes] would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticize without adequate knowledge of the background and perhaps with some axe to grind.

The risk of such criticism increases when, as often happens, Cabinet notes and minutes do not constitute a complete record of the discussions at Cabinet meetings and fail to indicate the basis upon which Cabinet reached its decisions. Lord Reid's concern over ill-informed public criticism was enthusiastically endorsed by Lords Scarman[122] and Wilberforce[123] in *Burmah Oil* as a factor legitimately to be put into the balance, and more recently by La Forest J. in *Carey* v. *The Queen in Right of Ontario.*[124] Gibbs A.C.J. conceded in *Sankey's* case that "[I]t is inherent in the nature of things that government at a high level cannot function without some degree of secrecy."[125] Nevertheless, Gibbs A.C.J. also pointed out that "[T]he object of the [immunity] is to ensure the proper working of the government, and not to protect Ministers . . . from criticism, however intemperate and unfairly based.[126] A mere risk that production of Cabinet papers might expose administrative inefficiency or embarrass the Executive should not suffice.[127] Lord Keith of Kinkel was even readier to expose to public gaze the inner workings of government if the justice of the case so demanded since:[128]

> [T]here may be some who would regard this as likely to lead, not to captious or ill-informed criticism, but to criticism calculated to improve the nature of that working as affecting the individual citizen.

### 2. *The 'candour' argument*

The reason most frequently relied on by the courts for refusing to order the production of Cabinet papers is that Ministers must be free to explore alternatives in the policy-formulation and decision-making processes in a private atmospehre in which candid, and even blunt, assessments may be made. The argument runs that Ministers and public servants would temper candour with a concern for appearances and personal interests at the expense of good government, were there any possibility of disclosure in subsequent litigation. The candour argument amounted in all cases to a conclusive reason against court-ordered disclosure of high level Executive documents, and Ministers exploited this "blank cheque" at the expense of justice in individual cases. Judicial scepticism manifested itself as early as 1956 when Lord Radcliffe considered

121 [1968] A.C. 910, 952.

122 [1980] A.C. 1090, 1145.

123 Ibid. 1112. Lord Wilberforce did not believe it was for the courts to assume the role of advocates for open government, and was "certainly not prepared to be wiser than the minister."

124 Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No. 18060, 1, 29.

125 *Sankey v. Whitlam* (1978) 142 C.L.R. 1, 40. Similar sentiments were uttered by the United States Court of Appeals for the District of Columbia Circuit in *Nixon v. Sirica* (1973, App DC) 487 F2d 700, 19 ALR Fed 343.

126 Idem.

127 *Burmah Oil Co. Ltd. v. Bank of England* [1980] A.C. 1090, 1128, per Lord Edmund-Davies.

128 Ibid. 1134.

that Crown servants should be made of sterner stuff.[129] Salmon L.J. expressed similar sentiments in 1964 when he considered "that it would be an injustice to civil servants to hold that they are so timid and supine that they would not write freely and candidly unless they knew that what they wrote could in no circumstances whatsoever come to the light of day".[130] By 1967, this scepticism had turned into categorical rejection when all five Law Lords in *Conway's* case criticized the basis of the candour argument.[131] Lord Salmon later referred to the candour argument as "the old fallacy"[132] but its most scathing indictment flowed from the pen of Lord Keith of Kinkel in *Burmah Oil:*[133]

> The notion that any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off-chance that they might have to be produced in a litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so. Nowadays the state in multifarious manifestations impinges closely upon . . . individual citizens. Where this has involved a citizen in litigation with the state . . . the candour argument is an utterly insubstantial ground for denying him access to relevant documents.

Commonwealth judges have also expressed their dissatisfaction with the candour argument.[134] In the recent New Zealand Court of Appeal decision in *Brightwell* v. *Accident Compensation Corporation*[135] McMullin J. asserted that "public confidence in the administration of Government [is] likely to be increased by the realisation that advice was given with knowledge of the risk of subsequent examination in the Courts."[136] While it is clear that the candour argument can no longer provide by itself a justification for withholding production of Cabinet papers, the need for candour should remain an important consideration in any claim for immunity of Cabinet papers. A survey of recent case-law suggests that even today the candour argument is not without its judicial supporters and that it should certainly constitute one of the balancing factors.[137]

129 *Glasgow Corporation v. Central Land Board* 1956 S.C. (H.L.) 1, 20.

130 *In re Grosvenor Hotel, London (No. 2)* [1965] 1 Ch. 1210, 1260. See the judgment of Harman L.J. (at 1255) to the same effect.

131 [1968] A.C. 910, 952, per Lord Reid; 957, per Lord Morris; 976, per Lord Hodson; 987, per Lord Pearce; 993-994, per Lord Upjohn.

132 *R. v. Lewes Justices, ex parte Secretary of State for Home Department* [1973] A.C. 388, 413.

133 [1980] A.C. 1090, 1133. In *Williams v. Home Office* [1981] 1 All E.R. 1151, 1155, McNeill J. cited this passage in support of his rejection of the candour argument. Other courts and judges have expressed their doubts that candour will be diminished by the infrequent occasions of disclosure: *U.S. v. Nixon* (1974) 418 U.S. 683, 712 (Sup.Ct.); *Brightwell v. Accident Compensation Corporation* [1985] 1 N.Z.L.R. 132, 158, per McMullin J.; *Carey v. The Queen in right of Ontario,* Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No. 18060, 1, 26, per La Forest J.

134 *Elston v. State Services Commission* [1979] 1 N.Z.L.R. 193, 207, per Richardson J.; *Sankey v. Whitlam* (1978) 142 C.L.R. 1, 97, per Mason J.

135 [1985] 1 N.Z.L.R. 132.

136 Ibid. 158. His Honour considered that the enactment (albeit in the non-litigious context) of the Official Information Act 1982 (N.Z.) had weakened further the candour argument since s. 9(2)(g)(i) of that Act merely recognises the candour argument as a "qualified" as opposed to "conclusive" reason for withholding official information.

137 See, for example, *Re Carey and the Queen* (1983) 1 D.L.R. (4th) 498, 535 (Ont. C.A.); *Carey v. The Queen in right of Ontario,* Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No. 18060, 1, 26, per La Forest J.; *Sankey v. Whitlam* (1978) 142 C.L.R. 1, 40, per Gibbs A.C.J.; *U.S. v. Nixon* (1974) 418 U.S. 683, 705 (Sup.Ct.); *Burmah Oil Co. Ltd. v. Bank of England* [1980] A.C. 1090, 1112, per Lord Wilberforce; 1145, per Lord Scarman.

*D. Nature of the Subject Matter*

While Cabinet papers as a class are no longer above the balancing exercise, it does not automatically follow that their production is to be routinely ordered. Judges have adverted recently to their entitlement to "high respect"[138] and "a high degree of protection"[139] and to their stronger claim to protection than papers emanating from lower echelons of government.[140] These views reflect a sensible judicial recognition that "[t]he Cabinet is at the very centre of national affairs, and must be in possession at all times of information which is secret or confidential."[141] Nevertheless, it would be wrong for the courts to treat all documents falling within the class of Cabinet papers as entitled to the same degree of protection since the extent of protection required should depend on the particular subject matter or policy with which the Cabinet paper deals.[142] As a general rule, the greater the sensitivity and importance of the information sought, the higher the document on the policy formulation scale,[143] and the wider the context, the more reluctant should a court be to order production over the objection of the Executive. Indeed, the cases are replete with references to the courts not being in a better position vis-a-vis the Executive to assess prejudice to the public interest through disclosure in such areas as diplomatic relations, defence, internal security, and matters of high economic, budgetary and financial policy.

Concerning the more mundane affairs of State, it is arguable that disclosure should more readily be ordered. Since *Duncan*'s case and World War II, public sector activities have encroached upon traditional areas of private enterprise with a corresponding increase in the frequency of litigation between citizens and the State. When the Crown descends from matters of high policy into the commercial arena, its activities should be no more immune from disclosure than those of ordinary litigants though they be undertaken at the highest level of the Executive.[144] Even as early as 1931, Lord Blanesburgh noted this phenomenon and urged the courts to remain vigilant in ensuring that the scope of Crown immunity was not extended in commercial litigation

138 *Re Carey and The Queen* (1983) 1 D.L.R. (4th) 498, 540, per Thorson J.A.

139 *Air Canada v. Secretary of State for Trade* [1983] 2 A.C. 394, 432, per Lord Fraser of Tullybelton.

140 Ibid. 435; *Brightwell v. Accident Compensation Corporation* [1985] 1 N.Z.L.R. 132, 157, per McMullin J.; *Carey v. The Queen in right of Ontario,* Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No. 18060, 1, 46, per La Forest J.

141 *Attorney-General v. Jonathan Cape Ltd.* [1976] 1 Q.B. 752, 770, per Lord Widgery C.J.

142 *Sankey v. Whitlam* (1978) 142 C.L.R. 1, 42-43, per Gibbs A.C.J.; *Burmah Oil Co. Ltd. v. Bank of England* [1980] A.C. 1090, 1134, per Lord Keith of Kinkel; *Carey v. The Queen in right of Ontario,* Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No. 18060, 1, 46, per La Forest J.

143 In *Carey v. The Queen in right of Ontario,* Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No.18060, 1, 48-49, La Forest J. drew a distinction between policy formulation on a broad basis and transactions made in implementation thereof, and referred to the transaction in question as involving, at best, low level government policy.

144 Eagles op.cit. 278-279.

involving the Crown.[145] Lords Salmon[146] and Edmund-Davies[147] echoed these sentiments in *Burmah Oil* and the Federal Court of Australia recently had little difficulty in ordering the inspection and production of Cabinet papers relating to a purchase of goods and performance of works.[148]

It is also arguable that the nature of the Cabinet paper itself may be relevant. If, for example, it contains purely factual material relevant to the issue of whether a statutory power has been duly exercised in accordance with the statutory requirements, it might conceivably defeat the ends of justice were courts reluctant to order disclosure.[149] The extent to which such factual material could be proved without resort to the Cabinet papers would, of course, be a countervailing consideration.

*E. The Public Interest in the Fair Administration of Justice*

Ministers and public servants have tended to give undue weight to the interests of secrecy and insufficient weight to hardship caused to litigants through non-disclosure.[150] The balancing factors must include the public interest in affording to a litigant the opportunity to lay before a court all documents which ought to be made available if justice is to be done. It is also submitted that even in the case of Cabinet papers, public policy requires that the law of public interest immunity not be expansively construed, for it can derogate from the search for the truth. As Lord Edmund-Davies has said:[151]

> It is a serious step to exclude evidence relevant to an issue, for it is in the public interest that the search for truth should, in general, be unfettered. Accordingly, any hindrance to its seeker needs to be justified by a convincing demonstration that an even higher public interest requires that only part of the truth should be told.

Similarly, the United States Supreme Court has observed:[152]

> The need to develop all relevant facts in the adversary system is . . . fundamental . . . . The ends of . . . justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . . .

These considerations point to the vital role which the courts must play in appraising, independently of the Executive, the possible prejudice to litigants that might be occasioned by an Executive decision to withhold documents in the public interest. The desirability of such role is most obvious when the Executive itself has a particular

145 *Robinson v. South Australia (No. 2)* [1931] A.C. 704, 715-716 (J.C.P.C.).

146 [1980] A.C. 1090, 1121.

147 Ibid. 1128.

148 *Harbours Corporation of Queensland v. Vessey Chemicals Pty. Ltd.* (1986) 67 A.L.R. 100. Pincus J. described (at 102) the Cabinet papers in question as "routine commercial documents" "of a kind which any large enterprise, governmental or otherwise, would frequently produce."

149 Section 34(1A) of the Freedom of Information Act 1982 (Cth. of Aust.), as inserted by s.18 of the Freedom of Information Amendment Act 1983, narrows the exemption from disclosure otherwise accorded to Cabinet papers by removing from it documents containing purely factual material.

150 S.A. de Smith op. cit. 640.

151 *D. v. National Society for the Prevention of Cruelty to Children* [1978] A.C. 171, 242.

152 *U.S. v. Nixon* (1974) 418 U.S. 683, 709.

interest in the outcome of the litigation, when justice should not only be meted out but should also be seen to be meted out.[153]

In considering this balancing factor, the courts will be concerned with the relevance, cogency and materiality of the documents sought. Concerning the importance to the litigation of the documents in question, the courts might well consider the likelihood and expediency of proof being made by means other than their disclosure. In *Sankey*'s case, Stephen J. considered that the character of the proceedings made it very likely that, for the prosecution to be successful, its evidence must include the Cabinet papers sought by Mr Sankey.[154] Similarly in the *Environmental Defence Society Inc.* case, Cooke J. asserted that the special statutory procedure for judicial review of the question whether the Governor-General in Council had exercised the statutory power in question according to law "could become largely valueless as a safeguard if, by refusing to inspect [Cabinet] documents, the Court effectively prevented any challenge to an Order in Council . . . ."[155]

The trend towards more open governmental methods may also have a bearing on the public interest in the fair administration of justice. Since the early 1980s judges[156] have drawn support from it in requiring that justice should be publicly recognised as having been done.[157] In *Fletcher Timber Ltd.*[158] the Court of Appeal liberalised the New Zealand common law of public interest immunity partly on the basis of its perception of the Official Information Act 1982 as an embodiment of such a trend.[159] Cabinet papers as a class are not specifically exempted from the Act but must rely instead for protection on its general provisions applicable to other types of documents. The "open government" theme may not be emphasised to the same degree in Australian and Canadian public interest immunity litigation concerning Cabinet papers, where the federal freedom of information legislation specifically exempts such papers from its purview.[160]

### *F. The Nature of the Litigation*

Courts should be more willing to disclose Cabinet and other high level papers where

153 *Burmah Oil Co. Ltd. v. Bank of England* [1980] A.C. 1090, 1127-1128, per Lord Edmund-Davies; *Sankey v. Whitlam* (1978) 142 C.L.R. 1, 56, per Stephen J.

154 (1978) 142 C.L.R. 1, 56.

155 [1981] 1 N.Z.L.R. 153, 157. In an extra-judicial address entitled "The Courts and Public Controversy" (1983) 5 Otago L.R. 357, 361, Cooke J. conceded that "without seeing the crucial [Cabinet] documents, the Court could never have felt any real confidence in the possibility of holding the balance equally between citizen and State."

156 *Burmah Oil Co. Ltd. v. Bank of England* [1980] A.C. 1090, 1134, per Lord Keith of Kinkel; *Carey v. The Queen in right of Ontario,* Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No. 18060, 1, 50, per La Forest J.

157 No doubt some would argue that it is for the legislators rather than judges to assume the role of advocates for open government: see *Burmah Oil Co. Ltd. v. Bank of England* [1980] A.C. 1090, 1112, per Lord Wilberforce.

158 [1984] 1 N.Z.L.R. 290, 296, per Woodhouse P.; 302, per Richardson J.; 305-306, per McMullin J.

159 It bears repeating that this piece of legislation does not purport to deal directly or generally with the law of public interest immunity.

160 Supra nn. 44 and 68.

the latter are required to support the defence of an accused person in a criminal trial.[161] There is also a public interest in having serious allegations of misconduct by Crown Ministers and public servants fully aired in judicial proceedings. Such interest is grounded in that facet of the rule of law which demands that "[T]hose who . . . exercise the executive power . . . should . . . be as amenable to the general law of the land as are ordinary citizens."[162] Routinely to refuse to order inspection of Cabinet papers may effectively confer immunity from conviction upon those occupying high offices of State.[163] In such situations, it would be difficult to pinpoint a countervailing consideration favouring protection. As La Forest J. has aptly remarked:[164]

> For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government.

It has also been held that a litigant's arguable case alleging unlawful interference with statutory rights may constitute a strong balancing factor.[165]

*G. Lapse of Time*

Lord Reid conceded implicitly in *Conway's* case[166] that Cabinet papers could be ordered disclosed when they became of "historical interest" only. In *Jonathan Cape Ltd.*, however, Lord Widgery C.J. was not prepared to wait that long in holding that ten-year-old Cabinet discussions no longer required protection. His Lordship preferred a functional approach which differentiated between the contents of Cabinet papers:[167]

> [T]he degree of protection afforded to Cabinet papers and discussions cannot be determined by a single rule of thumb. Some secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over.

Lord Widgery C.J. cited pre-Budget Day taxation proposals as an example of the former category and national security secrets as an example of the latter.[168]

The point in time at which a litigant seeks the disclosure of a Cabinet paper must constitute a balancing factor to be weighed by the courts. It may be relevant to consider the extent to which the policy underlying the Cabinet paper remains unfulfilled, in terms of possible prejudice to its implementation by premature disclosure.[169] Dis-

161 *Sankey v. Whitlam* (1978) 142 C.L.R. 1, 42, per Gibbs A.C.J.; *Carey v. The Queen in right of Ontario,* Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No. 18060, 1, 13, per La Forest J.

162 *Sankey v. Whitlam* (1978) 142 C.L.R. 1, 49, per Stephen J.; *U.S. v. Nixon* (1974) 418 U.S. 683, 708-709.

163 *Sankey v. Whitlam* (1978) 142 C.L.R. 1, 56, per Stephen J.; 47, per Gibbs A.C.J.

164 *Carey v. The Queen in right of Ontario,* Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No. 18060, 1, 49.

165 In *Williams v. Home Office* [1981] 1 All E.R. 1151 (Q.B.D.), McNeill J. Ordered the inspection and production of high level papers in order to help resolve the issue whether a prisoner's limited statutory right of personal freedom or liberty had been breached by a particular Home Office policy.

166 [1968] A.C. 910, 952.

167 [1976] 1 Q.B. 752, 767.

168 Ibid. 770.

169 *Burmah Oil Co. Ltd. v. Bank of England* [1980] A.C. 1090, 1134, per Lord Keith of Kinkel.

closure of Cabinet discussions at the developmental stage when there is keen public interest in the subject matter could seriously impair the proper functioning of the Executive branch of government.[170] On the other hand, the risk of damage to the public interest is correspondingly less when disclosure of stale information is sought. In *Sankey's* case, for example, the Cabinet papers sought related to a proposal which had been abandoned three years prior to the litigation and, as such, was no longer of continuing policy significance.[171]

*H. Prior Disclosure*

The public interest in withholding Cabinet papers will be substantially diminished if they or their contents have been published previously to the world at large. The fact of publication itself removes the basis for judicial protection. As Lord Blanesburgh observed in 1931, "the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published."[172] Some of the documents for which immunity was claimed in *Sankey's* case had been published in a magazine and a book while others had been tabled in Parliament. Stephen J. regarded such extensive publicity "as going far towards destroying any claim to Crown privilege."[173]

*I. Refusal by Crown to Claim Immunity*

The Executive's opinion concerning the desirability of disclosure of Cabinet papers should constitute a factor to be weighed in the balance even where such opinion is not opposed to disclosure. Although courts are entitled to intervene on their own initiative to withhold documents in cases where the Executive has not yet had an opportunity to make a proper assessment of the consequences of disclosure,[174] the situation may well be different if the Executive has made such assessment and decided that no immunity claim should be made. In *Sankey's* case, Gibbs A.C.J.[175] and Mason J.[176] considered the fact that the Executive had been given an opportunity to object to the production of certain Cabinet papers but had chosen not to do so, weighed strongly against immunity being extended to them.

## V. CONCLUSION

While Cabinet Ministers may object to being forced to conduct the business of government in a fishbowl, the *Sankey, Burmah Oil, Fletcher Timber Ltd.* and *Carey* cases can only be perceived as a favourable development in this area of the law. Though

170 *Carey v. The Queen in right of Ontario,* Unreported judgment of the Supreme Court of Canada rendered 18 December 1986, File No. 18060, 1, 46.

171 (1978) 142 C.L.R. 1, 46, per Gibbs A.C.J.

172 *Robinson v. South Australia (No. 2)* [1931] A.C. 704, 718 (J.C.P.C.).

173 *Sankey v. Whitlam* (1978) 142 C.L.R. 1, 64. One learned commentator has argued that the Executive cannot have it both ways by claiming that a Cabinet paper which it has tabled in Parliament with the consequent media reporting should not be disclosed in court: D. Pearce "Of Ministers, Referees and Informers-Evidence Inadmissible in the Public Interest" (1980) 54 A.L.J. 127, 133.

174 *Duncan v. Cammell, Laird & Co. Ltd.* [1942] A.C. 624, 642.

175 (1978) 142 C.L.R. 1, 44-45.

176 Ibid. 100-101.

the ultimate disposition in many cases might not change, the inspection and production of Cabinet papers and other high level documents has at least been brought into line with the treatment of other types of government documents concerning which a party seeking production is entitled to meet the arguments supporting protection.[177] Moreover, apart from obvious cases such as matters of defence and international relations, one might query why Cabinet policy discussion should gain from legally-enforced secrecy while much of that same discussion is fully open to examination by Parliament which publicly exercises the function of determining whether and in what form that policy should crystallise into law.[178]

As with other government papers, only the Judiciary should define the parameters of immunity and determine whether it has been properly invoked in cases involving Cabinet papers. To permit the Executive to determine conclusively scope and application issues would constitute an overlap, rather than a separation, of the executive and judicial branches of government and, as such, derogate from fundamental constitutional principle. The risk of judicial misjudgment of the requirements of good administration may at once be conceded but that risk must be weighed against the risk of abuse by the Executive of an otherwise uncontrolled power to withhold information. A system under which only those items of government information are revealed which a Cabinet Minister thinks it politically advantageous that the public should know, disclosure of everything else being tightly guarded, is to be avoided.[179] So too the unswerving belief of public servants that the most effective functioning of government demands the blanket protection of all official information.[180]

Some may question whether an unrepresentative, appointed and permanently tenured Judiciary should have, or are capable of exercising, a power to arbitrate between such important public interests. The independence and objectivity expected of judges will enable a fuller appraisal to be made of facets of the public interest with which a Minister or a department may not be immediately concerned.[181] If the Minister's reasons for non-disclosure are of a character which judicial experience (or inexperience) is incompetent to weigh, judges will defer to the Minister's views.[182] A survey of the

177 H. Tonning "Crown Privilege in Regard to Upper Echelon Government Documentation" (1981) 30 U.N.B.L.J. 121, 130.

178 *Harbours Corporation of Queensland v. Vessey Chemicals Pty. Ltd.* (1986) 67 A.L.R. 100, 104 (F.C.A.).

179 Ibid. 103.

180 The administrative concessions introduced by the Lord Chancellor in 1956 whereby immunity would no longer be claimed for certain categories of government information (197 H.L. Deb. col.741, 6 June 1956) represented a Government response to the tendency of public servants to overdraw on the blank cheque handed them in *Duncan's* case.

181 *Conway v. Rimmer* [1968] A.C. 910, 957, per Lord Morris.

182 Ibid. 952, per Lord Reid; 957, per Lord Morris.

cases indicates that the Courts have approached their task with due circumspection in treating high level government documents with sensitivity.[183] Moreover, the numerous safeguards accompanying in camera judicial inspection surely reduces the risk of disclosure of truly damaging information. Apart from a Ministerial right to appeal before the documents are in fact produced under court order, such order may provide for production of only that portion of the Cabinet paper which meets the tests of admissibility and relevance, with the remainder being obscured or sealed up and returned to its lawful custodian. The Crown would also be entitled to the protection of the court against the use of the paper by any party or non-party for any purpose ulterior or alien to the instant action.[184]

183 *Brightwell v. Accident Compensation Corporation* [1985] 1 N.Z.L.R. 132, 157.

184 *Riddick v. Thames Board Mills* [1977] Q.B. 881 (C.A.). In *Harbours Corporation of Queensland v. Vessey Chemicals Pty. Ltd.* (1986) 67 A.L.R.100, the risk of harm to the public interest by production of Cabinet papers was minimised by restricting access to the solicitor acting for the party seeking production on the basis of an undertaking that neither they nor their contents would be disclosed to that party or any other person for the time being.